No. 13-132

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Court of Appeal, Fourth District

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BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether evidence admitted at petitioner's trial was obtained in a search of petitioner's cell phone that violated petitioner's Fourth Amendment rights.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case centrally concerns Cato because it represents an opportunity to improve Fourth Amendment doctrine and maintain that provision's protections in the modern era.

SUMMARY OF THE ARGUMENT

The challenge of applying the Fourth Amendment to modern circumstances, such as when government agents search the cell phone of an arrestee, is best met by applying the terms of the amendment with specificity and care. This Court can provide a sensible rule for cell phone searches and model how to apply the Fourth Amendment for lower courts, by eschewing sweeping pronouncements or guesses about Americans' expectations of privacy. Rather, the Court should apply the terms of the Fourth Amendment to the facts of the case.

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored any part of this brief and that only *amicus* made a monetary contribution to its preparation or submission.

The Court should analyze distinctly each seizure and search that occurred, closely examining the legal basis for those that are contested. With respect to seizure, use and enjoyment of property are rights distinct from possession that can be seized. Searching a phone makes use of it for the government's purposes, which is a seizure distinct from taking physical possession, and which requires independent legal justification.

The Court should recognize and explicitly state that cell phones are constitutional effects. And it should find that the content stored on cell phones includes constitutional papers and effects distinct from the phones themselves. Digital files stored on cell phones serve the same human ends that papers, postal mail, books, drawings, and portraits did in the founding era.

The searches of petitioner Riley's cell phone did not meet the standards of *Chimel v. California*, 395 U.S. 752 (1969), which allows warrantless searches to protect officers and prevent escape or to prevent destruction of evidence. The methodical application of the Fourth Amendment requires that the judgment of the lower court be reversed.

ARGUMENT

I. THE COURT SHOULD ANALYZE DISTINCTLY EACH SEIZURE AND SEARCH THAT OCCURRED IN THIS CASE

As in many Fourth Amendment cases that this and lower courts consider, the investigation, arrest, and further investigation of petitioner Riley was a series of seizures and searches, some of which are contested. Articulating and distinctly examining

each seizure and search can improve this Court's consideration of the issues, while modeling for lower courts how to apply the Fourth Amendment more precisely in difficult cases. The court below did not articulate well its consideration of the seizure of the cell phone—nor did it articulate the search of the cell phone—which compromised its consideration of the issues.

A. "Seizure" and "Search" Are Distinct Activities, Even if They Are Often Used Together to Investigate Suspects.

This Court's cases have rarely defined "seizure" distinctly from "search." *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984) ("[T]he concept of a 'seizure' of property is not much discussed in our cases"). This is in part because incursions on property rights—seizures—are often the means government agents use to discover information; seizure is the way they search. Often, a seizure or seizures and the search they facilitate have the same legal justification—or they both lack one. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 949 (2012) ("The Government physically occupied private property for the purpose of obtaining information."). It is convenient to refer to seizures, especially small ones, and the searches they facilitate collectively as though they are a unitary "search." *See, e.g.*, *Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (moving of stereo equipment to gather serial numbers "constitute[d] a 'search'"). Unfortunately, the convenience of lumping together seizures and searches has occasionally permitted this Court to treat small seizures as though they did not occur. *See, e.g.*, *New York v. Class*, 475 U.S. 106, 114 (1986) (police officer lifting papers not considered a seizure).

Seizures and searches are not the same, and they do not always occur together. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 32 (2001) ("a 'search' despite the absence of trespass"); *Soldal v. Cook County*, 506 U.S. 56 (1992) (seizure of mobile home, not part of search). Collapsing important distinctions between seizure and search can obscure the legal import of government agents' actions—particularly with respect to information technologies, whose Fourth Amendment consequences spring not so much from their possession as from their *use*.

