

No. 13-212

In The Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

BRIMA WURIE, RESPONDENT.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

**BRIEF OF SOUTHWESTERN LAW STUDENT
ANNA ARAN, AND PROFESSORS NORMAN M.
GARLAND AND MICHAEL M. EPSTEIN, IN
ASSOCIATION WITH THE AMICUS PROJECT
AT SOUTHWESTERN LAW SCHOOL, AS *AMICI
CURIAE* IN SUPPORT OF THE RESPONDENT**

NORMAN M. GARLAND

MICHAEL M. EPSTEIN

Counsel of Record

AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL

3050 WILSHIRE BLVD.

LOS ANGELES, CA 90010

(213) 738-6774

amicusproject@swlaw.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT..... 3

 I. FOURTH AMENDMENT JURISPRUDENCE MUST
 ADAPT TO MOBILE PHONES’ CAPACITY TO
 CONTAIN A LARGE VOLUME OF SENSITIVE,
 PERSONAL, AND PRIVATE INFORMATION 3

 A. Technological advances affect Fourth
 Amendment jurisprudence 3

 B. Most Americans own mobile phones and
 carry them on their person 4

 C. The quantity and quality of private
 information that mobile phones contain
 distinguishes them from the traditional
 containers in *Robinson* and *Ross*..... 6

 D. A rule that allows warrantless searches of
 mobile phones allows warrantless searches
 of homes 11

II. PURSUANT TO A SEARCH INCIDENT TO ARREST,
A POLICE OFFICER SHOULD BE ABLE TO SEIZE
AN ARRESTEE’S ELECTRONIC DEVICES, BUT
SHOULD THEN OBTAIN A SEARCH WARRANT TO
SEARCH THE ELECTRONIC DEVICES 16

A. The suggested rule governs various
technological devices 17

B. The suggested rule guides police officers,
magistrate judges, and trial courts 18

C. The suggested rule protects individuals’
reasonable expectation of privacy..... 19

D. The suggested rule fulfills *Chimel’s* dual
rationale for the search incident to arrest
exception 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

<i>Abuelhawa v. United States</i> , 556 U.S. 816 (2009)	4
<i>Arizona v. Gant</i> , 556 U.S. 332 (2009)	24
<i>Brigham City v. Stuart</i> , 547 U.S. 398 (2006)	23
<i>Chimel v. California</i> , 395 U.S. 752 (1969)	24
<i>City of Ontario v. Quon</i> , 560 U.S. 746, 760 (2010).....	5
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971)	12
<i>Hawkins v. State</i> , 307 Ga. App. 253 (Ga. Ct. App. 2010) (Phipps, J. concurring & dissenting)	24
<i>In re United States for an Order Authorizing the Release of Historical Cell-Cite Info.</i> , 809 F. Supp. 2d 113 (E.D.N.Y. 2011).....	4, 21
<i>Kentucky v. King</i> , 131 S. Ct. 1849 (2011)	23
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001).....	4, 11, 16, 17

<i>New York v. Belton</i> , 453 U.S. 454 (1981), <i>abrogation</i> <i>recognized by Davis v. United States</i> , 131 S. Ct. 2419 (2011).....	7, 18
<i>Newhard v. Borders</i> , 649 F.Supp.2d 440 (W.D. Va. 2009)	22, 23
<i>Oliver v. United States</i> , 466 U.S. 170 (1984)	16
<i>Payton v. New York</i> , 445 U.S. 573 (1980)	12, 16
<i>People v. Diaz</i> , 244 P.3d 501 (Cal. 2011).....	6, 7
<i>R. v. Mohamad</i> , [2004] 69 O.R. 3d 481 (Can. Ont. C.A.).....	10
<i>R. v. Vu</i> , [2013] SCC 60 (Can.)	10
<i>Schlossberg v. Solesbee</i> , 844 F. Supp. 2d 1165 (D. Or. 2012).....	<i>passim</i>
<i>Smallwood v. State</i> , 113 So. 3d 724 (Fla. 2013)	<i>passim</i>
<i>State v. Smith</i> , 920 N.E.2d 949 (Ohio 2009)	6, 19, 24
<i>United States v. Flores-Lopez</i> , 670 F.3d 803 (7th Cir. 2012)	5, 6, 11, 12

<i>United States v. Lucas</i> , 640 F.3d 168 (6th Cir. 2011)	6, 19
<i>United States v. Mayo</i> , 2013 WL 5945802 (D. Vt. Nov. 6, 2013).....	8
<i>United States v. McLaughlin</i> , 170 F.3d 889 (9th Cir. 1999) (Trott, C.J, concurring).....	24
<i>United States v. Murphy</i> , 552 F.3d 405 (4th Cir. 2009)	19
<i>United States v. Park</i> , 2007 U.S. Dist. LEXIS 40596 (N.D. Cal. 2007) ..	8, 9
<i>United States v. Robinson</i> , 414 U.S. 218 (1973).....	6, 8, 11
<i>United States v. Ross</i> , 456 U.S. 798 (1982).....	6, 7, 8, 11
<i>United States v. Ventresca</i> , 380 U.S. 102 (1965)	18
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983) (Brennan, J. dissenting).....	21
<i>Virginia v. Moore</i> , 553 U.S. 164 (2008).....	15, 19
<i>Whren v. United States</i> , 517 U.S. 806 (1996).....	16, 21

