No. 13-212

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BRIMA WURIE

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

REPLY BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Neither respondent nor his amici seriously dispute three basic propositions: (i) that since the Founding officers have conducted full evidentiary searches of individuals lawfully arrested on probable cause to find evidence of the crime of arrest, including the examination of objects, containers, and written material; (ii) that in an unbroken series of decisions from 1914 to 2013, this Court has recognized that this historical search authority applies categorically; and (iii) that if an officer does not search an unlocked cell phone as soon as she finds it, a significant risk exists that the police will never be able to recover evidence contained on the phone. Nevertheless, respondent contends that the appropriate legal rule for a cell phone is that the police may *never* search it incident to arrest absent an articulable exigency: in other words, an inversion of

the traditional rule in the circumstance in which that rule is most needed.

Nothing justifies that extraordinary result, and it should be rejected. Respondent would have this Court disregard history and the very real practical problems inherent in cell-phone searches in favor of entirely unsubstantiated fears that officers will use their authority to explore the private lives of people arrested for jaywalking and littering. At a minimum, respondent and his amici have failed to articulate any sensible justification for rejecting even the narrower approaches suggested by the government in its opening brief, which would preserve officers' traditional authority to some degree while dispelling concerns about pretextual arrests or limitless "exploratory" searches. Although respondent purports to apply settled constitutional principles to a 21st Century technology, his position would place law-enforcement officers at a greater disadvantage in their efforts to apprehend and punish criminals than ever before. The Fourth Amendment does not compel that outcome.

A. This Court Should Not Exempt Cell Phones From Officers' Search-Incident-To-Arrest Authority

1. Under the time-honored principle confirmed in *United States* v. *Robinson*, 414 U.S. 218 (1973), an officer may conduct a full evidentiary search of any object found on a person who is lawfully arrested.

a. Respondent does not satisfactorily reconcile his proposed rule with the holding of *Robinson*—or, for that matter, *Gustafson* v. *Florida*, 414 U.S. 260 (1973),

United States v. *Edwards*, 415 U.S. 800 (1974),[1] or *Michigan* v. *DeFillipo*, 443 U.S. 31 (1979), or the numerous other decisions recognizing that the "search[] of a person incident to arrest" is an "exception[] to the warrant requirement that appl[ies] categorically." *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1559 n.3 (2013). If respondent were correct that an on-the-spot search of a cell phone is unreasonable because an officer "may seize a cell phone possessed by an arrestee and hold it pending the issuance of a warrant" (Br. 7), then *Robinson*, *Gustafson*, *Edwards*, and *DeFillipo* were all wrongly decided, because the same could be said of any package or object. Although a container found on an arrestee's person could contain a weapon or destructible evidence (*id.* at 22-23), those risks can be fully mitigated by moving the package out of reaching distance of the arrestee.[2] The rule recognized in *Robinson* thus makes sense only in light of officers' broad historical authority to "search the person of the accused when legally arrested, *to discover and seize the fruits or evidences of crime*." *Weeks* v. *United States*,

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[1] Respondent (Br. 26) is incorrect that the defendant in *Edwards* challenged "only [the] seizure" of his clothing, not "the subsequent search." See Resp. Br., *Edwards*, *supra* (No. 73-88), 1973 WL 172386. The government argued in favor of both procedures. U.S. Br., *Edwards*, *supra* (No. 73-88), 1973 WL 173802.

[2] The crumpled cigarette package in *Robinson* could not have contained a firearm or bowie knife, but respondent correctly notes (Br. 22-23) that the D.C. Circuit dissent had argued that it could have contained a small object like a razor blade that might have been used to injure the arresting officer. The United States echoed that suggestion in this Court, see U.S. Br., *Robinson*, *supra* (No. 72-936), at 34, 1973 WL 173865, but the Court's holding did not turn on that possibility.

232 U.S. 383, 392 (1914) (emphasis added). That authority rests both on the critical law-enforcement interest in gathering relevant evidence as soon as practicable after an arrest and on the arrestee's reduced expectation of privacy in his person.

