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

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BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police, without obtaining a warrant, to review the call log of a cell phone found on a person who has been lawfully arrested.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case centrally concerns Cato because it represents an opportunity to improve Fourth Amendment doctrine and maintain that provision's protections in the modern era.

SUMMARY OF THE ARGUMENT

The challenge of applying the Fourth Amendment to modern circumstances, such as when government agents search the cell phone of an arrestee, is best met by applying the terms of the amendment with specificity and care. This Court can provide a sensible rule for cell phone searches and model how to apply the Fourth Amendment for lower courts, by eschewing sweeping pronouncements or guesses about Americans' expectations of privacy. Rather, the Court should apply the terms of the Fourth Amendment to the facts of the case.

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored any part of this brief and that only *amicus* made a monetary contribution to its preparation or submission.

The Court should analyze distinctly each seizure and search that occurred, closely examining the legal basis for those that are contested. There are ways that law enforcement can access information without search or seizure, of course, and plain-view observation of an item properly seized is not an additional seizure or search.

Searching a phone makes use of it for the government's purposes, a seizure that is distinct from taking physical possession and which requires independent legal justification. Use and enjoyment are property rights distinct from possession, and they can be seized separately from a seizure of possession.

As in *Riley*, the Court should recognize and explicitly state that cell phones are constitutional effects. In addition, it should find that the content stored on cell phones includes constitutional papers and effects distinct from the phones themselves. Digital files stored on cell phones serve the same human ends that papers, postal mail, books, drawings, and portraits did in the founding era.

The search of respondent Wurie's cell phone did not meet the standards set by *Chimel v. California*, 395 U.S. 752 (1969), which allows warrantless searches only to the extent necessary to protect officers and prevent escape or to prevent destruction of evidence.

This case is not a candidate for a *Terry*-like exception to the warrant requirement. Allowing searches of a cell phone's digital content in an uncertain, narrow band of factual circumstances would produce difficulties in judicial and police administration and risks to the public's Fourth Amendment interests too great in relation to the law

enforcement benefit. The simpler rule requiring a warrant in the absence of exigency is the appropriate way to administer Fourth Amendment rights. The methodical application of Fourth Amendment and these considerations require that the judgment of the lower court be affirmed.

ARGUMENT

I. THE COURT SHOULD ANALYZE EACH SEIZURE AND SEARCH IN THIS CASE DISTINCTLY, AS WELL AS PLAIN-VIEW INFORMATION GATHERING

As in many Fourth Amendment cases that this and lower courts consider, the arrest and investigation of respondent Wurie was a series of seizures and searches, some of which are contested. Articulating and distinctly examining each seizure and search can improve this Court's consideration of the issues, while modeling for lower courts how to apply the Fourth Amendment in difficult cases. The court below articulated well the plain-view observation of information the seized phone displayed and the subsequent search of the cell phone, rightly treating it as distinct from its earlier seizure.

Amicus finds an additional seizure and search concerning the use of respondent Wurie's keys to access the threshold of two private homes and unlock the front door of one of them while a woman and baby were inside. The use of keys in this way was not justified by search-incident-to-arrest doctrine, which justified only taking possession of them. Using Wurie's keys at the doors of private homes was a seizure distinct from the taking of his possessory interest in them at arrest. Searching at the outer and

inner doors of two private homes for evidence of Wurie's residency should have required a warrant.

A. "Seizure" and "Search" Are Distinct Activities, Even if They Are Often Used Together to Investigate Suspects.

As your *amicus* also noted in *Riley v. California,* (13-132), this Court's cases have rarely defined "seizure" distinctly from "search." *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984) ("[T]he concept of a 'seizure' of property is not much discussed in our cases"). This is in part because incursions on property rights—seizures—are often the means government agents use to discover information: Seizure is the way they search.

