Nos. 13-132 & 13-212

IN THE

Supreme Court of the United States

DAVID LEON RILEY,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
BRIMA WURIE,
Respondent.

On Writs of Certiorari to the California Court of Appeal, Fourth District and the U.S. Court of Appeals for the First Circuit

Brief of Constitutional Accountability Center as *Amicus Curiae* in Support of Petitioner Riley and Respondent Wurie

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The text and history of the Fourth Amendment establish that police may not engage in generalized searches lacking in individualized suspicion. Indeed, the Framers adopted the Fourth Amendment in large part to guard against the significant intrusions into privacy that could result if the government enjoyed unlimited discretion to search people's homes and belongings. In an age when people keep vast stores of personal information and documents on their cell phones

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

and other digital devices, the invasion of privacy involved in searches of those devices will often be similar in degree to (if not more substantial than) the intrusion on privacy that results from the search of an individual's home, personal papers, and effects. By permitting the police to search the digital contents of an arrestee's cell phone without first obtaining a warrant, even after the phone has been removed from the arrestee, the California Supreme Court and other courts around the country have given the police unfettered discretion to engage in broad invasions of individual privacy. These decisions should not be allowed to stand.

When the Framers drafted the Fourth Amendment, which broadly provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," they were responding, in large part, to the British use of "general warrants" and "writs of assistance." These warrants and writs lacked any specificity about the people or items to be searched and were not predicated on any individualized suspicion; essentially unlimited in scope, these warrants and writs allowed the officers executing them virtually unfettered discretion to engage in broad searches of a person's home and the personal papers and effects in that home.

As early as the 1600s, the use of such warrants came under attack in Great Britain. They were decried as an instrument of arbitrary power, and popular opposition to them quickly solidified as they were used to harass critics of the Crown and trample personal liberty. The British nonetheless continued to use general warrants, including in the colonies. During the 1700s, colonial opposition to the use of such warrants grew, and their use was one of the grievances that prompted the call for independence from British rule.

Concerns about the abusive use of general warrants continued in the post-colonial period, and calls for the nation's new Constitution to include an explicit prohibition on the use of general warrants produced what would become the Fourth Amendment. The text of the Fourth Amendment, both as originally drafted and in the form that was ultimately adopted, reflects the Framers' staunch opposition to the use of general warrants. It required not only that all searches be reasonable, but also that all warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. This detailed text enshrines a specific prohibition against general warrants in our nation's charter, and reflects the Framers' more general concern that government officers not be able to search a person's home, papers, and effects in the absence of some individualized, justified suspicion that a specific search would produce evidence of wrongdoing. Stated simply, the Framers wanted to strip the government of the arbitrary power to

rifle through a person's belongings in the hope of finding something incriminating.

The searches in the cases now before the Court both violated this fundamental Fourth Amendment precept. The contents of Petitioner David Riley's cell phone were searched without a warrant and without exigent circumstances, first at the scene of his arrest and then hours later at the police station. Similarly, Respondent Brima Wurie's phone was searched without a warrant and without exigent circumstances. None of the traditional justifications for warrantless searches incident to a lawful arrest can justify the searches of these cell phones—the phones had been removed from the defendants, thus eliminating any concern about destruction of evidence, and it is difficult to see how the text messages, emails, photos, call logs, and other digital contents of the phones could have posed any threat, let alone an imminent threat, to the arresting officers' safety. To the contrary, as the detective who searched Riley's phone hours after the arrest acknowledged, he dug through "'a lot of stuff'" on the phone specifically "'looking for evidence.'" Riley J.A. 11, 20. These are precisely the type of searches for which the Constitution demands a warrant.