Respondent reads *Robinson* to establish a "presumption" (Br. 22-23) that the narrow interests identified in *Chimel* v. *California*, 395 U.S. 752 (1969)—officer safety and evidence preservation—are advanced by the search of any physical container found on the person of an arrestee. But *Robinson* did not refer to any "presumption." Nor did it frame the authority to search an arrestee's person as merely an application of *Chimel*. Rather, *Robinson* explained that the authority to search the person "ha[s] been treated quite differently" from the authority to search the premises of arrest addressed in *Chimel*. 414 U.S. at 224. The first authority has been "settled from its first enunciation," *ibid.*, and requires "no additional justification" beyond the lawful arrest, *id.* at 235.

Although respondent is correct that "[t]he permissible scope of a search incident to arrest fluctuated for the first half of the twentieth century" (Br. 14), that uncertainty existed only with respect to the premises of arrest, not the person of the arrestee. That fundamental distinction is explicitly recognized in cases on which respondent relies. For example, *Mincey* v. *Arizona*, 437 U.S. 385 (1978) (cited at Resp. Br. 35-36), which held that a warrantless search of an apartment incident to a homicide arrest violated the Fourth Amendment, distinguished *Robinson* and *Edwards* by explaining that "one who is legally taken into police custody has a lessened right of privacy in his person." *Id.* at 391. The same distinction was recognized in

United States v. *Chadwick*, 433 U.S. 1, 15, 16 n.10 (1977), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991). See U.S. Br. 21-22.

Respondent also cites (Br. 25) this Court's observation in *Maryland* v. *King*, 133 S. Ct. 1958 (2013), that custody alone does not mean that "*any* search is acceptable." *Id.* at 1979 (emphasis added). But the Court's examples—"a search of the arrestee's home," citing *Chimel*, and "invasive surgery," *ibid.*—differ fundamentally from the search of an item containing information found on an arrestee's person. Those items—be they wallets, diaries, letters, or address books—have long been held searchable by virtue of the arrest. No different rule is required for cell phones.

b. Neither respondent nor his amici substantially address the original understanding of the Fourth Amendment or the 19th Century cases indicating that search-incident-to-arrest authority was understood to serve the general interest in gathering evidence of the crime of arrest. Although Justice Scalia's concurrence in *Thornton* v. *United States*, 541 U.S. 615 (2004), noted some support for a rule cabined by the *Chimel* objectives, he cited for that proposition no cases holding unlawful a search of the person incident to arrest (including papers found on the person), and he noted that "[n]umerous" authorities support the broader understanding. *Id.* at 629-631; cf. *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C.P. 1765) (holding unlawful seizure of papers found in *home* of individual where both the arrest and search were conducted under a general warrant).

Respondent believes (Br. 18) that a sentence from *Dillon* v. *O'Brien & Davis*, 16 Cox C.C. 245 (Exch.

Div. Ir. 1887), supports his view that the only evidentiary purpose of a search incident to arrest is to protect evidence from concealment or destruction until a warrant can be obtained. But that view cannot be reconciled with the decision's explanation that the government may use "letters from co-traitors evidencing the common treasonable design" and other material seized during an arrest as "evidence at the trial." *Id.* at 248. If preventing concealment or destruction were the only purpose of a search incident to arrest, authorities could hardly *read* seized papers and introduce them in judicial proceedings without obtaining a warrant. Yet that has long been the rule. See *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (Hand, J.) ("[T]he law has never distinguished between documents and other property found upon the person of one arrested."); see also, *e.g.*, *People* v. *Chiagles*, 142 N.E. 583, 583 (N.Y. 1923) (Cardozo, J.); *Welsh* v. *United States*, 267 F. 819, 821 (2d Cir.), cert. denied, 254 U.S. 637 (1920).

Respondent also asserts (Br. 42) that no decision of this Court has "held that items such as address books and papers may be read without a warrant incident to arrest pursuant to *Robinson*." But as the United States has explained, this Court held that officers could read a diary incident to arrest in a pre-*Chimel* house search. U.S. *Wurie* Br. 25-26 (citing *Hill* v. *California*, 401 U.S. 797, 799-802 & n.1 (1971)). Respondent, moreover, cites no circuit decisions from any period holding that officers may not examine written material found in a search incident to arrest, in contrast to the numerous decisions cited by the United States. The categorical rule he favors thus threat-

ens to destabilize the long-settled legal framework that governs searches incident to arrest.

c. Respondent and his amici also characterize the distinction between a cell phone found on an arrestee's person and a cell phone within his reaching distance as arbitrary. See, *e.g.*, Rutherford Inst. Amicus Br. 14-15. But the basic distinction between items associated with a person and other items runs throughout this Court's search-incident-to-arrest precedents. A cigarette package found on the person of an arrestee can be searched in every case, see *Robinson*, 414 U.S. at 222-223, but a cigarette package sitting on the car seat next to him cannot be searched once he has been handcuffed and placed in a squad car (unless officers have reason to believe the vehicle contains evidence relevant to the offense of arrest), see *Arizona* v. *Gant*, 556 U.S. 332, 351 (2009).

