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 *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police, acting without a warrant, to search the digital contents of a cell phone seized by police incident to arrest, where there is no plausible risk that the cell phone presents a danger to the arresting officer or that the arrestee might destroy evidence.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing *pro bono* legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties that many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

The Rutherford Institute is interested in this case because the Institute is committed to ensuring the continued vitality of the Fourth Amendment. A decision reversing the First Circuit would effectively eliminate the warrant requirement for police searches of individuals' most personal and private

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk of the Court.

information—the contents of their cell phones—whenever a person happens to be arrested. Such a decision would erode the preference for a warrant, absent true exigent circumstances, and would jeopardize all citizens' Fourth Amendment rights.

SUMMARY OF THE ARGUMENT

First, cell phone data include extraordinary volumes of the most personal and private information an individual possesses. Such data are entitled to constitutional protection consistent with the very highest expectations of privacy.

Second, the scope of warrantless searches incident to arrest must be limited to ensure consistency with the two fundamental concerns—officer safety and evidence preservation—that justify the exception to the warrant requirement.

Third, police searches of cell phone data plainly exceed the scope of search permitted incident to arrest. Unlike seizure of the physical cell phone, warrantless police intrusion into the digital contents is unnecessary to protect the arresting officer or to guard against the arrestee destroying evidence. Absent such exigency, there is no reason to abandon the traditional—and important—benefits provided by the warrant requirement.

Finally, there is no justification for warrantless searches by police of cell phone data based on a belief that the data contain evidence of the offense of arrest. Absent exigency—and once the phone is reduced to police custody there is no exigency—there is no justification for proceeding with the search before a neutral magistrate can rule

on the search's propriety and, if appropriate, set forth its proper scope in a particularized warrant.

ARGUMENT

I. CELL PHONE DATA PRESENT THE VERY HIGHEST EXPECTATION OF PRIVACY

Cell phones contain the most personal and private information one possesses, *e.g.*, written communications and notes, financial information, health records, video and audio recordings, and photographs. They contain such data, moreover, in extraordinary volume. For example, Apple Inc. sells cell phones that offer from 16 to 64 gigabytes in storage,[2] with each gigabyte capable of holding the contents of ten yards of books on a shelf.[3] Cell phone data thus represent the modern equivalent of an individual's personal files, correspondence, and papers, which have always enjoyed a strong Fourth Amendment expectation of privacy. *See, e.g.*, *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987) (files); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (personal correspondence).

The personal and private files and records stored on cell phones are the sort that historically would have been "stored in one's home and that would have been off-limits to officers performing a search incident to arrest." *United States v. Wurie*,

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[2] *See, e.g.*, Shop iPhone, http://store.apple.com/us/buy-iphone/iphone5s (last visited April 3, 2014).

[3] *See, e.g.*, *United States v. Salyer*, No. CR S-10-0061, 2011 WL 1466887, at *1 n.2 (E.D. Cal. Apr. 18, 2011).

728 F.3d 1, 8 (1st Cir. 2013). The portability resulting from recent technological advances in digital storage does not undermine one's privacy interest in such data. A cell phone's "mobility [does not] justify dispensing with the added protections of the Warrant Clause." *United States v. Chadwick*, 433 U.S. 1, 13 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

The expectation of privacy is strengthened by recognition that any given cell phone may also contain information protected by the First Amendment or the attorney-client privilege. *See, e.g.*, *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("scrupulous exactitude" required where material to be searched may include constitutionally protected material) (internal quotes and citation omitted); *cf. City of Ontario, Cal. v. Quon*, 560 U.S. 746, 760 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.").

The searches at issue thus involve massive volumes of the most personal and private data. Even acknowledging that an individual has a generally reduced expectation of privacy at the time of his or her arrest, *see, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1978 (2013), the balance of private and government interests here requires application of the traditional warrant requirement.

II. THE FOURTH AMENDMENT LIMITS THE SCOPE OF SEARCHES INCIDENT TO ARREST TO WHAT IS NECESSARY TO PROTECT THE ARRESTING OFFICER OR TO PRESERVE EVIDENCE

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (internal quotes and citation omitted). This requirement that police secure a warrant is "subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (internal quotes and citation omitted).

The exceptions to the warrant requirement "have been jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958). They are justified only by "a showing by those who seek exemption" from the warrant requirement that "the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948).

This case involves the warrant exception for searches incident to arrest. As the Court has repeatedly explained, two specific exigencies justify warrantless search in this situation: "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v. Iowa*, 525 U.S. 113, 116-17 (1998) (citations omitted).

