Nos. 13-132 & 13-212

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 Appeals, Fourth District

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 *AMICI CURIAE* – PROFESSORS CHARLES E. MACLEAN & ADAM LAMPARELLO IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*

Amici Curiae Charles E. MacLean and Adam Lamparello[1] are assistant professors of law at Indiana Tech Law School in Fort Wayne, Indiana. They teach and write in the areas of criminal law, criminal procedure, and constitutional law, and have an interest in the sound development of the law in this area. They take the view that application of pre-digital age analogs and precedent to digital age technology is ill-advised and contrary to the Fourth Amendment, which, at a minimum, requires that searches be "reasonable" and enumerated with "particularity." Warrantless searches of digital storage devices, such as but not limited to smartphones, incident to lawful arrest, honor neither of those inviolable Fourth Amendment prongs.

Together or separately, *Amici* have written a number of articles regarding the application of the Fourth Amendment in the digital age, including: 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 Searches of Cell Phone Memories Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 37 (2012); Charles E. MacLean, *Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age*

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[1] All parties have consented to the filing of this amicus brief. No counsel for any 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 the amici curiae, their law school, or their counsel made a monetary contribution to its preparation or submission.

Unless Congress Continually Resets the Privacy Bar, 24 ALB. L.J. SCI. & TECH. 47 (2014); Charles E. MacLean & Adam Lamparello, *Abidor v. Napolitano: Suspicionless Cell Phone and Laptop "Strip" Searches at the Border Compromise the Fourth and First Amendments*, 108 NW. U. L. REV. COLLOQUY ___ (forthcoming 2014); and Adam Lamparello & Charles E. MacLean, *Back to the Future: Returning to Reasonableness and Particularity under the Fourth Amendment*, 99 IOWA L. REV. BULL. ___ (forthcoming 2014).

SUMMARY OF ARGUMENT

Warrantless searches of cell phone memory—*after* a suspect has been arrested, and *after* law enforcement has seized the phone—would have been unconstitutional at the time the Fourth Amendment was adopted, and are unconstitutional now. Simply stated, they are unreasonable. And reasonableness—not a categorical warrant requirement—is the "touchstone of Fourth Amendment analysis." *Oliver v. United States*, 466 U.S. 170, 177 (1984).

Searches of a cell phone's contents cannot be justified under the search incident to arrest doctrine because neither safety nor the preservation of evidence is implicated. *See Arizona v. Gant*, 556 U.S. 332, 339 (2009) (citing *Chimel v. California,* 395 U.S. 752, 763 (1963)). To be sure, after seizure by law enforcement, cell phones are no longer part of the "arrestee's person" or within the arrestee's "immediate control." *Id.* Furthermore, there is minimal risk of automatic or remote deletion.[2] Thus, "application of *Chimel* in this context should be entirely abandoned." *Gant,* 556 U.S. at 354 (Scalia, J., concurring).

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[2] *See, e.g.,* Samuel J. H. Beutler, *The New World of Mobile Communication: Redefining the Scope of Warrantless Cell Phone Searches*, 15 VAND. J. ENT. & TECH. L. 375, 394 (2013). (explaining that, "for an arrestee to effectively erase evidence … (1) a phone must be enabled with remote wipe capabilities, (2) an accomplice must have access to the remote wipe program, and (3) there must exist some way for the arrestee to contemporaneously alert the accomplice of the arrest").

In addition, these searches are not supported by the vehicle inventory exception. Modern cell phones are not "articles inside the relatively narrow compass of the passenger compartment of an automobile," and *after* seizure by law enforcement are not within "the area into which an arrestee might reach.' " *Gant*, 556 U.S. at 341 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)). They are in the hands of law enforcement. Not getting a warrant in this situation makes a mockery of the warrant requirement, its exceptions, and the reasonableness standard.

Cell phones are the modern day repository for the "papers" and "effects" that were stored in Eighteenth Century Colonial, Nineteenth Century Gothic Revival, and Twentieth Century Cape Cod homes. They store private correspondence, photographs, *personal thoughts*, and in some cases even the personal information of others. *See State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009). Within each "room" of a cell phone, individuals have an objective—and subjective—expectation of privacy against unreasonable searches and seizures. *See Katz v. United States*, 389 U.S. 347 (1967).

Given the recent advances in modern technology, the incompatibility with this Court's precedent, and the system-wide infringements that have occurred since *Belton*, the time has arrived to create a bright-line rule. As the Court recognized in *Gant*, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*."

Gant, 556 U.S. at 342 (quoting *Thornton v. United States,* 541 U.S. 615, 624 (2004)) (O'Connor, J., concurring). Indeed, some courts have upheld searches under *Belton* "even when . . . the handcuffed arrestee has already left the scene." *Id.* (quoting *Thornton,* 541 U.S. at 629 (O'Connor, J., concurring)). That same entitlement prevails in the context of post-arrest, post-seizure cell phone searches. It should stop now, or cell phone searches may become the modern day general warrant. In some cases—such as *Riley*—they already have.