Any legal rule that applies to a particular physical area can seem arbitrary at the margins. Cf., *e.g.*, *Bailey* v. *United States*, 133 S. Ct. 1031, 1042 (2013) ("A spatial constraint defined by the immediate vicinity of the premises to be searched is * * * required for detentions incident to the execution of a search warrant."). But this Court has recognized that items "immediately associated with the person of the arrestee" enjoy a lesser expectation of privacy than other items, *Chadwick*, 433 U.S. at 15, 16 n.10, just as an arrestee himself can be subjected to significant privacy deprivations upon arrest despite the fact that his home retains the same constitutionally protected status, *e.g.*, *Mincey*, 437 U.S. at 391.

2. a. In its opening brief and its amicus brief in *Riley* v. *California*, No. 13-212, the United States explained that even if the *Chimel* justifications were

thought to limit officers' authority to search objects found on the person of an arrestee, searching an arrestee's cell phone immediately upon arrest is often critical to protecting evidence against concealment in a locked or encrypted phone or remote destruction. The numerous party and amicus briefs in these cases have not seriously undermined that fundamental practical point. Although the briefs identify various techniques to prevent the remote-wiping problem (none of which is close to perfect), they barely address the principal problem that the government identified: automatic passcode-locking and encryption. For his part, respondent only perfunctorily addresses that issue, asserting that the government has provided "no information" on the scope of the problem. Resp. Br. 31. That is not so. In its two prior briefs, the United States provided extensive citations to forensic authorities and guidelines detailing the immense challenges that passcode-locking and encryption pose to law-enforcement investigations. See U.S. *Wurie* Br. 34-37; U.S. *Riley* Br. 11-14.

With respect to remote wiping, moreover, an amicus brief on behalf of law-enforcement organizations has documented instances in which that tactic successfully destroyed evidence—circumstances that are not likely to be described in reported judicial decisions because evidence cannot be introduced in a trial if it no longer exists. For example, in one California case, the members of a narcotics-trafficking organization "admitted that they had a security procedure, complete with an IT department, to immediately and remotely wipe all digital evidence from their cell phones." Association of State Criminal Investigative Agencies *Riley* Amicus Br. 9. And because remote-

wiping capability is widely and freely available to all users of every major mobile communications platform, individuals have used the same tactic. See U.S. *Riley* Br. 19-20. That problem will only increase as mobile technology improves and criminals become more sophisticated.

Respondent's amici also argue that remote wiping by confederates is irrelevant in a *Chimel* analysis because it is not physically triggered by the arrestee himself. See Nat'l Ass'n of Fed. Defenders et al. Amicus Br. 4-7. But this Court has never held (because the question has never arisen) that the ability of a third party to destroy evidence in police custody is not a relevant consideration under *Chimel*, and that distinction is not sensible. Whether information can be destroyed by the arrestee or by a confederate, the governmental interest is the same: the preservation of evidence. And in both cases—unlike, for example, a home-computer search—the arrestee has a reduced expectation of privacy in the item already lawfully seized from his person incident to the arrest.

But even if amici were correct in their premise that threats from third parties cannot justify the search of a cell phone incident to arrest, they ignore the principal justification in the government's opening brief—the threat of passcode-locking and encryption—as well as newer "geofencing" technologies that will enable individuals to preset their phones to automatically wipe in certain circumstances. Those tactics are not the actions of third parties, but rather automatic functions that an arrestee—potentially with police investigation in mind—can program into his phone.

b. Three additional points about the governmental interests at stake here bear emphasis.