OTHER AUTHORITIES

- About ADT*, ADT, <http://tinyurl.com/aboutadt> (last visited April 5, 2014) 13
- About IFTTT*, IFTTT, <http://tinyurl.com/aboutifttt> (last visited April 5, 2014)..... 12
- Stephen J. Blumberg, Julian V. Luke, Nadarajasundaram Ganesh, Michael E. Davern & Michel H. Boudreaux, *Wireless Substitution: State-level Estimates From the National Health Interview Survey, 2010-2011*, 61 Nat'l Health Stat. Rep. 1 (2012), available at <http://tinyurl.com/9q74e4l> 5
- Jan Lauren Boyles, Aaron Smith & Mary Madden, *Privacy and Data Management on Mobile Devices* (2013), available at <http://tinyurl.com/n6yfuls>..... 19, 20
- Call me if the liquor cabinet opens!*, IFTTT, <http://tinyurl.com/iftttrecipe3> (last visited April 5, 2014)..... 13
- Cell Phone and Smartphone Ownership Demographics*, Pew Research Center, <http://tinyurl.com/ppdsm38> (last visited April 3, 2014)..... 4
- Alexandra Chang, *6 Smartphone-Controlled Home Products*, Dwell (Sept. 9, 2013), <http://tinyurl.com/dwellsmartphonehome> 12

<i>Find My iPhone, iPad, and Mac</i> , Apple.com, http://tinyurl.com/mut5obb (last visited April 3, 2014).....	20
Brian Fling, <i>Mobile Design and Development</i> (2009).....	7
<i>Hey kids! That party is getting too quiet. Make some noise down there!</i> , IFTTT, http://tinyurl.com/iftttrecipe4 (last visited April 5, 2014).....	13
<i>iCloud</i> , Apple.com, http://tinyurl.com/63gt4mu (last visited April 3, 2014)	9
<i>Keep Your Phone Safe: How to Protect Yourself From Wireless Threats</i> , ConsumerReports.org, http://tinyurl.com/o28upnc (last visited April 3, 2014).....	20
<i>Meet Hue: You and Hue</i> , Philips, http://tinyurl.com/youandhue (last visited April 5, 2014).....	12
<i>Menstrual Calendar Premium</i> , Google Play, http://tinyurl.com/cvxbyw2 (last visited April 3, 2014).....	9
<i>Mint.com Personal Finance</i> , Google Play, http://tinyurl.com/7glpvg6 (last visited April 3, 2014).....	9
<i>Motion detected on one of the house netcams</i> , IFTTT, http://tinyurl.com/iftttrecipe2 (last visited April 5, 2014).....	13

- My Medical*, iTunes, <http://tinyurl.com/mkmsn8y>
(last visited April 3, 2014)..... 9
- Devin W. Ness, *Information Overload: Why Omnipresent Technology and the Rise of Big Data Shouldn't Spell the End for Privacy As We Know It*, 31 *Cardozo Arts & Ent. L.J.* 925 (2013)..... 5, 7
- Remote Home Monitoring From Your Smartphone*, ADT, <http://tinyurl.com/adtreremote> (last visited April 5, 2014) 14
- Patricia E. Salkin, *From Bricks and Mortar to Mega-Bytes and Mega-Pixels: The Changing Landscape of the Impact of Technology and Innovation on Urban Development*, 42/43 *Urb. Law.* 11 (2011) 7
- Smart Home: Getting Ready For Smart Home Systems*, ADT, <http://tinyurl.com/adtsmarthome>
(last visited April 5, 2014)..... 14
- Cheryl Staats & Charles Patton, *State of the Science: Implicit Bias Review* (2013), available at <http://tinyurl.com/kntjae9>21, 22
- Turn your lights to orange when the room's Carbon Dioxide rises above 1000 ppm*, IFTTT, <http://tinyurl.com/iftttrecipe5> (last visited April 5, 2014)..... 13
- WeMo Switch + Motion*, Belkin, <http://tinyurl.com/belkinwemoswitch> (last visited April 5, 2014) 12

While I'm not home, let me know if any motion is detected in my house, IFTTT,
<http://tinyurl.com/iftttrecipe1> (last visited April 5, 2014)..... 13

INTEREST OF THE *AMICI CURIAE*¹

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Respondent. Norman M. Garland is a professor of law at Southwestern Law School. He teaches Evidence, Constitutional Criminal Procedure, Trial Advocacy, and Advanced Criminal Procedure. He writes about Evidence and Criminal Procedure.

Amicus Anna Aran is an upper-division J.D. candidate at Southwestern Law School with extensive academic interest and professional experience in constitutional criminal procedure. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. He is the Supervising Editor of the Journal of International Media and Entertainment Law, published by the American Bar Association and the Donald E. Biederman Entertainment and Media Law Institute.

¹ All parties have consented in writing to the filing of this brief. 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. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. This brief was researched and prepared in the Amicus Project Practicum at Southwestern Law School.

