20-10059

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEORGE ANIBOWEI,
Plaintiff-Appellant

v.

MARK A. MORGAN, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; WILLIAM P. BARR, U.S. Attorney General; CHAD F. WOLF, Acting Secretary, U.S. Department of Homeland Security; MATTHEW T. ALBENCE, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; DAVID P. PEKOSKE, Administrator of the Transportation Security Administration, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRANSPORTATION SECURITY ADMINISTRATION,
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
District Court No. 3:16-CV-3495-D

BRIEF FOR APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

This appeal is from the district court's denial of a preliminary injunction. The relevant portion of the record is short and straightforward, consisting of only the plaintiff's second amended complaint and the parties' respective motion, response, and reply papers. And the record also contains a transcript of the hearing held by the district court at which counsel for both parties were able to argue their positions (but at which no evidence was presented). The government submits that the case can be decided on this existing record without the need for oral argument.

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STATEMENT OF JURISDICTION

This is an appeal by plaintiff-appellant George Anibowei from the district court's denial of his motion for a preliminary injunction. The district court entered its order on January 14, 2020, and on the following day, Anibowei filed a notice of appeal "from the Memorandum Opinion and Order entered in this action on January 14, 2019 [*sic*] denying his motion for a preliminary injunction." (ROA.18, 874, 883.)

No final judgment has yet been entered, but this Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's denial of Anibowei's motion for a preliminary injunction. As discussed in this brief, jurisdiction does not exist to review the district court's interlocutory denial of Anibowei's motion for partial summary judgment. The Court should therefore dismiss that portion of the appeal.

INTRODUCTION

The first—and only—substantive issue that the Court should decide in this interlocutory appeal is whether the district court abused its discretion in denying a preliminary injunction. It did not. Plaintiff George Anibowei sought a preliminary injunction under a theory that a warrant is required before a cell phone may be searched at the border. But as the district court correctly noted, no decision from this Court or the Supreme Court has ever imposed such a requirement. It was not error for the district court to decline to issue extraordinary relief on a novel theory that appears never to have been adopted by any court, much less in a precedent binding on the district court.

The district court specifically found that the evidentiary record proffered by Anibowei was insufficient to satisfy all four essential elements for obtaining preliminary relief. As the district court explained, Anibowei's preliminary-injunction motion was presented in an unusual procedural posture and was supported by nothing more than Anibowei's verified second amended complaint. Anibowei fails to show any basis for this Court to disturb the district court's sound exercise of its discretion in deciding that the stringent requirements for obtaining extraordinary preliminary relief were not met. Indeed, the second amended complaint—which, again, was the *only* evidence relied upon by Anibowei in support of his motion—did not identify any

irreparable injury sustained by Anibowei as a result of any border search of his cell phone, and was likewise essentially silent on the balancing of possible harms to the government and the public interest. The allegations and averments of the second amended complaint, standing alone, did not compel the issuance of a preliminary injunction. No abuse of discretion, or any other error, is shown. This Court should therefore affirm the district court's denial of Anibowei's motion for a preliminary injunction.

And that should be the end of the matter, as far as this appeal is concerned. No final judgment has yet been entered by the district court. This case is here at an interlocutory stage only because, by statute, there is appellate jurisdiction to review the denial of a preliminary injunction. Anibowei attempts to obtain additional appellate review of the denial of his motion for partial summary judgment, but he fails to show that jurisdiction exists for this portion of his appeal. Although there is some overlap between the preliminary-injunction denial and the partial-summary-judgment ruling, these matters are not so interconnected as to support appellate jurisdiction over the latter. And the district court's interlocutory ruling on the partial-summary-judgment motion was not even partially dispositive of any claim or defense in the case. The district court did not grant partial summary judgment in favor of the government, or even against Anibowei. It merely denied Anibowei's

request for an early partial summary judgment, with an explanation that the motion had been presented in an unusual manner on an essentially nonexistent record and that the district court expected that Anibowei might later seek summary judgment on a more developed record. This denial of summary judgment would very likely be unreviewable on appeal from a final judgment. No appellate jurisdiction attaches now in this limited interlocutory appeal, and the portion of Anibowei's appeal challenging the district court's partial-summary-judgment ruling should be dismissed. Alternately, if the Court does find jurisdiction to reach this issue, the Court should affirm.

STATEMENT OF THE ISSUES

1. Anibowei filed a second amended complaint asserting that a warrant is required to search a traveler's cell phone at the international border, and, approximately a month later, sought a preliminary injunction premised on this theory. Noting that neither this Court nor the Supreme Court has ever required a warrant for such a search and that the factual record was largely undeveloped, the district court found that Anibowei had not satisfied the four elements necessary to obtain a preliminary injunction. Did the district court abuse its discretion in declining to grant extraordinary preliminary relief?

2. In addition to requesting a preliminary injunction, Anibowei moved for partial summary judgment on the issue of whether a warrant is

required for a cell-phone search at the border. The district court concluded that Anibowei had not shown an entitlement to judgment as a matter of law, while also noting that the record was essentially undeveloped and that the district court expected the case to soon pivot to a more typical course and for Anibowei to later seek summary judgment on a more developed record. Does this Court have appellate jurisdiction to review the district court's interlocutory denial of Anibowei's motion for partial summary judgment? If so, did the district court err in denying the motion?

STATEMENT OF THE CASE

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

This case arises out of the search of a cell phone at the international border and thus implicates the government's border-search authority.[1] 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

[1] The concept of a border search as discussed herein refers both to searches occurring at an physical international boundary as well as at any so-called "functional equivalent" of the border, such as at an airport checkpoint for passengers on international flights. *See United States v. Cardenas*, 9 F.3d 1139, 1147–48 (5th Cir. 1993).

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.* at 538 (citing *United States v. Ramsey*, 431 U.S. 606, 618–19 (1977)). "[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 *Ramsey*, 431 U.S. at 616).

The government's "longstanding concern for the protection of the integrity of the border" extends, among other things, to the "prevent[ion of] the introduction of contraband into this country," the requirement for a person "entering the country to identify himself as entitled to come in," and "the collection of duties," *Montoya de Hernandez*, 473 U.S. at 537, 538 & n.1 (internal quotation marks and citation omitted), and also to "the power of the Federal Government to exclude aliens from the country," *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). Accordingly, "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also 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; *see also 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 a border search of her 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").

The two agencies with primary federal law-enforcement responsibility at the border are U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). Both agencies have adopted policies governing searches of electronic devices at the border.[2] CBP's current policy, adopted on January 4, 2018, "governs border searches of electronic devices" by CBP personnel. *See* CBP Directive No. 3340-049A, Border Search of Electronic Devices ¶ 2.3 (Jan. 4, 2018).[3] The CBP policy distinguishes between "basic" and "advanced" border searches of electronic devices.[4] *Id.*

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[2] CBP's and ICE's policies were never actually placed into the record in the district court, but they were referred to in Anibowei's pleadings. (*See, e.g.*, ROA.549–55.)

[3] A copy of the CBP policy is available online at https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf. CBP's 2018 directive supersedes earlier-issued directives that permitted officers to conduct all border searches of electronic devices without suspicion.