First, the exigent-circumstances doctrine is a totally inadequate solution to the problems that the government has identified. That doctrine requires officers to evaluate "the facts and circumstances of the particular case" in deciding whether to conduct a search. *McNeely*, 133 S. Ct. at 1560. But the arresting officers will rarely know whether passcode locking or remote wiping is a particularized threat. Cell-phone searches thus are unlike the warrantless blood draws that this Court considered in *McNeely*, where the facts bearing on the exigent-circumstances analysis, such as the rate at which alcohol dissipates from the bloodstream and the likely delay before a warrant could be obtained, are known to officers before they need to make a decision. Unlike in *McNeely*, officers who seize a cell phone may well be "confronted with a 'now or never' situation," *id.* at 1561 (internal quotation marks and citation omitted), but they will realize that fact only when it is too late.

Second, the United States has explained why interposing a warrant requirement in this circumstance is likely to lead to the loss of evidence. Respondent incorrectly suggests otherwise. But to the extent the Court concludes that significant factual uncertainty remains about law-enforcement agencies' ability to preserve evidence from cell phones other than by examining the phone at the scene of an arrest, that uncertainty favors retaining the traditional *Robinson* rule for cell phones at least until the technological questions are resolved. U.S. *Riley* Br. 21-22 (citing *City of Ontario, Cal.* v. *Quon*, 130 S. Ct. 2619, 2629 (2010)). Basing a novel Fourth Amendment restriction on an incomplete understanding of a fast-evolving technology risks awarding offenders, and es-

pecially sophisticated criminal organizations, a powerful new tool to evade apprehension and punishment.

Third, even if some of the techniques that respondent and his amici have identified for preserving cellphone evidence until a warrant can be obtained can be effective in particular cases, that would not justify eliminating officers' historical search-incident-to-arrest authority in this context. As *Edwards* explained, when asking whether a particular category of warrantless searches complies with the Fourth Amendment, it is "no answer to say that the police could have obtained a search warrant": the relevant question is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable." 415 U.S. at 807 (citation omitted). This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Quon*, 130 S. Ct. at 2632 (internal quotation marks omitted); see *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557-558 n.12 (1976) ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.") That mode of analysis would be particularly unsuited to this context, in which some of the proposed solutions to the evidentiary problems posed by cell phones, like the use of Universal Forensic Extraction Devices, would impose substantial financial and logistical costs on law-enforcement agencies and therefore could "unjustifiably interfer[e] with legitimate law enforcement" activities. *Fernandez* v. *California*, 134 S. Ct. 1126, 1136-1137 (2014) (brackets in original) (citation omitted); see U.S. *Riley* Br. 17-19.

3. a. Cell phones differ from other containers that the police have always had authority to search because they can hold more written, photographic, and video material than could fit into a suitcase, a diary, or a purse. That quantitative difference, however, does not call for a special constitutional rule. Phones do not generally contain a different *type* of information than what an individual could carry on his person. Although phones might contain, for example, banking or health records, a person arrested forty years ago could have carried financial records in a briefcase or a pharmaceutical prescription in a purse. Likewise, books, correspondence, contacts lists, and photographs all have traditionally been subject to searches incident to arrest. And at least where, as here, a search incident to arrest occurs before "the administrative mechanics of arrest have been completed and the prisoner is incarcerated," *Edwards*, 415 U.S. at 804, little risk exists that officers could review a phone's entire contents in a gratuitous intrusion into personal privacy. Instead, officers will almost surely, as here, home in on matters of relevance to the arrest and ensuing activity.

Amici Center for Democracy & Technology et al. (CDT Br.) observe (at 11-12) that a smart phone may contain detailed locational information, which would go beyond what could have been found on a map with a highlighted route or a written set of directions. Neither this case nor *Riley*, however, involves locational information. Any issues it raises should be evaluated in a concrete case, in which the Court can consider the extent to which it is shared or available from providers—factors that will "shape the average person's expectations of the privacy of his or her daily move-

ments." *United States* v. *Jones*, 132 S. Ct. 845, 963 (2012) (Alito, J., concurring in the judgment). In any event, any concerns about that type of information would not justify eliminating search-incident-to-arrest authority in its entirety in this context.

b. Although respondent and his amici assert that the government has failed to substantiate the practical problems that cell phones pose to law-enforcement investigations, the most conspicuous absence of evidence is the lack of any record of police abuse of search-incident-to-arrest authority with respect to cell phones. Cell phones have been in common use for well over a decade, and only in recent years have some courts held that the traditional *Robinson* rule does not apply to them. Yet the numerous briefs filed in this case and *Riley* have not identified any wave of vast "exploratory" searches of arrestees' cell phones unrelated to the offense of arrest, or of agents prying into an individual's personal information with no reasonable connection to investigating and preventing crimes. Nor have the briefs pointed to any examples of an officer "orchestrat[ing] an arrest motivated only by the desire to trawl through the contents of someone's cell phone or electronic device." ACLU *Riley* Amicus Br. 14.