Amici have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the Court's interpretation of the Fourth Amendment.

SUMMARY OF THE ARGUMENT

Once a police officer seizes a mobile phone in a search incident to arrest, and thus secures the mobile phone and any evidence that it could contain, the police officer should be required to obtain a warrant to search the mobile phone. This suggested rule is based upon the First Circuit's holding in the instant case. Additionally, this rule could be flexible and include electronic devices other than mobile phones that have capabilities similar to mobile phones. There are several benefits to adopting this rule; the rule is clear, flexible enough to support technological advances, easy for police officers to follow, and protects individuals' privacy rights.

The mobile phone has changed how much private and highly sensitive information individuals can carry on their person. As technological advances change Americans' lives, in turn, the Fourth Amendment's guarantee of privacy will need to adapt to technological advances. Mobile phones are now a prevalent, integral part of modern life. As such, mobile phones should not be subject to the same search and seizure rules as cigarette packages and paper bags.

Americans do not use mobile phones just for telephonic communication. Mobile phones can contain anything from emails to bank or medical

records, and in vast quantities. Moreover, individuals can use mobile phones to interact with their homes. Thus, a search of a mobile phone can turn into a search of a home.

Fourth Amendment rules should accommodate police officers' needs with individuals' Fourth Amendment interests. A rule that requires police officers to obtain a warrant before searching a seized mobile phone or other electronic device achieves that balance. The suggested rule is easy for police officers to follow, whereas a narrower rule that protects only the type mobile phone at issue could cause police confusion. A broader, more permissive rule that allows warrantless mobile phone searches as long as the mobile phone was seized incident to arrest values police officer convenience over individuals' reasonable expectations of privacy. By contrast, the suggested rule would both protect individuals' privacy expectations and allow police officers to search electronic devices under exigent circumstances.

ARGUMENT

I. FOURTH AMENDMENT JURISPRUDENCE MUST ADAPT TO MOBILE PHONES' CAPACITY TO CONTAIN A LARGE VOLUME OF SENSITIVE, PERSONAL, AND PRIVATE INFORMATION

A. Technological Advances Affect Fourth Amendment Jurisprudence

To protect individuals' private lives in the modern era, Fourth Amendment jurisprudence must adapt to

technology. See *In re United States for an Order Authorizing the Release of Historical Cell-Cite Info.*, 809 F. Supp. 2d 113, 127 (E.D.N.Y. 2011). Technology can simultaneously grant individuals easy access to personal information and shrink their Fourth Amendment privacy rights. As Justice Scalia noted in *Kyllo*, “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.” *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). Mobile phone technology has made “drastic” advances in the last thirty years. *In re United States for an Order Authorizing the Release of Historical Cell-Cite Info.*, 809 F. Supp. 2d at 127. Fourth Amendment jurisprudence should also “evolve to preserve [mobile] phone user’s reasonable expectation of privacy” *Id.*

B. Most Americans Own Mobile Phones And Carry Them On Their Person

The Court’s holding in this case will directly impact many Americans because most Americans own mobile phones and carry them on their person. As this Court has observed, “everyone over the age of three seems to carry a [mobile] phone” *Abuelhawa v. United States*, 556 U.S. 816, 822 (2009) (calling a drug dealer to make a misdemeanor drug purchase is not facilitating drug distribution). As of January 2014, 90% of American adults have a mobile phone, and of those 58% own a smartphone. *Cell Phone and Smartphone Ownership Demographics*, Pew Research Center, <http://tinyurl.com/ppdsm38> (last visited April 3, 2014).

Thirty years after the introduction of the DynaTAC 8000X, the first commercially available mobile phone, mobile phones are ubiquitous, multi-purpose, and can cost as little as \$14.99. *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012) (Posner, J.). Indeed, mobile phones “are [now] so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.” *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) (searching a government employee’s mobile work phone was reasonable because the search was motivated by a legitimate work-related purpose and was not excessive).

The technology that was “once [an] unaffordable and impractical status symbol [is now] the primary means of telephonic communication.” Devin W. Ness, *Information Overload: Why Omnipresent Technology and the Rise of Big Data Shouldn't Spell the End for Privacy As We Know It*, 31 *Cardozo Arts & Ent. L.J.* 925, 927-28 (2013). Many households have completely substituted landline telephones for mobile phones. Stephen J. Blumberg, Julian V. Luke, Nadarajasundaram Ganesh, Michael E. Davern & Michel H. Boudreaux, *Wireless Substitution: State-level Estimates From the National Health Interview Survey, 2010-2011*, 61 *Nat'l Health Stat. Rep.* 1, 1 (2012), available at <http://tinyurl.com/9q74e4l>. In 2011, wireless-only adult households ranged from as high as 44.6% (Idaho) and as low as 15.3% (Rhode Island). *Id.*

C. The Quantity And Quality Of Private Information That Mobile Phones Contain Distinguishes Them From The Traditional Containers In *Robinson* And *Ross*

Mobile phones are distinguishable from traditional containers such as *Robinson's* cigarette package and *Ross's* paper bag because mobile phones have the capacity to hold or grant access to a large volume of sensitive, personal, and private information. *Smallwood v. State*, 113 So. 3d 724, 732 (Fla. 2013) (quoting *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011)). A mobile phone contains “not just phone numbers and call history, but also photos, videos, bank records, medical information, daily planners, and even correspondence between individuals through applications such as Facebook and Twitter.” *Id.*

Mobile phones' capacity to contain private information makes them difficult for courts to categorize. Some courts place mobile phones somewhere in-between laptop computers and traditional address books. See *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009). Other courts state that “[a] modern [mobile] phone is a computer.” *United States v. Flores-Lopez*, 670 F.3d at 804.