A government agent who only takes possession of a digital device does little to undermine the security of the papers and digital effects its owner has stored on it. A government agent *using* the device to bring stored information out of its natural concealment does a great deal to threaten the interests that the Fourth Amendment was meant to protect.

Casual use of language in a spate of Fourth Amendment cases from the 1980s may suggest that only the "possessory" interest in property can be seized by government agents. *See United States v. Place*, 462 U.S. 696, 705 (1983) (discussing "possessory" interest in luggage); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (seizure found because destruction of powder infringed "possessory interests"); *United States v. Karo*, 468 U.S. 705, 712 (1984) (installation of beeper does not interfere with "possessory" interest); *cf. Karo* 468 U.S. at 729 (Stevens J., dissenting) ("Surely such an invasion is an 'interference' with possessory rights; the right to exclude . . . had been infringed."). In the past, it may have been sound to treat deprivation of "possessory interests" and constitutional "seizures" as one and the same. Nearly always, possession of an item was

the aspect of ownership material to Fourth Amendment cases. This approach does not translate to the information technology context if the interests secured by the Fourth Amendment are to survive.

The right to possess property is one of several aspects of ownership identified in legal philosophy. *See,* TONY HONORÉ, *Ownership, in* OXFORD ESSAYS ON JURISPRUDENCE 104-147 (A.G. Guest ed., 1961). The right to use property is another distinct aspect of ownership. The right to the income of property—the enjoyment of its benefits—is yet another in what law students are taught to be the "bundle of sticks" that comprise property rights.

The Fourth Amendment's proscription on unreasonable seizures is not synonymous with common law trespass, but is both narrower and broader. As an example, the limitation in the Fourth Amendment's text to "persons, houses, papers, and effects" means it does not bar government agents' entry onto open fields with a "no trespassing" sign posted at the border. *Oliver v. United States*, 466 U.S. 170, 176-77 (1984).

"Seizure" also extends beyond common law trespass. Taking possession of persons—which would otherwise constitute the torts of battery and false imprisonment or the crime of kidnapping—is a power government agents enjoy in the proper exercise of their duties. But they may not unreasonably seize people thanks to the Fourth Amendment.

Along with the kinds of things the Fourth Amendment protects from unreasonable seizure, it is important to recognize all the dimensions of seizure, including taking the use and enjoyment of digital devices for the government's benefit. This Court

should recognize that use and enjoyment are property rights that can be seized. Doing so will allow this Court to apply long-standing principles, even in a "high-tech" case, to "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34; *Jones*, 132 S.Ct. at 950 (majority opinion); *Id.* at 958 (Alito J., concurring in the judgment).

B. The investigation and arrest of Riley was a series of seizures and searches.

When Officer Dunnigan stopped petitioner Riley, having observed him driving a car with expired registration tags, he seized Riley's car and Riley. *Brendlin v. California*, 551 U.S. 249, 254-263 (2007). Officer Dunnigan had reasonable suspicion that an infraction had occurred, and a brief seizure is permitted in such a case. *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968).

After learning that Riley was driving with a suspended driver's license, Officer Dunnigan removed him from the car and continued the original seizure of Riley with an additional legal basis for doing so: reasonable suspicion of another violation. Officer Dunnigan was then joined by Officer Ruggiero, who prepared the car for impoundment, consistent with a policy that prevents suspended drivers from returning to and continuing to operate their vehicles. No longer seized for the purpose of a brief investigation, the car was now seized in order to prevent additional driving infractions.

As part of the latter, Officer Ruggiero began an "impound inventory search" of the car of the type this this Court approved as reasonable in *South Dakota v.*

Opperman, 428 U.S. 364, 376 (1976).[2] Under new legal authority, Ruggiero commenced a new search.

To be precise, an inventory search of a car is executed through a series of small seizures in addition to, and distinct from, the original seizure of the car as a whole. Officer Ruggiero exercised further dominion over the car by opening the hood, trunk, and other compartments. He exercised additional and particularized dominion over items in the car by picking them up or moving them to facilitate the inventory.