Often, seizures and the searches they facilitate have the same legal justification—or they both lack one. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 949 (2012) ("The Government physically occupied private property for the purpose of obtaining information."). It is convenient to refer to small seizures and the searches they facilitate collectively as though they are a unitary "search." *See, e.g.*, *Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (moving of stereo equipment to gather serial numbers "constitute[d] a 'search'"). Unfortunately, the convenience of lumping together seizures and searches has occasionally permitted this Court to treat small seizures as though they did not occur. *See, e.g.*, *New York v. Class*, 475 U.S. 106, 114 (1986) (police officer lifting papers not considered a seizure).

Seizures and searches are not the same, and they do not always occur together. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 32 (2001) ("a 'search' despite the absence of trespass"); *Soldal v. Cook*

County, 506 U.S. 56 (1992) (seizure of mobile home, not part of search). Collapsing important distinctions between seizure and search can obscure the legal import of government agents' actions—particularly with respect to information technologies, whose Fourth Amendment consequences spring not so much from their possession as from their *use*.

A government agent who only takes possession of a digital device does little to undermine the security of the papers and digital effects its owner has stored on it. A government agent *using* the device to bring stored information out of its natural concealment does a great deal to threaten the interests that the Fourth Amendment was meant to protect.

Similarly, a government agent taking possession of house keys does not undermine the security of the home very much. Using those keys to unlock the front door does a great deal to threaten Fourth Amendment interests.

Casual use of language in Fourth Amendment decisions from the 1980s may suggest that only the "possessory" interest in property can be seized by government agents. *See United States v. Place*, 462 U.S. 696, 705 (1983) (discussing "possessory" interest in luggage); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (seizure found because destruction of powder infringed "possessory interests"); *United States v. Karo*, 468 U.S. 705, 712 (1984) (installation of beeper does not interfere with "possessory" interest); *cf. Karo* 468 U.S. at 729 (Stevens, J., dissenting) ("Surely such an invasion is an 'interference' with possessory rights; the right to exclude . . . had been infringed."). In the past, it may have been sound to treat deprivation of "possessory

interests" and constitutional "seizures" as one and the same. Nearly always, possession of an item was the aspect of ownership material to Fourth Amendment cases. This approach does not translate to the information technology context if the interests secured by the Fourth Amendment are to survive.

The right to possess property is one of several aspects of ownership identified in legal philosophy. *See,* TONY HONORÉ, *Ownership, in* OXFORD ESSAYS ON JURISPRUDENCE 104-147 (A.G. Guest ed., 1961). The right to use property is another distinct aspect of ownership. The right to the income of property—the enjoyment of its benefits—is yet another in what law students are taught to be the "bundle of sticks" that comprise property rights.

This Court should recognize all the dimensions of seizure, including taking the use and enjoyment of digital devices and physical items for the government's benefit. This Court should recognize that use and enjoyment are property rights that can be seized distinctly from possession. Doing so will allow this Court to apply long-standing principles, even in a "high-tech" case, to "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34; *Jones*, 565 U.S. at 950 (majority opinion); *Id.* at 958 (Alito, J., concurring in the judgment).

B. The investigation and arrest of Wurie was a series of seizures and searches, as well as gathering of information in plain view.

When Boston police stopped and arrested respondent Wurie, they had observed him apparently

committing an illegal drug sale in plain view. *See Horton v. California*, 496 U.S. 128, 136-37 (1990). Their suspicions confirmed by the other party to the transaction, the seizure of Wurie and his car, *Brendlin v. California*, 551 U.S. 249, 254-263 (2007), was based on probable cause.

Consistent with standard practice for a booking search, a separate legal basis for searching suspects and seizing property, *see*, *e.g.*, *Illinois v. Lafayette,* 462 U.S. 640 (1983), Wurie was dispossessed of two cell phones and $1,275.

Shortly thereafter, one of the phones began to indicate that it was receiving calls, displaying the identifier "my house" on its external caller ID screen. (Joint App. 44) The cell phone being properly seized and in the possession of the Boston police, they were entitled to observe and take cognizance of its external features and displays, including the "my house" display, which was in plain view. *Horton*, 496 U.S. at 136-37.