Some courts, such as the *Diaz* court, have held that the propriety of a search incident to arrest does not turn upon the character of the item searched, or how much information the item could contain. *People v. Diaz*, 244 P.3d 501, 506-07 (Cal. 2011). The *Diaz* court relied on *United States v. Ross*, 456 U.S. 798

(1982) and *New York v. Belton*, 453 U.S. 454 (1981), which both discussed searches incident to arrest in the automobile context. *Id.* at 507. But, at the time *Ross* and *Belton* were decided, mobile phones were not commercially available and did not have modern mobile phones' capacity to store private information.

The Motorola DynaTAC 8000X was the first commercially available mobile phone. The DynaTAC 8000X was released in 1983 and cost \$3,995. Patricia E. Salkin, *From Bricks and Mortar to Mega-Bytes and Mega-Pixels: The Changing Landscape of the Impact of Technology and Innovation on Urban Development*, 42/43 *Urb. Law.* 11, 23-24 (2011); Ness, *supra*, at 927 n.10. The DynaTAC 8000X, a “brick era” phone, was used only for communication. Brian Fling, *Mobile Design and Development* 3-5 (2009).

As the technology progressed, mobile phones were used to make phone calls, send text messages, and play simple games. Fling, *supra*, at 6. Then, in 1998's “feature phone era,” mobile phones could take photographs, play music, and were Internet capable. *Id.* at 6-7. Finally, in 2002's “smartphone era” and 2007's “touch era,” mobile phones “got smarter by learning from desktop computing, truly becoming personal computers” *Id.* at 10.

Thus, when the *Ross* Court held that “[a] constitutional distinction between “worthy” and “unworthy” containers would be improper” in the automobile context, the *Ross* Court did not consider containers with the modern mobile phone's capabilities. *People v. Diaz*, 244 P.3d at 507 (quoting *United States v. Ross*, 456 U.S. at 822). The

container at issue in *Ross* was a “lunch-type’ brown paper bag.” *Ross*, 456 U.S. at 801. The *Ross* Court discussed “paper bags, locked trunks, lunch buckets, and orange crates” *Id.* at 822. None of those items are capable of containing the same type and quantity of private information as a modern mobile phone, nor are they capable of the variety of feats that a modern mobile phone can accomplish.

Likewise, *Robinson* was decided in 1973. *United States v. Robinson*, 414 U.S. 218 (1973). The container in *Robinson* was a “crumpled package of cigarettes.” *Id.* at 236. A cigarette package is a physical, traditional container. Such a container’s physical boundaries limit how much it can hold, as well as what it can hold. By contrast, a mobile phone can be used to access information that is not physically contained within it.

Judge William K. Sessions III’s comparison of a mobile phone to the magical wardrobe in *The Lion, the Witch, and the Wardrobe* is compelling. *United States v. Mayo*, 2013 WL 5945802 (D. Vt. Nov. 6, 2013). A cigarette pack “has easily discernable limits: the container is large, but it is contained,” whereas a mobile phone “is a portal to the vast cosmos that is the [I]nternet.” *Id.* Judge Sessions explained that if *Robinson*’s rule applied to mobile phones, it would be akin to a search that “would extend to all of Narnia.” *Id.* Thus, the quantity and quality of the information that a mobile phone can potentially hold sets it apart from traditional containers. *Schlossberg v. Solesbee*, 844 F. Supp. 2d 1165, 1168 (D. Or. 2012) (citing *United States v.*

Park, 2007 U.S. Dist. LEXIS 40596 at *8-9 (N.D. Cal. 2007)).

Furthermore, individuals can customize smartphones by downloading applications that help them manage their daily lives. These applications can contain private, personal information. For instance, a woman can download a menstrual calendar onto her phone that tracks when she has had intercourse, menstruated, and ovulated. *Menstrual Calendar Premium*, Google Play, <http://tinyurl.com/cvxbyw2> (last visited April 3, 2014). Or, a parent could download an application that keeps medical records for the whole family, including x-rays, CAT scans, laboratory test results, and health insurance information. *My Medical*, iTunes, <http://tinyurl.com/mkmsn8y> (last visited April 3, 2014). Or, an individual can download an application that gathers all of his or her personal finance information from checking accounts, savings accounts, and credit cards and charts the individual's spending. *Mint.com Personal Finance*, Google Play, <http://tinyurl.com/7glpvg6> (last visited April 3, 2014).

