No. 18 – 2417

IN THE

SUPREME COURT OF THE UNITED STATES

ELIZABETH JORALEMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether, under the Fourth Amendment, the government must secure a warrant based upon probable cause to directly obtain genetic information related to a medical condition when the defendant has previously sent the information to a non-medical website service and consented to that information being public.

2. Whether, under the Fourth Amendment, the government must have reasonable suspicion to perform a forensic search of an electronic device seized at the border when the search is routine and when there has never been such a rule about any other electronics.

3. Whether Federal Rule of Evidence 106 applies to the remainder of unrecorded oral statements when its text refers only to written and recorded statements. Additionally, whether the Rule permits the receipt of otherwise inadmissible hearsay evidence when its text expresses no exception to the hearsay rules.

STATEMENT OF FACTS

Factual Background

On August 20, 2016, U.S. Customs and Border Patrol Agent Clinton O'Keefe ("O'Keefe") spent his workday patrolling the international port-of-entry at Washington Dulles International Airport. (R. 5.) Later that afternoon, Petitioner Elizabeth ("Joralemon") came off of an international flight and entered that port-of-entry. (R. 5.) Joralemon irritably approached O'Keefe and presented her identification (R. 5.) Sensing her anxiety, O'Keefe selected her for a search of her person and luggage. (R. 5.) At first, Joralemon complied and presented her belongings for search. (R. 5.) When O'Keefe requested she enter her password to unlock her smartphone, however, she refused. (R. 5.) Eventually, O'Keefe informed Joralemon that he would need to conduct a forensics analysis on her phone and promised that it would be returned when it was complete. (R. 5.) At that point, Joralemon surrendered her phone. (R. 5.)

Two days later, FBI Special Agent Madison Throop ("Throop") followed up on an anonymous tip. (R. 6.) The tip alerted the FBI to a conversation overheard at a bar in Washington, D.C. in which a female patron described a series of drop-offs she made to a foreign agent at the request of her boss. (R. 6.) The female patron expressed that she wanted to quit her job but could not because she needed the health insurance after recently learning through a genetic test that she would one day get Ashwells disease. (R. 6.) In reaction to this information, the FBI contacted a genetic service, 23andyou.com ("23andyou"), to request a list of customers with Ashwells in the Washington D.C. area. (R. 7.)

FBI Special Agent Adira Pierrepont ("Pierrepont") spoke with Mark Givens ("Givens"), a former FBI agent employed with 23andyou. (R. 7.) Givens informed her that the 23andyou lawyers agreed that they could share the information Throop requested. (R. 13.) Pierrepont

learned from 23andyou that Joralemon was the only carrier of Ashwells in a 20-mile radius of Washington, D.C. (R. 7.)

Around the same time, Joralemon met with Marin Rapstol ("Rapstol"), a computer hacker. (R. 1.) Joralemon was a junior aide to Congressman Jerry Livingston, who had been suffering in his political race after an unsympathetic video of him went viral. (R. 4.) Joralemon brought a briefcase containing $50,000 to her meeting with Rapstol, and exchanged it for a briefcase containing thumb drives with hacked emails from Livingston's political opponent. (R. 1–2.) On September 7, Joralemon again met with Rapstol and delivered a second briefcase containing $50,000, and received a briefcase containing flash drives with hacked emails. (R. 2.)

After this meeting, FBI Special Agent Orlando Remsen ("Remsen") arrested and interviewed Rapstol. (R. 8.) Rapstol was read his *Miranda* rights and agreed to speak without counsel present. (R. 8.) Rapstol admitted that his hacking conglomerate contacted the Livingston campaign, through TextApp, with an offer of damaging information on Livingston's political opponent, for $100,000 cash. (R. 8.) Additionally, Rapstol admitted that their first encounter and exchange occurred on August 9. (R. 8.) Rapstol stated that he was aware that the briefcase he delivered contained flash drives with stolen information and that the $50,000 was partial payment. (R. 8.) Rapstol reported that on the second encounter with Joralemon, he asked her if the Livingston campaign was satisfied with the material delivered earlier, and she replied that she did not know what he was referring to and that she just wanted to keep her job. (R. 8–9).

The same day these comments were made to Rapstol, the forensic analysis was completed on Joralemon's phone. (R. 10.) The analysis revealed a conversation between Joralemon and another individual through TextApp, where the two discussed an "exchange" and "cash" was mentioned. (R. 10.) Dean Norstrand, the forensic analyst, did not recommend a criminal

investigation based on this conversation but did add the transcript of the conversation to the Interagency Border Inspection System. (R. 10.)

On October 20, 2016, Throop continued her investigation of Joralemon by searching federal law enforcement databases, including the Interagency Border Inspection System. (R. 11.) Her search returned the forensic analysis of Joralemon's smartphone, where she learned of the TextApp conversation flagged by Norstrand. (R. 10.) Throop alerted the investigation team, knowing that the messages would be gone by the time the phone was searched. (R. 10.)

Procedural History

Joralemon was charged in violation of 18 U.S.C. § 1030(a)(2), conspiracy to commit computer intrusions. (R. 2, 3.) She filed motions *in limine* in the District Court for the District of Westnick to suppress the DNA evidence obtained from 23andyou and the TextApp conversation obtained from the forensic analysis of her smartphone. (R. 15.) The motions were denied. (R. 29 at 1, 30 at 18–19.)

At trial, Joralemon sought a Federal Rule of Evidence 106 application to admit a self-exculpatory statement she made to Rapstol after other parts of their conversation were elicited during Remsen's testimony. (R. 36 at 1–2.) This application was denied. (R. 41.) Joralemon was convicted by a jury. (R. 43.) The United States Court of Appeals for the Fourteenth Circuit affirmed the district court's denial of Joralemon's pretrial motions and Rule 106 application. (R. 49.) This Court granted Joralemon's writ of certiorari to address three questions: (1) whether, under the Fourth Amendment, the government must secure a warrant issued upon probable cause to directly obtain, from a non-medical commercial service that performs DNA analysis, genetic information related to a medical condition; (2) whether, under the Fourth Amendment, the government must have reasonable suspicion to perform a forensic search of an electronic device

seized at the United States border; and (3) whether Federal Rule of Evidence 106 applies to the remainder of or related oral statements, and whether the Rule permits the receipt of otherwise inadmissible evidence. (R. 53.)

SUMMARY OF THE ARGUMENT

This is a case about government officials acting consistently with the Fourth Amendment and the Federal Rules of Evidence. The Fourth Amendment protects against unreasonable searches and seizures when individuals have a reasonable expectation of privacy. The touchstone of the Fourth Amendment is reasonableness. Thus, an expectation of privacy can only exist in situations where individuals keep what they wish to keep private, private. Under the third-party exception, surrendered her expectation of privacy when she shared her DNA with a non-medical, commercial website.

Individuals also have lessened expectations of privacy at the nation's border. The border search doctrine provides an exception to the Fourth Amendment warrant requirement by allowing for routine searches of persons and property without suspicion. The doctrine balances the sovereign's interest in national security against the privacy rights of individuals who wish to enter the country. Joralemon had a lessened expectation of privacy when she stepped off an international flight and entered the U.S. airport. The government actor then followed search protocols that are supported by the border search doctrine. The legislative history of the doctrine underscores the paramount importance of searches without probable cause at the border.