Allowing law enforcement officers to look through the contents of an arrestee's cell phone without a warrant and in the absence of recognized exigent circumstances invites law enforcement to engage in the same sort of generalized searches that the Framers abhorred—and adopted the Fourth Amendment to prevent. Because modern

cell phones generally contain significant amounts of information, often including sensitive communications and private photographs, the intrusion into an individual's privacy when police rummage through the contents of these phones, particularly smart phones, is substantial. Indeed, because a person may store much of his most private information on his cell phone, the invasion of privacy involved in such searches will often be more substantial than the intrusion on privacy that occurred when individuals' homes—and their personal papers and effects—were searched by overreaching British colonial officers during the Founding era. This Court should hold that, absent exigent circumstances, the warrantless search of an arrestee's cell phone violates the Fourth Amendment.

ARGUMENT

By permitting the police to search the digital contents of an arrestee's cell phone without first obtaining a warrant, even after the phone has been removed from the arrestee, the California Supreme Court and other courts around the country have given the police unfettered discretion to engage in broad invasions of individual privacy. It was just this sort of generalized search, undertaken without probable cause or particularized suspicion, that the Fourth Amendment was adopted to prevent. This Court should hold that the Fourth Amendment's text and history prohibit warrantless searches like the ones that took places in the cases now before the Court.

I. The Framers Viewed the Fourth Amendment as a Fundamental Protection Against the Use of "General Warrants"

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. As the text suggests, the Framers incorporated this fundamental safeguard of liberty into the Constitution to limit the discretion of government officers to engage in general searches unsupported by specific, articulable suspicion, and to prevent the broad invasions of privacy that such searches could entail. This safeguard was "indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895 (1833).

The Fourth Amendment's broad protections were in large part a response to specific abuses the Framing generation had suffered under British rule—namely, the use of "general warrants" and "writs of assistance" that lacked specificity as to the person and place to be searched and were not based on any individualized suspicion. *See, e.g.*, *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) ("It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the

colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England."); *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting) (noting that the Framers "despised" the use of general warrants); Hon. M. Blane Michael, Madison Lecture, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905, 906 (2010) (noting that "the British Crown's unbridled power of search . . . is at the center of the rich history that led to the adoption of the Fourth Amendment"); *id.* at 907 ("The Fourth Amendment owes its existence to furious opposition in the American colonies to British search and seizure practices, particularly in the area of customs enforcement."). As Joseph Story observed, the Fourth Amendment's "introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution." STORY, COMMENTARIES § 1895. Such warrants were despised by Americans as the tools of an arbitrary and unlimited government, used to harass and oppress the people.

General warrants had long been used in Great Britain. For example, the Act of Frauds of 1662 "empowered customs officers in England to enter 'any house, shop, cellar, warehouse or room, or other place' and to 'break open doors, chests, trunks and other package[s]' for the purpose of seizing any 'prohibited and uncustomed' goods."

Michael, 85 N.Y.U. L. Rev. at 907.[2] These warrants were also used to limit the publication of materials critical of the government. *See Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Mo.*, 367 U.S. 717, 726 (1961) (noting that in the mid-seventeenth century, the Parliament's asserted need for "a broad search and seizure power to control printing" resulted in the issuance of warrants that "often gave the most general discretionary authority"); *see also id.* at 724 ("Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.").

As early as the mid-1600s, the use of these general warrants came under attack in Great Britain when Edward Coke "became the first of many English legal thinkers to deny the legality of general warrants." WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 105 (2009). "By the end of the century, at least four legal treaties had mentioned Coke's language against general warrants as legal fact," *id.* at 121, and the popularity of Coke's views continued to spread in the ensuing years, as other "legal treatises recited Coke on general warrants as doctrine," *id.*

Despite the growing opposition to the use of general warrants in Great Britain, they remained

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[2] In 1696, "the broad enforcement powers in the 1662 Act" were extended "to customs officers in the colonies, authorizing the officers to conduct warrantless searches at their discretion." Michael, 85 N.Y.U. L. Rev. at 907.

the standard method of search in the colonies as of the mid-eighteenth century. *See* Tracy Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 940 (1997). Colonial opposition to the use of general warrants was galvanized by a series of events on both sides of the Atlantic on the eve of the American Revolution.