Thus, a warrantless search incident to arrest of an individual's mobile phone or any other electronic device should not turn upon whether the device was immediately associated with the arrestee's person. A mobile phone can contain the same information as or be linked via a "cloud" to a desktop computer, but unlike a desktop computer, a mobile phone can be easily found on an individual's person. *iCloud*, Apple.com, <http://tinyurl.com/63gt4mu> (last visited April 3, 2014). With a broad, permissive search

incident to arrest rule, a police officer can access, via an arrestee's mobile phone, the contents of the arrestee's desktop computer without a warrant.

Recently, foreign courts have addressed police searches of mobile phones and the attendant privacy concerns. The Supreme Court of Canada recognized that mobile phones should be treated differently from other containers because of the quantity and quality of information that mobile phones can contain. *R. v. Vu*, [2013] SCC 60, para. 41, 44, 49 (Can.) (holding that if a search warrant does not specifically authorize a search of a mobile phone, the police may seize the mobile phone, but then must obtain a warrant to search the mobile phone.).

In *Vu*, the court equated modern mobile phones with computers, and distinguished both from “traditional storage receptacles.” *R. v. Vu*, [2013] SCC at para. 24, 38 (“[W]hen I referred to ‘computers’, I include within that term the cellular telephone.”). The court reasoned that comparing mobile phones to traditional containers is “unrealistic” because of the “scale and variety” of information that mobile phones can contain. *Id.* at para. 41. Unlike a cupboard, a mobile phone “can be a repository for an almost unlimited universe of information.” *Id.* at para. 41 (quoting *R. v. Mohamad*, [2004] 69 O.R. 3d 481, para. 43. (Can. Ont. C.A.)). Furthermore, a mobile phone, unlike a filing cabinet, allows “access to information and documents that are not in any meaningful sense at the location for which the search is authorized.” *Id.* at para. 44.

Since mobile phones can contain or grant access to so much private information, *Robinson's* permissive rule and *Ross's* reasoning should not govern warrantless searches of mobile phones and other similar technological devices. *Robinson* and *Ross* involved containers with discernable limits. By contrast, mobile phones are containers that can access a vast quantity of personal information outside of their physical boundaries. As the Florida Supreme Court reasoned, warrantless searches should not be allowed such that a police officer may delve “into the most private and personal details of an arrestee’s life without a search warrant simply because the cellular phone device [that] stores that information is small enough to be carried on one’s person.” *Smallwood v. State*, 113 So. 3d at 738.

D. A Rule That Allows Warrantless Searches Of Mobile Phones Allows Warrantless Searches Of Homes

A broad, permissive rule that allows warrantless searches of mobile phones incident to arrest interferes with the Fourth Amendment’s bright line at the home’s threshold. *Schlossberg v. Solesbee*, 844 F. Supp. 2d at 1169 (discussing an individual’s privacy expectation in a digital camera); *Kyllo v. United States*, 533 U.S. at 40. Under such a rule, a police officer could search an individual’s home without a search warrant by searching that individual’s mobile phone incident to an arrest for a minor offense, such as jaywalking. See *United States v. Flores-Lopez*, 670 F.3d at 805-06. Such a search conflicts with the “basic principle of Fourth Amendment law’ that searches and seizures inside a

home without a warrant are presumptively unreasonable.” *Payton v. New York*, 445 U.S. 573, 586 (1980) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 473-74 (1971)).

There are several ways in which a mobile phone search could become a house search, or reveal intimate details about the home. Via applications like iCam, a police officer could view the interior of the individual’s home. *United States v. Flores-Lopez*, 670 F.3d at 805-06. Thus, “[a]t the touch of a button a cell phone search becomes a house search, and that is not a search of a ‘container’ in any normal sense of that word, though a house contains data.” *Id.*

Furthermore, for some individuals, their mobile phone functions as a “robo-home” remote control. Alexandra Chang, *6 Smartphone-Controlled Home Products*, Dwell (Sept. 9, 2013), <http://tinyurl.com/dwellsmartphonehome>. Smartphone applications can remotely control a home’s locks, lights, appliances, motion detectors, baby monitors, and temperature controls. *Id.* Many of these applications utilize “if this then that” (IFTTT) technology. See *WeMo Switch + Motion*, Belkin, <http://tinyurl.com/belkinwemoswitch> (last visited April 5, 2014); *Meet Hue: You and Hue*, Philips, <http://tinyurl.com/youandhue> (last visited April 5, 2014). IFTTT, a third-party service, allows users to create personalized “recipes” wherein if a specified triggering condition occurs, then a certain action will follow. *About IFTTT*, IFTTT, <http://tinyurl.com/aboutifttt> (last visited April 5, 2014).

Shared IFTTT recipes demonstrate how individuals use their mobile phones to interface with their homes. One popular recipe sends the mobile phone user a text message if a motion detector senses motion in user's house after a specified "quiet period." *While I'm not home, let me know if any motion is detected in my house*, IFTTT, <http://tinyurl.com/iftttrecipe1> (last visited April 5, 2014). Another recipe prompts a security camera to take a photograph and then email the photograph to the user whenever a specified motion sensor detects motion in the house. *Motion detected on one of the house netcams*, IFTTT, <http://tinyurl.com/iftttrecipe2> (last visited April 5, 2014).