Officers Robert England and Kevin Jones drew sensible inferences from the information that was now available to them. The "my house" alias given to a number stored in a cell phone is likely to be the number of a landline phone in the domicile of the phone's owner. They could learn Wurie's probable landline number and thus his street address by accessing the telephone number stored inside the phone. And this they did. They "opened the phone to look at the phone call's log." (Joint App. 44)

Opening the flip-phone and pressing two buttons was not observation of information in plain view. It was an additional seizure of the phone, a use and manipulation of it for the government's purposes.

The manipulation of the phone did not affect possession, as the phone was already under the complete physical control of the government. Instead, the government made *use* of the phone and the data in it for its purposes, gathering the information stored in it and effectuating a search. This seizure-based search, in addition to discovering the phone number associated with the "my house" identifier, also revealed a photo of a woman and baby, presumed loved ones of respondent Wurie's, which was displayed as the phone's wallpaper.

As noted above, *use* is an aspect of ownership distinct from possession. HONORÉ, *supra*, at 162, 165. Looking through a phone makes use of the electronics, the battery, the display technology, and the data, none of which are ordinarily the property of the government agent to use. Government agents are allowed to exercise this aspect of ownership—to use the phone as if it were their property—with sufficient legal justification. The power of Officers England and Jones to do this is what respondent Wurie contests.

Having gathered the telephone number associated with the "my house" identifier and the photograph of the woman and baby, Officer Jones typed that number into a reverse lookup service, discovering an address in Boston where they believed respondent Wurie lived.

Armed with this information, Sergeant Detective Murphy and "several members of the Drug Control Unit" went to investigate that address. (Joint App. 22) Looking into the house from the sidewalk, a plain view observation, they saw a woman resembling the one whose image was stored by the cell phone and displayed as its wallpaper.

Sergeant Detective Murphy then took respondent Wurie's keys and used them to unlock the door and enter the vestibule of the residence. (Joint App. 22) He was apparently not certain of the identity between the woman pictured in the cell phone and the woman in the first-floor apartment because he first tried to use the keys to unlock the door of the home on the second floor. Returning to the first floor, he found that "one key unlocked the door." (Joint App. 23) Sergeant Detective Murphy's affidavit does not say whether he restored the door to its prior locked position before knocking and engaging the occupant of the residence in continuation of his investigation.

Like manipulating a cell phone to access the information it stores, manipulating keys to test and unlock the outer and inner doors of private residences is a use of property distinct from the seizure that occurred when government agents took respondent Wurie's keys upon his arrest. Sergeant Detective Murphy *used* the keys and the lock mechanism at the vestibule for two homes to infer that Wurie lived within one of them. He used the keys and the lock mechanism at the home of unknown people on the second floor, inferring from their non-operation that Wurie did not live there. He then used the keys and the lock mechanism on the first floor—unlocking the front door of a home with a woman and baby inside—to infer that the first floor residence was respondent Wurie's.

"Houses" are specifically named in the Fourth Amendment because they have traditionally been the locus of activity and communications the Framers meant to protect from government access and scrutiny. *See Boyd v. United States*, 116 U.S. 616,

624-627 (1886) (recounting history related to Fourth Amendment and "unreasonable searches and seizures"). This Court has been particularly solicitous of the home, of course. *See, e.g.*, *Gouled v. United States*, 255 U.S. 298, 305-06 (1921), *Agnello v. United States*, 269 U.S. 20, 32 (1925) (calling the search of a private dwelling without a warrant . . . "unreasonable and abhorrent to our laws."). Sergeant Detective Murphy's further seizure of the keys and the lock mechanisms on two private homes—making use of others' property for the government's investigatory purposes—must meet the standards of the Fourth Amendment just like the use of the cell phone to discover otherwise unavailable information. Like all others, he enjoyed an implicit license to approach the home and knock or ring the bell at the outer door, *see Florida v. Jardines*, 133 S.Ct. 1409, 1415-16 (2013), but using the outer- and inner-door lock mechanisms of private homes in hopes of discovering incriminating evidence is something else. Sergeant Detective Murphy should have sought a warrant for this search.

The question whether the cell phone seizure and search that Officers England and Jones conducted satisfies the Fourth Amendment relies on a premise agreed upon by both parties, and which this Court should explicitly affirm: Cell phones and their contents are "papers and effects" protected by the Fourth Amendment.