These exercises of dominion over the car and other items touched and moved were all exercises of possession, which is one aspect of ownership. Government agents are allowed to take possession of others' property in the context of a lawful inventory search such as the one that happened here. All these small seizures are part of the "inventory search" and are reasonable under *Opperman*.

Following Officer Ruggiero's discovery of guns in the engine compartment of the car, Officer Dunnigan, having probable cause, placed petitioner Riley under arrest, continuing the initial seizure of Riley under new legal authority. In placing Riley under arrest, Officer Dunnigan also searched his person, undoubtedly doing so by placing his hands on Riley to "seek[] out that which is otherwise concealed

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[2] The court below noted an investigatory purpose to the search, saying Officer Ruggiero looked under the hood not only because items on the impound sheet are in the engine compartment, but "because he has found contraband under the hood on prior occasions," but it did not investigate the legal propriety of that motivation any further. *People v. Riley* 2013 Cal. App. Unpub. LEXIS 1033 at 9 (2013)

from view"—the definition of "search" from *Black's Law Dictionary*. BLACK'S LAW DICTIONARY 1349 (6th ed. 1990). The search was distinct from the original and ongoing seizure of the body, and its legal basis was different. *Chimel v. California*, 395 U.S. 752, 762-763 (1969), permits a search incident to an arrest to aid in the discovery of weapons or of evidence that could be destroyed.

Consistent with standard practice for a booking search, which is yet another legal basis for searching suspects and seizing property (*see, e.g., Illinois v. Lafayette,* 462 U.S. 640 (1983)), Officer Dunnigan seized Riley's possessions, including his cell phone, for the purpose of transporting and housing his arrestee.

The lower court's description of events is not detailed, but in the process, Dunnigan "looked at Riley's cell phone," and "he noticed all of the entries starting with the letter 'K' were preceded by the letter 'C'." *Riley,* LEXIS 1033 at 8. It is possible that these "entries" were in plain view, displayed by the otherwise untouched phone as Officer Dunnigan seized it. The likelihood is that Dunnigan caused the "entries" to be displayed by manipulating the phone, an additional and separate search. Later at the station, Detective Malinowski, who had come at the request of Officer Dunnigan, "looked through the phone," turning up photos that corroborated evidence suggesting that Riley was involved in gang activity. *Id.*

Officer Dunnigan's apparent search of the phone and Detective Malinowski's clearly described search have similarities to the inventory search of a car.

Both searches were executed through a series of small seizures.

Data in a phone obviously does not decide to display itself. Rather, the phone responds to commands issued by touches and taps on buttons and screens. These touches and taps do not effect possession of the phone, which is already under the complete physical control of the government. Instead, they make *use* of the phone and the data in it to convey stored information to the possessor.

As noted above, *use* is another of the aspects of ownership common to "mature legal systems." HONORÉ, *supra*, at 162, 165. Looking through a phone makes use of the electronics, the battery, the display technology, and the data, none of which are ordinarily the property of the government agent to use. The government agent is allowed to exercise this aspect of ownership—to use the phone as if it were his or her property—with sufficient legal justification. The power of Officer Dunnigan and Detective Malinowski to use the phone this way is what petitioner Riley contests.

Detective Malinowski's seizure of data in downloading it from the cell phone, (Joint App. 14), was an additional step in the process of investigating petitioner Riley. It appears not to be contested, but the legal authority to seize data would spring from discovery of evidence during a lawful search of the cell phone.

The question whether the cell phone search satisfied the Fourth Amendment relies on a premise agreed upon by both parties. This Court should raise and address that premise: the status of cell phones

and their contents as Fourth Amendment "papers and effects."