[4] For purposes of the CBP policy, a "border search" includes "any inbound or outbound search pursuant to longstanding border search authority and conducted at the physical border, the functional equivalent of the border, or the extended border, consistent with law and agency policy." CBP Directive No. 3340-049A, ¶ 2.3. And an "electronic device" includes "[a]ny device that may contain information in an electronic or digital form, such as

¶¶ 5.1.3–1.4. 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." *Id.* ¶ 5.1.4. A "basic search" is "[a]ny border search of an electronic device that is not an advanced search." *Id.* ¶ 5.1.3. CBP officers may conduct a basic search "with or without suspicion," *id.*, but may conduct an advanced search only if "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," and only with supervisory approval, *id.* ¶ 5.1.4. For both types of searches, CBP officers may examine "only the information that is resident upon the device" and may not intentionally access "information that is solely stored remotely." *Id.* ¶ 5.1.2.

ICE's primary border-search policy dates from 2009 and "establishes policy and procedures . . . with regard to border search authority to search, detain, seize, retain, and share information contained in electronic devices possessed by individuals at the border, the functional equivalent of the border, and the extended border." *See* ICE Directive No. 7-6.1, Border Searches of

computers, tablets, disks, drives, tapes, mobile phones and other communication devices, cameras, music and other media players." *Id.* ¶ 3.2.

Electronic Devices, ¶ 1.1 (Aug. 18, 2009).[5] The policy "applies to searches of electronic devices of all persons arriving in, departing from, or transiting through the United States, unless specified otherwise." *Id.* By supplemental guidance issued on May 11, 2018, ICE adopted the CBP policy's distinction between "basic" and "advanced" searches, with reasonable suspicion required for the latter.[6]

2. Anibowei files suit to challenge the search of his cell phone at the border.

Anibowei, a licensed attorney, initially filed a *pro se* complaint in the district court to challenge a search of his cell phone performed at Dallas/Fort Worth International Airport upon his return from an international trip in October 2016. (ROA.34–36.) The complaint alleged that Anibowei's cell phone was briefly detained by government agents at the airport and then returned to him with an explanation that its contents had been "copied for examination." (ROA.35–36.) In two counts, Anibowei asserted that the search and seizure of information from his cell phone violated the Fourth and

[5] A copy of the ICE policy is available online at https://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf.

[6] The ICE supplemental guidance is not contained in the record and does not appear to be available online, but has been noted in the record of other border-search litigation that is currently pending. *See* Corrected Appellants' Principal Brief 5–6, *Alasaad v. Wolf*, No. 20-1077 (4th Cir. filed June 10, 2020).

First Amendments. (ROA.38–39.)

The government[7] filed a motion to dismiss for lack of jurisdiction and for failure to state a claim. (ROA.102.) Anibowei elected to amend as a matter of course and filed a first amended complaint, which had the effect of mooting the government's motion to dismiss. (ROA.9, 133.) The government thereafter filed a new motion to dismiss, directed at the first amended complaint. (ROA.201.) Anibowei responded and the government replied. (ROA.234, 274.)

Upon consideration of a report and recommendation prepared by the magistrate judge, the district court determined that the government's motion to dismiss should be granted, but with leave for Anibowei to attempt to replead his claims. (ROA.467.) Citing cases from the Fourth, Ninth, and Eleventh Circuits, the district court noted the existence of a circuit split on the issue of "whether the Constitution prohibits the government from conducting suspicionless searches of individuals' electronic devices at the border."

[7] Through the course of this litigation Anibowei has named as defendants a number of federal officials in their official capacities, including the heads of CBP and ICE, as well as federal agencies themselves. (ROA.3–7.) But unless there is some specific need to distinguish a particular defendant, this brief will simply refer generically to the defendants as "the government" or with other similar language. A suit against a government official in an official capacity is considered the equivalent of a suit against the government itself. *See Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *Smart v. Holder*, 368 F. App'x 591, 593 (5th Cir. 2010).

(ROA.484.) The Eleventh Circuit holds that no individualized suspicion is required for such a search, the district court explained, while the Fourth and Ninth Circuits require some level of individualized suspicion for at least some searches. (ROA.484 (citing *United States v. Touset*, 890 F.3d 1227, 1231 (11th Cir. 2018); *United States v. Kolsuz*, 890 F.3d 133, 147 (4th Cir. 2018); *United States v. Cotterman*, 709 F.3d 952, 962 (9th Cir. 2013) (en banc)).) "The Fifth Circuit has not yet chosen a side" on the issue of whether some suspicion is required for certain searches of electronic devices, the district court noted. (ROA.484 (citing *Molina-Isidoro*, 884 F.3d at 289).) This Court had explained in *Molina-Isidoro*, though, that no court has ever required a warrant to support such searches. *Molina-Isidoro*, 884 F.3d at 292.

3. With newly retained counsel, Anibowei files a second amended complaint and moves for a preliminary injunction and partial summary judgment on his theory that electronic border searches require a warrant.

Anibowei retained counsel and filed a second amended complaint. (ROA.539.) As in his earlier pleadings, Anibowei again challenged the October 2016 occasion on which the contents of his cell phone were allegedly copied at DFW Airport. (ROA.562.) Anibowei further alleged that his cell phone had been manually inspected by government agents at the border on four other occasions, although apparently without copying any information. (ROA.563–64.) Anibowei also referenced the CBP and ICE policies governing

those agencies' border searches of cell phones and other electronic devices, which policies he generally contended were unlawful. (*See* ROA.549–55.)

The second amended complaint alleged violations of the Fourth and First Amendments as well as the Administrative Procedure Act. (ROA.565–72.) In each of the constitutional counts, Anibowei pleaded alternately that (a) the government must obtain a warrant supported by probable cause to search any electronic device at the border, or (b) if there is no warrant requirement, that reasonable suspicion is required. (ROA.567–71.)

Approximately one month after filing the second amended complaint, and prior to the government's agreed deadline to respond to that pleading, Anibowei filed a motion for partial summary judgment and for a preliminary injunction. (ROA.635, 643.) This was in April 2019, some two-and-a-half years after Anibowei's cell phone had been searched and copied at DFW Airport. (*See* ROA.635.) In his motion, Anibowei argued for relief only under his theory that a warrant is required to search an electronic device at the border, and sought a preliminary injunction restraining the government "from searching or seizing Plaintiff's electronic devices or communications *absent a warrant supported by probable cause* . . . ." (ROA.642 (emphasis added); *see also* ROA.658–72 (arguing that CBP and ICE policies "authorizing warrantless cell

phone searches"[8] violate the Fourth and First Amendments); ROA.639–40 (language in Anibowei's proposed partial-summary-judgment order, seeking relief against warrantless searches[9]).)

In its response, and as relevant to the issue of Anibowei's likelihood of success on the merits of his warrant-requirement theory, the government discussed the border-search doctrine and noted the Supreme Court's explanation that searches at the border "are reasonable simply by virtue of the fact that they occur at the border." (ROA.762 (quoting *Flores-Montano*, 541 U.S. at 152–53).) The government also cited and discussed numerous cases demonstrating that no court had imposed a warrant requirement for border searches of cell phones, even in the aftermath of the Supreme Court's decision

[8] The quoted language challenging "warrantless" cell-phone searches is taken from the two principal subheadings (A and B) within the "ICE and CBP's Policies Are Unlawful" argument section of Anibowei's brief in the district court. (*See* ROA.658, 670.) Subsections A and B within this section were respectively entitled "By Authorizing Warrantless Cell Phone Searches, The Electronics Search Polices Violate the Fourth Amendment," and "By Authorizing Warrantless Cell Phone Searches, The Electronics Search Policies Violate the First Amendment." (ROA.658, 670.)