In the event this Court reconsiders the traditional *Robinson* rule in the context of cell phones, therefore, it must weigh the real, documented police need to promptly search cell phones of persons lawfully arrested against the unsubstantiated fear that officers will abuse their authority to intrude into arrestees' personal lives. That inquiry favors retaining the historical rule. This Court should not deprive officers of an investigative tool that is increasingly important for

preserving evidence of serious crimes based on purely imaginary fears that police officers will invoke their authority to review drug dealers' "reading history," ALA Amicus Br. 13, gang members' "appointments with * * * marital counselors," or armed robbers' "apps to help smokers quit," CDT Br. 9-11.[3]

4. The United States explained in its opening brief that the *Robinson* rule would not authorize officers to use a cell phone to access files not stored on the phone itself. Respondent suggests (Br. 43) that officers will not be able to determine in the field whether they are accessing information stored elsewhere. Officers may encounter practical difficulties in that respect, although they may also be able to turn off a phone's wireless signal at the outset of a search by switching it into "airplane mode." See U.S. *Riley* Br. 16-17 (noting potential obstacles to that approach). Ultimately, law-enforcement agencies will need to develop protocols to address that issue, and defendants will be able to en-

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[3] Amici assert that the FBI stores "all telephone data collected during FBI investigations[,] including data extracted from cellphones seized incident to arrest," in a "Telephone Applications Database," which then "feeds into" a database accessible by state and local law-enforcement agencies. Nat'l Ass'n of Criminal Defense Lawyers et al. *Riley* Amicus Br. 24. The database to which they refer "stores raw data derived from telephone records, known as 'metadata,'" such as telephone numbers and call-duration information, that has been lawfully obtained. Office of the Inspector General, U.S. Dep't of Justice, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records* 208 n.242 (Jan. 2010). It "does not store the contents of telephone conversations" or any other communications, *ibid.*, and the database is accessible only to the FBI for investigative purposes.

force the limitation through suppression motions. No information indicates that agencies are not up to that task.

B. A Categorical Prohibition On Cell-Phone Searches Incident To Arrest Is Wholly Unjustified

In its opening brief, the United States suggested two narrower approaches to searches of cell phones incident to arrest that would preserve much of officers' traditional authority and address the serious practical problems that cell phones present, while also mitigating the concerns raised by the First Circuit. Respondent and his amici have not identified any compelling reason to reject those narrower approaches in favor of a categorical prohibition on searches of cell phones incident to arrest. Respondent characterizes the government's suggestions as "an end run around the probable cause and warrant requirements" (Br. 37), but that assertion assumes (contrary to history and precedent) that those requirements apply. The issue in this case is whether the Court should impose new restrictions on a type of search that has never been subject to them because of special concerns allegedly raised by cell phones. Rather than imposing warrant and probable-cause restrictions that have never applied to searches incident to arrest, this Court could address any cell-phone specific concerns it may have through more targeted doctrinal responses.

1. The first approach suggested by the United States would permit officers to search a cell phone when they have reason to believe that it contains evidence relevant to the offense of arrest. This Court adopted that standard in *Gant*, *supra*, for a category

of vehicle searches incident to arrest that are not supported by the *Chimel* justifications—searches of the passenger compartment and its containers, such as purses and briefcases, when the arrestee is no longer in reaching distance of that area. The standard was first articulated by Justice Scalia in his concurrence in *Thornton*, *supra*, and he derived it from "[n]umerous earl[y] authorities" that justified searches incident to arrest as furthering "the general interest in gathering evidence related to the crime of arrest" rather than "the more specific interest in preventing its concealment or destruction." 541 U.S. at 629 (concurring in the judgment). The reasoning this Court employed in *Gant* would support a similar standard for searches of cell phones incident to arrest in the event that this Court agrees with respondent that those searches are not categorically lawful because they do not sufficiently implicate the *Chimel* justifications.