Ironically, Joralemon leans on the Fourth Amendment to enforce her privacy rights. Yet, it is a private conversation she had with Rapstol which she now looks to for relief. Federal Rule of Evidence 106 reads, "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing

or recorded statement — that in fairness ought to be considered at the same time." Fed. R. Evid. 106. Since the Federal Rules of Evidence are an act of Congress, the Court should use its "traditional tools of statutory construction," language and legislative history, to interpret their meanings. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). Under the Rule's plain language, it neither applies to oral statements nor permits the receipt of otherwise inadmissible evidence. The Rule's legislative history produces the same conclusion. Thus, Joralemon's statements to Rapstol in their private conversation are inadmissible.

Respondent acknowledges that Joralemon has encountered three closely-examinable facets of federal law. Her actions, however, have left her susceptible to both unfavorable Fourth Amendment doctrine and Federal Rule of Evidence 106 application. For these reasons, the Court should affirm the Fourteenth Circuit on all issues.

ARGUMENT

I. THE GOVERNMENT DOES NOT NEED A WARRANT TO DIRECTLY OBTAIN INFORMATION VOLUNTARILY SUBMITTED TO A THIRD PARTY.

The first question before the Court is whether the government needs a warrant to obtain information voluntarily submitted to a DNA-collecting third party. It does not. We respectfully ask the Court to affirm the holding of the Fourteenth Circuit.

The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. Although the Amendment is protective in function, it does not declare a right to be free from all searches and seizures. *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Terry v. Ohio*, 392 U.S. 1, 10 (1968). A search occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *United*

States v. Karo, 468 U.S. 705, 712 (1984); *Olmstead v. United States*, 277 U.S. 438, 464 (1928). Although government officials are generally required to obtain warrants when collecting information, they are under no such obligation if there is no search. *See Smith v. Maryland*, 442 U.S 735, 738 (1979); *Davis v. United States*, 413 F.2d 1226, 1233 (5th Cir. 1969) (holding that when no search occurs, no warrant is required).

The government does not need a warrant to obtain medical information from a third-party service for two reasons. First, Joralemon had no reasonable expectation of privacy for DNA that she sent out to the commercial service. Second, even if this Court finds that Joralemon had an expectation of privacy of information she voluntarily sent, the search fits squarely within the third-party doctrine and no warrant is required.

A. There is No Reasonable Expectation of Privacy in Medical Information Deduced from DNA Voluntarily Shared with a Non-medical, Commercial Service.

The ultimate touchstone of a Fourth Amendment analysis is reasonableness. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991); *United States v. Jones*, 565 U.S. 400, 404 (2012). The test for whether an individual has a legitimate expectation of privacy is long-established in *Katz v. United States*, 389 U.S. 347, 351–52 (1967) (Harlan, J., concurring). In *Katz*, the Court held that wiretapping a public telephone booth violated the Fourth Amendment because it "protects people, not places." *Id.* at 375. In his concurrence, Justice Harlan expressed that a person has a legitimate expectation of privacy where, first, he or she exhibited an actual, subjective expectation of privacy and, second, that expectation is one society is prepared to recognize as reasonable. *Id.* at 361; *See generally Jacobsen*, 466 U.S. at 113; *Kyllo v. United States*, 533 U.S. 27, 33, (2001); *Florida v. Jardines*, 569 U.S. 1, 10 (2013).

The question before the Court is not whether a person's DNA is protected, but whether medical information deduced from the DNA voluntarily submitted is protected. This Court must

decide if there is an expectation of privacy regarding information shared with a company which is verbally reported back from a database. (R. 7.) There is not.

1. Joralemon had no objective expectation of privacy in information shared with a commercial company and stored in a system to which people could gain access.

Joralemon did not have an objective expectation of privacy to the medical information she shared with a commercial, non-medical DNA service. Although this Court has not established a bright-line rule for what society accepts as objectively reasonable, the Court weighs the government interest against "the everyday expectations of privacy that we all share." *Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (holding that overnight guests have, and society values, a legitimate expectation of privacy in a host's home). The objective aspect of the *Katz* reasonableness inquiry, therefore, looks to whether society would identify an expectation of privacy as reasonable. *Katz*, 389 U.S. at 361.

In analyzing the reasonableness of a search by examining the totality of the circumstances, the Court must weigh the government's interests in efficiency and accuracy during investigations against the individual's right to privacy regarding medical information submitted online. *Samson v. California*, 547 U.S. 843, 848 (2006). If the legitimate government interests outweigh the individual's privacy interest, the search is reasonable under the Fourth Amendment. *United States v. Knights*, 534 U.S. 112, 118 (2001) (limits reasonable searches to those with a "probationary" purpose); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("in situations where the police have some evidence of illicit activity . . . a search authorized by valid consent may be the only means of obtaining important and reliable evidence").

Here, reasonableness is determined by weighing the government's interest in medical information listed in commercial databases against the individual's privacy interests of information voluntarily submitted to a website.

Although intrusions are generally substantial, the right to privacy of individuals who voluntarily conveyed their medical information online is minimal—especially their right to privacy of DNA record—because they openly shared that information over the internet. *United States v. Sczubelek*, 402 F.3d 175, 184 (3d. Cir. 2005). The Court should find that the degree to which the access to medical records intrudes upon Joralemon's right to privacy is minimal. Further, when this Court balances the degree to which assessing medical records intrudes upon Joralemon, the government's legitimate interests in protecting the nation "weighs in the government's favor." *Banks v. United States*, 490 F.3d 1178, 1188 (10th Cir. 2007).

On the other hand, the government has a compelling and legitimate interest in that access to DNA reports from third-party websites is crucial for identifying past and potential future criminal offenders.[1] The government has an interest in using modern DNA technology to solve investigations efficiently and, most importantly, accurately. *Ambach v. Norwick*, 441 U.S. 68, 74 (1979) (defining police as the most fundamental obligation of the government to its people).

Before DNA analysis was an option, fingerprinting and cheek-swabbing became "no more than an extension of methods of identification long used in dealing with persons under arrest or supposed violations of criminal law." *Maryland v. King*, 569 U.S. 435 (2013); *United States v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011). As technology has evolved, law enforcement officers have used more advanced techniques because of their reliability and accuracy. *Sczubelek*, 402 F.3d at 184 ("DNA is a further—and in fact more reliable—means of identification"); *DA's Office v. Osborne*, 557 U.S. 52, 55 (2009) (DNA testing has "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty").

[1] There are new, cutting cases related to this issue where serial killers and predators linked to crimes they committed decades ago now that their DNA is finally linked to the crime. Susan Scutti, WHAT THE GOLDEN STATE KILLER CASE MEANS FOR YOUR GENETIC PRIVACY CNN (2018), https://www.cnn.com/2018/04/27/health/golden-state-killer-genetic-privacy/index.html.

In *King*, the Court upheld a Maryland statute that required DNA collection upon arrest for certain serious crimes. *King*, 569 U.S. at 447. A buccal swab inside of a cheek for DNA, the Court said, is "like fingerprinting and photographing, one of many legitimate police booking procedures that is reasonable under the Fourth Amendment" *Id.* 435. That was six years ago. This Court should similarly hold that because as technology evolves daily, new forms of identification are made available. Medical information relayed from a third-party DNA collection service is just one of those forms of identification.