A. Police Need Not Prove on a Case-by-Case Basis that a Search Will Produce Weapons or Endangered Evidence

United States v. Robinson, 414 U.S. 218 (1973), makes clear that there is no need for the police to consider, case-by-case, whether searching the person of an arrestee is likely to find a weapon or to prevent destruction of evidence. In *Robinson*, police searched an arrestee's person, finding a crumpled cigarette pack that contained "objects" that the officer could not identify. *Id.* at 222. Concerned that unidentified objects might be weapons such as a razor blade or live bullets, *see United States v. Robinson*, 471 F.2d 1082, 1118 (D.C. Cir. 1972) (Wilkey, C.J., dissenting), the officer examined them and discovered heroin. 444 U.S. at 222.

The Court explained that the "authority to search the person incident to a lawful custodial arrest, while based on the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* at 235. Rather, "[i]t is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.*

B. Police Must Limit the Scope of the Search to What Is Reasonably Necessary to Locate Weapons or Endangered Evidence

Though *Robinson* makes clear that the fact of arrest—without more—justifies a search incident to arrest, the Court has uniformly insisted that the *scope* of that search be consistent with the exigencies justifying the exception in the first place. In *Chimel v. California*, 395 U.S. 752 (1969), for example, the Court rejected the notion that police could search the arrestee's entire house incident to his arrest at that location. Because the scope of searches incident to arrest "must be strictly tied to and justified by the circumstances which rendered its initiation permissible," police were required to limit their search to "the arrestee's person and the area 'within his immediate control'—*construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence.*" 395 U.S. at 761, 762-63 (emphasis added and citation omitted).

In *United States v. Chadwick*, 433 U.S. 1 (1977), similarly, the Court found that police could not search, incident to arrest, a locked footlocker defendant had placed in the still-open trunk of his automobile. Searching the footlocker would address neither of the exigencies justifying the search-incident-to-arrest exception: "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy

evidence, a search of that property is no longer an incident of the arrest." *Id.* at 15 (footnote omitted).

In *Arizona v. Gant*, 556 U.S. 332 (2009), finally, the Court found it unreasonable for police to search the interior of an arrestee's car after the arrestee was safely locked in the patrol car. The Court squarely re-affirmed *Chimel*'s holding that searches incident to arrest could encompass only "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Id.* at 339 (quoting *Chimel*, 395 U.S. at 763; internal quotes omitted). Warrantless searches outside that clearly defined scope do not survive Fourth Amendment scrutiny: "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.*

III. THE FOURTH AMENDMENT DOES NOT PERMIT THE WARRANTLESS SEARCH OF CELL PHONE DATA INCIDENT TO ARREST, BECAUSE THERE ARE NO EXIGENCIES TO JUSTIFY THE EXEMPTION

A. There Is No Exigent Need to Search Cell Phone Data at the Time of Arrest

The police unquestionably have the right to search an arrestee's person and to seize the arrestee's physical cell phone. *See, e.g.*, *Robinson*, 414 U.S. at 235. But neither of the concerns that underlie the search-incident-to-arrest exception—

securing weapons and destructible evidence—justifies going further and conducting a warrantless search of the cell phone's data.

Such a search is plainly not necessary to "disarm the suspect." *Knowles*, 525 U.S. at 116. Any concern that the arrestee might try to hurt the arresting officer with the cell phone is addressed fully once the officer has taken the phone into physical custody. *See Chadwick*, 433 U.S. at 15 (noting that once police had reduced luggage "to their exclusive control," there was no longer any danger that "the arrestee might gain access to the property to seize a weapon") (footnote omitted).

Nor is a warrantless search of cell phone data necessary to preserve evidence, for at least three independent reasons. *First*, once the police have taken both the arrestee and the cell phone into custody, there is no plausible risk that the *arrestee* will destroy evidence (*e.g.*, by remotely "wiping" the cell phone). Third parties might theoretically try to wipe the phone or otherwise destroy evidence, but the focus of the search-incident-to-arrest exception is on the potential actions of the *arrestee*, not third parties. *See Chadwick*, 433 U.S. at 15 (focusing on "danger that the *arrestee* might gain access to the property to seize a weapon or destroy evidence") (emphasis added and footnote omitted); *Chimel*, 395 U.S. at 768 (disapproving search that "went far beyond the petitioner's person and that area from within which *he* might have otherwise obtained either a weapon or something that could have been used as evidence against him") (emphasis added).

The Court has never held or suggested that the search-incident-to-arrest exception permits warrantless searches to prevent *third parties* from destroying evidence in response to the arrest of their associate. Because there was no plausible risk that the *arrestee* would destroy the cell phone's data once police had seized the phone, there was no exigency justifying a warrantless search.