II. THIS COURT SHOULD RECOGNIZE THAT PHONES ARE THEMSELVES FOURTH AMENDMENT "EFFECTS," AND THAT PHONES CONTAIN FOURTH AMENDMENT PAPERS AND EFFECTS

This Court should explicitly endorse the premise adopted by all parties in this case and in *Riley v. California*, that a cell phone is an "effect" under the Fourth Amendment. It should also explicitly acknowledge that among other content stored by the cell phone in this case were constitutional "papers and effects" in their own right, distinct from the physical phone.

A. A Cell Phone Is an "Effect" Under the Fourth Amendment.

If a car is an effect for purposes of the Fourth Amendment, *Jones*, 132 S. Ct. at 949, and a footlocker is an effect, *United States v. Chadwick*, 433 U.S. 1, 12 (1977), then a phone must also be an effect. Cell phones are typically carried on one's person. They can contain copious amounts of personal information. They have that "intimate relation" to the person that characterizes personal effects. BLACK'S LAW DICTIONARY 1143 (6th ed. 1990) (defining "personal effects").

Yet *amicus* knows of no case holding that a cell phone is an "effect" for purposes of the Fourth Amendment. Perhaps this is because lower courts treat the matter as too obvious to state, or because Fourth Amendment doctrine leads courts so far from the text of the law, or even because *amicus*'s research skills are inadequate. An explicit holding that a cell phone is an effect would aid the work of courts below—as well as advocates before them—all of whom might be reminded to think methodically about applying the terms of the Fourth Amendment to the cases they consider.

B. Wurie's Cell Phone Held Constitutional "Papers and Effects."

Cell phones themselves are fairly obviously effects. Some of the contents stored by cell phones are also rightly treated as papers and effects distinct from the material phone. The cell phone government agents seized from Wurie contained stored papers and effects, including a photograph and a contact list. This Court should hold explicitly that the photograph and contact-list information on Wurie's cell phone were, for constitutional purposes, papers and effects protected by the Fourth Amendment.

As your *amicus* detailed in our *Riley* brief, the communications and storage functions of cell phones serve the same human ends today that papers, postal mail, books, drawings, and portraits did in the founding era. This Court should clearly acknowledge that the Fourth Amendment protects digital equivalents of the same types of documents that it protects in analog form. In this case, the Court should find that at the very least the photo discovered by Officers England and Jones and the contact entry they accessed were papers, effects, or both.

Finding that a photo in a cell phone or a contact entry is a constitutional paper or effect does not establish whether its seizure or search is reasonable or unreasonable, constitutional or unconstitutional. These subjects we turn to next.

III. THE SECONDARY SEIZURE AND SEARCH OF WURIE'S CELL PHONE WERE NOT JUSTIFIED BY THE *CHIMEL* FACTORS, AND NEITHER WERE THE FURTHER SEIZURE OF HIS KEYS FOR USE IN A SEARCH OF THE VESTIBULE AND FRONT DOORS OF TWO HOMES

Absent a warrant, the search and seizure of a suspect's property is "*per se* unreasonable" unless justified by one of "a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). The First Circuit Court of Appeals was correct to hold "that the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person." *United States v. Wurie*, 728 F.3d 1, 13 (2013). Though properly taken from respondent Wurie in the course of his arrest, the further seizure of the phone in using it to reveal personal information should have awaited a warrant.

A warrant should also have been required for the search of two homes using his keys. The *Chimel* factors in no way permit keys seized from an arrestee to be used as investigatory tools at the entry to the vestibule and at the front doors of two homes, or to unlock the door of a home occupied by a woman and her baby.

A. The Exceptions to the Warrant Requirement for Searches Incident to Arrest Do Not Apply to Digital Searches.

This Court did not create a broad new authority for officers to search suspects and seize their property in *Chimel* and *Robinson*. Rather, the Court recognized the continuing validity of two long-

standing but separate exceptions to the general rule against warrantless seizures and searches.