The search in the present case occurred when Pierrepont called 23andyou and personally requested information about Joralemon. (R. 7.) This search itself was as minimally invasive as a search can be in that the person of Joralemon was not touched. Notably, the 23andyou employee who distributed Joralemon's name was a former FBI agent. (R. 7.) If a former FBI agent who is presumably well-versed in reasonable search procedures identifies that the information in a commercial website is not objectively private, neither should this Court.

In our modern world, information that was once objectively private is now shared freely on the internet. With the advent of DNA analysis services and other genetic testing technologies, it has become commonplace to share genetic information on the internet. It is up to these DNA-sharing companies, not this Court, to regulate procedure regarding when to comply with the government's request for information, and when to refuse. Accordingly, it would be unreasonable for this Court to place an objective expectation of privacy on a now commonly shared commodity.

2. Joralemon had no subjective expectation of privacy regarding the information derived from that which she sent to a non-medical, DNA analysis website.

Not only is there no objective expectation of privacy, Joralemon demonstrated no subjective expectation of privacy regarding the information she sent to a commercial company. To have a

subjective expectation of privacy under the *Katz* analysis, an individual must evidence that she had an actual belief that the information searched would have remained private. *California v. Greenwood*, 487 U.S. 35 (1988); *Smith*, 442 U.S. at 740. This means that the defendant must *exhibit* an expectation of privacy. *United States v. Taborda*, 635 F.2d 131, 137 (2d Cir. 1980) (emphasis added). Harlan's concurrence opines that statements a person puts in "plain view" of outsiders are not protected because "no intention to keep them to himself has been exhibited." *Katz*, 389, U.S. at 361.

Here, Joralemon exhibited no subjective expectation of privacy because she shared information with a service that she knew would then analyze it against their database. (R. 7). She checked the appropriate box to consent to the future sale of her information to third parties. (R. 19.) Joralemon had the exact opposite of a subjective expectation of privacy. She literally wanted others to analyze her information to learn more about herself.

In *Greenwood*, this Court held that people who place their trash onto the curb have no subjective expectation of privacy therein. 486 U.S. at 40. First, it is common knowledge that trash bags on the street are accessible to any person or animal who sees it. *Id.* Second, the purpose of putting trash outside onto a corner is to present it to the trash collectors to pick up. *Id.* This Court should apply the reasoning from *Greenwood* to reach the conclusion that Joralemon exhibited no subjective expectation of privacy to information she submitted to the website. First, it is common knowledge that information submitted on the internet is accessible by that website, especially when that is the purpose of the website. Joralemon will argue that she only intended for that information to be shared with the website, not the public. That is wrong. The website, 23andyou, "collects and analyzes DNA in order to *tell* customers about their genetic makeup."

(R. 7.) (emphasis added). Here, Joralemon subjectively understood that to analyze her DNA—like the garbage men in *Greenwood*—someone at 23andyou would be picking it up.

Further, Joralemon was not your average internet user —she communicated via TextApp, which encrypts text messages. (R. 10.) Thus, Joralemon certainly knew that the unencrypted information she shared through the internet could become public. The Court should find that because Joralemon had neither an objective nor subjective expectation of privacy, the search was reasonable and no warrant was necessary.

B. In the Alternative, No Warrant was Required Because the Search was Reasonable Under the Third-Party Doctrine.

Even if the Court finds that Joralemon had an expectation of privacy, the search was constitutional because the government received consent to search and the information itself from a third-party. The third-party doctrine holds that when someone shares information with a third party, that person surrenders a reasonable expectation of privacy regarding that information. *Smith v. Maryland*, 442 U.S. at 743 (holding that the police can collect pen register information without a warrant); *see also Perlman v. United States*, 247 U.S. 7, 15 (1918); *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *Lopez v. United States*, 373 U.S. 427, 83 (1963). This Court has held that information revealed to a third-party is subject to this rule, even if the information is revealed "on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435 (1976) (holding that there is no expectation of privacy in bank records). Therefore, "[t]he Fourth Amendment does not prohibit obtaining of information revealed to a third party and conveyed by him to government authorities." *Id.* at 443.

The Court has drawn the line at information that is revealed to a third-party in which the party had no reason to believe anyone else could know. *Carpenter v. United States*, 138 S. Ct.

2206 (2018) (reasonable expectation of privacy when cell phone records reveal past locations); *Riley v. California*, 134 S. Ct. 2473 (2014). Most of the cases on record, however, involve monitoring or surveillance, not record information. *Katz*, 389 U.S. 347 (1967); *Kyllo*, 533 U.S. at 41–42 (holding that a thermal imaging device used to detect heat radiating from a home for the purposes of surveillance of drug activity was an unreasonable search); *Jones*, 565 U.S. 400 (holding that the GPS monitor installation was a physical trespass of the vehicle).

Here, the medical information deduced from the DNA does not come close to the Court's drawn line and falls under the third-party doctrine for two reasons. First, the medical records listed by the website are exactly the type of searches contemplated by the third-party doctrine. Second, this Court should find that changes in the digital landscape do not preclude third-party doctrine application in all cases.

1. *Medical information in a database is similar to business records, telephone numbers, and other searches that fall within the third-party doctrine.*

The medical information deduced from the DNA information submitted voluntarily is similar to records and data that the government can lawfully obtain and search. The Court has applied the third-party doctrine broadly to telephone numbers, business records, and conversations that suspects have with confidential informants. *See, e.g.*, *Smith*, 442 U.S. at 7454; *Miller*, 425 U.S. at 442–44; *United States v. White*, 401 U.S. 745, 751–53 (1971) (holding that information recorded by an accomplice and then turned over to police is not protected.).

Here, Joralemon's medical information is no different than a pen registry or bank record because it is a record of information that has been sent to a third-party. In *Miller*, the Court held that bank records are subject to the third-party doctrine because bank users have a subjective understanding that by using the service, their records are collected. 425 U.S. at 442. Similarly, in *Smith*, the Court held that people do not have subjective expectations of privacy in the phone

numbers they call because telephone users "realize that they must 'convey' phone numbers to the telephone company." 442 U.S. at 742.

This Court can distinguish the present case from those involving tracking and locations because of the subjective level of privacy. Instead, the Court should apply the bright-line rule in *Miller* and *Smith* because Joralemon had reason to know that the DNA she sent in would be recorded in normal course of 23andyou business. Further, *Miller* and *Smith* hold that when a person shares information with another entity, they assume the risk that the third party will share that information with others. *Smith*, 442 U.S. at 744. Joralemon exceeded that general assumption of risk because she specifically consented to her information being shared with third parties. (R. 19.) Under the third-party doctrine, Joralemon has no Fourth Amendment claim because a third-party freely presented the requested information from 23andyou to the government.

2. Changes in the digital landscape do not preclude third-party doctrine application.

Joralemon calls upon this Court to "discard the long-established third-party doctrine and the holdings of *Smith* and *Miller*." (R. 47.) To prevail on this argument, the Court would have to declare precedential *Smith* and *Miller* inapplicable and disregard cases where the third-party doctrine applied to locations. This is unpersuasive. Here, the Fourteenth Circuit properly held that Joralemon read too much into the *Carpenter* decision because it only addressed geolocation data. This Court should affirm.