[9] Anibowei's brief in the district court argued that "[b]ecause it is undisputed that ICE and CBP's policies permit warrantless cell phone searches, and that Mr. Anibowei's data was taken *pursuant to such a warrantless search*, the court should grant Mr. Anibowei summary judgment, vacate ICE and DHS's unlawful policies, and order his data destroyed," and that "[a]t minimum, the court should grant Mr. Anibowei a preliminary injunction to protect him *from future warrantless searches*." (ROA.658 (emphases added).) And in his reply brief, he urged the district court to find that the "Fourth Amendment requires a warrant supported by probable cause to search a cell phone at the border" and argued that "[t]his case requires the Court to decide the warrant question and nothing . . . prevents the Court from finally saying what the law is." (ROA.789.)

regarding searches incident to arrest in *Riley v. California*, 573 U.S. 373 (2014). (*See* ROA.766.)

The government further argued that Anibowei had not satisfied the other preliminary-injunction elements requiring a substantial threat of irreparable injury, a consideration of the balance of potential harms if an injunction were granted, and the public interest. (*See* ROA.773–77.) More than two years had passed since Anibowei's cell phone had been inspected and copied, the government noted, yet Anibowei had not identified any concrete, specific harm to him that had occurred as a result, or that might occur in the future. (ROA.773–74.) Anibowei also had not accounted for the significant administrative and national-security burdens his proposed injunction would cause, insofar as it would radically alter the government's existing and longstanding border-search practices. (ROA.774–76.) And his proposed remedy—an across-the-board warrant requirement—would short-circuit ongoing consideration and evaluation of border-search polices and procedures by Congress and the Executive Branch. (ROA.776–77.)

In a reply brief, Anibowei conceded that no court had previously "dared" to require a warrant for a cell-phone search at the border, but urged the district court to be the first to do so. (ROA.789.)

4. After holding a hearing, the district court declines to issue a preliminary injunction and denies Anibowei's motion for partial summary judgment.

The district court held a hearing on Anibowei's motion. (*See* ROA.950.) At the very beginning of the hearing, the district court zeroed in on the issue of what specific legal theory Anibowei was relying on and, in the following colloquy with Anibowei's counsel, confirmed that Anibowei was proceeding only on his theory that a warrant supported by probable cause was required:

> THE COURT: All right. First of all, in reading your briefing one could get the impression that you are arguing for a probable cause standard and a warrant requirement, and -- and really anything else is not emphasized. Would that be a correct reading of your position?
>
> MR. TUTT: Yes, Your Honor. Our primary position is that a warrant is required for these searches.
>
> THE COURT: And to your knowledge has any court, and particularly the Supreme Court and the Fifth Circuit, required probable cause in a warrant in a border search context?
>
> MR. TUTT: No, Your Honor. But I have two answers to that, saying no, ...

(ROA.954.)

After the hearing, the district court issued a memorandum opinion and order denying Anibowei's motion. (ROA.874.) Regarding Anibowei's argument that border cell-phone searches require a warrant, the district court explained that "no decision of the Supreme Court or of the Fifth Circuit

imposes such requirements in the context of border searches," and that "no court has extended the Supreme Court's decision in *Riley* [] to a border search." (ROA.880.) On the issue of *Riley* in particular, the district court noted this Court's explanation in *Molina-Isidoro* that "not a single court addressing border searches of computers since *Riley* has read it to require a warrant." (ROA.880 (quoting *Molina-Isidoro*, 884 F.3d at 292).) In the absence of such authority, the district court determined that Anibowei was not entitled to partial summary judgment in his favor, but left the door open for Anibowei to revisit this issue in a later motion. (ROA.880–82.)

The district court additionally found that Anibowei had not met his heavy burden to obtain a preliminary injunction, which remedy the district court explained was an "extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." (ROA.879 (internal quotation marks and citation omitted).) The district court found the "pertinent evidentiary record, which at this point consists only of Anibowei's second amended complaint," to be "insufficient for the court to conclude that Anibowei has satisfied each of the four essential elements for obtaining such relief." (ROA.880.) The district court further noted that Anibowei had agreed to defer the government's obligation to respond to the second amended complaint, such that the government had not

yet had the "obligation (or opportunity) to deny the allegations of the second amended complaint." (ROA.881.) But even overlooking this "procedural imbalance" and "accept[ing] all the allegations of the second amended complaint as evidence," the district court found that "the evidence is insufficient to satisfy all four of the essential elements for obtaining a preliminary injunction." (ROA.881.)

The district court closed its memorandum opinion and order by again noting the unusual posture of the motion that Anibowei had presented, with an explanation of the district court's expectations for the case going forward:

> This case is before the court in a somewhat unusual procedural posture. In a typical case of this type, assuming that at least some of the plaintiff's claims survived a Fed. R. Civ. P. 12(b)(6) motion, a plaintiff like Anibowei would pursue development of the record (through his own evidence and/or discovery from defendants), move for a preliminary injunction, and perhaps later seek partial summary judgment on a more developed record.
>
> In this case, however, only a thin record (i.e., the second amended complaint) has been developed, defendants by agreement have not been obligated (or able) to deny Anibowei's allegations, and Anibowei has moved for a preliminary injunction only as an alternative form of relief, which was insufficient to trigger entry of a scheduling and procedural order [specific to the preliminary-injunction motion]. The court anticipates that this case will pivot hereafter to a more typical course.

(ROA.881–82 (footnote omitted).)

This interlocutory appeal—made possible only by 28 U.S.C.

§ 1292(a)(1)'s grant of jurisdiction to review the denial of a preliminary injunction—has followed.

SUMMARY OF THE ARGUMENT

The first issue the Court should consider is the one that it can be assured it has jurisdiction over—the denial of Anibowei's motion for a preliminary injunction. And the Court should affirm that ruling because the district court did not abuse its discretion in concluding that Anibowei failed to satisfy the four essential elements to obtain such relief. No decision of this Court or the Supreme Court has ever required a warrant for the search of a cell phone at the border, and thus the district court did not err in concluding that Anibowei failed to show a likelihood of success on the merits. The district court also specifically found that the evidentiary record was insufficient to establish the remaining elements—irreparable harm, that any threatened injury outweighs potential harm to the government, and the public interest. There is no basis for disturbing the district court's factbound exercise of its discretion in finding that these requirements for extraordinary relief were not met. As the district court noted, Anibowei's motion was presented on an essentially undeveloped record with only his verified second amended complaint in support. This Court will reverse the denial of a preliminary injunction only in extraordinary

circumstances, but no such circumstances are present and no error—much less an abuse of discretion—has been shown.

Once the Court has affirmed the district court's preliminary-injunction ruling, it should dismiss the remainder of this appeal for lack of appellate jurisdiction. The district court denied Anibowei's partial-summary-judgment motion after (correctly) noting that no court had extended the Supreme Court's *Riley* decision to the border-search context. But the district court also noted that Anibowei had filed his motion in an unusual procedural posture and that the district court expected the case to pivot to a more usual course including the possibility of a later summary-judgment motion on a more developed record. It is not necessary for this Court to review the district court's interlocutory partial-summary-judgement ruling in order to review the preliminary-injunction ruling, and in these circumstances the two rulings were not so interconnected as to give rise to pendent appellate jurisdiction. Alternately, if the Court does review the partial-summary-judgment ruling, it should affirm because no error is shown.