II. THIS COURT SHOULD RECOGNIZE THAT PHONES ARE THEMSELVES FOURTH AMENDMENT "EFFECTS," AND THAT PHONES CONTAIN FOURTH AMENDMENT PAPERS AND EFFECTS

This Court should explicitly endorse the premise adopted by all parties in this case that a cell phone is an "effect" under the Fourth Amendment. It should also explicitly acknowledge that among other content stored by the cell phone in this case were constitutional "papers and effects."

A. A Cell Phone Is an "Effect" Under the Fourth Amendment.

If a car is an effect for purposes of the Fourth Amendment, *Jones*, 132 S. Ct. at 949, and a footlocker is an effect, *United States v. Chadwick*, 433 U.S. 1, 12 (1977), then a phone must also be an effect. Cell phones are typically carried on one's person. They can contain copious amounts of personal information. They have that "intimate relation" to the person that characterizes personal effects. BLACK'S LAW DICTIONARY 1143 (6th ed. 1990) (defining "personal effects").

Yet *amicus* knows of no case holding that a cell phone is an "effect" for purposes of the Fourth Amendment. Perhaps this is because lower courts treat the matter as too obvious to state, or because Fourth Amendment doctrine leads courts so far from the text of the law, or even because *amicus*'s research skills are inadequate. An explicit holding that a cell phone is an effect would aid the work of courts below—as well as advocates before them—all of

whom might be reminded to think methodically about applying the terms of the Fourth Amendment to the cases they consider.

B. Among Other Content of the Cell Phone Were Constitutional "Papers and Effects."

Cell phones themselves are fairly obviously effects. Some of the contents stored by cell phones are also rightly treated as papers and effects distinct from the material phone. The cell phone government agents seized from Riley contained stored papers and effects, including his photographs. This Court should hold explicitly that the photographs on Riley's cell phone were, for constitutional purposes, papers and effects protected by the Fourth Amendment.

The communications and storage functions of cell phones serve the same human ends today that papers, postal mail, books, drawings, and portraits did in the founding era. This Court should clearly acknowledge that the Fourth Amendment protects digital equivalents of the same types of documents that it protects in analog form.

The Framers used written communications, both public and private, to revolutionize political life on the American continent, so they promptly provided for protection of information against government seizure and search after the founding. Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 559-69 (2007). Congress's first comprehensive postal statute wrote the confidentiality of sealed correspondence into law, with heavy fines for opening or delaying another's mail. *Id* .at 566-57; Act of Feb. 20, 1792, § 16, 1 Stat. 232, 236. This Court

validated Fourth Amendment protection for mail in *Ex Parte Jackson*, 96 U.S. 727 (1877).

Writing on sheets of paper predominated during the founding era, but new ways to store and convey information have emerged since. The invention of Morse Code, for example, allowed words to be transmitted after their conversion into electrical pulses. Lewis Coe, THE TELEGRAPH: A HISTORY OF MORSE'S INVENTION AND ITS PREDECESSORS IN THE UNITED STATES 26-27 (McFarland and Co. 1993). This became relatively common with the emergence of telegraph networks including Western Union in the late 1850s. *Id.* at 86. A new protocol for recording and storing writings was in use.

In the year this Court decided *Ex Parte Jackson*, both Western Union and the Bell Company began establishing voice telephone services. Gerald W. Brock, THE SECOND INFORMATION REVOLUTION 28 (Harvard University Press 2003). Now, instead of messages written on paper carried in the post or telegrams sent along a wire, representations of the human voice itself began moving across great distances. Rather than recording letters and numbers on paper, a microphone in the handset would produce a modulated electrical current that varied its frequency and amplitude in response to the sound waves arriving at its diaphragm. The resulting current was transmitted inaudibly and invisibly along the telephone line to the local exchange, then on to the phone at the other end of the circuit. At its destination, the signal would pass through the coil of the receiver and produce a corresponding movement of the diaphragm in the receiving phone's earpiece. This is the technology this Court confronted in *Olmstead v. United States*, 277 U.S. 438 (1928),

failing to recognize it as a new protocol for communication of the same things that might previously have been contained in a letter.