In the high-profile Paxton's Case, for example, a group of Boston merchants challenged customs officials' use of general warrants, CUDDIHY, THE FOURTH AMENDMENT, at 380, attacking them as "'the worst instrument of arbitrary power, the most destructive of English liberty . . . that ever was found in an English law-book.'" Michael, 85 N.Y.U. L. Rev. at 908. The merchants' attorney, James Otis, argued that such warrants "place[] the liberty of every man in the hands of every petty officer." JAMES OTIS, IN OPPOSITION TO WRITS OF ASSISTANCE, http://bartleby.com/268/8/9 (last visited July 24, 2013); *see* Michael, 85 N.Y.U. L. Rev. at 908 (noting that Otis called the writ of assistance an "'instrument[] of slavery on the one hand, and villainy on the other'"). According to Otis, writs of assistance could be legal only if they were much more specific, providing for the "search [of] *certain houses* &c. *especially set[ting] forth*, . . . *upon oath made* . . . by the person who asks *that he suspects such goods to be concealed in* THOSE VERY PLACES HE DESIRES TO SEARCH." CUDDIHY, THE FOURTH AMENDMENT, at 377-78 (quoting Brief of Otis, *Paxton's Case* (Mass. Sup. Ct. 24-26 Feb. 1761), *Massachusetts Spy*, Thu., 29 Apr. 1773 (vol. 3, no. 117), p. 3, col. 1). Although the writs in

Paxton's Case were granted, the decision prompted public resistance, and the Massachusetts legislature responded by reducing the judges' salaries and passing a law requiring the use of specific warrants. CUDDIHY, THE FOURTH AMENDMENT, at 403-04; *cf.* Michael, 85 N.Y.U. L. Rev. at 908 (noting that this case "galvanized support for what became the Fourth Amendment").

In the years that followed, colonial opposition to general warrants continued to grow, in part in response to events in Great Britain. When a publication was released that criticized the King, the British Secretary of State issued a general warrant to authorize sweeping searches of forty-nine individuals who might be responsible. John Wilkes, the primary target of the investigation, sued those responsible for executing the warrant. In one of the resulting trials, Chief Justice Pratt of the Court of Common Pleas declared general warrants to be "illegal, and contrary to the fundamental principles of the constitution." *Wilkes v. Wood*, 98 Eng. Rep. 489, 499 (1763). This case was widely covered in American newspapers, and "the reaction of the colonial press to that controversy was intense, prolonged, and overwhelmingly sympathetic to Wilkes." CUDDIHY, THE FOURTH AMENDMENT, at 538; *see id.* at 539 (discussing the scope of the coverage in the colonial press); *id.* at 538 (noting that a "revulsion to general warrants ensued in the colonies" following the Wilkes controversy); *cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1176 (1991) ("Madison's choice of language [in the Fourth

Amendment] may well have been influenced by the celebrated 1763 English case of Wilkes v. Wood, one of the two or three most important search and seizure cases on the books in 1789." (internal footnote omitted)).[3]

Despite the growing opposition to general warrants, Parliament in 1767 again authorized their use in the colonies. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 566 (1999). Some of the local courts in the colonies resisted, refusing to issue the broad, general writs authorized by the Act and instead issuing the more specific warrants lauded by Otis. CUDDIHY, THE FOURTH AMENDMENT, at 519. But "[g]eneral warrants and affiliated methods were still central to colonial search and seizure in 1776." *Id.* at 538.

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[3] The Wilkes controversy also brought to the fore the public's opposition to the search and seizure of private papers. *See* Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 887-94 (1985). The search and seizure of private papers was viewed as a particularly intrusive invasion of privacy because, in part, such papers often "contain[ed] an individual's most private thoughts" and could "expose [the] confidences" of other people. *Id.* at 890. Moreover, "[b]ecause papers cannot so easily be distinguished from each other, a typical search for a document is necessarily a rummaging search of the most intrusive kind." *Id.* at 918. This controversy and the ensuing debates in Britain also influenced thinking in the colonies and helped shape the protections provided by the Fourth Amendment. *See id.* at 920 ("Read in light of its historical background, the fourth amendment's search and seizure clause condemns the inspection of innocent private papers by government officials in search of a document that by itself may be unprotected.").