ARGUMENT AND AUTHORITIES

Contrary to the ordering of issues in Anibowei's brief, the Court should first address the district court's denial of Anibowei's motion for a preliminary injunction. The preliminary-injunction ruling provides the sole jurisdictional

hook for this interlocutory appeal. It therefore merits first consideration. And as discussed below, the district court did not abuse its discretion in denying a preliminary injunction. That decision should therefore be affirmed. The remainder of this appeal—in which Anibowei challenges the district court's interlocutory denial of a partial-summary-judgment motion—should then be dismissed for lack of jurisdiction, but even if jurisdiction is assumed to exist, no error is shown.

1. The district court did not abuse its discretion in determining that Anibowei had not met his heavy burden to obtain a preliminary injunction.

Standard of Review

This Court "will reverse the denial of a preliminary injunction only under extraordinary circumstances." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court and may be reversed on appeal only by a showing of abuse of discretion." *Id.* (quoting *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984)). The Court will "not simply . . . substitute [its] judgment for the trial court's, else that court's announced discretion would be meaningless." *Id.* (quoting *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)).

A preliminary injunction "is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion." *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). Its "primary justification" is to "preserve the court's ability to render a meaningful decision on the merits." *Id.* "The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." *Id.* at 572. "The denial of a preliminary injunction will be upheld where the movant has failed sufficiently to establish *any one* of the four criteria." *Black Fire Fighters Ass'n v. City of Dallas*, 905 F.2d 63, 65 (5th Cir. 1990).

Discussion

A. Anibowei failed to show a likelihood of success on the merits of any claim that a warrant is required for the border search of an electronic device.

Anibowei sought a preliminary injunction to restrain the government from searching his cell phone at the border without a warrant. (ROA.642.) It was therefore his burden to show a likelihood of success on some claim supporting this relief. *See Canal Auth.*, 489 F.2d at 573. But the district court

correctly noted that no decision of this Court or the Supreme Court has ever required a warrant in the context of a border search of a cell phone. (ROA.880.) Anibowei identified no such authority in his briefing to the district court, nor has he done so on appeal. The district court was thus on firm ground in declining to preliminarily enjoin the government from "searching or seizing Plaintiff's electronic devices or communications absent a warrant supported by probable cause," as had been requested by Anibowei. (ROA.642.)

There was no error in the district court's conclusion that Anibowei failed to demonstrate a substantial likelihood of success on any claim supporting the novel warrant requirement contained in his proposed preliminary injunction. As this Court has previously recognized, "no court has ever required a warrant to support searches, even nonroutine ones, that occur at the border." *Molina-Isidoro*, 884 F.3d at 292.

Despite the dearth of authority in support of his position, Anibowei relied heavily on *Riley*—a non-border-search case—to argue that cell phones are "different" and that a different legal regime should therefore apply. (*See, e.g.*, ROA.658–71.) But as the district court recognized, and as discussed in more detail below (*see* pp. 32–35, *infra*), *Riley* has not been extended by the Supreme Court to the border-search context and does not support Anibowei's

argument that a warrant is required. *See also Molina-Isidoro*, 884 F.3d at 292 ("[N]ot a single court addressing border searches of computers since *Riley* has read it to require a warrant."). It was not the district court's role, nor is it this Court's, to "read tea leaves to predict where [the Supreme Court] might end up" if it decides to consider an electronic border-search case post-*Riley*. *Big Time Vapes, Inc. v. Food & Drug Admin.*, --- F.3d ----, 2020 WL 3467973, at *9 (5th Cir. 2020) (quoting *United States v. Mecham*, 950 F.3d 257, 265 (5th Cir. 2020)). The district court's determination that no substantial likelihood of success had been shown by Anibowei was faithful to controlling precedent, and did not represent legal error of any type, much less an abuse of discretion. For this reason alone, the district court's denial of Anibowei's preliminary-injunction motion should be affirmed.

B. Anibowei failed to satisfy the remaining preliminary-injunction elements.

In addition to finding no substantial likelihood of success, the district court rightly concluded that the remaining requirements for a preliminary injunction were not satisfied. Anibowei sought a preliminary injunction on an essentially undeveloped record consisting of only his verified second amended complaint. (*See* ROA.880.) The district court found that this record was "insufficient for the court to conclude that Anibowei has satisfied each of the

four essential elements for obtaining such relief." (ROA.880.) And Anibowei fails to show any abuse of discretion or other error in this finding.

Notably, Anibowei devotes less than two full pages of his brief to the issues of irreparable harm, the balancing against potential harm to the government, and the public interest. (*See* Brief at 61–62.) He makes a cursory assertion that he is "suffering ongoing irreparable injury because his private information and his confidential attorney-client communications are currently in the government's possession," but he points to no record support for this claim. (*See* Brief at 61.) Given his reference to materials in the government's "possession," Anibowei can be referring only to the occasion at DFW Airport in October 2016 when the contents of his cell phone were allegedly copied—that is the only time a copying of cell-phone data, as opposed to manual inspection, is alleged to have occurred. But Anibowei's cell phone was returned to him immediately at the time it was copied in October 2016. (ROA.562.) Anibowei thus had equal knowledge of and access to any information on the phone at that time. If there was some specific information present, the copying of which resulted in irreparable harm, Anibowei could have provided evidence to the district court of what this information was and how its copying and retention by the government specifically harmed him.

Anibowei did not do so, and instead offered, at most, only generalities about speculative threatened harm.

The same deficiency is true of Anibowei's arguments on appeal. Anibowei waited over two years to even file his motion for a preliminary injunction, which timing is hardly indicative of some substantial threatened injury. And it has now been over three-and-a-half years since Anibowei's cell phone was inspected in October 2016. If there was any irreparable harm, one would have expected Anibowei to be able to identify and describe it with specificity. He has not done so, and it was no abuse of discretion for the district court to find that he did not meet his burden on the irreparable-harm element.

Nor did Anibowei establish that the balancing-of-potential-harms and public-interest elements supported a preliminary injunction. Anibowei argues that the government has "no legitimate interest in enforcing unconstitutional policies" and that it is "always in the public interest to prevent the violation of a party's constitutional rights." (Brief at 62 (internal quotation marks and citations omitted).) But this simply assumes that Anibowei's legal arguments about a warrant requirement are correct and that a preliminary injunction should therefore issue more or less automatically. As the government explained in the district court, though, there are significant administrative and

national-security burdens that would accompany the proposed injunctive relief requested by Anibowei. (*See* ROA.774–77.)