More recent technological advances have further improved people's ability to record and communicate written words, as well as images and sounds. Digitization—the representation of letters, numbers, symbols, sights, and sounds as 1s and 0s—is a new way of representing the same content as was found in papers, postal mail, books, drawings, and portraits during the founding period.

The federal trial court system has recognized, as it must, that digital representations of information are equivalent to paper documents for purposes of both filing and discovery. *See,* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Report of the Civil Rules Advisory Committee* 2, 18-22, May 27, 2005.[3] The subject matter held in digital documents and communications is at least as extensive and intimate as what is held on paper records, and probably much more so. *See,* Mary Czerwinski et al., *Digital Memories in an Era of Ubiquitous Computing and Abundant Storage*, Communications of the ACM 45, Jan. 2006.[4]

The storage of documents and communications on media other than paper changes nothing about their Fourth Amendment significance. The same information about each American's life that once

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[3] Available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf.

[4] Available at http://research.microsoft.com/pubs/79673/CACMJan2006DigitalMemories.pdf

resided on paper and similar media in attics, garages, workshops, master bedrooms, sewing rooms, and desk drawers (*cf. Chimel*, 395 U.S. at 754), now resides, digitized, in cell phones and similar electronic devices.

Digital representations of information are constitutional "papers and effects" whose security against unreasonable seizure is protected by the Fourth Amendment. It is essential to make clear that the coverage of the Fourth Amendment extends to these media if this Court is to "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34

At least one lower court has found constitutional protection for email clearly enough to rely on its premise that email represents a paper or effect.[5] In *United States v. Warshak*, the U.S. Court of Appeals for the Sixth Circuit wrote: "Given the fundamental similarities between email and traditional forms of communications, it would defy common sense to afford emails lesser Fourth Amendment protection. Email is the technological scion of tangible mail." 631 F.3d 266, 285-6 (6th Cir. 2010).

Email is but one of many protocols that replicate and improve on people's ability to collect, store, and transmit information as they did in the founding era. Images which once had to be drawn, for example, are now commonly digitized using standards like JPEG.

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[5] Current Fourth Amendment doctrine collapses the existence of a seizure or search and its reasonableness into a single question, whether one's "reasonable expectation of privacy" has been violated. This makes it unclear whether the Sixth Circuit regards email as a paper or an effect.

See, JPEG Homepage, http://www.jpeg.org/jpeg/, (last visited March 9, 2014). There are many protocols that convert text, sound, and images to digital files and permit their transport via modern equivalents of postal mail.

In this case, the Court should find that at the very least the photos discovered by Detective Malinowski and the "entries" discovered by Officer Dunnigan were papers and effects.

Finding that a photo in a cell phone is a constitutional effect does not establish whether its seizure or search is reasonable or unreasonable, constitutional or unconstitutional. These subjects we turn to next.

III. NEITHER SEARCH OF RILEY'S CELL PHONE WAS JUSTIFIED BY THE *CHIMEL* FACTORS

Absent a warrant, the search and seizure of a suspect's property is *"per se* unreasonable" unless justified by one of "a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). The California Court of Appeals erred in finding that the searches performed by Officer Dunnigan and Detective Malinowski fell into the "search incident to arrest" exception to the warrant requirement, and also in finding that "a delayed search of an item immediately associated with the arrestee's person may be justified as incident to a lawful custodial arrest without consideration as to whether an exigency for the search exists." *Riley,* LEXIS 1033 at 12 (quoting *People v. Diaz*, 244 P.3d 501 (Cal. 2011)).

A. The Exceptions to the Warrant Requirement for Searches Incident to Arrest Do Not Apply to Digital Searches.

This Court did not create a broad new authority for officers to search suspects and seize their property in *Chimel* and *Robinson*. Rather, the Court recognized the continuing validity of two long-standing but separate exceptions to the general rule against warrantless seizures and searches.