The colonists' animosity toward general warrants was one of the grievances that caused them to seek independence from Great Britain. As John Adams would later remark, Otis's fiery attack on the practice in *Paxton's Case* "was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." Michael, 85 N.Y.U. L. Rev. at 909 (quoting Letter from John Adams to William Tudor (March 29, 1817) *in* THE WORKS OF JOHN ADAMS 247-48 (Boston, Little Brown & Co. 1856)). Indeed, the colonists attached great importance to the issue of general warrants as they contemplated breaking ties with Great Britain. *See, e.g.*, *id.* at 911 ("the First Continental Congress in 1774 included customs searches under general writs of assistance in its list of grievances against Parliament"); *see also Berger v. State of N.Y.*, 388 U.S. 41, 58 (1967) (noting that the use of general warrants "was a motivating factor behind the Declaration of Independence"); *Boyd v. United States*, 116 U.S. 616, 625 (1886) (describing the debate in which Otis's speech occurred as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country").

After the War for Independence was won, the colonists' fight to end the use of general warrants continued. Their use initially remained common in the new nation, CUDDIHY, THE FOURTH AMENDMENT, at 602 ("General warrants proliferated and remained the keystone of American laws and practices regarding search and

seizure until at least 1782."). But the "specific warrant ultimately won out." *Id.* By 1784, Vermont and half of the original thirteen states had "formulated constitutions with restrictions on search and seizure," although the precise formulations of those restrictions varied. *Id.* at 603; *see King*, 133 S. Ct. at 1980-81 (Scalia, J., dissenting) (quoting, for example, the Virginia Declaration of Rights § 10, which provided that "general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed," or to search a person "whose offence is not particularly described and supported by evidence," "are grievous and oppressive, and ought not be granted").[4]

When the Framers gathered to draft the new federal Constitution, concerns about potential abuses of governmental authority through the use of general warrants were raised. *See* Davies, 98 Mich. L. Rev. at 583. Indeed, the Constitution's failure to provide any protection against general warrants was a favorite topic of Anti-Federalist writers, at least 15 of whom penned objections to the Constitution on that ground. CUDDIHY, THE FOURTH AMENDMENT, at 674; *see id.* ("The general warrant attracted the earliest and heaviest criticism."); *King*, 133 S. Ct. at 1981 (Scalia, J.,

[4] The introduction of constitutional prohibitions on the use of general warrants did not result in the complete elimination of such searches in the States, CUDDIHY, THE FOURTH AMENDMENT, at 624, 628, but these constitutional provisions were nonetheless the "direct ancestors" of the Fourth Amendment, *id.* at 603.

dissenting) ("Antifederalists sarcastically predicted that the general, suspicionless warrant would be among the Constitution's 'blessings'"). Patrick Henry, for example, "warned that the new Federal Constitution would expose the citizenry to searches and seizures 'in the most arbitrary manner, without any evidence or reason.'" *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting) (quoting 3 DEBATES ON THE FEDERAL CONSTITUTION 588 (J. Elliot 2d ed. 1854)). Another critic of the new Constitution described "the absence of security against [general] warrants as part of an 'extraordinary' failure by Congress to safeguard the people's rights." CUDDIHY, THE FOURTH AMENDMENT, at 674. James Otis's sister, Mercy Otis Warren, joined the fight, "assail[ing] writs of assistance" as "'a detestable instrument of arbitrary power.'" *Id.* at 677.

Several state ratifying conventions requested more explicit protection. The Fourteenth Amendment of Virginia's proposed Bill of Rights reflected Anti-Federalists' concerns about general warrants, providing, in pertinent part, that "all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted." *Id.* at 684. New York, North Carolina, and Rhode Island copied Virginia's search and seizure amendment with minimal alteration. *Id.* at 685. The arguments presented in favor of including an express prohibition on general warrants in the federal constitution received consistent and nationwide newspaper coverage, and "[t]he magnitude of that publicity indicated the

emergence of a consensus for a comprehensive right against unreasonable search and seizure." *Id.* at 686.