Second, the United States offers no evidence that the risk of remote cell phone wiping is any more than ephemeral. *See, e.g.*, *Gant*, 556 U.S. at 352 (Scalia, J., concurring) (noting that the government had failed to provide "a single instance" in which a formerly restrained arrestee had escaped and retrieved a weapon from his vehicle); *United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("the burden is on those seeking the [warrant] exemption to show the need for it") (citation omitted). Millions of Americans are arrested every year in possession of cell phones. If the United States is unable to offer a single example of "remote wiping" that has actually taken place, it is difficult to view the risk as anything more than purely theoretical.

Finally, even if remote cell phone wiping were a non-trivial concern, police can eliminate the risk in numerous ways less intrusive than warrantless search. As the briefs before the Court amply demonstrate, police can eliminate the risk entirely through routine steps, including: (a) turning the cell phone off (*see, e.g.*, Brief *Amicus Curiae* of the DKT Liberty Project in Support of Petitioner at 12-13, *Riley v. California* (No. 13-132)); (b) removing the cell phone's battery (*see, e.g.*, Brief of *Amicus Curiae* Electronic Privacy Information Center (EPIC) and

Twenty-Four Technical Experts and Legal Scholars in Support of Petitioner at 34, *Riley v. California* (No. 13-132)); (c) placing the cell phone in an inexpensive Faraday bag or in aluminum foil (*id.* at 36-39; Brief of *Amici Curiae* Criminal Law Professors in Support of Petitioner at 4-12); or (d) copying the cell phone's data (*see, e.g.*, Brief for Petitioner at 22-24, *Riley v. California* (No. 13-132)).

B. Absent Exigent Circumstances, There Is No Reason to Abandon the Recognized Benefits of the Warrant Requirement

Because there is no need immediately to search the digital contents of an arrestee's cell phone, there is no legitimate reason to abandon the traditional benefits of the warrant requirement. Upholding the warrant requirement in this context would not deny the police access to evidence, it would simply permit the probable cause determination to be made by a neutral and detached magistrate instead of by police. *See Coolidge*, 403 U.S. at 449.

Applying the traditional warrant requirement will also ensure that any police search is carefully limited to the specific areas of cell phone data for which there is probable cause. The Framers adopted the Fourth Amendment, in part, to guard against abuses of the English "general warrant," which allowed officers of the Crown to "search where they pleased." *Stanford v. Texas*, 379 U.S. 476, 482 (1965) (citation omitted). Accordingly, this Court has repeatedly instructed that the Fourth Amendment forbids police from "indiscriminate

rummaging" through an individual's papers and records. *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 62 (1974); *see Coolidge*, 403 U.S. at 467 (Amendment forecloses "general exploratory rummaging").

Instead, the Fourth Amendment requires a particularized warrant in which a neutral magistrate specifies the exact parameters of the permissible search. *See Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (noting the requirement that warrants be particular); *Maryland v. Garrison*, 480 US. 79, 84 (1987) (warrant must define "the specific areas and things for which there is probable cause to search") (citations omitted).

Given the vast amount of data stored on modern cell phones, this narrowing and limiting feature of the warrant requirement is particularly important. Cell phone digital data represent the equivalent of bookshelves of an individual's papers and records. Absent exigent circumstances, the Fourth Amendment's fundamental purposes are best served by required a particularized warrant that clearly defines the specific portions of that data the police have probable cause to search.

C. The United States Identifies No Precedent Supporting the Warrantless Search of Cell Phone Data

The United States argues that the Fourth Amendment affords police unlimited discretion to search anything found on an individual's person at the time of arrest, without regard to the scope of the search or the need to secure weapons and prevent destruction of evidence. This is not so.

Robinson (*see* Pet'r Br. at 17-18) is a straightforward example of the police's unquestioned right to search an arrestee's person to "remove any weapons" and to "search for and seize any evidence on the arrestee's person *in order to prevent its concealment or destruction.*" 414 U.S. at 226 (emphasis added) (internal quotation marks and citation omitted). While frisking an arrestee, police found a crumpled cigarette pack. It contained "objects" that the police officer could not identify, though he "knew they weren't cigarettes." *Id.* at 223. Concerned that that the unidentified objects might be weapons such as a razor blade or bullets, *see* 471 F.2d at 1118, the officer examined them and discovered heroin.

The most straightforward reading of *Robinson* (as well as cases like *Michigan v. DeFillippo*, 443 U.S. 31 (1979) and *Gustafson v. Florida*, 414 U.S. 260 (1973) (*see* Pet'r Br. at 24)), is that an officer, having found unidentified objects that might be dangerous, was justified in investigating to determine what they were. *Nothing* in *Robinson*, *DeFillippo*, or *Gustafson* suggests that the police could have opened the cigarette pack to see if it contained internal writing, let alone approves a search of cell phone data that is plainly neither dangerous nor in danger of destruction while the police secure a proper warrant.