Relying on precedent from an era of black-and-white televisions would allow this practice to continue, and would stretch the search incident to arrest doctrine "beyond its breaking point." *Thornton*, 541 U.S. at 620, 625 (Scalia, J. concurring); *see also People v. Diaz,* 244 P.3d 501, 516-17 (Cal. 2011)) (Werdegar, J., dissenting) ("[t]he United States Supreme Court's holdings on clothing and small spatial containers were not made with mobile phones, smartphones and handheld computers—none of which existed at the time—in mind"). Indeed, the Court has "never relied on *stare decisis* to justify the continuance of an unconstitutional police practice . . . that is so easily distinguished from the decisions that arguably compel it." *Gant,* 556 U.S. at 348.

Professors MacLean and Lamparello respectfully submit that the Court should adopt a rule allowing law enforcement to seize an arrestee's cell phone, but prohibiting a search of its contents without probable cause and a warrant describing with particularity

the "rooms" to be searched.[3]

The only exception should be where law enforcement officers are faced with an *imminent* threat to life or safety.[4] Even then, however, the search should be proportionate to the nature and duration of the exigency, and not as a pretext to go on a fishing expedition for evidence of any crime whatsoever. Absent an exigent circumstance, searches of cell phone contents should be *ipso facto* unreasonable. The modest inconvenience to law enforcement is a small price to pay to prevent the unconstitutional infringements upon privacy that result when law enforcement officers, without a warrant, search cell phones incident to arrest.

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[3] *See* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010) (discussing the particularity requirement in the context of internet searches). When either a search warrant or an exigency allows a law enforcement officer to "search" a cell phone, neither should occur without specifically enumerating the particular parts or "rooms" of the cell phone the officer is authorized to search. Just as an officer cannot constitutionally look inside an envelope when the officer is only authorized by the warrant or exigency to look for a stolen automobile, nor should any computer or cell phone "search" ever authorize a blunderbuss search of the entirety of its memory, that is, a search of all its "rooms," without regard to whether the probable cause provided sufficient justification and nexus for all of those "rooms." Both the "particularity" and the "reasonableness" prongs of the Fourth Amendment compel that particularity, without which the search cannot be deemed reasonable.

[4] Whether this requires an exception in every case is a separate issue.

Professors MacLean and Lamparello also counsel against carving out a narrow exception where officers have "reason to believe evidence relevant to the crime of arrest" will be found in the phone. *Gant*, 556 U.S. at 341 (quoting *Chimel,* 395 U.S. at 763). Such standard would not "provide the needed guidance to arresting officers," and would leave "much room for manipulation." *Gant,* 556 U.S. at 353 (Scalia, J., concurring). That distinction threatens to swallow the rule and is a recipe for arbitrariness of the most unreasonable—and unconstitutional—kind.

Ultimately, there can be no doubt—in an era of unprecedented technological advances—that individual privacy is under attack by state action that neither the Fourth Amendment nor basic notions of liberty countenance. Smartphones are now owned and operated by fifty-five percent of the population[5] and transcend the finite physical space that is traditionally subject to searches incident to arrest or other exceptions to the warrant requirement. Warrantless, post-arrest searches of cell phones therefore implicate privacy interests that the Fourth Amendment, at the time of its adoption and throughout its evolution, safeguards against arbitrary government intrusion. These searches are unnecessary, unreasonable, and unconstitutional.

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[5] *See, e.g.,* Pew Research Internet Project, *Mobile Technology Facts Sheet, available at* http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/.

ARGUMENT

I. WARRANTLESS, POST-ARREST SEARCHES OF A CELL PHONE ARE UNREASONABLE AND NOT JUSTIFIED BY ANY EXCEPTION TO THE WARRANT REQUIREMENT.

The Fourth Amendment does not categorically require a warrant. It demands reasonableness.[6] And a "warrantless search of the person is reasonable only if it falls within a recognized exception." *Missouri v. McNeely,* 133 S. Ct. 1552, 1558 (2013). Warrantless searches of cell phones fall within no exception. And for good reason. They offend even the most relaxed definition of reasonableness.

In *Smith v. Ohio*, the Court explained that "[a]lthough the Fourth Amendment may permit a brief *detention* of property on the basis of only 'reasonable, articulable suspicion' that it contains contraband or evidence of criminal activity, it proscribes—except in certain well-defined circumstances—the search of that property unless accomplished pursuant to judicial warrant issued upon probable cause." 494 U.S. 541, 542 (1990)

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[6] *See* U.S. Const. amend. IV ("The 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").

(*quoting United States v. Place,* 462 U.S. 696, 702 (1983)); *see also Skinner v. Railway Labor Execs' Ass'n,* 489 U.S. 602, 619 (1989); *Mincey v. Arizona,* 437 U.S. 385, 390 (1978); *Katz*, 389 U.S. at 357. A brief discussion of the character of cell phones demonstrates that they do not fall within the warrant requirement's "established and well-delineated exceptions." *Katz,* 389 U.S. at 357.

A. Individuals Have an Objectively Reasonable Expectation of Privacy in the Content of their Cell Phones.

Cell phones are unlike any of the objects that this Court has confronted in its jurisprudence. *See, e.g., California v. Greenwood*, 486 U.S. 35, 40 (1988) (trash left on the curb); *Oliver*, 466 U.S. 170 (objects or activities in open fields) (1984); *Hudson v. Palmer*, 468 U.S. 517 (1984) (items in prison cells); *United States v. Chadwick,* 433 U.S. 1 (1977) (footlocker), *abrogated by California v. Acevedo*, 500 U.S. 565 (1990); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (cars); *United States v. Edwards*, 415 U.S. 800 (1974) (clothing).