In addition, Congress and the relevant federal agencies have shown an ongoing awareness of the emerging and changing considerations relating to border searches of electronic devices, and continue to engage with these issues. CBP and ICE have revised and updated their electronic border-search policies over time and will continue to analyze and re-analyze them on an ongoing basis, bearing in mind the relevant interests. (*See* pp. 7–9, *supra*.) And Congress is well aware of the issues and debate surrounding electronic border-searches—no doubt in part due to the efforts of public-policy advocates like the *amici* who have submitted briefs in this case and who are also otherwise quite active in this area. With the benefit of these and other viewpoints, Congress has considered a number of different bills on the topic of electronic border searches in recent years, but to date has not seen fit to alter the existing framework governing border searches. (*See* ROA.776–77 (citing recent proposed legislation relating to electronic border searches[10]).) The public

[10] In addition to the proposed legislation noted in the record, Congress also passed legislation in 2015 directing CBP to issue standard operating procedures for searching electronic devices at the border. *See* Trade Facilitation & Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 802(a), 130 Stat. 122, 205 (codified in pertinent part at 6 U.S.C. § 211(k)(1)(A)). Notably, though, this legislation did not impose any warrant or suspicion requirement on such searches. *See id.*

interest favors allowing Congress and the relevant Executive Branch agencies to continue addressing the evolving "important issues of public law" relating to electronic border searches through these branches' democratic, constitutional processes, instead of simply resolving them for all time in a single judicial proceeding. (ROA.776–77); *see also Kolsuz*, 890 F.3d at 148 (Wilkinson, J., concurring) (explaining that the legislative and executive branches "have a critical role to play in defining the standards for a border search, and they are much better equipped than we are to appreciate both the privacy interests at stake and the magnitude of the practical risks involved").

The district court was right: Anibowei did not make the kind of showing on the elements of irreparable harm, the balancing of potential harms, and the public interest as would be necessary to support the issuance of extraordinary relief. Particularly given the undeveloped record and absence of any evidentiary support beyond Anibowei's pleading statements, it cannot be said that the district court erred, much less abused its discretion, in not granting his motion. *See Black Fire Fighters*, 905 F.2d at 65 ("Because of the complexity of this case and the early stage of its factual development, the district court's conclusions on these two issues [in the preliminary-injunction analysis] were not clearly erroneous and its denial of relief was not an abuse of discretion.").

Moreover, the primary purpose of a preliminary injunction is to "preserve the court's ability to render a meaningful decision on the merits." *Canal Auth.*, 489 F.2d at 573. Yet Anibowei has identified no way in which the lack of a preliminary injunction will impair the district court's ability to resolve this case on the merits through a final judgment in the usual course. The fact that Anibowei waited over two years after his cell phone was copied before even filing the preliminary-injunction motion only serves as further evidence that the opposite is true. There is no basis for disturbing the district court's preliminary-injunction ruling.

C. Anibowei's arguments to the contrary are unavailing.

As noted above, Anibowei only lightly brushes across the final three preliminary-injunction elements and instead devotes the great majority of his brief to arguing—relevant here to the first of the elements, likelihood of success on the merits—that a warrant should be required for essentially any search of a cell phone or other electronic device at the border. Because Anibowei did not establish any entitlement to a preliminary injunction regardless of his chances of success on this theory, the Court actually does not need to reach this issue at all. But if it does, Anibowei's arguments fail to show that a warrant is required for electronic searches at the border, as explained below.

(1) Border searches do not require a warrant.

"The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *Flores-Montano*, 541 U.S. at 152. Accordingly, a person's "expectation of privacy [is] less at the border than in the interior," and "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." *Montoya de Hernandez*, 473 U.S. at 539, 540. The Supreme Court has reaffirmed "[t]ime and again" that routine "searches 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 (second quotation quoting *Ramsey*, 431 U.S. at 616). Thus, "[r]outine searches of the persons and effects of entrants [at the border] are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Montoya de Hernandez*, 473 U.S. at 538. In addition, travelers "have a lesser expectation of privacy when they (or their goods) leave the country if for no other reason than the departure from the United States is almost invariably followed by an entry into another country which will likely conduct its own border search." *United States v. Boumelhem*, 339 F.3d 414, 423 (6th Cir. 2003)

(quoting *United States v. Oriakhi*, 57 F.3d 1290, 1302 (4th Cir. 1995) (Phillips, J., concurring)).

While Anibowei argues that a warrant is required for any cell-phone search at the border, routine border searches do not require even reasonable suspicion or probable cause, much less a warrant. *Montoya de Hernandez*, 473 U.S. at 538. The Supreme Court has noted the possibility that "in the case of highly intrusive searches of the person," the "dignity and privacy interests of the person" might require "some level of suspicion," *Flores-Montano*, 541 U.S. at 152, but has reserved judgment on that question, *id.* at 154 n.2; *see Montoya de Hernandez*, 473 U.S. at 541 n.4; *Ramsey*, 431 U.S. at 618 n.13. On a single occasion the Supreme Court concluded that a person's *detention* during a border inspection for purposes of a monitored bowel movement was nonroutine, but was justified on a showing of reasonable suspicion. *Montoya de Hernandez*, 473 U.S. at 542–43.

Following these precedents, this Court has held that "routine border searches may be conducted without any suspicion," and that "[s]o-called 'nonroutine' searches need only reasonable suspicion, not the higher threshold of probable cause." *Molina-Isidoro*, 884 F.3d at 291. This Court has never required more than reasonable suspicion, though.

For example, in *United States v. Kelly*, 302 F.3d 291, 294 (5th Cir. 2002), this Court explained that nonroutine searches requiring reasonable suspicion "include body cavity searches, strip searches, and x-rays," but that a "canine sniff" that made contact with the person's "groin area" did not require reasonable suspicion. Similarly, the Court held in *United States v. Sandler*, 644 F.2d 1163, 1167–68 (5th Cir. 1981) (en banc), that while reasonable suspicion may be required for strip searches or body-cavity searches at the border, it is not required for less intrusive personal searches such as patdowns or frisks. *See also United States v. Carter*, 590 F.2d 138, 139 (5th Cir. 1979) (a strip search at the border requires reasonable suspicion).

Other circuits are in agreement that only highly intrusive inspections of the person, such as strip searches or body-cavity searches, qualify as nonroutine border searches, and even then only reasonable suspicion is required. *See United States v. Alfaro-Moncada*, 607 F.3d 720, 729 (11th Cir. 2010) ("Even at the border, however, reasonable suspicion is required for highly intrusive searches of a person's body such as a strip search or an x-ray examination."); *United States v. Charleus*, 871 F.2d 265, 267 (2d Cir. 1989) ("More intrusive border searches of the person such as body cavities searches or strip searches, however, require at a minimum reasonable suspicion of

criminal activity."); *United States v. Oyekan*, 786 F.2d 832, 837–38 (8th Cir. 1986) (strip searches and involuntary x-rays justified by reasonable suspicion).

To sum up, some border searches may require reasonable suspicion, but "[f]or border searches both routine and not, no case has required a warrant." *Molina-Isidoro*, 884 F.3d at 291; *see also id.* at 292 ("[N]o court has ever required a warrant to support searches, even nonroutine ones, that occur at the border.").

(2) Courts before and after *Riley* have upheld warrantless searches of electronic devices at the border, and *Riley* does not remove such searches from the border-search doctrine.

Principally relying on *Riley*, Anibowei argues that cell phones and other electronic devices represent a "new technological context" and that the traditional rules governing border searches therefore should not "extend" to cell phones. (*See* Brief at 35–40.) But as just noted above, this Court explained in *Molina-Isidoro*, a case involving the search of an electronic device at the border, that "[f]or border searches both routine and not, no case has required a warrant." 884 F.3d at 291. The Court also found it "telling that no post-*Riley* decision issued either before or after [the] search [at issue in *Molina-Isidoro*] has required a warrant for a border search of an electronic device." *Id.* at 292. Anibowei's theory that a warrant requirement applies simply is not the law.

Anibowei seeks to draw a distinction between the border searches of

electronic devices and the border searches of other things (or even persons). In his view, only the latter are properly analyzed under the border-search doctrine. But such a distinction is not consistent with this Court's precedent. Instead, all of these searches—searches of electronic devices as well as of other things and of persons at the border—are considered border searches.