The recent *Carpenter* holding should not sway the Court. There, Court addressed "pervasive tracking" in which a person is constantly monitored via their own phone usage, making the consent to search involuntary. *Carpenter*, 138 S. Ct. at 2220. The Court identified that each time a phone connects to a cell site, it time-stamps a record of a person's location. *Id.*

Though *Smith* is technically limited by *Carpenter*, a close reading of *Carpenter* indicates that its holding applies only to the facts it considered. This is fair because creates a narrow precedent for specific cases such as this, but does not discount cases applicable in other contexts. *Carpenter* is distinguishable from the present case and *Smith* because it involved a person's continuous physical location, while the latter considered pieces of data with limited information. Thus, the Court should rely on *Smith* and find that information revealed to 23andyou, and subsequently to government authorities, is well within the scope of the third-party doctrine, even if the information is revealed on the assumption that it will not be shared, which it was not. *Smith*, 442 U.S. at 748.

Additionally, in *Smith*, this Court had the opportunity to limit the use of technology in searching through records but declined to do so. *Smith*, 442 U.S at 742. Instead, the Court insisted that although the pen register involved technology, it had "limited capabilities" in that it could only disclose numbers that had been dialed, not any information about the call itself or the identity of the parties involved. *Id*. Here, the learned medical information is no different. It is a combination of numbers that identify a person's identity in a finite capacity. Moreover, the information in question is not a physical entity the government can access whenever it needs. Instead, like a social security number, DNA is a list of numbers that function to identify a person. It is a singular piece of information that can only be accessed if a person chooses to distribute it to the world, which Joralemon did.

Joralemon also relies on *Jones*, which held that a GPS tracking device placed on the vehicle without the person's knowledge was a Fourth Amendment search because it was a physical

trespass onto property by the government.[2] *Jones*, 565 U.S. at 413-414. The record does not suggest that the government conducted a physical search of Joralemon's DNA when it called 23andyou, so *Jones* does not apply. For similar reasons, this Court should find the holding in *Kyllo* inappropriate to apply because in *Kyllo,* the Court emphasized the danger of unreasonable searches occurring in a person's home. 533 U.S. at 27.

Although technology inevitably requires individuals to share more information that would have otherwise remained private (R. 17,) technology does not compel us to send DNA kits to third-party services. This Court should find Joralemon's arguments against the third-party doctrine unpersuasive because medical records are exactly the type of information to which the third-party applies and because the third-party is narrow enough to operate as a tailored doctrine, but broad enough to easily reach this present case.

II. THE GOVERNMENT DOES NOT NEED REASONABLE SUSPICION TO CONDUCT A FORENSIC SEARCH PURSUANT TO THE BORDER SEARCH EXCEPTION.

The second question before the Court is whether a forensic search of a cell phone at the United States border requires a finding of reasonable suspicion. It does not. As discussed in Part I, the *Fourth Amendment* protects against unreasonable searches and seizures, but not against all government intrusions. The border search doctrine is an exception to the Fourth Amendment's warrant requirement. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). The same Fourth Amendment reasonableness test is implemented in border searches as discussed in Part I, but with some nuisances. *See* Part I.A.1,2., *supra*.

[2] Joralemon further relies on the concurrence, but it is not persuasive enough on its own to justify a dismantling of the third-party doctrine. Despite the Court's discussion of the third-party doctrine's relevance in the technological world, this Court should not base its decision on dicta.

Customs and Border Patrol Officers (CBP) may conduct routine searches and seizure on both property and people without individualized suspicion at the border. *Montoya de Hernandez*, 473 U.S. at 538; *see also United States v. Braks*, 842 F.2d 509, 514 (1st Cir. 1988); *United States v. Ramsey*, 431 U.S. 606, 616–17 (1977). Accordingly, searches at the border are considered reasonable simply because they take place at the border. *Ramsey*, 431 U.S. at 616.

Circuit courts have consistently upheld that searches of electronic devices at the border are reasonable where reasonable suspicion existed. *See*, *e.g.*, *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006) (upholding the border search of film); *United States v. Ickes*, 393 F.3d 501, 507 (4th Cir. 2005) (computer); *United States v. Cotterman*, 709 F.3d 952, 962 (9th Cir. 2013) (hard drive). In this case, however, the government concedes that the agents searched Joralemon's phone with neither probable cause nor reasonable suspicion. (R. 21.) Here, the search was reasonable because it took place at the border. *Ramsey*, 431 U.S. at 616.

In the past, many searches of electronic devices at the border did not require a finding of reasonable suspicion. *See*, *e.g.*, *United States v. Stewart*, 729 F.3d 517, 525–26 (6th Cir. 2013) (holding that a laptop search twenty-miles from the airport was a routine border search and did not require reasonable suspicion); *United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008) (holding that the Fourth Amendment does not protect electronic devices from warrantless searches at the border); *United States v. Linarez-Delgado*, 259 Fed. App'x 506, 508 (3d Cir. 2007) (holding that there is no reasonable suspicion required for data storage equipment).

Recently, however, a circuit split has formed between the Fourth, Ninth, and Eleventh circuits based on the application of the border search doctrine to electronic device searches. In 2013, the Ninth Circuit held that reasonable suspicion is required for a search of a computer at the border. *Cotterman*, 709 F.3d at 962. Less than one year later, the Supreme Court held in

Riley that cell phones contain a privacy interest so strong that searching a phone without a warrant is unreasonable under the Fourth Amendment. 134 S. Ct. at 2473.

In *United States v. Kolsuz*, the Fourth Circuit echoed *Riley* by stating that due to the ubiquitous and private nature of cell phones, electronic device searches require reasonable suspicion. 890 F.3d 133, 140 (4th Cir. 2018). Five days later, the Eleventh Circuit rejected these decisions and held that a forensic cell phone search at the border is constitutional and does not require reasonable suspicion. *United States v. Touset*, 890 F.3d 1227 (11th Cir. 2018).

In the present case, the government's forensic search fits within the border search doctrine and does not require reasonable suspicion for two reasons. First, the forensic search was routine. Second, the Court should look to the legislative history of the border search doctrine to determine that the decision is paramount to national security and should be left to Congress.

A. The Government Did Not Need Reasonable Suspicion to Perform a Forensic Search of an Electronic Device Because the Search was Routine Under the Border Search Doctrine.

The Supreme Court has created two categories of border searches: "routine" and "nonroutine." *Montoya de Hernandez*, 473 U.S. at 538. A routine border search is not subject to the Fourth Amendment because it does not seriously invade a person's privacy. *Kolsuz*, 890 F.3d at 137. If a border search is routine, it may be conducted not only without a warrant, but also without probable cause. *United States v. Whitted*, 541 F.3d 480, 485 (3d Cir. 2008) ("the expectation of privacy is 'less at the border than in the interior'"). Nonroutine border searches involve a more invasive search which requires reasonable suspicion.[3] *United States v. Robles*, 45

[3] Under CBP Directive No. 3340-049A, (Border Search of Electronic Devices), CBP agents may conduct a routine search of electronic devices at the border, but they must have reasonable suspicion or a national security concern to conduct an advance search. (5.1.4). This is not binding on the Court, however, because it is a policy and not codified in law.