The above cases establish three levels or gradations of privacy. First, privacy expectations "that society is prepared to recognize as legitimate have, at least in theory, the greatest protection." John P. Cronan, et al., *Fourth Amendment Trends and the Supreme Court's October 1999 Term,* 19

YALE L. & POL'Y REV. 197, 200 (2000) (quoting Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 331 (1998)) (internal quotations and footnotes omitted). Houses, for example, fall within this group. Cronan, *supra*, at 200. Areas where an individual has "diminished expectations of privacy are more easily invaded." *Id.* (*quoting* Clancy, *supra*, at 331). Cars have been placed in this group. *Opperman*, 428 U.S. at 367. Finally, "subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection." Cronan, *supra*, at 200 (*quoting* Clancy, *supra*, at 331).

Cell phones deserve the highest privacy protections. They transcend physical boundaries and finite space, shatter the distinctions between public thoroughfares and private homes, and store the "papers" and "effects" that, in the pre-digital era, were kept in the privacy of one's home. These items are not rendered searchable simply because they are stored in a cell phone rather than a closet. *See Chadwick,* 433 U.S. at 13. ("the footlocker's mobility [does not] justify dispensing with the added protections of the Warrant Clause").

That principle applies with particular force here. In the cell phone context, mobility and location are less relevant. The more pertinent inquiry should focus on the diverse array of deeply personal contents that can—and are—stored within cell phones, as well as the ubiquity of cell phones in contemporary life. As one court aptly described, we now live in a "cell-

phone centric" society. *Klayman v. Obama*, 957 F. Supp. 2d 1, 36 (D.D.C. 2013).

Cell phones cannot be analogized to a crumpled up cigarette package, address book, wallet, or container. *See Robinson,* 414 U.S. at 236; *United States v. Rodriguez,* 995 F.2d 778, 778 (7th Cir. 1993); *Acevedo*, 500 U.S. at 575-76. That would be like comparing a rotary telephone to a Smartphone.

Unlike a container, for example, a cell phone is not an "object capable of holding another object." *Belton,* 453 U.S. at 460 n.4. Moreover, cell phone contents are "limited to digital data, the intangible nature of which renders it unavailable for use as a weapon or as evidence that can be physically destroyed." Joshua Eames, *Can You Hear Me Now? Warrantless Cell Phone Searches and the Fourth Amendment; People v. Diaz, 244 P.3d 501 (Cal. 2011)*, 12 WYO. L. REV. 483, 499 (2012).

Also, "modern cell phones are capable of accessing almost limitless amounts of data," and "[e]ven the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container." *Id.; see also* Jana L. Knott, *Is There an App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phones,* 35 OKLA. CITY U. L. REV. 445, 456 (2010).

But it is the quality, not simply the quantity, of data that distinguishes cellphones from parked cars, passenger compartments, pagers, and plastic containers:

> [M]odern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.

United States v. Park, No. CR 05–375 SI, 2007 WL 1521573, at *9 (N.D. Cal. May 23, 2007). ("[a]lthough information of this nature can now be stored electronically, in the past such information has traditionally been stored in one's home office or desk and given protection by the Fourth Amendment"). Put differently, people do not store confidential documents in a Rolodex, and they do not watch YouTube videos in a suitcase.

As such, relying on cases from an era of rotary phones and black-and-white televisions is akin to relying on the plain view doctrine to justify pulling apart the curtains of someone's home to get a glimpse into their private life. While precedent is vital to ensuring predictability and consistency, it has less importance in this case. And stare decisis "does not compel us to follow a past decision when its

rationale no longer withstands 'careful analysis.'" *Gant*, 556 U.S. at 348 (quoting *Lawrence v. Texas,* 539 U.S. 558, 577 (2003)).

The "potential intrusion on informational privacy involved in a police search of a person's mobile phone, smartphone, or handheld computer," is substantial. *Diaz II*, 244 P.3d at 513 (Werdegar, J., dissenting). The justifications for searching these items without a warrant, however, are not. Noting that the amount of information that can be stored on a cell phone "dwarfs that which can be carried on the person in a spatial container," Judge Werdegar criticized the *Diaz* majority for "indulg[ing] a fiction that an item that was on the arrestee's person when he was detained is *still* on his person—and thus vulnerable to destruction of evidence—notwithstanding that the arrestee is safely in custody and the item securely in police control." *Id.* at 515.

The threats to privacy are particularly acute because cell phones have become "attractive targets for criminal investigators, providing a wealth of evidence such as lists of recent incoming and outgoing calls, text messages, and possibly incriminating photographs." Lily R. Robinton, *Courting Chaos: Conflicting Guidance From Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence*, 12 YALE J.L. & TECH. 311, 315 (2010); Ashley B. Snyder, Note, *The Fourth Amendment and Warrantless Cell Phone Searches: When is Your Cell Phone Protected?*, 46 WAKE FOREST L. REV. 155, 163 (2011). To make matters worse, law enforcement can search for incriminating evidence by "just 'thumbing through'

the cell phone." Snyder, *supra* at 163.

Not only does this "increase the likelihood that highly personal information that is irrelevant to the subject of the lawful investigation will also be searched," but it also demonstrates the reasonableness, under *Katz,* of finding that an individual has a constitutionally protected expectation of privacy in cell phones. And it underscores the unreasonableness of searching cell phones unless law enforcement has a warrant, or is confronted with an exigent circumstance.