Although the Federalists initially believed that there was no need to add a Bill of Rights to the Constitution, by 1789, James Madison had decided the Constitution should be amended to expressly protect a number of "essential rights" not explicitly protected in the new Constitution, including the "security against general warrants." Letter from James Madison to George Eve (Jan. 2, 1789), *at* http://bit.ly/134r6nw. The initial text of Madison's proposed amendment made clear the importance that he attached to individualized and particularized suspicion as predicates for governmental searches: "The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be voided by warrants . . . not particularly descrybing the places to be searched, or the persons or things to be seized." 1 *Annals of Cong.* 452 (1789) (Joseph Gales ed., 1790). The language was subsequently modified in committee, but the requirement of specific warrants remained materially unchanged. CUDDIHY, THE FOURTH AMENDMENT, at 695-97.

The Fourth Amendment thus enshrines in our national charter the Framers' opposition to generalized searches that were not predicated on any individualized suspicion. As the next section demonstrates, warrantless cell phone searches like the ones that took places in the cases now before the Court violate that core Fourth Amendment

principle, even though those searches were incident to lawful arrests.

II. Permitting Broad Searches of Cell Phones Incident to Arrest Undermines the Fundamental Protections of the Fourth Amendment

As explained above, the Fourth Amendment was a response, in significant part, to the abusive use of general warrants by the British, but its adoption also reflected a broader concern about the intrusions into privacy that could result if the government enjoyed unlimited discretion to search people's homes and belongings. Michael, 85 N.Y.U. L. Rev. at 906 (noting the "broader purpose of the Amendment: to circumscribe government discretion"); CUDDIHY, THE FOURTH AMENDMENT, at 679 (noting an Anti-Federalist "desire to divest the central government not only of [the general warrant] but of all relatives of it that jeopardized privacy"). Thus, as this Court has repeatedly recognized, a core concern of the Fourth Amendment is ensuring that the government has individualized suspicion about wrongdoing before it intrudes on a person's privacy. *See, e.g.*, *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (explaining that the Fourth Amendment's "restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion"); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967) (explaining that the Fourth Amendment was "a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against

invasions of 'the sanctity of a man's home and the privacies of life' from searches under indiscriminate, general authority" (internal citation omitted)); *King*, 133 S. Ct. at 1982 (Scalia, J., dissenting) ("suspicionless searches are *never* allowed if their principal end is ordinary crime-solving").

Allowing the police to search the contents of an individual's cell phone without a warrant violates this fundamental Fourth Amendment precept because it permits exactly the sort of generalized search lacking in particularized suspicion (and the concomitant invasion of privacy) that the Fourth Amendment's requirement for particularized warrants was supposed to prevent. That such searches are triggered by an arrest does little to limit the government's discretion because arrests are often triggered by minor legal infractions; as Petitioner Riley notes, "in California as in most other states, the police may—and sometimes do—arrest people for traffic and other 'fine only' infractions such as jaywalking, littering, or riding a bicycle the wrong direction on a residential street." Riley Pet. Br. 2; *see* Wurie Pet. App. 19a (noting that the Government's proposed rule would allow cell phone searches "even for something as minor as a traffic violation").[5]

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[5] To the extent such searches disclose an individual's papers (as they often will), they are especially problematic in light of the Fourth Amendment's special protections for personal papers. *See supra* at 11 n.3; *see also* Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 101, 109 (2013) (discussing