In *Chimel*, this Court reiterated the importance of the Fourth Amendment's warrant requirement: "It is a cardinal rule that . . . law enforcement . . . use search warrants wherever reasonably practicable." *Chimel* 395 U.S. at 758 (quoting *Trupiano v. United States,* 334 U.S. 699, 705 (1948)). This Court articulated clearly and sensibly the extent of the "search incident to arrest" principle:

> [I]t is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

Chimel, 395 U.S. at 763 (1969)

In *United States v. Robinson*, 414 U.S. 218 (1973), this Court further reiterated the two prongs of the "search incident to arrest" exception to the warrant requirement. *Robinson* overturned a ruling suggesting that the only reason for a full search was discovery of evidence or the fruits of a crime. "The

justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." *Id*. at 234.

The *Robinson* Court pragmatically approved the examination of a crumpled cigarette package on the person of an arrestee, giving rise to a "container" doctrine that this Court has since had to curtail. *See, e.g., Chadwick*, 433 U.S. at 1 (1977); *Arizona v. Gant*, 566 U.S. 332 (2009). Courts have applied this doctrine to cell phones, too—not chastened, apparently, by container-doctrine trends. *See, e.g., People v. Diaz*, 244 P.3d 501 (Cal. 2011); *Hawkins v. Georgia*, 290 Ga. 785, 787 (Ga. 2012); *Massachusetts v. Phifer*, 463 Mass. 790, 795-96 (Mass. 2012).

In retrospect, Justice Marshall's dissent in *Robinson* is prescient. He called for a more granular assessment of the search, saying: "the search in this case divides into three distinct phases: the patdown of respondent's coat pocket; the removal of the unknown object from the pocket; and the opening of the crumpled-up cigarette package." *Robinson,* 414 U.S. at 249-250 (Marshall J., dissenting). He believed that the removal of the cigarette package was unwarranted because the danger was not great and because no evidence of a driving infraction would be found, much less would such evidence be at risk of destruction. *Id*. at 250-255.

That granularity of analysis in Fourth Amendment methodology commends itself to this Court, regardless whether one agrees or disagrees with Justice Marshall's conclusion in *Robinson*. A carefully analytical *Robinson* majority could have

found, for example, that the officer developed reasonable suspicion about the crumpled cigarette pack because there is no good reason to keep one on hand after one's cigarettes are gone.

The "search incident to arrest" doctrine is two separate exceptions to the warrant requirement that enjoy independent pedigrees and rationales. An arresting officer's search for weapons and other dangerous articles has a twofold justification: "[a] due regard for his own safety," *Closson v. Morrison,* 47 N.H. 482, 484 (NH 1867), and the need to prevent the prisoner from escaping custody, which would see "the arrest itself frustrated." *Chimel,* 395 U.S. at 763. Because Riley could not use the digital contents of his phone to attack the arresting officers or to effect his escape, Officer Dunnigan's search was not grounded in "search incident to arrest" principles.

1. Digital Data Is No Threat to Officers.

The average cell phone is fragile, inefficient, and expensive as a bludgeoning tool. But because it could conceivably be used in an attack, its seizure at the time of an arrest is a wise precaution, justified under *Chimel*. Leaving a modern smartphone in an arrestee's possession could aid in his escape—most dramatically by his calling in heavily armed confederates. An arrestee's ability to communicate from detention can also help protect his or her rights, *see, e.g.*, Mallory Simon, *Student 'Twitters' his way out of Egyptian Jail*, CNN.com (2008),[6] but, on balance, in situations with a prospect for violence, taking the phone out of the prisoner's physical reach

[6] Available at http://www.cnn.com/2008/TECH/04/25/twitter.buck/index.html

eliminates potential uses in escape and assures officer safety.