B. THE SEARCH INCIDENT TO ARREST DOCTRINE DOES NOT SUPPORT WARRANTLESS, POST-ARREST CELL PHONE SEARCHES.

As the Court stated in *Gant*, the "the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." 556 U.S. at 339. A cell phone implicates neither of these concerns—particularly after it is seized.

1. Safety is Not a Concern.

A cell phone is not—and cannot—be used as a weapon,[7] and "cannot hide weapons."[8] Thus, the

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[7] *See e.g.,* Marty Koresawa, *Pay Phone Protections in a Smart Phone Society: The Need to Restrict Searches of Modern Technology Incident to Arrest,* 45 LOY. L.A. L. REV. 1351, 1389

distinctions established in search incident to arrest jurisprudence, including "immediate control," and "lunging area," which were driven by safety concerns, do not apply in the cell phone search context. *Gant,* 556 U.S. at 339 (*quoting Chimel,* 395 U.S. at 763); *Diaz II*, 244 P.3d at 505. In *Gant,* Justice Scalia stated as follows:

> Since the historical scope of officers' authority to search vehicles incident to arrest is uncertain . . . traditional standards of reasonableness govern. It is abundantly clear that those standards do not justify what I take to be the rule set forth in *New York v. Belton* . . . and *Thornton:* that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons. When an arrest is made in connection with a roadside stop, *police virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car*

Gant, 556 U.S. at 351-52 (Scalia, J., concurring).

(2012).

8 *Id.* at 1389.

The same "less intrusive" means are available in the cell phone context. Police can seize the phone, and subsequently procure a warrant to search its contents.

2. Evidence Will Not Be Destroyed.

The only issue that ever arguably arises in a cell phone memory search context relates to the preservation of evidence. Importantly, however, unless an arrestee's cell phone has minimal storage capacity, an automatic delete function, or can be remotely deleted by a third party, the risk of losing evidence is remote.[9]

Modern cell phones "no longer store only a handful of recent text messages and phone calls and greatly expanded digital memories eradicate any real risk of automatic deletion."[10] Also, even though remote deletion "pose[s] a real and substantial risk of destroying evidence,"[11] it depends on factors that law enforcement can mitigate by *seizing*—but not *searching*—the phone. As one commentator explains, "for an arrestee to effectively erase evidence . . . (1) a phone must be enabled with remote wipe capabilities, (2) an accomplice must have access to the remote wipe program, and (3) there must exist some way for the arrestee to *contemporaneously alert*

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9 *See* Mireille Dee, *Getting Back to the Fourth Amendment: Warrantless Cell Phone Searches,* 56 N.Y.L. SCH. L. Rev. 1129, 1152 (2012).

10 *See, e.g.,* Beutler, *supra* note 2, at 394.

11 *Id.* at 395.

the accomplice of the arrest."[12] And even wiped data can often be forensically recovered.[13]

C. The Motor Vehicle Exception Does Not Support the Warrantless, Post-Arrest Search of a Cell Phone.

The Court has set forth several instances when a vehicle may be searched without a warrant. The first "permit[s] an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant,* 556 U.S. at 346. An officer may also search a "vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to "gain immediate control of weapons." *Gant,* 556 U.S. at 346-47 (quoting *Michigan v. Long,* 463 U.S. 1032, 1049 (1983)).

Additionally, a warrantless search of the entire vehicle is permissible if "there is *probable cause* to believe a vehicle contains evidence of criminal activity." *Gant,* 556 U.S. at 347 (*citing United States*

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[12] *Id.* (emphasis added).

[13] *See* David Goldman, *How police can find your deleted text messages*, CNN (May 22, 2013), *available at* http://money.cnn.com/2013/05/22/technology/mobile/smartphone-forensics/; *see also United States v. Seiver*, 692 F.3d 774, 776 (7th Cir. 2012) (deleted file recovery in a computer context).

v. Ross, 456 U.S. 798, 820–21 (1982)) (emphasis added); *see also Maryland v. Buie,* 494 U.S. 325, 334 (1990) (a limited protective sweep of a home is permissible in areas where an officer believes a dangerous person may be hiding). Finally, although *Ross* authorizes even broader searches for "evidence relevant to offenses other than the offense of arrest," it is intended to safeguard "*genuine* safety or evidentiary concerns" encountered during the arrest of a vehicle's recent occupant. *Gant,* 556 U.S. at 347 (emphasis added).

Proffered concerns about safety or preserving evidence in cell phone searches incident to arrest are not credible. They are pretext to go on a fishing expedition. Based on the quantity and quality of private information stored in cell phones, law enforcement has virtually unlimited access to an arrestee's private life, including confidential communications in a personal or professional setting, intimate messages to family members and loved ones, and internet search history. Furthermore, the only event that triggers such a search is the arrest itself, regardless of whether it is for Driving under the Influence of Alcohol or Premeditated Murder. And it is not intended to protect officer safety, preserve evidence, or even search for evidence relating to the crime of arrest. It is to search for any evidence of any crime in any *room* that law enforcement desires. In a nutshell, that is the essence of a general warrant.