F.3d 1 (1st Cir. 1995). Thus, Congress gives border officials broad authority to conduct searches on people and belongings entering the country without a warrant or probable cause. *Flores-Montano*, 541 U.S. 149, 153 (2004); 19 U.S.C. § 1581(a).

In determining whether a search was routine, the Court looks to the level of intrusiveness. *Braks*, 842 F.2d at 511–12; ("the degree of invasiveness or intrusiveness associated with any particular type of search determines whether or not that search is routine"); s*ee also Riley*, 134 S. Ct. at 2484; *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). Here, the search was routine.

1. The forensic cell phone search is minimally invasive and non-destructive.

Nonroutine searches require a finding of reasonable suspicion because they are "highly intrusive" searches that threaten the privacy and dignity interests of an individual.[4] *Flores-Montano*, 541 U.S. at 152; *see generally United States v. Roberts*, 274 F.3d 1007 (5th Cir. 2001); *United States v. Johnson*, 991 F.2d 1287, 1292 (7th Cir. 1993) ("authorities must be allowed to graduate their response to the demands of any particular situation") (*citing United States v. Place*, 462 U.S. 696, 709 (1983)). The Court has recognized that some searches are so destructive that they require reasonable suspicion. *Flores-Montano*, 541 U.S. at 155–56.

In *Montoya de Hernandez*, the Court held that a search in which the defendant was detained for sixteen hours while agents searched her alimentary canal was nonroutine because of its intrusive, physical nature. 473 U.S. at 544. The present case is distinguishable from *Montoya de Hernandez* because it was not physically intrusive. The search of a cell phone is far less intrusive than body-cavity searches. In a way, the Court has drawn the line—albeit scribbly—to establish that physical searches that go beyond the scope of national security concerns are more likely to be nonroutine. A cell phone search does not include physical contact of the person,

[4] The Supreme Court has listed certain factors for determining whether the requirement for reasonable suspicion is warranted. *Braks*, 842 F.2d at 511–12.

exposure of intimate parts, or use of force. A holding other than one deeming a cell phone search nonintrusive would constitute a sharp departure from the long-standing and broadly-written border search doctrine precedent.

2. The forensic search is reasonable because the government's interest in national security outweigh the individual's right to cell phone privacy at the border.

The Court has called for case-by-case analysis to determine reasonableness. *Cotterman*, 709 F.3d at 963. In determining whether a border search is reasonable, courts balance the individual's Fourth Amendment rights against the legitimate government interest involved. *Montoya de Hernandez*, 473 U.S. at 549. Reasonableness "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Id*. at 537 (internal citation omitted). Here, the Court should find that the security issues at the national border outweigh those of a piece of personal property.

Distinctions between routine and nonroutine searches do not apply to searches of property that are within the scope of the border search exception. *Id.*; *United States v. Chaudhry*, 424 F.3d 1051, 1054 (9th Cir. 2005). This Court has never required a finding of reasonable suspicion for a search of property at the border. *Touset*, 890 F.3d at 1233. In fact, the Court has limited the reasonableness considerations to searches of the person, not property, by stating that the "dignity and privacy interests of the person being searched . . . simply do not carry over" to personal property and belongings. *Flores-Montano*, 541 U.S. at 152, 154.

Technological advancements cause circuit courts to wrestle with the balance between individual cell phone privacy and the legitimate government interest of protecting our borders. But, that devices have become more advanced is of no import, and does not create a different level of consideration than other physical property items. *Ramsey*, 431 U.S. at 620 (implying that it is the fact that something is entering the country, not what that something is, that matters).

Although *Riley* is meaningful law within the country, it should not be persuasive at the border. Its limited application to incident-to-arrest circumstances separates this case. While *Riley* applies to situations where a police officer can perform a warrantless search on an arrestee under certain circumstances, the border search doctrine only applies when a person voluntarily enters an airport or secured area of the border. The Fourth Circuit puts too much emphasis on the holding in *Riley*. In *Kolsuz*, the Court echoed *Riley* and held that a forensic search of a computer seized at the border requires reasonable suspicion because devices hold incredible amounts of private information containing the "most intimate details of our lives." 890 F.3d at 138. There is an important distinction, however, between unlocking a phone at the border for security purposes and a phone that covertly tracks and reports a person's every move. Joralemon incorrectly relies on *Riley* as controlling precedent because cases involving cell phones and physical items inside the border have no bearing on the national security issues and searches at the border.

Instead, this Court should adopt the approach outlined in the Eleventh Circuit case, *Touset*, which held that no reasonable suspicion is necessary in order to search electronic devices seized at the border. The most critical element of the border search doctrine is the "reliance upon the trained observations and judgments of customs officials, rather than upon constitutional requirements . . .." *Cotterman*, 709 F.3d at 976. At the border, individuals have a reduced expectation of privacy. *Montoya de Hernandez*, 473 U.S. at 538 (the "balance of reasonableness is qualitatively different at the international border than in the interior"); *United States v. Thirty-Seven Photographs*, 402 U.S. 353, 376 (1971). The Fourth Amendment "does not guarantee the right to travel without great inconvenience" within the borders of the nation, but travelers do have the right to leave property at home to prevent an unwanted search. *Touset*, 890 F.3d at

1235. People are put on notice that they will be subjected to a search when they voluntarily enter the airport and choose to cross the border. *Id.*

The distinction between routine and nonroutine searches have major modern day implications. In 2017, approximately 29,200 out of 397 million international travelers arriving in the United States had their electronic devices searched by CBP officers, compared to 18,400 out of 390 million travelers in 2016.[5] The CBP states that, "[t]hese searches . . . are essential to enforcing the law at the U.S. border and to protecting border security" and "help detect evidence relating to terrorism and other national security matters . . .."[6] Based on the increase in traffic at borders, and thus of electronic devices, it would not be efficient to require that all forensic searches meet the requisite level of reasonable suspicion.

B. Even if this Court Does Not Find that a Forensic Search is a Routine Search and that *Riley* Applies, the Government Does Not Need Reasonable Suspicion Based on the Legislative History of the Border Search Doctrine.

Congress has granted the government the "plenary authority to conduct searches . . . at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya de Hernandez*, 473 U.S. at 537. The border exception is "grounded in the recognized right of the sovereign to control . . . who and what may enter the country[.]" *Ramsey*, 431 U.S. at 620. Thus, in the absence of a contrary congressional mandate, the Court should restrain from carving out an exception to long-established doctrine.

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[5] *CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics*, U.S. CUSTOMS AND BORDER PROT. (Jan. 5, 2018), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and.

[6] U.S. CUSTOMS AND BORDER PROT., CBP DIRECTIVE NO. 3340-049A, BORDER SEARCH OF ELECTRONIC DEVICES (Jan. 4 2018), https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.