United States v. Edwards, 415 U.S. 800 (1974) (*see* Pet'r Br. at 18-19), explicitly disclaimed any *per se* rule eliminating the warrant requirement as applied to "postarrest seizures of the effects of an arrestee." 415 U.S. at 808 (footnote omitted). To the contrary, the *Edwards* decision held only that arrest

reduced an individual's privacy interests—"for at least a reasonable time and to a reasonable extent" with respect to "weapons, means of escape, and evidence." *Id.* at 808-09.

People v. Chiangles, 142 N.E. 583 (N.Y. 1923) (*see* Pet'r Br. at 25), similarly, stands for the unremarkable principle that an arresting peace officer "must be empowered to disarm" and if "he may disarm, he may search, lest a weapon be concealed." *Id.* at 584. To the extent this search discovers documentary or other evidence of guilt, the police of course seize such "fruits or evidences of crime." *Id.* (citation omitted). This is also the substance of *Welsh v. United States*, 267 F. 819 (2d Cir. 1920) (*see* Pet'r Br. at 25).

Hill v. California, 401 U.S. 797 (1971), and *Marron v. United States*, 275 U.S. 192 (1927) (*see* Pet'r Br. at 26), are simply examples of pre-*Chimel* decisions upholding broad searches of the arrestee's premises at the time of the arrest. It is unlikely that the Court would have upheld the searches in either *Hill* or *Marron* had they been decided under the Fourth Amendment principles clarified in *Chimel.*

Nor is there any principled or logical basis for the United States' proposed distinction between a cell phone found on the *person* of an arrestee—which it argues can be searched without limitation—and one found *next* to the arrestee at the time of the arrest (which the United States concedes is subject to warrantless search only if some exigent circumstance is present). *See* Pet'r Br. at 8-9.

Wholly apart from the absurdity of the warrant requirement turning on a few inches

location at the time of arrest, this Court has made clear that the warrant requirement can be dispensed with only where the "*balance* of privacy interests and governmental interests" justifies doing so. *See Nat'l Treasury Emps. Union v. Von Rabb*, 489 U.S. 656, 666 (1989) (emphasis added). The government's argument that "the reduced expectations of privacy triggered by the fact of arrest," Pet'r Br. at 19 (citation omitted), justify a *per se* rule allowing unlimited warrantless search of anything found on the arrestee's person entirely ignores the other side of that crucial balancing test. That is, even if the balance of interest justified a warrantless search of the unidentified cigarette pack objects in *Robinson*, a very different balance is presented by the voluminous personal files contained in the data memory of a cell phone.[4]

[4] There are lower court decisions upholding searches of, for example, paper notes contained in the arrestee's wallet and telephone numbers from a pager found on the arrestee's person. *See Wurie*, 728 F.3d at 15-16 (Howard, C.J., dissenting) (collecting cases). To the extent these cases approve searches that go beyond the reasonable scope necessary to guard against weapons or the arrestee's destruction of evidence, we respectfully submit that they were wrongly decided for the reasons discussed above.

D. Nor Is It Reasonable to Permit Warrantless Searches of Cell Phone Data Based on Reason to Believe the Data Contains Evidence of the Offense of Arrest

Equally meritless is the United States' alternative argument that warrantless searches of cell phone data are permitted whenever there is a basis to believe the data contain evidence related to the offense of arrest. *See* Pet'r Br. at 45-48. Once the police have seized the cell phone and reduced it to custody, there is no appreciable risk the arrestee could use it as a weapon or destroy any evidence it might contain. *See supra* § III(A). Absent such exigency, there is no justification for proceeding with the search before a neutral magistrate can rule on its propriety and, if appropriate, define its proper scope through a particularized warrant. *See supra* § III(B).[5]

CONCLUSION

Police can and will routinely search the persons of those they arrest. They will seize cell phones as found. Once they have taken a cell phone into their custody, there is no remaining danger that

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[5] Similarly, there is no justification for the United States' suggestion that the police be permitted to decide the search's propriety based on a balancing of governmental and private interests. *See* Pet'r Br. at 49-55. Absent exigency, there is no reason that the balancing of these interests should not be done by a neutral magistrate in the course of deciding whether to issue a warrant. *See supra* § III(B).

the arrestee could use the cell phone to injure the arresting officer or to destroy evidence. Under these circumstances, the "justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 556 U.S. at 339.

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