To be sure, it is one thing to use a pen register to track a suspect's outgoing calls from a private residence. *See Smith v. Maryland*, 442 U.S. 735

(1979) (holding that law enforcement could use a pen register to track outgoing telephone calls from a suspect's private residence). It is quite another to go on a fishing expedition for evidence of any crime, particularly when there are no reasons to justify the search, and nothing to prevent law enforcement from seizing the phone and subsequently obtaining a warrant. There is nothing reasonable about this practice.

And reasonableness is the foundation for every exception to the warrant requirement. Under the public safety exception, for example, it is reasonable to allow officers to forego a search warrant prior to entering a building where they hear screams for help as they approach. *See United States v. Barone*, 330 F.2d 543, 544-45 (2d Cir. 1964), *cert. denied*, 84 S. Ct. 1940 (1964)). A plain view search is likewise reasonable; the officers had a right to be present where they saw the inculpating item in plain view, thus we need not call it a "plain view" search – under the Constitution, it is a reasonable search – the "plain view" label is just veneer. *See Coolidge v. New Hampshire*, 403 U.S. 443, 464-69 (1971).

On the other hand, it is not reasonable to conduct a warrantless search of a cell phone's memory merely because it was in the arrestee's pocket. The officer's safety is not threatened. There is little, if any, risk that the information will be deleted. Thus, relying on the "search incident to arrest" exception in this context is not merely stretching the doctrine "beyond its breaking point"; it is stretching reasonableness to a place that this Court should not be willing to go.

Thornton, 541 U.S. at 625 (Scalia, J. concurring).

Ultimately, the reason this Court has not endorsed a categorical warrant requirement is identical to that which gave rise to the above exceptions: it was reasonable to do so. Searching cell phones without a warrant or demonstrable exigency fails to satisfy this standard.

II. THE *RILEY* COURT APPLIED OLD, INAPPOSITE DOCTRINE TO A NEW PROBLEM, AND THE *WURIE* COURT DID NOT PROVIDE THE NECESSARY EXCEPTION FOR EXIGENT CIRCUMSTANCES.

A. *People v. Riley.*

In *People v. Riley*, the California Court of Appeals followed *Diaz*,[14] and upheld the warrantless search of defendant's cell phone because it was, "immediately associated with his person when he was arrested, and therefore the search of his cell phone was lawful whether or not an exigency still existed." *See People v. Riley*, No. D059840, 2013 WL 475242, at *6 (Cal. Ct. App. 4 Dist. Feb. 8, 2013), unpublished/noncitable, *review denied* (May 01, 2013), *cert. granted in part*, Riley v. California, ___ S. Ct. ___, No. 13-132, 2013 WL 3938997, 82 U.S.L.W. 3082 (Jan. 17, 2014). The California Court of Appeals reached the wrong result. The search was unlawful because it was not reasonable.

Even if the cell phone was immediately associated with Riley's "person," it neither threatened the officers' safety nor presented a risk that evidence would be destroyed. Tellingly, the Court of Appeals made no attempt to establish a

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[14] 81 Cal. Rptr. 3d 732 (Cal. Ct. App. 2008) ("*Diaz I*"), *aff'd*, 244 P.3d 501 (Cal. 2008) ("*Diaz II*"); *cert. denied sub. nom.*, *Diaz v. California*, 132 S. Ct. 94 (Oct. 3, 2011).

nexus between the *Chimel* justifications and the subsequent search of Riley's cell phone. Instead, the California Court of Appeals permitted an unfettered search of Riley's cell phone, essentially sanctioning a suspicionless fishing expedition into his personal life. As Judge Werdegar noted in his dissent, the majority's decision "sanctions a highly intrusive and unjustified type of search, one meeting neither the warrant requirement nor the reasonableness requirement of the Fourth Amendment to the United States Constitution." 244 P.3d at 518.

In doing so, the California Court of Appeals failed to make an important distinction between the privacy interests at stake. And that distinction is what lies at the heart of this case. The individual's expectation of privacy is not in a cell phone *as an object*, but as the safe keeper of the "papers" and "effects" that the Fourth Amendment has *always* deemed private. *See Diaz,* 244 P.3d at 517 (Werdegar, J., dissenting) ("the grounds for deeming an arrestee to have lost privacy rights in his or her *person* do not apply to the privacy interest in *data* stored on electronic devices"). In *Diaz,* Judge Werdegar explained as follows:

> In *Robinson,* the Supreme Court . . . explained that while warrantless searches of the person are ordinarily unlawful, [s]earch of the person becomes lawful when grounds for arrest and accusation have been discovered, and *the law is in the act of subjecting the body of the accused to its physical dominion . . .* It does not follow,

> however, that the police also have "'dominion . . . over the entirety of stored messages, photographs, videos, memoranda and other records an arrestee may be carrying on a mobile phone or smartphone. That an arrestees interest in his or her own privacy' " . . . is severely reduced does not imply a corresponding reduction in privacy of personal and business data. Even when they happen to be stored on a device carried on the person, these records are clearly distinct from the person of the arrestee.

Id. at 517-18 (Werdegar, J., dissenting) (*quoting Robinson,* 414 U.S. at 232; *Edwards,* 415 U.S. at 809). Put differently, "[a]n individual lawfully arrested and taken into police custody necessarily loses much of his or her *bodily* privacy, but does not necessarily suffer a reduction in the *informational* privacy that protects the arrestee's records." *Id.* at 517.