But Officer Dunnigan went beyond just confiscating Riley's phone. He used it to reveal digitally stored information—a distinct form of seizure/search that lacked the legal justification of the initial traffic stop, pat-down, and arrest, or the seizure of the phone itself. Looking at Riley's contacts list in no way increased Officer Dunnigan's safety or reduced the likelihood of Riley's escape.

In *Chimel*, this Court permitted the search of areas and objects near a suspect at the time of arrest to ensure officer safety, but limited those searches to areas immediately physically accessible by the suspect, noting that there was no safety justification "for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." 395 U.S. at 763. The Court's logic was clear: Even very dangerous weapons like guns and knives pose no risk if the suspect is physically incapable of using them. The necessity of protecting officers during the arrest and transport of prisoners does not justify searching for or seizing weapons that are beyond a prisoner's reach. *See also, Arizona v. Gant,* 556 U.S. 332 (2009) (police may not search a vehicle as a consequence of arresting its driver or owner unless the suspect had physical access to the vehicle at the time of the arrest). Property that cannot be used to cause anyone harm cannot be seized or searched in the name of officer safety.

Detective Malinowski's search of the phone's contents is even less justified. Malinowski did not

take part in Riley's arrest, transfer, or booking (situations in which the *Chimel* exception for officer safety applies), and Riley was not present during Detective Malinowski's search. Malinowski testified that he was not looking for a weapon or threat stored on the phone, but rather evidence of crime: "I went through it looking for evidence, because I know gang members will often video themselves with guns or take pictures of themselves with the guns. I have knowledge. I've seen pictures where guys are arrested with the gun, pictures with them with the firearms on the phone." Joint App. 20.

Neither Officer Dunnigan nor Detective Malinowski had any safety-based reason to be using Riley's phone to search its contents.

2. There was No Threat of Evidence-Destruction.

The other exception to the warrant requirement afforded by *Chimel* and *Robinson* does not permit open-ended searches for any and all incriminating evidence or contraband. Rather, the exception permits search of an arrestee based "on the need to preserve evidence on his person for later use at trial." *Robinson*, 414 U.S. at 234. *See also, Weeks v. United States*, 232 U.S. 383, 392 (1914). When evidence is no longer on an arrestee's person, this branch of "search incident to arrest" doctrine does not apply.

Then-Judge Cardozo tied the scope of this search to ancient English common law traditions, noting that the power to seize a captured criminal's tools and ill-gotten gains "goes back beyond doubt to the days of the hue and cry, when there was short shrift for the thief who was caught 'with the mainour,' still 'in seisin of his crime' (2 Pollock & Maitland History

of English Law, 577, 578). The defendant, conceding the right, would, none the less, restrict the seizure to things subject to be taken under a search warrant when there is no arrest of the possessor." *People v. Chiagles*, 237 N.Y. 193, 196 (N.Y. 1923).

This Court has held that the *Chimel* exception only extends to cases in which seizure alone would be "insufficient" to prevent the evidence's loss or destruction before police could obtain a warrant authorizing a search. *Chadwick*, 433 U.S. at 13. As a general rule, this Court has held that once a physical container, item, or location, is under the exclusive control of law enforcement, the evidence there is "safe" and the police are required to apply for a warrant before conducting a search. *Illinois v. McArthur*, 531 U.S. 326 (2001).

It has been argued that cell phones and other digital devices ought to be treated differently from physical storage containers because of the risk that the suspect's friends, relatives, or co-conspirators would remotely delete the data on the phone. *See, e.g.*, *United States v. Flores-Lopez*, 670 F.3d 803, 807-09 (7th Cir. 2012) ("Other conspirators were involved . . . besides . . . the defendant, and conceivably could have learned of the arrests . . . and wiped the cell phones remotely before the government could obtain and execute a warrant and conduct a search.").