That much was made clear by this Court's decision in *Molina-Isidoro*. There, a criminal defendant argued that evidence found during a warrantless search of her cell phone at the border should have been suppressed. *Molina-Isidoro*, 884 F.3d at 289. The Court determined that it need not definitively resolve any Fourth Amendment question, because in any event the good-faith exception to the exclusionary rule would apply. *Id.* at 290–91. But to reach this conclusion, the Court relied on the "border-search doctrine," and surveyed the "longstanding and expansive authority of the government to search persons and their effects at the border." *Id.* at 290. The "location of a search at the border," the Court explained, "affects both sides of the reasonableness calculus that governs the Fourth Amendment." *Id.* at 291 (citing *Montoya de Hernandez*, 473 U.S. at 538). And because the cell phone in *Molina-Isidoro* had been physically located at the border, these concepts applied.

Per *Molina-Isidoro*, then, the search of an electronic device at the border is indeed a "border search" and is analyzed by reference to traditional border-

search doctrine. And this is consistent with the practice of the numerous courts that, even post-*Riley*, have continued to analyze electronic searches at the border under the framework of the border-search doctrine, in which reasonable suspicion represents the highest hurdle to any search. *See United States v. Cano*, 934 F.3d 1002, 1015 (9th Cir. 2019) ("post-*Riley*, no court has required more than reasonable suspicion to justify even an intrusive border search"); *United States v. Wanjiku*, 919 F.3d 472, 485 (7th Cir. 2019) ("no circuit court, before or after *Riley*, has required more than reasonable suspicion for a border search of cell phones or electronically-stored data"); *Kolsuz*, 890 F.3d at 147 ("Even as *Riley* has become familiar law, there are no cases requiring more than reasonable suspicion for forensic cell phone searches at the border."); *United States v. Vergara*, 884 F.3d 1309, 1312 (11th Cir. 2018) ("The forensic searches of Vergara's phones required neither a warrant nor probable cause.").

These courts are correct that *Riley* did not alter border-search doctrine or categorically exempt cell phones from its reach. The Supreme Court took pains to explain that its holding in *Riley* was limited to the search-incident-to-arrest context, stating that while "the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone." *Riley*, 573 U.S. at 401–02. The border-search doctrine remains one such exception that allows for warrantless

searches of cell phones. To hold otherwise would be to extend *Riley* to a new context in a manner that the Supreme Court expressly declined to do.

Indeed, Anibowei effectively asks this Court to reverse the district court for declining to "read tea leaves to predict where [the Supreme Court] might end up" if it were to consider an electronic border-search case post-*Riley*. *Big Time Vapes, Inc.*, --- F.3d ----, 2020 WL 3467973, at *9 (quoting *Mecham*, 950 F.3d at 265). But the district court acted appropriately by not staking out a new position that the Supreme Court itself declined to take. *See id.*

(3) Some courts have required individualized suspicion for certain border searches, but that question is not presented by this appeal.

To the extent there is any uncertainty regarding the legal requirements for an electronic border search, the question—which is not actually presented in this appeal—is not whether a warrant is required, but rather whether some level of individualized suspicion may be required for so-called advanced or forensic searches. The Eleventh Circuit says no, holding that "no suspicion is necessary to search electronic devices at the border." *Touset*, 890 F.3d at 1229. The court's reasoning is that the Supreme Court "has never required reasonable suspicion for a search of property at the border, however non-routine and intrusive," and therefore there is "no reason why the Fourth Amendment would require suspicion for a forensic search of an electronic

device when it imposes no such requirement for a search of other personal property." *Id.* at 1233; *see id.* at 1234 ("Property and persons are different."). In the view of the Eleventh Circuit, a "forensic search of an electronic device is not like a strip search or an x-ray" that would qualify as a nonroutine search, because "it does not require border agents to touch a traveler's body, to expose intimate body parts, or to use any physical force against him," and, in the end, "[a]lthough it may intrude on the privacy of the owner, a forensic search of an electronic device is a search of property." *Id.* at 1234.

The Ninth and Fourth Circuits, on the other hand, have reached a slightly different conclusion, but both courts have nonetheless rejected the warrant requirement that Anibowei urges. Both courts permit suspicionless "manual" searches, in which officers examine a device to view limited files, photos, or data, and have required individualized suspicion only for certain "forensic" searches—searches where officers download and analyze a comprehensive catalog of data or view deleted information that may not be accessed without the use of specialized equipment or software. *See Cano*, 934 F.3d at 1007 (explaining that "*manual* cell phone searches may be conducted by border officials without reasonable suspicion but that *forensic* cell phone

searches require reasonable suspicion") (Ninth Circuit)[11]; *Kolsuz*, 890 F.3d at 139, 144 (explaining that individualized suspicion was required for a "'forensic' search" of the defendant's iPhone, which consisted of "attach[ing] the phone to a Cellebrite Physical Analyzer, which extracts data from electronic devices, and conduct[ing] an advanced logical file system extraction" that yielded an "896-page report that included [the defendant's] personal contact lists, emails, messenger conversations, photographs, videos, calendar, web browsing history, and call logs, along with a history of [his] physical location down to precise GPS coordinates") (Fourth Circuit).[12]

Either view rejects Anibowei's argument that a warrant would be

[11] Also from the Ninth Circuit, see *United States v. Arnold*, 533 F.3d 1003, 1005–10 (9th Cir. 2008), in which CBP officers searched the defendant's laptop computer at the border by opening and viewing files, and the court held that no "particularized suspicion" was required, and *Cotterman*, 709 F.3d at 957–62, in which the court held that an initial search in which officers viewed photos on the defendant's electronic devices was permissible "even without particularized suspicion," while reasonable suspicion was required for a second search that "used a forensic program to copy the hard drives of the electronic devices" with the capability to unlock password-protected files, restore deleted material, and retrieve images viewed on web sites.

[12] Also from the Fourth Circuit, see *United States v. Ickes*, 393 F.3d 501, 503 (4th Cir. 2005), in which the court considered a border search in which officers "confiscated a computer and approximately 75 disks" and then searched "the contents of [the defendant's] computer" to view various photographs and videos. The court held that such a search is permissible, reasoning that under the border-search doctrine, customs officers have broad authority and travelers have lower privacy expectations. *Id.* at 505–08. The court specifically noted that, although the officers likely had reasonable suspicion, such suspicion was not required by the Fourth Amendment. *See id.* at 507 ("the probability that reasonable suspicions will give rise to more intrusive searches is a far cry from enthroning this notion as a matter of constitutional law").

required even for forensic or advanced searches. Again, then, no error in the district court's decision is shown.

Finally, on the issue of reasonable suspicion, Anibowei briefly suggests that the district court erred by not considering whether there was reasonable suspicion to justify any search of Anibowei's phone. (Brief at 3–4.) But there is no merit to this argument. Anibowei's motion in the district court was based on Anibowei's theory that an electronic border search is invalid in the absence of a warrant, and it did not make any comparable argument about reasonable suspicion. The two principal argument subsections of Anibowei's brief in the district court were titled, respectively, "By Authorizing Warrantless Cell Phone Searches, The [CBP and ICE] Electronics Search Polices Violate the Fourth Amendment," and "By Authorizing Warrantless Cell Phone Searches, The [CBP and ICE] Electronics Search Policies Violate the First Amendment"—and those titles fairly capture the content of the brief. (ROA.658, 670.) There were no companion sections asserting that the CBP and ICE policies violate the Constitution by authorizing (some) suspicionless searches, or that the district court should grant relief because some particular search of Anibowei's phone was not supported by reasonable suspicion.