In *Chimel*, this Court reiterated the importance of the Fourth Amendment's warrant requirement: "It is a cardinal rule that . . . law enforcement . . . use search warrants wherever reasonably practicable." *Chimel* 395 U.S. at 758 (quoting *Trupiano v. United States,* 334 U.S. 699, 705 (1948)). This Court articulated clearly and sensibly the extent of the "search incident to arrest" principle:

> [I]t is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

Chimel, 395 U.S. at 763 (1969)

In *United States v. Robinson*, 414 U.S. 218 (1973), this Court further reiterated the two prongs of the "search incident to arrest" exception to the warrant requirement. *Robinson* overturned a ruling suggesting that the only reason for a full search was discovery of evidence or the fruits of a crime. "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." *Id*. at 234.

The *Robinson* Court pragmatically approved the examination of a crumpled cigarette package on the

person of an arrestee, giving rise to a "container" doctrine that this Court has since had to curtail. *See, e.g., Chadwick*, 433 U.S. at 1 (1977); *Arizona v. Gant*, 566 U.S. 332 (2009). Courts have applied this doctrine to cell phones, too—not chastened, apparently, by container-doctrine trends. *See*, *e.g.*, *People v. Diaz*, 244 P.3d 501 (Cal. 2011); *Hawkins v. Georgia*, 290 Ga. 785, 787 (Ga. 2012); *Massachusetts v. Phifer*, 463 Mass. 790, 795-96 (Mass. 2012).

In retrospect, Justice Marshall's dissent in *Robinson* is prescient. He called for a more granular assessment of the search, saying: "the search in this case divides into three distinct phases: the patdown of respondent's coat pocket; the removal of the unknown object from the pocket; and the opening of the crumpled-up cigarette package." *Robinson,* 414 U.S. at 249-250 (Marshall J., dissenting). He believed that the removal of the cigarette package was unwarranted because the danger was not great and because no evidence of a driving infraction would be found, much less would such evidence be at risk of destruction. *Id*. at 250-255.

That granularity of analysis in Fourth Amendment methodology commends itself in this case, as it did in *Riley*, regardless whether one agrees or disagrees with Justice Marshall's conclusion in *Robinson*. A carefully analytical *Robinson* majority could have found, for example, that the officer developed reasonable suspicion about the crumpled cigarette pack because there is no good reason to keep one on hand after one's cigarettes are gone.

The "search incident to arrest" doctrine is two separate exceptions to the warrant requirement that enjoy independent pedigrees and rationales. An

arresting officer's search for weapons and other dangerous articles has a twofold justification: "[a] due regard for his own safety," *Closson v. Morrison,* 47 N.H. 482, 484 (NH 1867), and the need to prevent the prisoner from escaping custody, which would see "the arrest itself frustrated." *Chimel,* 395 U.S. at 763. Because Wurie could not use the digital contents of his phone to attack Officers England or Jones or to effect his escape, their search of it was not grounded in "search incident to arrest" principles.

1. Digital Data Is No Threat to Officers.

The average cell phone is fragile, inefficient, and expensive as a bludgeoning tool. But because it could conceivably be used in an attack, its seizure at the time of an arrest is a wise precaution, justified under *Chimel*. Leaving a modern smartphone in an arrestee's possession could aid in his escape—most dramatically by his calling in heavily armed confederates. An arrestee's ability to communicate from detention can also help protect his or her rights, *see*, *e.g.*, Mallory Simon, *Student 'Twitters' his way out of Egyptian Jail*, CNN.com (2008),[2] but, on balance, in situations with a prospect for violence, taking the phone out of the prisoner's physical reach eliminates potential uses in escape and assures officer safety.

But Officers England and Jones went beyond securing Wurie's phone against use in an attack. They used it themselves to reveal digitally stored information—a distinct form of seizure/search that

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[2] Available at http://www.cnn.com/2008/TECH/04/25/twitter.buck/index.html.

lacked the legal justification of the initial arrest or seizure of the phone itself. Looking at the contact entry in Wurie's phone in no way increased their safety or reduced the likelihood of Wurie's escape.