A *Gant*-based approach would also assuage the concern that respondent primarily invokes: that applying the *Robinson* rule to cell phones would permit a search "regardless of the purpose of the arrest and without any connection between the device and the activity leading to the arrest." Resp. Br. 9. Under a *Gant*-based approach, "[a] person arrested for failing to wear a seatbelt," for example, could not "be subject to having her private life and associations laid bare." *Id.* at 28. At the same time, arrestees like respondent—who conducted a drug deal by phone immediately before he was apprehended—would not acquire a special protection from police investigation that they would not have enjoyed had they used pre-Digital Age technology to perpetrate their crimes.

Respondent's only objection to a *Gant*-based approach is that *Gant* itself cited "circumstances unique to the automobile context." Resp. Br. 19. But the Court relied on Justice Scalia's *Thornton* concurrence, see *Gant*, 556 U.S. at 343, which explained that the pertinent "circumstances" were that "motor vehicles [are] a category of 'effects' which give rise to a reduced expectation of privacy, and heightened law enforcement needs," 541 U.S. at 631 (citations omitted). The same is true of objects found on the person of an arrestee—particularly objects that could quickly conceal or destroy the digital evidence they contain. See, *e.g.*, *Chadwick*, 433 U.S. at 16 n.10; U.S. *Riley* Br. 28. Moreover, even the automobile-specific considerations that respondent identifies (which were not voiced in *Gant*) support the authority to search a cell phone. Respondent claims that "mobility concerns" do not apply to cell phones (Br. 20), but the digital evidence on a cell phone can vanish or be concealed in an instant.

Some of respondent's amici argue that a *Gant*-based standard would not meaningfully limit police search authority. But as this Court explained in *Gant* with respect to vehicles, "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." 556 U.S. at 343. The same holds true for cell phones. It is not likely that an arrestee's cell phone will contain evidence of routine traffic violations, "littering, jaywalking, creating a disturbance on a school bus, riding a bicycle without a bell or gong, [or] disobeying police orders at a parade," ACLU *Riley* Amicus Br. 3. If there were any doubt about that, this Court could make it explicit, as

the *Gant* opinion did. And once such minor crimes are excluded, it becomes abundantly clear that the police's interest in finding and preserving evidence during the critical period after an arrest outweighs the diminished privacy interests of someone who has been lawfully arrested based on probable cause that he committed a crime.

2. Respondent and his amici have even less to say about a scope-limited approach, in which officers would be permitted to search cell phones incident to arrest only to the extent reasonably necessary to serve the legitimate law-enforcement interests of finding evidence of the offense of arrest, identifying the arrestee, and ensuring officer safety. Under that approach, courts would remain vigilant against uninhibited "exploratory" searches that do not serve those interests.

a. Respondent briefly argues (Br. 36-38) that a scope-limited approach would "impose[] no constraints" on officers. Br. 37. The government explained how the suggested standard would work in practice to impose such constraints. See U.S. *Wurie* Br. 49-55. Under a scope-limited approach, an officer could not peruse every area of a phone on the off-chance that evidence of some crime might be found there. Rather, the officer would be required to articulate a specific reason to believe that evidence relevant to the offense of arrest, officer safety, or arrestee identity would be found in each area of the phone she searched. And for offenses in which it is not reasonable to believe that any evidence would be found on the phone, an officer could do no more than conduct a brief examination of the phone for identity- and

safety-related information. Evidence obtained from broader searches would be suppressible.[4]

Respondent's contention that this approach would not impose an enforceable limitation is belied by the other contexts in which officers are subject to case-specific limitations on the scope of their searches. For example, under *Maryland* v. *Buie*, 494 U.S. 325 (1990), officers may conduct a protective sweep of a house where an arrest is made only if they identify "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 334. Even when justified, the search is scope-limited: it is "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found," and "[t]he sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger." *Id.* at 335-336. The *Buie* standard, like the scope-limited standard suggested here, requires officers to make case-specific judgments about the scope of a search under a general reasonableness standard and courts to evaluate those judgments in ruling on suppression motions.