Indeed, the legislative history of the border search doctrine reveals that it should be applied broadly. This very Court has emphasized that the border search doctrine "has a history as old as the Fourth Amendment itself." *Ramsey*, 431 U.S. at 619. In 1790, the same Congress that proposed the Fourth Amendment also enacted the first far-reaching border statute. *Act of Aug. 4. 1790. ch. § 31, 1 Stat. 145. 164–65 (1790)*. This Act granted customs officials "full power and authority" to enter and search "any ship or vessel," even before the ships reached the United States. *Id.; see also Witt v. United States*, 287 F.2d 389, 391 (9th Cir. 1961) (noting the centuries-old plenary search power at the border).

It was and is Congress' intent to protect citizens from the harmful and illegal items crossing our borders, not to burden law enforcement officers with heightened requirements of probable cause. In conducting a forensic search without reasonable suspicion, the government is not asking for a boundless expansion of the border search exception (R. 25,) but rather that the exception continues in a way that upholds principles of thorough and efficient investigations.

This Court should affirm the Fourteenth Circuit and find that a forensic cell phone search at the United States border is a reasonable search under the established border search doctrine. A holding any other way would plummet law enforcement efficiency at the border and risk national security in the process.

III. RULE 106 NEITHER APPLIES TO ORAL STATEMENTS NOR PERMITS RECEIPT OF OTHERWISE INADMISSIBLE EVIDENCE.

The final question for this Court is whether Federal Rule of Evidence 106 applies to the remainder of or related oral statements and whether it permits the receipt of otherwise inadmissible evidence. It does neither. Rule 106 reads, "[i]f a party introduces all or part of a *writing* or *recorded statement*, an adverse party may require the introduction, *at that time*, of any other part — or any other *writing* or *recorded statement* — that in fairness ought to be

considered *at the same time*." Fed. R. Evid. 106 (emphasis added). To interpret this Rule, the Court should turn to its language and legislative history. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163–164 (1988). The Rule's unambiguous plain language does not apply to oral statements or permit the receipt otherwise inadmissible evidence. Should the Court find the Rule's language ambiguous, its legislative history will tell this very same story.

A. By Its Plain Text, Rule 106 Precludes Oral Statements and Otherwise Inadmissible Evidence.

Rule 106 mentions written and recorded statements twice. It does not mention oral statements. Twice it mentions timing. It does not provide an exception for otherwise inadmissible evidence. The plain language of the Rule should lead the Court to the conclusion that it does not apply to oral statements or permit otherwise inadmissible evidence.

1. As Its Title and Text State, Rule 106 Applies to Writings or Recorded Statements, Not Oral Statements.

The Court should affirm the Fourteenth Circuit's holding that Rule 106 does not apply to oral statements. (R. 48.) Rule 106 is a partial codification of the common-law rule of completeness. *Beech Aircraft*, 488 U.S. at 172. At common-law, the rule of completeness applied to oral statements. *Id.* at 171. Thus, by its plain terms, Rule 106 is limited in application to written or recorded statements. *United States v. Sanjar*, 853 F.3d 190, 204 (5th Cir. 2017); *United States v. Liera-Morales*, 759 F.3d 1105, 1111 (9th Cir. 2014); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996). Some courts, however, permit oral statements through Federal Rule of Evidence 611(a), "which obligates the court to make the interrogation and presentation effective for the ascertainment of the truth." *United States v. Mussaleen*, 35 F.3d 692, 696 (2d Cir. 1994) (internal citations and quotation marks omitted); *United States v. Shaver*, 89 Fed. App'x 529, 533 (6th Cir. 2004); *United States v. Verdugo*, 617 F.3d 565, 579 (1st Cir. 2010); *United States v.*

Lopez-Medina, 596 F.3d 716, 734–735 (10th Cir. 2010); *United States v. Li*, 55 F.3d 325, 329 (7th Cir. 1995); *United States v. Pacquette*, 557 Fed. App'x 933, 936 (11th Cir. 2014).

Rule 106's text does not include oral statements. The Fourteenth Circuit court deemed this "sufficient" to hold that Joralemon's oral statement could not be introduced thereunder. (R. 48.) It is not alone in this reasoning. *See Sanjar*, 853 F.3d 204 (holding Rule 106 "expressly limit[ed]" to writings or recorded statements and inapplicable to unrecorded post-arrest statements); *Liera-Morales*, 759 F.3d at 1111 ("Consistent with Rule 106's text," precluding the defendant from introducing exculpatory statements from his post-arrest interview); *Wilkerson*, 84 F.3d at 696 (Citing the Advisory Committee's notes to support the proposition that "[t]he rule applies only to writings or recorded statements, not to conversations.").

By way of Rule 611(a), however, some circuits allow admission of the remainder of oral statements. *See Mussaleen*, 35 F.3d at 696 (stating completeness applies to oral testimony through Rule 611(a)); *Verdugo*, 617 F.3d at 579 (same); *Lopez-Medina*, 596 F.3d at 734 (allowing introduction of codefendant's plea allocution after the defendant questioned officer about codefendant's conviction and sentencing); *Li*, 55 F.3d at 329–330 (permitting an oral statement under 611(a) to the extent that it "(1) it explains the admitted evidence, (2) places the admitted evidence in context, (3) avoids misleading the jury, and (4) ensures fair and impartial understanding of the evidence."); *Pacquette*, 557 Fed. App'x at 936 (remanding district court's exclusion of an oral statement that denied knowledge of cocaine).

The Court instructed in *Williamson v. United States* that "[a]bsent contrary indications, we can presume that Congress intended the principles and terms used in the Federal Rules of Evidence to be applied as they were at common law." 512 U.S. 954, 615 (1994). The common-law rule of completeness did not distinguish between writings, recordings, and oral statements,

see Beech Aircraft, 488 U.S. at 171, but Rule 106 does. It omits oral statements. Thus, Rule 106 puts forth "contrary indications." *Williamson*, 512 U.S. at 615. In so following, the Ninth Circuit court in *Liera-Morales* affirmed the district court's exclusion of exculpatory statements from a post-arrest interview in consideration of the Rule's "terms" and "[c]onsistent with [its] text[.]" 759 F.3d at 1111. *See also Wilkerson*, 84 F.3d at 696 (finding the defendant's reliance on Rule 106 "misplaced" where he sought to introduce the exculpatory portion of an oral statement). Similarly, in this case, the Fourteenth Circuit relied on the text of Rule 106 in affirming the district court's exclusion of Joralemon's oral statement. (R. 48.)

Moreover, the Fifth Circuit court in *Sanjar* even compromised that if testimony is "tantamount to offering a recorded statement into evidence," then the testimony may be included under the Rule. 853 F.3d at 204 (internal citation and quotation marks omitted). But, Rule 106 only applies to that testimony if the witness reads or quotes from a report, which the federal agent witness did not do in *Sanjar*, and Special Agent Remsen did not do here. *Id.* Accordingly, not only was it logical and appropriate, but it was in accordance with the Court's instruction for the district court to rely on the plain language of Rule 106 in excluding Joralemon's unrecorded oral statement, and for the appellate court to "look no further than the text of the Federal Rule" in affirming. (R. 41, 48.) The Court, too, should start and stop at the text of Rule 106, and hold that it does not permit oral statements.