In *Chimel*, this Court permitted the search of areas and objects near a suspect at the time of arrest to ensure officer safety, but limited those searches to areas immediately physically accessible by the suspect, noting that there was no safety justification "for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." 395 U.S. at 763. The Court's logic was clear: Even very dangerous weapons like guns and knives pose no risk if the suspect is physically incapable of using them. The necessity of protecting officers during the arrest and transport of prisoners does not justify searching for or seizing weapons that are beyond a prisoner's reach. *See also*, *Arizona v. Gant*, 556 U.S. 332 (2009) (police may not search a vehicle as a consequence of arresting its driver or owner unless the suspect had physical access to the vehicle at the time of the arrest). Property that cannot be used to cause anyone harm cannot be seized or searched in the name of officer safety.

Officers England and Jones had no safety-based reason for searching the contents of Wurie's phone.

2. There was No Threat of Evidence-Destruction.

The other exception to the warrant requirement afforded by *Chimel* and *Robinson* does not permit open-ended searches for any and all incriminating evidence or contraband. Rather, the exception

permits search of an arrestee based "on the need to preserve evidence on his person for later use at trial." *Robinson*, 414 U.S. at 234. *See also, Weeks v. United States*, 232 U.S. 383, 392 (1914). When evidence is no longer on an arrestee's person, this branch of "search incident to arrest" doctrine does not apply.

This Court has held that the *Chimel* exception only extends to cases in which seizure alone would be "insufficient" to prevent the evidence's loss or destruction before police could obtain a warrant authorizing a search. *Chadwick*, 433 U.S. at 13. As a general rule, this Court has held that once a physical container, item, or location, is under the exclusive control of law enforcement, the evidence there is "safe" and the police are required to apply for a warrant before conducting a search. *Illinois v. McArthur*, 531 U.S. 326 (2001).

It has been argued that cell phones and other digital devices ought to be treated differently from physical storage containers because of the risk that the suspect's friends, relatives, or co-conspirators would remotely delete the data on the phone. *See, e.g.*, *United States v. Flores-Lopez*, 670 F.3d 803, 807-09 (7th Cir. 2012) ("Other conspirators were involved . . . besides . . . the defendant, and conceivably could have learned of the arrests . . . and wiped the cell phones remotely before the government could obtain and execute a warrant and conduct a search.").

That could be a real prospect in the future, but it was not in this case. There is no evidence that Sergeant Detective Murphy raced to secure the cell phone because it contained potential evidence. The phone's call signaling attracted the attention of Officers England and Jones, who were not

apparently interested otherwise in securing what evidence it might reveal.

Phone-wiping is fairly exotic, and in the most common case—a remote signal initiated by the owner—the threat is fairly easily and cheaply defeated either by turning the phone off, removing the battery, or placing the device in a container (commonly known as a "Faraday bag") that shields radio waves. Faraday bags are available for about the same price as a set of handcuffs.

The same threat of evidence destruction can exist in physical environments, but that does not justify warrantless searches of physical property under *Chimel*. Sergeant Detective Murphy acted consistently with this rule at the door of the Silver Street home. Though he knew that a confidante and likely confederate of Wurie's was inside, that this risked destruction of evidence at any time, and that he could enter at will, having unlocked the door, he knocked on the door and waited for Wurie's companion to answer. He did not enter with the many other officers in attendance to immediately secure evidence against destruction.

Warrantless searching of physical property spurred by fear that evidence may be destroyed is governed by this Court's more general exigent circumstances precedents. *Kentucky v. King,* 131 S.Ct. 1849, 1854 (2011). *See also, Wong Sun v. United States*, 371 U.S. 471 (1963); *Ker v. California*, 374 U.S. 23 (1963); *Welsh v. Wisconsin,* 466 U.S. 740 (1984). *Chimel* does not permit exigent-like searching of a phone when it can be secured during the time application for a warrant is made.