One amicus brief argues that a scope-limited approach would be unworkable because certain applica-

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[4] Respondent is mistaken (Br. 37) that a cell phone is not useful for obtaining identifying information—such as an arrestee's real name, home phone number, or home address—because an arrestee might be carrying someone else's phone. Investigations always rely on probabilities, and in the vast majority of cases a cell phone found on the person of an arrestee will be his own.

tions on a phone pull information from other applications. See CDT Br. 31-32. For example, a social-networking application might access the phone's contacts list. That facet of cell phones does not render the scope-limited approach more complicated to apply. The question in every case is whether the specific steps the officer took in interacting with the phone were reasonably related to legitimate objectives. That it might not be reasonable to examine a particular application on the phone would not necessarily make it unreasonable to examine another application that pulls information from the first.

b. Even if the scope-limited approach entails fairly significant practical complexity, the same concern exists in any search under a warrant and thus any practical problems presented by the scope-limited approach are no more severe than under respondent's favored rule. If respondent's rule is adopted, at the time a magistrate issues a warrant, neither officers nor the magistrate will know what files or applications the phone contains. A typical warrant would identify information sought in the search (*e.g.*, drug ledgers, customer lists, financial records, and evidence of a suspect's use or ownership). Officers would then necessarily need to conduct at least cursory searches of relevant areas of the phone to determine whether they might contain the object of the search—a process indistinguishable from the scope-limited approach the United States has suggested. See *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976) (papers); *United States* v. *Williams*, 592 F.3d 511, 522 (4th Cir.) (computer), cert. denied, 131 S. Ct. 595 (2010).

A warrant-based approach would thus not limit the scope of any ultimate search, as compared to the

scope-limited approach described above. Rather, the primary function of a warrant requirement would be to preclude officers from searching a phone when they have reason to believe that it contains evidence of crime, but cannot establish the higher standard of probable cause—or cannot obtain a warrant before a phone locks and becomes inaccessible. Any benefits for personal privacy would not outweigh the very substantial risk to law enforcement in an arrest situation, including the inability to conduct any cell-phone search at all.

c. It is true that a scope-limited approach would require a more intensive ex post judicial evaluation of the lawfulness of a search than either the traditional rule or the *Gant*-based standard described above, which would limit which phones could be searched, but not the scope of the search. But it would be ill-advised to completely deprive the police of an important investigative tool in the interest of lessening a potential litigation burden. If this Court were to establish a scope-limited standard, police departments would develop standards of conduct for their officers and courts would make nuanced post-search judgments. That may not be ideal, but it is vastly preferable to eliminating on-the-spot search authority entirely in response to unsubstantiated fears of "exploratory" searches.

3. In its opening brief, the United States urged that, whatever other restrictions this Court might establish on searches of cell phones incident to arrest, it should always permit a search of areas of the phone containing information in which a person lacks a reasonable expectation of privacy—as relevant here, call logs. Respondent is correct (Br. 39) that the third-

party doctrine of *Smith* v. *Maryland*, 442 U.S. 735 (1975), does not directly apply to information on an individual's cell phone because a cell phone screen is not a record in the hands of a third party, and for that reason the United States does not contest that an examination of a call log is a Fourth Amendment "search." U.S. *Wurie* Br. 54-55. But searches of objects found on a person incident to arrest have always been considered to be reasonable searches within the meaning of the Fourth Amendment. If this Court were to draw a special exception from that settled doctrine for information on cell phones, on the theory that a phone can contain a large quantity of particularly private information, it should at least preserve officers' authority to review information in which the individual lacks a significant privacy interest, such as information that is also conveyed to telecommunications companies.

Respondent points out (Br. 39) that a call log can contain some information that is not conveyed to a company, such as the names that a user assigns to numbers. That is true, but that minimal additional information has no greater privacy value than the information contained in objects and containers that officers have long had authority to search incident to arrest, such as wallets, purses, address books, and briefcases.

C. Respondent Does Not Dispute That The Search Here Was Lawful Under Any Of The Government's Suggested Approaches

The government explained in its opening brief that the search here was lawful under any of the approaches that it outlined, and respondent does not appear to

contest that point. The officers in this case conducted a limited search of respondent's cell phone, not to delve into his private affairs, but to learn his true address with the hope of confiscating his likely supply of illegal narcotics. That focused search was well within the scope of searches incident to arrest that law-enforcement officers have conducted since the Founding.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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