Some IFTTT recipes are designed to aid parenting. For example, there is a recipe that calls the user's mobile phone when "the teenagers have gotten into the liquor cabinet!" *Call me if the liquor cabinet opens!*, IFTTT, <http://tinyurl.com/iftttrecipe3> (last visited April 5, 2014). Or, there is a recipe that will text the user's mobile phone if the noise level in a room drops below a specified level. *Hey kids! That party is getting too quiet. Make some noise down there!*, IFTTT, <http://tinyurl.com/iftttrecipe4> (last visited April 5, 2014). For the safety-minded, there is a recipe that will turn the house's lights orange if a room's carbon dioxide level rises above a certain amount. *Turn your lights to orange when the room's Carbon Dioxide rises above 1000 ppm*, IFTTT, <http://tinyurl.com/iftttrecipe5> (last visited April 5, 2014).

Finally, home security can be controlled via smartphone applications. ADT, with over 6.5 million

customers, is one of America's largest home and small business security providers. *About ADT*, ADT, <http://tinyurl.com/aboutadt> (last visited April 5, 2014). ADT was the "first security company to offer mass market home automation services." *Id.* Home automation turns ADT customers' homes into "smart homes." *Smart Home: Getting Ready For Smart Home Systems*, ADT, <http://tinyurl.com/adtsmart> (last visited April 5, 2014). With their smartphones, ADT's customers can control their "home's lighting, thermostat, security, appliances and more" *Id.* Similar to iCam, ADT's smartphone application allows ADT's customers to use their mobile phones to view their home's security camera feed, arm or disarm their security system, and specify alert criteria. *Remote Home Monitoring From Your Smartphone*, ADT, <http://tinyurl.com/adremote> (last visited April 5, 2014).

Thus, a mobile phone search incident arrest could give police officers intimate knowledge of an arrestee's home – without a warrant. A mobile phone's ability to give police officers access to individuals' homes is why the Florida Supreme Court equated allowing a warrantless search of an arrestee's mobile phone to handing police officers "a key to access the [arrestee's] home" *Smallwood v. State*, 113 So. 3d at 738.

For instance, a police officer could hold a sincere belief that an individual's home contains evidence of a crime. But, the officer might not have probable cause to obtain a search warrant to search that individual's home. Under a rule that allowed a

warrantless search of a mobile phone incident to arrest, the officer could follow and arrest that individual for jaywalking. From a mobile phone search, the officer could view security footage of the individual's home. At that point, the officer could determine whether a warrant to search the arrestee's home would be needed. The officer will have gained probable cause to obtain a search warrant for the arrestee's home via searching the arrestee's mobile phone without a warrant.

If the federal Constitution does not protect individuals from the aforementioned search, then States may choose "to protect privacy beyond the level that the Fourth Amendment requires." *Virginia v. Moore*, 553 U.S. 164, 171 (2008). However, if the States adopted differing rules, individuals would be subject to a warrantless home search via a search of a mobile phone incident to arrest based upon what state they live in or travel to.

Thus, allowing States to choose to protect mobile phones from warrantless searches incident to arrest could interfere with the Fourth Amendment's bright line at the home's threshold. An individual could live in a state with a more protective rule, but then travel into a state that follows the federal rule. A police officer from the state that the individual travelled into could arrest the individual for jaywalking, search the individual's mobile phone, view the individual's home via a security camera, and transmit the information to a police officer in the individual's home state.

In this way, a permissive federal rule that allows searches of mobile phones incident to arrest could result in unequal application of the Fourth Amendment's protection of the home. *See Payton v. New York*, 445 U.S. 573, 586 (1980) (“[T]he ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’”). The Fourth Amendment's protections should not be variable, nor turn upon which State an individual lives in or travels to. *See Whren v. United States*, 517 U.S. 806, 815 (1996).

**II. PURSUANT TO A SEARCH INCIDENT TO ARREST,
A POLICE OFFICER SHOULD BE ABLE TO SEIZE
AN ARRESTEE'S ELECTRONIC DEVICES, BUT
SHOULD THEN OBTAIN A SEARCH WARRANT TO
SEARCH THE ELECTRONIC DEVICES**

In this case, the Court could hold that a police officer may seize an arrestee's electronic device pursuant to a search incident to arrest, but must then obtain a search warrant to search the seized electronic device. This suggested rule achieves several Fourth Amendment goals: the rule (1) governs various technological devices; (2) guides police officers, magistrate judges, and trial courts; (3) protects individuals' reasonable expectations of privacy; and (4) fulfills the search incident to arrest exception's dual rationale. Furthermore, the suggested rule “provide[s] a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment” *Kyllo v. United States*, 533 U.S. at 39 (quoting *Oliver v. United States*, 466 U.S. 170, 181 (1984)).

By contrast, a narrower protective rule could cause confusion, and a broader permissive rule could harm individuals' reasonable expectations of privacy. On the one hand, a narrow protective rule could require a police officer to obtain a warrant to search a specific type of mobile phone, like an Android or an iPhone. On the opposite extreme, a broader permissive rule would allow all warrantless searches of mobile phones incident to arrest. Neither of these rules is a "workable accommodation" between law enforcements' needs and individual's reasonable expectation of privacy. *Kyllo v. United States*, 533 U.S. at 39.