That could be a real prospect in the future, but it was not in this case. There is no evidence that Officer Dunnigan raced to secure the cell phone evidence. He testified that he brought in Detective Malinowski, who was on call, to perform the most invasive search of Riley's phone because of Malinowski's gang

expertise. Dunnigan did not mention any urgency or risk of losing cell phone evidence. (Joint App. 8, 10.)

Phone-wiping is fairly exotic, and in the most common case—a remote signal initiated by the owner—the threat is fairly easily and cheaply defeated either by turning the phone off, removing the battery, or placing the device in a container (commonly known as a "Faraday bag") that shields radio waves. Faraday bags are available for about the same price as a set of handcuffs.

More importantly, this threat is not unique to technological devices. The same threat of evidence destruction can exist in physical environments, but that does not justify warrantless searches of physical property under *Chimel*.

Consider a suspected drug dealer arrested while walking from his car to his place of business. Looking at his key ring, police officers know he has access to at least a residence, a vehicle, a storage unit, and a storefront—and he could be hiding more drugs at any of them. He also has a cell phone, and they think he might have the names and contact information of all his clients and suppliers. If the threat of tampering with the phone data by hypothetical confederates justifies the warrantless search of that phone's digital contents, then the risk that these confederates would go to wherever the drugs are stored and dispose of them likewise justifies warrantless searches of residences, cars, storage units, and businesses to which a suspect has access. The government's argument proves too much.

Warrantless searching of physical property spurred by fear that evidence may be destroyed is governed by this Court's more general exigent

circumstances precedents. *Kentucky v. King,* 131 S.Ct. 1849, 1854 (2011). *See also, Wong Sun v. United States*, 371 U.S. 471 (1963); *Ker v. California*, 374 U.S. 23 (1963); *Welsh v. Wisconsin,* 466 U.S. 740 (1984). *Chimel* does not permit exigent-like searching of a phone when it can be secured while an application for a warrant is made.

There is no legitimate distinction between the risk of hypothetical confederates deleting evidence stored on a phone or in remote storage and their destroying physical evidence when they learn of a co-conspirators arrest. To allow wide-ranging searches on this "confederates" theory would be a sharp departure from the Court's existing view of what is reasonable. The preservation-of-evidence rationale from *Chimel* does not permit police to perform free-standing investigative searches of phones, laptops, and other digital devices.

This Court should not allow government agents to search through a cell phone without a warrant merely because it was properly seized. Doing so would throw open too-wide a door onto suspects' personal and private information without judicial supervision. Cell phones are doorways into people's lives as broad as the front doors of their homes.

Warrantless cell phone searches would also give the government unsupervised access to the personal and private lives of non-suspects. In *United States v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2008), for example, a law enforcement officer purportedly investigating the smell of marijuana in a stopped vehicle called the wife of the suspect, then looked through a digital album on the suspect's phone. The album included "photos of an intimate nature"

involving that woman, the suspect's wife, Amy. *Id*. at 1295-96. Whether it is the intimacy of bared breasts, text-based love-notes sprinkled with emoticon hearts ("<3"), or a mother's plea for her wayward, gang-banger son to come home, these are not things for law enforcement officers to rifle through on the streets.

CONCLUSION

Amicus's argument here follows the structure one would use to apply the Fourth Amendment as a law, rather than as a stack of doctrines. Courts should examine whether there was a seizure or search, and whether any such seizure or search was of persons, papers, houses or effects. If those conditions are met, courts should examine whether the warrantless seizures and searches were reasonable.

Using Court-assumed "reasonable expectations" to draw lines around privacy is especially difficult where both technology and societal norms are in flux. "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society becomes clear." *Ontario v. Quon*, 560 U.S. 746, 759 (2010).

Here, well after its seizure, Dunnigan and Malinowski each searched Riley's cell phone, making use of it for their investigative purposes. Because their seizures and searches did not meet *Chimel*'s exceptions to the warrant requirement, they were unreasonable and they violated petitioner Riley's Fourth Amendment rights.

The judgment below should be reversed.

Respectfully submitted,

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