There is no relevant distinction between the risk of hypothetical confederates deleting evidence stored on a phone or in remote storage and their destroying physical evidence when they learn of a co-conspirators arrest. To allow wide-ranging searches on this "confederates" theory would be a sharp departure from the Court's existing view of what is reasonable. The preservation-of-evidence rationale from *Chimel* does not permit police to perform free-standing investigative searches of phones, laptops, and other digital devices.

IV. A *TERRY*-LIKE EXCEPTION TO THE WARRANT REQUIREMENT FOR SOME CELL PHONE SEARCHES WOULD BE TOO DIFFICULT TO ADMINISTER

This close case may seem like a candidate for some exception to the general rule that a warrant is required for searches of cell phones. Respondent Wurie's phone put in plain view information that suggested a way to discover his residence and possibly evidence related to his arrest. The steps Officers England and Jones took to access the information were relatively simple. And flip-phones in 2007 had relatively little data and interactive features, decreasing the risks of inordinate privacy invasion. It could be that an officer with "reasonable grounds" to believe that evidence is available, and who makes a "carefully restricted" search aimed at "particular items" may be relieved of the warrant requirement. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Such a rule would require lower courts to engage in extensive factual investigations and legal line-drawing, though, related to least the factors mentioned in the paragraph above. What

circumstances make it apparent enough to government agents that information relevant to an investigation is near enough at hand? How simple is the operation that would access the sought-after information? How much risk of accessing irrelevant private data relating to either suspects or non-suspects did a given search involve? How much personal and private data did the particular phone in a given case store or access? What apps or other features on the phone increased the risk of excess disclosure, even in a "carefully restricted" search?

These considerations cannot be avoided, of course. But if this Court affirms that a warrant is required to search the seized phone of an arrestee absent exigency, they will be addressed as part of the regular push-and-pull between law enforcement agents and the magistrates that regularly oversee them already. That venue is well-suited to developing a "common law" of cell phone searches.

The alternative is to let law enforcement set the terms of cell phone "*Terry* searches," bringing courts —including this Court—in only sporadically, to make rough judgments that direct and redirect what the law of warrantless cell phone searches should be. This Court could expect to return many times over years to disputes about what factual circumstances justify a "quick" warrantless search of a phone and what factual circumstances do not.

Consensus about the rule from *Terry v. Ohio* may be that it allows a brief stop-and-frisk based on reasonable suspicion about evidence of crime, but the case itself is much more limited. The *Terry* majority was quite focused on the use of stop-and-frisk to avert danger to law enforcement officers and others.

Terry, 392 U.S. at 30 ("At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized."). The rule in *Terry*, like the rule in *Chimel,* is more limited than most people remember. Warrantless searches are justified by the acute interest in officer safety, not by the desire to readily discover evidence.

This Court should not allow government agents to search through a cell phone without a warrant merely because it was properly seized. Doing so would throw open too-wide a door onto suspects' and others' personal and private information without judicial supervision. Cell phones are doorways into people's lives as broad as the front doors of their homes, and courts' efforts to administer a regime of warrantless cell phone searching would be too difficult.

The government's use of respondent Wurie's keys to unlock the door of a private home without a warrant is a parallel: It shows that a proper seizure of possession does not entitle the government to make any and all uses of the item seized. Distinct and additional uses of a seized item must pass Fourth Amendment muster independently.

CONCLUSION

As in our filing in *Riley, amicus*'s argument here follows the structure one would use to apply the Fourth Amendment as a law, rather than as a stack of doctrines. Courts should examine whether there was a seizure or search, and whether any such seizure or search was of persons, papers, houses or effects. If those conditions are met, courts should examine whether each seizure and search was reasonable without a warrant.

Here, well after it was seized, Officers England and Jones searched respondent Wurie's cell phone, making use of it—a seizure not warranted by search-incident-to-arrest doctrine—for their investigative purposes. Sergeant Detective Murphy made similar unwarranted use of Wurie's keys, which, though seized, were not Murphy's to use in testing the front doors of two private homes and unlocking one of them. Because the seizures and searches of the respondent's cell phone did not meet *Chimel*'s exceptions to the warrant requirement, they violated Wurie's Fourth Amendment rights. The judgment below should be affirmed.

Respectfully submitted,

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