The question to the Court asks if *Rule 106* permits oral statements. (R. 53.) Under its plain language, it does not. That courts apply the doctrine of completeness to oral statements through Rule 611(a) speaks volumes—they are doing so despite this Court's direction and the plain language of Rule 106. *See, e.g.*, *Musaleen*, 35 F.3d at 696 ("While Rule 106 applies only to writings . . ."); *Li*, 55 F.3d at 329 ("We have recently refused to extend [Rule 106] to oral

statements . . . "); *Lopez-Medina*, 596 F.3d 716 ("While Rule 106 applies only to writings and recorded statements . . ."); *Pacquette*, 557 Fed. App'x at 936 (prefacing its application of Rule 611(a) to oral statements by stating "[r]ule 106 does not apply to oral statements"). Thus, courts have legislated around Congress's enactment. On the same token, the four-part fairness test established in *Li* is certainly equitable, but it is unnecessary. Congress created the only test courts need. It is called Rule 106, and it only applies to written or recorded statements. This type of maneuver should stop, unless and until Congress—and only Congress—says otherwise.[7]

The Eleventh Circuit's application of Rule 611(a) in *Pacquette* is also distinguishable. In a case about whether the defendant had knowledge of the cocaine in his bag, the arresting officer testified that the defendant stated ownership of his bags, that he packed them, and that everything in them belonged to him. 557 Fed. App'x at 935. These statements, however, were made prior to the discovery of the cocaine. *Id.* The defendant denied ownership of the cocaine after its discovery, but the district court prohibited questions about this denial on cross-examination. *Id.* The appellate court found this an abuse of discretion because the district court allowed the government, in closing, to argue that the defendant *did not* deny that the cocaine was his. *Id.* at 937. The district court, therefore, permitted the government to completely mischaracterize the admitted statements. *Id.* at 937–38. The Eleventh Circuit deserves applause for righting the wrong of the trial court in *Pacquette*, but no such wrong was committed by the district court in this case. Rather, it acknowledged outside of jury presence that the "second half of the statement

[7] Moreover, several of the courts to permit oral statements through Rule 611(a) were hardly dealing with de facto unrecorded oral statements like Joralemon's. For instance, in *Mussaleen*, the "oral statement" under scrutiny was the defendant's pretrial statement, which was "reduced to a writing" and signed. 35 F.3d at 694. In *Lopez-Medina*, at issue was whether it was appropriate for the district court to allow a testifying officer to read into the record portions of a fact allocution that were "reflected in the transcript" of a codefendant's change of plea hearing. 596 F.3d at 725, 734–35. Thus, the "oral statements" in these cases were much more reviewable and observable than Joralemon's self-serving unrecorded statement, which Special Agent Remsen only learned through a conversation with Rapstol, and of which there is no transcript or videotape. (R. 8–9, 36–37.)

likely does affect how a jury would interpret the first half," (R. 42.), but simply adhered to "the language of the Rule itself." *Beech Aircraft*, 488 U.S. at 163.

Rule 106 omit oral statements. "Because the Federal Rules of Evidence are a legislative enactment," the Court should adhere to the language Congress chose to use, and hold that oral statements cannot be permitted through Rule 106, or through the Rule 611(a) backdoor. *Id.*

2. Rule 106 Does Not Provide an Exception to Evidence That is Otherwise Inadmissible.

The language of Rule 106 does not provide an exception to the exclusionary nature of any other Federal Rule of Evidence. Therefore, just as the Rule does not apply to oral statements, it does not admit otherwise inadmissible evidence.

Courts cite the plain language of Rule 106 to hold that it does not "render admissible the evidence which is otherwise inadmissible under the hearsay rules." *United States v. Lentz*, 524 F.3d 501, 526 (4th Cir. 2008) (quoting *Wilkerson*, 84 F.3d at 696); *see also United States v. Meraz*, 663 Fed. App'x 580, 581 (9th Cir. 2016)[8]; *United States v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012); *Shaver*, 89 Fed. App'x at 533; *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983). Simply put, Rule 106 "covers an order of proof problem." *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982). Despite the lack of an explicit exception to hearsay, some courts reason that the Rule "can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously." *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986); *see also United States v. Green*, 694 F. Supp. 107, 110 (E.D. Pa. 1988), *aff'd*, 875

[8] The Ninth Circuit adhered to this rule six other times before *Meraz*. *See United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996); *United States v. Bourgeois*, No. 95-50474, 1997 U.S. App. LEXIS 5392, at *21 (9th Cir. 1997); *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000); *United States v. Cline*, No. 06-50109, 2007 U.S. App. LEXIS 8043, at *6 (9th Cir. 2007); *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007); *United States v. Hayat*, 710 F.3d 875, 896 (9th Cir. 2013).

F.2d 312 (3d Cir. 1989); *United States v. Awon*, 135 F.3d 96, 101 (1st Cir. 1998); *Lopez-Medina*, 596 F.3d at 735–736; *United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007); United *States v. Reese*, 666 F.3d 1007 (7th Cir. 2012).

Courts unwilling to permit otherwise inadmissible evidence through Rule 106 pay attention to the language of the Rules, and to the separation of powers. In the Sixth Circuit, the court in *Shaver* noted that the common-law rule of completeness "survived the codification of the Federal Rules of Evidence," but that it does not "outweigh the hearsay rules because 'hearsay is not admissible except as provided *by these rules* or rules prescribed by the Supreme Court pursuant to statutory authority.'" 89 Fed. App'x at 533 (citing Fed. R. Evid. 802[9]) (emphasis in original). Similarly, in *Vargas*, the court stated that "a party cannot use the doctrine of completeness to circumvent Rule 803's exclusion of hearsay testimony." 689 Fed. App'x at 876. Rule 106 does not provide an exception. In light of the Rule's text, courts agree with little discussion. *See Lentz*, 524 F.3d at 526 ("Rule 106 does not, however, render admissible the evidence which is otherwise inadmissible under the hearsay rules"); *Meraz*, 663 Fed. App'x at 581 ("Even if Rule 106 did apply, it does not compel admission of otherwise inadmissible hearsay evidence.") (internal citation and quotation marks omitted); *Terry*, 702 F.2d at 314 ("in any event, Rule 106 does not render admissible evidence that is otherwise admissible").

In contravention of the hearsay rules, some courts have chosen to read a meaning into Rule 106 that its text does not warrant. Indeed, Rule 106 speaks of fairness. Fairness about timing. The remainder of or related written or recorded statement may be introduced "*at that time* . . . that in fairness ought to be considered *at the same time*." Fed. R. Evid. 106 (emphasis added).

[9] Federal Rule of Evidence 802 was amended in 2011. It now reads: "Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court." Fed. R. Evid. 802.

The D.C. and First Circuits, which many courts have since followed, supplied their own meaning to fairness. *Sutton*, 801 F.2d at 1368 (suggesting there is an increased chance of "distorted and misleading trials" unless otherwise inadmissible evidence is sometimes admissible); *Awon*, 135 F.3d at 101 ("the doctrine of completeness . . . operates to ensure fairness where a misunderstanding or distortion created by the other party can only be averted by the introduction of the full text of the out-of-court statement").