Surely, an individual has at least *some* expectation of privacy in personal documents stored on a cell phone, videos downloaded from YouTube, or private emails sent from an email account. While this does not immunize the information from a valid search, it does require law enforcement to have probable cause and a warrant—or sufficient justification for proceeding under one of the exceptions to the warrant requirement—before rummaging through such private space.

In *Riley,* law enforcement had neither, and the California Court of Appeals' "fanciful reliance upon

officer safety [should be recognized] for what it was: "a return to the broader sort of [evidence-gathering] search incident to arrest that we allowed before *Chimel*." *Thornton,* 541 U.S. at 631 (Scalia, J., concurring).

Of course, there is nothing problematic about saying that a cell phone is "immediately associated" with the person, if this term is construed as an association with the person's thoughts, private "papers," and personal "effects." Note, *Looking Back to Look Forward: Reexamining the Application of the Third-Party Doctrine to Conveyed Papers,* 37 HARV. J.L. & PUB. POL'Y 329, 330 (2014).

In *Wurie,* however, the First Circuit got it right, cell phone data searches are *categorically* unlawful under the search incident to arrest exception, given the government's failure to demonstrate that they are ever necessary to promote officer safety or prevent the destruction of evidence. *See Katz,* 389 U.S. at 353.

B. *United States v. Wurie.*

The First Circuit's decision in *Wurie* drew a better, but not sufficiently brighter, line. The Court recognized that unrestricted searches of an arrestee's cell phone were anything but reasonable:

> Since the time of its framing, "the central concern underlying the Fourth Amendment" has been ensuring that

> law enforcement officials do not have "unbridled discretion to rummage at will among a person's private effects" . . . Today, many Americans store their most personal "papers" and "effects," in electronic format on a cell phone, carried on the person. Allowing the police to search that data without a warrant any time they conduct a lawful arrest would, in our view, create "a serious and recurring threat to the privacy of countless individuals."
>
> * * *
>
> In reality, "a modern cell phone is a computer," and "a computer . . . is not just another purse or address book."

728 U.S. 1, 8, 14 (1st Cir. 2013) (internal citations omitted); *see also United States v. Jones*, 132 S. Ct. 945, 950 (2012) ("[a]t bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted'") (quoting *Kyllo v. United States,* 533 U.S. 27, 34 (2001)).

The First Circuit also recognized that the information stored on cell phones is the type of "information one would previously have stored in one's home and that would have been off-limits to officers performing a search incident to arrest."

Wurie, 728 U.S. at 8. The court stated as follows:

> 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 [allowing searches of cell phone memories as a bright-line 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, even for something as minor as a traffic violation.

Id. at 8-9.

Finally, the First Circuit flatly rejected the search incident to arrest justification, holding that "warrantless cell phone data searches strike us as a convenient way for the police to obtain information related to a defendant's crime of arrest – or other, as yet undiscovered crimes – without having to secure a warrant." *Id.* at 12-13. As the court correctly noted, "nothing in the Supreme Court's search-incident-to-arrest jurisprudence that sanctions such a general evidence-gathering search." *Id.* (quoting *Thornton* 541 U.S. at 632 (Scalia, J., concurring)).

More recently, in *Klayman,* the United States District Court for the District of Columbia held that

the National Security Agency's ("NSA") surveillance program, which consisted of the suspicionless collection of cell-phone metadata, likely constituted a search under the Fourth Amendment. 957 F. Supp. 2d at 37. In so holding the court explained that, because "people in 2013 have an entirely different relationship with phones than they did thirty-four years ago," the Government "metadata collection and analysis almost certainly does violate a reasonable expectation of privacy." *Id.* at 32, 36. The court recognized the "rapid and monumental shift towards a cell-centric culture," where metadata from each person's phone reveals " 'a wealth of detail about her familial, political, professional, religious, and sexual associations.' *Id.* at 36 (quoting *Jones,* 132 S. Ct. at 955-56). As this Court noted in *City of Ontario v. Quon*, "[t]hat might strengthen the case for an expectation of privacy." 560 U.S. 746, 760 (2010).

It does strengthen the case because times have changed. So too should this Court's view of privacy in the cell phone search context, which implicates privacy in ways that pre-digital case law could not foresee. *See United States v. Seljan*, 547 F.3d 993, 1014 (9th Cir. 2008) (Kozinski, J., dissenting), *cert. denied*, 129 S. Ct. 1368 (2009) ("[t]he reference to papers [in the Fourth Amendment] is not an accident; it's not a scrivener's error. It reflects the Founders' deep concern with safeguarding the privacy of thoughts and ideas--what we might call freedom of conscience--from invasion by the government"). Searching a cell phone's memory is, in essence, searching persons *and* their "papers," memories, thoughts, and historical locations. It gives

law enforcement license to forage through an individual's private life—and *mind*—where less intrusive methods are available to safeguard law enforcement's evidence gathering function.

III. ALLOWING THE SEIZURE OF AN ARRESTEE'S CELL PHONE, BUT PROHIBITING ITS WARRANTLESS SEARCH ABSENT EXIGENT CIRCUMSTANCES, PRESERVES LAW ENFORCEMENT'S INTERESTS AND PROTECTS PRIVACY.