In this regard the proposed preliminary-injunction order tendered to the district court by Anibowei is instructive. Anibowei's proposed order would

have restrained the government only from "searching or seizing Plaintiff's electronic devices or communications absent a warrant supported by probable cause . . . ." (ROA.642.) And the district court also confirmed the limited scope of Anibowei's motion at the commencement of the hearing, and accordingly did not reach any issue regarding reasonable suspicion in order to resolve Anibowei's motion.[13] (ROA.954.) No error is shown with respect to this aspect of the district court's decision. Simply put, the question of reasonable suspicion was not sufficiently raised and briefed in Anibowei's motion for a preliminary injunction, (*see* ROA.643–74), nor has it even been briefed in any meaningful way in this appeal.[14] Thus there is no basis for this Court to address it now. *See, e.g.*, *Stults v. Conoco, Inc.*, 76 F.3d 651, 657 (5th Cir. 1996) (explaining that the Court "will not consider evidence or arguments that were not presented to the district court for its consideration in ruling on the motion" (quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 (5th Cir.

[13] Anibowei suggests that his counsel urged a reasonable-suspicion standard during later portions of the motion hearing conducted in the district court, after the district court had noted that Anibowei's motion papers appeared to be based only on a warrant-requirement theory. (*See* Brief at 4 n.1.) But even accepting these stray statements of counsel as arguments, the district court did not err by declining to rule on them when they were not contained in Anibowei's underlying motion and were presented for the first time at the hearing.

[14] Anibowei merely mentions the reasonable-suspicion issue in the background section of his brief, (*see* Brief at 3–4), but does not actually brief it in his argument section.

1992))); *McGruder v. Necaise*, 733 F.2d 1146, 1148 (5th Cir. 1984) ("[The Court] will not consider issues not briefed.").

2. No appellate jurisdiction exists for Anibowei's challenge to the district court's interlocutory denial of his motion for partial summary judgment; alternately, the district court's ruling should be affirmed.

Standard of Review

With respect to the question whether there is appellate jurisdiction to review the district court's denial of Anibowei's motion for partial summary judgment, this Court "has a duty to analyze its own jurisdiction de novo." *Providence Behavioral Health v. Grant Rd. Pub. Util. Dist.*, 902 F.3d 448, 455 (5th Cir. 2018). If appellate jurisdiction does exist, this Court will review a summary-judgment ruling de novo, applying the same standard as the district court. *Thomas v. Johnson*, 788 F.3d 177, 179 (5th Cir. 2015).

A. There is no appellate jurisdiction to review the district court's interlocutory denial of partial summary judgment.

"The denial of a summary judgment is generally not a final, appealable order." *Reyes v. City of Richmond*, 287 F.3d 346, 350 (5th Cir. 2002). Here, though, Anibowei urges the Court to find that it has pendent appellate jurisdiction to review his denied motion for partial summary judgment. (*See* Brief at 6.) But no such jurisdiction exists.

As an initial matter, Anibowei's notice of appeal designated only the

denial of his motion for a preliminary injunction, and not the denial of his motion for partial summary judgment, as the subject of the appeal. (*See* ROA.883 ("Notice is hereby given that Plaintiff George Anibowei hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Memorandum Opinion and Order entered in this action on January 14, 2019 [*sic*] denying his motion for a preliminary injunction. (Docket No. 94).").) Rule 3(c)(1)(B) of the Federal Rules of Appellate Procedure gives parties the option of appealing only a portion of an order, by specifying that the notice of appeal must "designate the judgment, order, *or part thereof* being appealed" (emphasis added). And "[w]hen an appellant chooses to appeal specific determinations of the district court—rather than simply appealing from an entire judgment—only the specified issues may be raised on appeal." *Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 565 (5th Cir. 2003) (citing *Pope v. MCI Telecomm. Corp.*, 937 F.2d 258, 266 (5th Cir. 1991)). Because Anibowei expressly limited his notice of appeal to the denial of his motion for a preliminary injunction, the denial of his motion for partial summary judgment is not properly part of this appeal.[15] *See id.*

[15] To be sure, the same memorandum opinion and order issued by the district court resolved both the motion for partial summary judgment and the motion for a preliminary injunction. (*See* ROA.874.) However, Anibowei's notice of appeal references only the portion of the memorandum opinion and order denying the motion for a preliminary injunction.

Even assuming that the partial-summary-judgment denial had been included in the notice of appeal, there is still no basis for exercising pendent appellate jurisdiction. "Pendent appellate jurisdiction may exist where, in the interest of judicial economy, courts have discretion to review interlocutory rulings related to independently appealable orders when the two are 'inextricably intertwined.'" *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009) (citing *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 43–44, 51 (1995); *Wallace v. Cty. of Comal*, 400 F.3d 284, 291–92 (5th Cir. 2005)). "Although *Swint* did not foreclose pendent appellate jurisdiction in all circumstances, the opinion emphasized that courts should not circumvent congressional intent by grafting ad hoc appellate jurisdictional rules on the statutory grant of jurisdiction." *Id.* (citing *Swint*, 514 U.S. at 46–47, 50–51). "Following *Swint*, this court has held that, pend[e]nt appellate jurisdiction is only proper in rare and unique circumstances where a final appealable order is 'inextricably intertwined' with an unappealable order or where review of the unappealable order is necessary to ensure meaningful review of the appealable order." *Id.* (cleaned up).

This case does not present one of the "rare and unique circumstances" in which pendent appellate jurisdiction exists to necessitate review an of interlocutory order denying partial summary judgment that is unappealable in

its own right. In denying Anibowei's motion for a preliminary injunction, the district court did not merely announce that because it was not granting the motion for partial summary judgment, Anibowei therefore also was not entitled to a preliminary injunction. Instead, the district court analyzed the two requests separately and found that Anibowei had failed to satisfy the four essential elements necessary to obtain a preliminary injunction. (ROA.881.) These included the elements of irreparable harm, the balancing of equities, and the public interest—elements with no overlap whatsoever with the issue of whether Anibowei was entitled to partial summary judgment.

Under these circumstances, it is not necessary for this Court to review the partial-summary-judgment ruling in order to review the preliminary-injunction denial. To the contrary, as discussed above, the Court can affirm the preliminary-injunction denial without even needing to reach the issue of Anibowei's likelihood of success on the merits, because Anibowei did not satisfy the other elements and failure to satisfy a single element is dispositive and requires affirmance. *Black Fire Fighters*, 905 F.2d at 65. Conversely, even if the Court were to conclude that a preliminary injunction should have been granted because Anibowei did establish a likelihood of success on the merits as well as the other necessary elements, this would not create any irreconcilable conflict with the district court's determination not to grant Anibowei an early

partial summary judgment. The case would simply proceed in the district court with a preliminary injunction in place, as routinely occurs when such injunctions are granted.