Here, the Fourteenth Circuit was faced with a self-serving hearsay statement much like that in *Shaver*. The defendant in *Shaver*, who was charged with and convicted of mail fraud, told the Postal Inspector who later testified against him that he "innocently followed his mother's instructions." 89 Fed. App'x at 531. Joralemon told Rapstol (who then told Remsen) that she just wanted to swap briefcases so that she could keep her job. (R. 9, 37.) Notably, the court in *Shaver* would have permitted an oral statement through Rule 611(a) had it not been otherwise inadmissible hearsay. 89 Fed. App'x at 532. But, the innocence-proclaiming statement in *Shaver* was being offered for the truth of the matter it asserted, *id.* at 531–532, and Joralemon sought to offer her statement for its truth here, too. (R. 36–37.) Thus, since hearsay is inadmissible unless and until provided otherwise by a federal statute, the Rules, or the Supreme Court, Fed. R. Evid. 802, then even if Rule 106 did apply to oral statements, "[e]xculpatory hearsay may not come in solely on the basis of completeness." *Shaver*, Fed. App'x at 533. *See also Lentz*, 524 F.3d at 526 ("Rule 106 does not, however, render admissible the evidence which is otherwise inadmissible under the hearsay rules.") (internal citation and quotation marks omitted); *Vargas*, 689 F.3d at 876 (embracing the *Li* four-part test but refusing hearsay in the absence of a valid exception).

The reasoning of the D.C. and First Circuits in permitting otherwise inadmissible hearsay is problematic. First, the court in *Sutton* theorized that because Rule 106 lacks the proviso, "except as otherwise provided by these rules," that it does not exclude hearsay. 801 F.2d at 1368. This is circular. The Rule Against Hearsay, 802, *does* contain the proviso. Indeed, the court in *Sutton* chose to read more into something Rule 106 does not say than something Rule 802 does say—that hearsay is inadmissible unless otherwise provided. The court itself even acknowledged that Rule 106 "explicitly changes the normal order of proof" but commented that "[w]hether [it] concerns the substance of evidence . . . is a more difficult matter." *Id.* It is a difficult matter only if the court makes it one. The court in *Awon* did just that, and the Fourteenth Circuit dissent was misled therefrom. In its opinion, the First Circuit disregarded the Court's guidance in *Beech Aircraft* by categorizing the common-law rule of completeness as codified—not *partially* codified—in Rule 106. 135 F.3d at 101. It then cited *Irons v. FBI*, 880 F.2d 1446, 1453 (1st Cir. 1989), and *United States v. Range*, 94 F.3d 614, 620 (11th Cir. 1996), to support the proposition that "an otherwise inadmissible recorded statement may be introduced into evidence where one side has made a partial disclosure of the information, and full disclosure would avoid unfairness to the other party." *Id.* Indeed, this was true under the common-law rule of completeness, and that is all *Irons* says. 880 F.2d at 1446. Rule 106 is not mentioned in the case. Moreover, in *Range*, the court did not discuss whether the additional statement was otherwise inadmissible; "hearsay" is not mentioned in the opinion. *See Range*, 94 F.3d 614. The reasoning of the D.C. and First Circuits, on which the dissent based its understanding—and upon which courts have based their own reasoning in permitting otherwise inadmissible evidence[10]—should be ignored.

[10] *See, e.g.*, *Lopez-Medina*, 596 F.3d at 735–736; *Green,* 694 F. Supp. at 110.

The majority rested its case on a sound textual reading and reasoning, and this Court should do the same in concluding that Rule 106 does not permit otherwise inadmissible evidence.

While the circuits are split, those permitting the admission of otherwise inadmissible evidence through Rule 106 misinterpret the Federal Rules of Evidence and precedent from this Court. Therefore, the Court should follow the text-based approach, and hold that Rule 106 does not permit otherwise inadmissible evidence. If any ambiguity remains, then the Rule's legislative history will confirm that neither oral statements nor otherwise inadmissible evidence may come through Rule 106.

B. Rule 106's Legislative History Confirms that the Rule Does Not Apply to Oral Statements Nor Permit Otherwise Inadmissible Evidence.

Rule 106's legislative history, like its plain language, makes it clear that the Rule does not apply to oral statements and does not permit otherwise inadmissible evidence. Neither at the time of the Rules' adoption in 1975, nor at their most recent meeting on October 19, 2018 (and at no point in between), did the Advisory Committee on Evidence Rules (the "Committee") recommend differently to Congress.

The common-law rule of completeness—in addition to writings and recorded statements—"encompassed conversations and other spoken utterances (as well as acts) that had not been memorialized in writing or recorded." *United States v. Bailey*, 322 F. Supp. 3d 661, 664 (D. Md. 2017) (Grimm, J.). Upon codification in Rule 106, the Committee noted that "[f]or practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations." Fed. R. Evid. 106 and Notes of Advisory Committee on Proposed Rules. [11] It

[11] As the Fourteenth Circuit noted in its opinion, the Committee's notes "bear no special authoritativeness" and cannot "change the meaning that the Rules would otherwise bear." *Tome v. United States*, 513 U.S. 150, 167–168 (1995) (Scalia, J., concurring). The Notes are, however, "ordinarily *the* most persuasive" commentary "concerning the meaning of the Rules." *Id.* at 167 (emphasis in original). But, binding, persuasive, or merely suggestive, there is no conflict between this Note and the Rule, whose plain language reveals that it does not apply to oral statements.

was not until their spring 2002 meeting that the Committee considered an amendment to include oral statements. Report of the Advisory Committee on Evidence Rules, *Meeting of April 19, 2002*, at 8.[12] At their fall meeting six months later, the Committee voted to reject a proposal to expand Rule 106's reach to oral statements, determining that "such a change would be unnecessarily disruptive to the order of proof at a trial." Report of the Advisory Committee on Evidence Rules, *Meeting of October 18, 2002*, at 2. Also at this meeting, the Committee agreed to consider whether otherwise inadmissible evidence could be permitted under the Rule. *Id.* at 5. Six months later, the Committee declined to propose the amendment, noting that "the apparent conceptual disagreement among the courts has not made a difference in the results of any of the reported cases." Report of the Advisory Committee on Evidence Rules, *Meeting of April 23, 2003,* at 4–5.

Another fifteen years passed before the Committee again considered the amendments. District Judge Paul Grimm presented a proposal after his opinion in *Bailey* that would amend Rule 106 to apply to oral statements and permit otherwise inadmissible evidence. Advisory Committee on Evidence Rules, *Draft Minutes of Meeting of October 26, 2017*, at 19–20. But, the meeting concluded without a proposed amendment and only a plan to continue consideration at the next meeting. *Id.* at 22. The next two meetings ended the same way. *See* Advisory Committee on Evidence Rules, *Draft Minutes of Meeting of April 26–27, 2018*, at 57; Advisory Committee on Evidence Rules, *Draft Minutes of Meeting of October 19, 2018,* at 289.

[12] This Report, and those cited following it, are available online at https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/committee-reports. The page numbers referenced here coincide with the page numbers of the PDF files accessible at this internet location.

Without question, the Committee is considering a proposal to amend Rule 106 to capture oral statements and permit otherwise inadmissible evidence. Unless and until that happens, the Committee's hesitation and the Rule's language make it clear that no such application is available now. The Committee may recommend the amendment when it convenes this spring, but in the meantime, the Court should avoid an act of legislation and find that Rule 106 neither applies to oral statements nor permits otherwise inadmissible evidence.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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Counsel for Respondent

Dated: February 8, 2019