Professors MacLean and Lamparello respectfully submit that the pragmatic approach would be to: (1) allow law enforcement to seize an arrestee's cell phone; (2) require a warrant and probable cause to search the phone's contents; and (3) provide a narrow exception for imminent substantial threats to human life and safety. This standard would bring more certainty and guidance in a jurisprudence that is currently unsettled. *See Diaz,* 51 Cal. 4th at 518 (Werdegar, J., dissenting) (instead of searching an arrestee's cell phone without a warrant, "the item can be taken from the arrestee and securely held until (assuming probable cause for a search exists) a warrant has issued").

In *Gant*, the Court inched in this direction when it held that a motor vehicle search incident to arrest was improper. 556 U.S. at 351-52. The Court recognized that, because the officers' safety was not at risk, and, because they had no reason "to believe evidence relevant to the crime of arrest might be found in the vehicle," there was no justification for

the search. The same is true here.

The time has come for a bright-line rule recognizing that individuals have an objectively reasonable expectation of privacy in the contents of their cell phones. That means the following: seizing the phone is permissible because it would prevent an arrestee from destroying evidence, coordinating with third parties to endanger officer safety, or remotely deleting the cell phone's memory. On the other hand, searching it without a warrant and probable cause, "would give authorities an open door into the most private details of an arrestee's life."[15] The only exception is when officers are faced with exigent circumstances. But the Court must also define the contours of this exception, so that it is not used to circumvent the rule.

A. *Remote Deletion is not a Sufficient Exigency.*

As discussed above, "[r]apid improvements in technology . . . have obviated the . . . concern[]" that "incoming calls or messages will replace recent calls or messages in a phone's memory." Beutler, *supra* note 2, at 394. Riley, Wurie, and other *Amici* have covered this issue at length. Remote deletion is such an attenuated risk, that it cannot suffice to justify a warrantless cell phone memory search incident to arrest.[16]

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[15] *Id.* at 1064.

[16] Even where officers are aware of an actual and specific risk of remote deletion, that risk can be obviated by the simple and

B. *Imminent and Substantial Threats to Life and Safety are Sufficient Exigencies.*

Where law enforcement officers have an objectively reasonable belief that an "immediate threat to [human] life or safety" exists, they should be entitled to search a cell phone without a warrant, limited to the areas ("rooms") in the cell phone where evidence relevant to the exigency itself could reasonably be found. Clifford S. Fishman, *Searching Cell Phones After Arrest: Exceptions to the Warrant and Probable Cause Requirements,* 65 RUTGERS L. REV. 995, 1002 (2013); *see also Michigan v. Fisher,* 558 U.S. 45, 47 (2009); *Diaz,* 244 P.3d at 518 (Werdegar, J., dissenting) ("where the arresting officers have reason to fear imminent loss of evidence from the device, or some other exigency makes immediate retrieval of information advisable, warrantless examination and search of the device would be justified").

One scholar explains the exigent circumstances exception as follows:

> [P]olice may enter premises and conduct a search without a warrant "to provide emergency assistance to an occupant," or to "enter a burning building to put

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inexpensive safeguards available today (for example, turn the phone off, remove its battery, place the phone in a Faraday enclosure, or make a mirror image of the phone's memory for subsequent search only *if and when* the officers obtain a search warrant).

> out a fire and investigate its cause." In such cases, the law not only dismisses the warrant requirement--in appropriate circumstances, the police may act even in the absence of probable cause.

Fishman, *supra* at 1003. Furthermore, to prevent the exception from swallowing the rule, law enforcement should be required to show that it had a reasonable belief that the exigency presented an imminent and substantial threat to the life or physical safety of others. While law enforcement does not need "ironclad" proof of an exigency, the Court should require that it does not encompass any threat, no matter how attenuated or speculative. *Fisher,* 558 U.S. at 49. The belief must be reasonable—as the Fourth Amendment requires.

It should also be sufficiently particular. A constitutional search pursuant to such an exigency must be limited to areas within the cell phone that are likely to uncover evidence relating to the exigency. In some situations, this may include initiating or responding to a call or text message, or reviewing the arrestee's recent phone calls or emails. Fishman, *supra* at 1004-05. It should not, for example, give officers license in every case to search the arrestee's Google search history or purchases on Amazon.com. Additionally, the search must cease when the exigency dissipates, or when officers discover evidence—in the cell phone or elsewhere—that allows them to effectively address the problem.

C. *The "Reasonable Relationship" Doctrine is Unworkable in the Cell Phone Context.*

What worked in *Gant*—which involved the search of an automobile—does not work when applied to cell phones. In other words, searches should not be allowed simply because the cell phone may contain evidence related to the crime of arrest. *See Gant,* 556 U.S. at 351. A cell phone stores far more information than can be found in a passenger compartment, a trunk, or a few closed containers.

Thus, the risk that officers will simply rummage through all "rooms" of the cell phone in an unfettered search for evidence far outweighs the convenience to law enforcement. Furthermore, given the minimal, even non-existent, risk that a cell phone's memory will be destroyed, there exist no reasons whatsoever that could justify such a warrantless search. Requiring officers to, instead, procure a warrant will allow a magistrate judge to confine the scope of every search, and describe with particularity the areas of a cell phone that are properly subject to a search.