A. The Suggested Rule Governs Various Technological Devices

Modern technology permits individuals to carry a vast amount of private information on their person in one device. *See Smallwood v. State*, 113 So. 3d at 731-32. In this case, that device is a mobile phone. In future cases, and in routine cases across the United States, the device could be a digital camera, a laptop, a pager, a tablet, a pair of Google glasses, or an mp3 player. Any one of those devices could contain a large quantity of private, personal information. A holding that applied to all of those devices would help police officers, magistrate judges, and trial courts determine whether a warrantless search would be proper.

B. The Suggested Rule Guides Police Officers, Magistrate Judges, And Trial Courts

Each time modern technology changes, the Court could tailor a narrow rule to the particular technological device at issue. But, such an approach could cause police and magisterial confusion.

Fourth Amendment jurisprudence favors clear rules for police officers to follow. *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *Schlossberg v. Solesbee*, 844 F. Supp. 2d at 1170; *New York v. Belton*, 453 U.S. at 459-60, *abrogation recognized by Davis v. United States*, 131 S. Ct. 2419 (2011) (“When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.”). Whether or not an officer could conduct a warrantless search would depend upon the precise technological device. In turn, a police officer in the field may not have time to determine whether a warrant is required for a search. *See Schlossberg*, 844 F. Supp. 2d at 1170. Then, if the arrest resulted in criminal charges, magistrate and trial judges would need to second-guess police officers’ snap judgments.

If the Court’s rule distinguished electronic devices based on their capabilities, allowing warrantless searches for less advanced mobile phones, but requiring a warrant for smartphones, “officers [would be forced] to learn and memorize the capabilities of constantly changing electronic

devices.” *Schlossberg v. Solesbee*, 844 F. Supp. 2d at 1170 (“A primary goal in search and seizure law has been to provide law enforcement with clear standards to follow”); *State v. Smith*, 920 N.E.2d at 954 (“[I]t would not be helpful to create a rule that requires officers to discern the capabilities of a [mobile] phone before acting accordingly.”); *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009) (“[T]o require police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule.”).

C. The Suggested Rule Protects Individuals’ Reasonable Expectation Of Privacy

A warrantless search of a mobile phone can be invasive and intrude upon individuals’ reasonable expectation of privacy. *Smallwood v. State*, 113 So. 3d at 732 (quoting *United States v. Lucas*, 640 F.3d at 178). Especially “[w]hen history has not provided a conclusive answer, [the Court has] analyzed a search or seizure in light of traditional standards of reasonableness” *Virginia v. Moore*, 553 U.S. at 171.

While it is difficult to quantify individuals’ reasonable expectation of privacy, there are some ways to demonstrate that many individuals who own mobile phones do have a subjective expectation of privacy in their mobile phones and their mobile phones’ contents. For instance, half of Americans with smartphones “have cleared their phone’s [Internet] search or browsing history,” Jan Lauren Boyles, Aaron Smith & Mary Madden, *Privacy and*

Data Management on Mobile Devices 3 (2013), available at <http://tinyurl.com/n6yfuls>, and about one-third “have turned off their phone’s location tracking feature.” *Id.* Smartphone owners are more likely than other mobile phone owners to feel that “someone has accessed [their] phone in a way that felt like a privacy intrusion.” *Id.* at 4 (explaining that 15% of smartphone owners have felt that their privacy was invaded, versus 8% of other mobile phone owners).

Also, mobile phones have features that increase their users’ privacy expectations. Mobile phones can be locked with a password or have an application that remotely wipes the mobile phones’ contents in case the mobile phone is lost or stolen. *Find My iPhone, iPad, and Mac*, Apple.com, <http://tinyurl.com/mut5obb> (last visited April 3, 2014). Interestingly, only about 8% of smartphone users use, or perhaps are aware of, the application that can remotely wipe their phone’s contents, and 64% of smartphone users do not have a “lock” that requires some form of passcode to use their phone. *Keep Your Phone Safe: How to Protect Yourself From Wireless Threats*, ConsumerReports.org, <http://tinyurl.com/o28upnc> (last visited April 3, 2014). It is possible that smartphone users do not utilize these security features because they do not expect that other individuals will have physical access to their phones without their permission.

A broad, permissive rule does not allow individuals to realize their expectation of privacy in their mobile phones and the private data their mobile phones contain. Mobile phones have become an integral and

necessary part of individuals' modern lives. *In re United States for an Order Authorizing the Release of Historical Cell-Cite Info.*, 809 F. Supp. 2d at 115. Many individuals are never "more than a few feet away from their cell phones." *Id.* The same holds true for many other technological devices, such as laptops or iPads. *Schlossberg v. Solesbee*, 844 F. Supp. 2d at 1170.

If a police officer has probable cause that an individual has violated the law, a search and seizure are justified regardless of the individual officer's motivations. *Whren v. United States*, 517 U.S. at 818-19. At the same time, the Fourth Amendment's warrant requirement acts to ensure that individuals' reasonable expectation of privacy is not subject "to the whim of an individual police officer in the field." *United States v. Villamonte-Marquez*, 462 U.S. 579, 600-01 (1983) (Brennan, J. dissenting). As the *Whren* Court stated, the Fourth Amendment's protections should not be variable, nor should they "turn upon . . . trivialities." *Whren*, 517 U.S. at 815.