In denying Anibowei's early motion for partial summary judgment, the district court did not conclusively resolve any claim or defense in the case. It did not grant partial summary judgment in favor of the government. Nor did it enter judgment against Anibowei in any respect. It merely concluded that Anibowei had not met his burden to show that he was entitled to partial summary judgment as a matter of law, while also noting that the record was essentially undeveloped and that it was likely that Anibowei would move for summary judgment at a later time on a more developed record. (*See* ROA.880–82.) This kind of interlocutory denial of summary judgment in favor of further proceedings is the type of ruling that likely would not even be reviewable on appeal after a final judgment. *See Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345 (5th Cir. 2017) ("Denials of summary judgment, with few exceptions not relevant here, are not final decisions that can be reviewed."). Instead, in any later appeal after a final judgment, this Court would review whatever later final determination is made to resolve the case, based on the fuller record developed in the course of subsequent proceedings. *See Black v. J.I. Case Co.*, 22 F.3d 568, 569–70 (5th Cir. 1994) (explaining that

the Court will not review the pretrial denial of a motion for summary judgment when a final judgment is later entered on the basis of a trial). It would be odd to review here a partial-summary-judgment ruling that would not even be subject to review after a final judgment is entered.

In sum, Anibowei identifies no compelling reason that the district court's interlocutory denial of his partial-summary-judgment motion *must* be reviewed at this time, and this ruling was not so closely interconnected with the denied preliminary-injunction-motion as to mandate that it be considered now.[16] Accordingly, the Court should find that pendent appellate jurisdiction does not extend to the partial-summary-judgment ruling and dismiss this portion of Anibowei's appeal.

B. Alternately, if there is appellate jurisdiction, the district court did not err in denying partial summary judgment.

With his partial-summary-judgment motion, Anibowei sought a declaration that the government's "policies and practices violate the First and

[16] Anibowei suggests that the government has admitted that Anibowei's two motions were "inextricably intertwined" so as to confer appellate jurisdiction on this Court to review the partial-summary-judgment ruling. (Brief at 30.) Not so. The government merely flagged in general terms the "possibility" that "issues" beyond the preliminary injunction might be addressed in the appeal. (ROA.1066.) The government has not conceded that appellate jurisdiction exists over the partial-summary-judgment denial, nor could it, since it is black-letter law that parties cannot confer jurisdiction on a federal court even by agreement. *See United States v. Hazlewood*, 526 F.3d 862, 864 (5th Cir. 2008); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir. 2001).

Fourth Amendments by authorizing searches of travelers' electronic devices and communications absent a warrant supported by probable cause that the devices contain contraband or evidence of a violation of criminal, immigration, or customs laws, and without particularly describing the information to be searched." (ROA.639–40.) In particular, Anibowei challenged CBP's and ICE's border-search policies and argued that these policies were unlawful and violated the Fourth and First Amendments by allowing for warrantless searches of electronic devices at the border. (*See* ROA.658–73.)

As the district court noted, though:

> [N]o decision of the Supreme Court or of the Fifth Circuit imposes such requirements in the context of border searches. In particular, no court has extended the Supreme Court's decision in *Riley* [] to a border search. And as the Fifth Circuit has recognized, "not a single court addressing border searches of computers since *Riley* has read it to require a warrant."

(ROA.880 (quoting *Molina-Isidoro*, 884 F.3d at 292).) Anibowei fails to show any error in the district court's analysis. Thus, if the Court addresses the partial-summary-judgment motion, it should affirm. Given that no court has ever imposed a warrant requirement for electronic border searches, the CBP and ICE policies comply with any applicable constitutional standards. CBP and ICE both require reasonable suspicion for advanced searches of electronic

devices, while basic searches do not require reasonable suspicion. (*See* pp. 7–9, *supra*.) And the relevant legal issues and authorities supporting the government's position have been discussed in detail above, in connection with the likelihood-of-success element of the preliminary-injunction analysis. (*See* pp. 21–23, 28–39, *supra*.)

Anibowei's (and *amici*'s) arguments for a warrant requirement therefore fail. Nor is there any merit to Anibowei's and *amici*'s attempts to cabin the government's border-search authority to physical (or electronic) contraband while proscribing any search for evidence of contraband or related criminal activity. As this Court and others have correctly recognized, searches for contraband and searches for evidence of contraband and of other border-related offenses are equally within the border-search doctrine.

In *Warden v. Hayden*, 387 U.S. 294 (1967), the Supreme Court considered whether the Fourth Amendment sets up any such contraband/evidence distinction. The Court considered "the validity of the proposition that there is under the Fourth Amendment a 'distinction between merely evidentiary materials, on the one hand, . . . and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime.'" *Id.* at 295–96 (quoting *Harris v. United States*, 331 U.S. 145, 154 (1947)). The Court "reject[ed] the distinction"

"made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband" because it was "based on premises no longer accepted as rules governing the application of the Fourth Amendment." *Id.* at 300–01. Calling the distinction "wholly irrational" and "discredited," the Court explained that "[n]othing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband," and that "nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true." *Id.* at 301, 302, 306.

This Court's decision in *United States v. Fortna*, 796 F.2d 724 (5th Cir. 1986), is illustrative of these principles in the border-search context. In *Fortna*, a criminal defendant challenged the government's search and photocopying of documents carried in the defendant's personal luggage while crossing the border. *Id.* at 738. Noting that the "initial examination of the documents was clearly proper" because it occurred at the border, the Court explained that the defendant "had no legitimate expectation that these papers would be kept private from the customs officials" and that the photocopying of the documents was permissible given the suspicion that they "might relate to some illegal conduct involving material or persons entering or leaving the United

States." *Id.* at 738, 738–39. If the border-search doctrine were strictly limited to physical contraband itself, the search in *Fortna* would have been invalid.

Similarly, in the context of electronic border searches, a number of courts have rejected the argument that searches for evidence, as opposed to physical contraband itself, are not permissible. *See Kolsuz*, 890 F.3d at 143–44 (explaining that "[t]he justification behind the border search exception is broad enough to accommodate not only the direct interception of contraband as it crosses the border, but also the prevention and disruption of ongoing efforts to export contraband illegally, through searches initiated at the border," and a cell-phone search "conducted at least in part to uncover information about an ongoing transnational crime . . . fits within the core of the rationale underlying the border search exception" (internal quotation marks and citation omitted)); *see also id.* at 147 n.7 (rejecting the argument "that even if the search of [the defendant's] phone could be justified by reasonable suspicion, what would be required is reasonable suspicion that contraband, as opposed to evidence, would be found on the device"); *United States v. Gurr*, 471 F.3d 144, 149 (D.C. Cir. 2006) (affirming a post-arrest border search of documents; "The distinction [for border-search purposes] . . . between contraband and documentary evidence of a crime is without legal basis."). *Cf. United States v. Molina-Gómez*, 781 F.3d 13, 17, 20 (1st Cir. 2015) (concluding that text

messages on a cell phone properly contributed to reasonable suspicion that the defendant was smuggling contraband).

For all these reasons, even if there is appellate jurisdiction to review the denial of Anibowei's motion for partial summary judgment, the district court did not err in denying that motion.

CONCLUSION

The Court should affirm the district court's order denying Anibowei's motion for a preliminary injunction, and then dismiss the remainder of this appeal for lack of jurisdiction to the extent Anibowei is challenging the denial of his partial-summary-judgment motion. Alternately, if the Court finds that it has jurisdiction to consider the partial-summary-judgment ruling, that ruling should also be affirmed.

Respectfully submitted,

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I hereby certify that on July 22, 2020, this document was served on appellant by transmission to him through the Court's electronic filing system, and

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