Moreover, that the individual whose phone is being searched was arrested is not sufficient to justify such a broad invasion of privacy. As this Court recently noted, the fact that a person is in custody following arrest cannot justify all searches, regardless of the level of privacy invaded, *King*, 133 S. Ct. at 1979, and the traditional justifications for searches incident to arrest have no bearing once the cell phone has been removed from the arrestee's control, *see* Riley Pet. Br. 16-24; *see also Chimel v. California*, 395 U.S. 752, 763 (1969) (setting out the twin purposes of searches incident to arrest, *viz.*, "remov[ing] any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and "seiz[ing] any evidence on the arrestee's person in order to prevent its concealment or destruction"); *Arizona v. Gant*, 556 U.S. 332, 339 (2009) ("If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."). Further, because of the vast stores of information that are generally saved on modern cell phones, the invasion of privacy inherent in such a search is significantly greater than the invasion involved in

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Learned Hand's "anti-rummaging" principle which held that "the police had no more constitutional power upon arrest than a judge issuing a warrant to comb through a vast trove of innocent papers in quest of an illegal one" and arguing that "[t]he anti-rummaging principle . . . suggests curtailing the warrantless seizure and search of digital devices incident to arrest").

previous search-incident-to-arrest cases, involving, for example, physical containers with much more limited and physical contents. *See* Riley Pet. Br. 3 ("Americans use smart phones to generate and store a vast array of their more sensitive thoughts, communications and expressive material."); *id.* at 14 ("[l]aw developed with only physical objects in mind cannot be woodenly applied to digital files containing virtually limitless amounts of information").

Modern cell phones are unique, after all, in that they permit individuals to carry significant amounts of personal information and documents that would previously have been kept in the home and office. Indeed, they are like computers in their ability to store vast amounts of information. *See, e.g.*, Bryan Andrew Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 Ga. L. Rev. 1165, 1172 (2008) (noting that cell phones have been described as "microcomputers"); *id.* at 1201 ("The more advanced devices are practically hand-held computers with telephone capabilities, giving the user access to a wealth of public and private data stored online and in the device's memory.").[6] Thus, they will often contain not only phone call records and a rolodex of the owner's

[6] The storage capacities of modern cell phones are staggering. For example, "modern cell phones are capable of storing at least sixty-four gigabytes of private information equaling four million pages of Microsoft Word documents." Charles E. MacLean, *But, Your Honor, A Cell Phone Is Not a Cigarette Pack: An Immodest Call for a Return to the* Chimel *Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 Fed. Cts. L. Rev. 37, 42 (2012).

contacts (both professional and personal), but also thousands of email messages and texts, photographs, even personal notes. Petitioner Riley's smartphone was "capable of accessing the internet, capturing and storing photos and videos, providing and storing GPS location information, and capturing and storing both voice and text messages, among other features," Riley Pet. Br. 5, and the police search exposed private text messages, the phone's contacts list, photographs, and videos, *id.* at 5-6. Even Respondent Wurie's "comparatively unsophisticated flip phone" (Wurie BIO 12) contained, among other things, call logs and a rolodex of phone numbers. Wurie Pet. App. 3a.

In other words, many documents and effects that would once have been stored physically in a person's home are often now stored in digital form, and a search of a person's cell phone thus invites an invasion of personal privacy that is little different from the invasion of privacy produced by searches of people's homes and papers at the Founding. *See id.* at 18a-19a ("Just as customs officers in the early colonies could use writs of assistance to rummage through homes and warehouses, without any showing of probable cause linked to a particular place or item sought, the government's proposed rule would give law enforcement automatic access to 'a virtual warehouse' of an individual's 'most intimate communications and photographs without probable cause' if the individual is subject to a custodial arrest . . . ."); *cf. City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (2010) ("Cell phone and text message communications are so pervasive that

some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.").

The Framers adopted the Fourth Amendment to ensure that the people would be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. This Court should hold that, absent exigent circumstances, the text and history of the Fourth Amendment do not permit police officers to conduct a warrantless search of the digital contents of an individual's cell phone seized from the person at the time of arrest.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to hold that, absent exigent circumstances, warrantless searches of the digital contents of cell phones incident to arrest violate the Fourth Amendment.

Respectfully submitted,

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