D. *The "Third Party Doctrine" is Unworkable in the Digital Age.*

Some courts have relied on the third-party doctrine to hold that a cell phone user's Google searches and sent emails constitute a voluntary disclosure (thus surrendering Fourth Amendment protections), because the user knows that the search or email will be transmitted through a server. Jeremy H. Rothstein, *Track Me Maybe: The Fourth*

Amendment and the Use of Cell Phone Tracking to Facilitate Arrest, 81 FORDHAM L. REV. 489, 506 (2012) (discussing United States v. Miller, 425 U.S. 435, 442-43 (1976)).

Importantly, however, "the Supreme Court decisions that established the third-party doctrine are decades old," and cell phones, just as they are not containers or address books, are unlike "bank records voluntarily conveyed to banks in the ordinary course of business." *Id.* at 507-08 (discussing *Miller,* 425 U.S. at 442-43). They are also not comparable to "exposing numerical information to the telephone company," because individuals should not be required to "assum[e] the risk that the company would turn over that information to the government." *Id.* at 506.

If this reasoning were applied to cell phones, it would, in effect, condition the downloading and storage of traditionally private information, *e.g.*, confidential legal documents, upon the knowing waiver of constitutional rights. No conception of constitutional reasonableness can support this view, because it would result in an unconstitutional chill, through a *de facto* prior restraint, on speech and other expressive activity.

It would also require the assumption, under *Katz*, that individuals do not have an objectively reasonable expectation of privacy[17] in *otherwise-*

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17 *Katz* came to be seen as having held that the Fourth Amendment is triggered only where an individual can demonstrate both an objective and subjective expectation of privacy. 389 U.S. at 361-62 (Harlan, J., concurring).

private material simply because they know it may be viewed by an unidentified third party, for whatever reason, and disclosed to the government, for no reason. That logic might work for bank records that are given to tellers, or numbers that are dialed from a home phone. But it goes too far when applied to private information that reveals intimate details about individuals, and embraces a concept of disclosure that is incompatible with the role cell phones play in the digital age. Individuals using their cell phones to send text messages or emails, for example, are not 'disclosing' information in the traditional sense; they are capitalizing on the efficiency cell phones offer and the ubiquitous role they play in modern human interaction. Comparing a Google search to the act of handing over bank records to a teller fails to appreciate these differences, and ignores the fact the 'disclosure' in this context is not to a single person, but to the entire world. That requires more, not less, protection.

IV. THE COURT'S RULES IN THESE CASES WILL DRIVE CONSTITUTIONAL JURISPRUDENCE FOR DECADES NO MATTER WHERE THE DIGITAL AGE LEADS US; IT IS ESSENTIAL, THEREFORE, THAT THE COURT FASHION A BROAD RULE.

In the same way that *Katz* drove Fourth Amendment jurisprudence far beyond the phone booth,[18] the Court's decisions in these cases will

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[18] As surveyed by Louisville Professor Russell Weaver, *Katz* has been applied to digital era cases as disparate as officer use

drive Fourth Amendment rights far beyond flip phones, iPhones, and any other snapshot of today's digital age technologies. It is, therefore, incumbent on the Court to issue a bright-line rule that provides clear guidance to law enforcement, and added protections for individuals.

The Court's decision will also guide lower courts for decades as they struggle with new factual scenarios brought about by rapid advances in technology. Just as pre-digital era case law could not foresee these developments, this Court also cannot know the numerous issues that will arise as technology continues to evolve. A broad and categorical rule will help to eliminate some of the uncertainty. A narrow rule would invite chaos.

To be sure, some courts, in considering cell phone searches incident to arrest, have focused on the particular features and capabilities of the type of cell

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of flashlights, low-flying helicopters, aerial photography, radio transmitters, electronic listening devices, infrared technologies, and information conveyed through a third party. Russell L. Weaver, *The Fourth Amendment, Privacy and Advancing Technologies*, 80 MISS. L.J. 1131, 1186-1221, 1227 (2011) ("today, more than three decades after *Katz* was decided, it is not clear that the Court's [reasonable expectation of privacy] test is providing [privacy] protections, or that the test is capable of doing so"). Professors MacLean and Lamparello suggest that perhaps now is the time for the Court to consider abandoning the "reasonable expectation of privacy" approach in favor of a "constitutional reasonableness" test, focused on the reasonableness of safeguarding the "persons, houses, papers, and effects" that officers choose to search and seize, and the reasonableness of the officers' actions in searching and seizing them, with or without a warrant.

phone before them. But this Court, issuing just 100 or so formal opinions per year, may not revisit the issues raised in *Riley* and *Wurie* for many years. Therefore, this decision must stand the test of time.

Professors MacLean and Lamparello suggest that the Court and society would be best served by decisions in *Riley* and *Wurie* that look beyond flip phones and iPhones. Perhaps denominating the rule as applicable to "digital storage devices,"[19] rather than to cell phones of this type or that, would be sufficient. Whatever rule is adopted, and whatever language employed, it should include a requirement that already has stood the test of time: reasonableness.

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[19] Digital storage devices, as used here, could include digital data storage instruments capable of storing substantial quantities of the types of "papers" and "effects" protected by the Fourth Amendment, including cell phones, smartphones, laptop computers, tablet computers, thumb drives, external storage devices, DVDs, and the like as those technologies expand in the future.

CONCLUSION

For these reasons, and those set forth by Petitioner, the judgment in *Riley v. California* should be reversed, and the judgment in *United States v. Wurie* should be affirmed with the modifications addressed herein.

Respectfully submitted,

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