Once a police officer in the field has seized a mobile phone, a snap judgment, the police officer can then seek independent judicial review of his or her need to search the mobile phone's contents. This allows the police officer to simultaneously secure evidence and protect the individual's privacy rights. A police officer can act in good faith but be motivated by implicit bias against an individual. Cheryl Staats & Charles Patton, *State of the Science: Implicit Bias Review* 36-39 (2013), available at <http://tinyurl.com/kntjae9>. Because implicit bias is unconscious by nature, a police officer acting under

an implicit bias does not intentionally seek to harm an arrestee or impinge upon an arrestee's reasonable expectation of privacy. *Id.* at 6-7.

Requiring judicial scrutiny for mobile phone searches helps prevent implicit bias because the warrant application process ensures that once a mobile phone is secured, police officers can make a planned out decision to search a mobile phone rather than a snap judgment. Given the magnitude of the personal information that mobile phones can contain, the Fourth Amendment should require police officers to routinely get a warrant to search mobile phones. This, in turn, ensures that a judicial officer independently reviews the exercise of discretion by officers in the field.

Moreover, sometimes police officers do not act in good faith. For instance, in *Newhard*, the plaintiff alleged that a police officer arrested him and searched his mobile phone without a warrant. *Newhard v. Borders*, 649 F.Supp.2d 440, 444 (W.D. Va. 2009). The mobile phone contained nude pictures of the plaintiff and his girlfriend "in 'sexually compromising positions.'" *Id.* The officer shared the intimate pictures with other officers and members of the general public. *Id.* The district court referred to the police officer's conduct as "irresponsible, unprofessional, and reprehensible." *Id.* Even so, the district court held that the plaintiff was not entitled to relief under 42 U.S.C. § 1983 because the officer "who allegedly searched through the cell phone did not violate any 'clearly established' constitutional right of [the plaintiff's] under the Fourth Amendment and is thus entitled to qualified

immunity.” *Id.* at 450. Thus, the suggested rule protects individuals from “unprofessional” officers as well as officers who act in good faith, but through implicit bias.

At the same time, the suggested rule allows for police officers to search a mobile phone if exigent circumstances exist. Two of the exigencies that apply to warrantless searches of homes readily apply to mobile phones.

First, the “emergency aid exception” would apply to a warrantless mobile phone search. *See Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). For instance, if officers had reason to believe that searching a suspect’s mobile phone could prevent injury to a kidnapping victim, they could search the mobile phone.

Second, the “need to prevent imminent destruction of evidence” is also applicable. *Ibid.* The potential for destruction of evidence could be a reason for allowing a search incident to arrest. But if an officer has actual knowledge that an associate of the arrestee is poised to destroy evidence on a mobile phone in police custody, then an officer’s warrantless search of a mobile phone would be permissible under this exigent circumstance exception to the warrant requirement. Destruction of evidence is a recognized exigency that would apply to mobile phones even if warrantless searches were not allowed under the incident to arrest exception.

**D. The Suggested Rule Fulfills *Chimel's*
Dual Rationale For The Search Incident
To Arrest Exception**

Gant illustrates that the dual rationales for searches incident to arrest do not apply to mobile phones once they are seized from an arrestee's person. *Smallwood v. State*, 113 So. 3d at 735. Once an arrestee is separated from the mobile phone, the arrestee cannot use the mobile phone as a weapon nor destroy evidence contained within the phone. *Id.* At the time when the arrestee's mobile phone is in police custody, the arrestee's high expectation of privacy in the mobile phone's contents should require police officers to "then obtain a warrant before intruding into the phone's contents." *Id.* at 736 (quoting *State v. Smith*, 920 N.E.2d 949 (Ohio 2009)).

A basic tenet of Fourth Amendment jurisprudence is that a warrantless search is per se unreasonable. *Hawkins v. State*, 307 Ga. App. 253, 263-64 (Ga. Ct. App. 2010) (Phipps, J. concurring & dissenting) (quoting *Arizona v. Gant*, 129 S.Ct. 1710 (2009)). This tenet is "subject only to a few specifically established and well-delineated exceptions." *Id.* The Fourth Amendment's warrant requirement tempers police officer discretion with judicial scrutiny. See *Gant*, 556 U.S. at 345. When the justifications for a warrantless search are no longer present, a police officer's search "may be made only under the authority of a search warrant." *Chimel v. California*, 395 U.S. 752, 762-63 (1969); see *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, C.J. concurring).

CONCLUSION

The Court should affirm the First Circuit's ruling and require that police officers obtain a warrant to search a mobile phone after it is seized pursuant to a search incident to arrest. A consistent rule in this case will help police officers in the field and will protect individuals' reasonable expectation of privacy as their home lives become more dependent on mobile technology.

April 9, 2014

Respectfully submitted,

Norman M. Garland
Michael M. Epstein
Counsel of Record
Amicus Project at
Southwestern Law School
3050 Wilshire Blvd.
Los Angeles, CA 90010
(213) 738-6774