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

BRIEF FOR THE UNITED STATES

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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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 728 F.3d 1. The opinion of the district court (Pet. App. 54a-69a) is reported at 612 F. Supp. 2d 104.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2013. A petition for rehearing was denied on July 29, 2013 (Pet. App. 70a-73a). The petition for a writ of certiorari was filed on August 15, 2013. The petition was granted on January 17, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, respondent was found guilty of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g); distributing crack cocaine, in violation of 21 U.S.C. 841(a); and possessing crack cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a). Pet. App. 4a. He was sentenced to 262 months in prison. *Ibid.* The court of appeals vacated his convictions on two of the counts on the ground that evidence had been admitted at trial in violation of the Fourth Amendment and remanded for resentencing on the remaining count. See *id.* at 1a-31a, 52a-53a.

1. Over the last 25 years, cell phones have become ubiquitous in American life. Over 90% of American adults now own a cell phone. See Pew Research Ctr., *Smartphone Ownership—2013 Update* 2 (June 5, 2013).[1] Cell phones typically come equipped with a variety of capabilities. Older models include voice

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[1] http://pewinternet.org/files/old-media/Files/Reports/2013/PIP_Smartphone_adoption_2013_PDF.pdf.

calling, call-history logs, text messages, and basic cameras. Newer "smartphones," such as Apple's iPhone, have a variety of additional features, such as Internet browsers, video recording and playback, and navigation tools. They also offer users the option of downloading applications developed by third parties. Those applications include games, social-networking platforms like Facebook and Twitter, and music-distribution programs.

The same features of cell phones that have made them popular among ordinary citizens—their versatility and portability—have also made them pervasive instrumentalities of crime. It is now common for drug deals to be arranged by cell phone, for violent street gangs to communicate through text messages, and for child abuse to be recorded on camera phones. The majority of judicially authorized telephone wiretaps, for example, now involve cell phones. See Administrative Office of the U.S. Courts, *Wiretap Report 2012*.[2] Drug traffickers and terrorist organizations often use so-called "burner" phones—cheap phones with prepaid service plans intended to be discarded after a brief period of time—to avoid detection by law-enforcement officials. See, *e.g.*, *United States* v. *Portalla*, 496 F.3d 23, 26-28 (1st Cir. 2007). Cell phones also present special challenges for law-enforcement officers, because their contents can quickly be concealed behind sophisticated encryption walls, or destroyed entirely by individuals who do not have physical access to the phone, a process known as "remote wiping." See pp. 34-40, *infra*.

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[2] www.uscourts.gov/Statistics/WiretapReports/wiretap-report-2012.aspx#sa1 (last visited Feb. 28, 2014).

2. On September 5, 2007, a Boston police officer noticed respondent make an apparent drug sale out of his car that the officer believed to have been arranged by cell phone. Pet. App. 2a, 56a-57a & n.3. After the transaction, the officer confronted the buyer and found two bags of crack cocaine in his pocket. *Id.* at 2a. The buyer told the officer that he had purchased the drugs from "B," the driver of the car, who was a crack dealer living in South Boston. *Ibid.* Officers following respondent then arrested him for drug distribution, read him the *Miranda* warnings, and drove him to a nearby police station, where they seized two cell phones, a set of keys, and more than one thousand dollars in cash from his person. *Id.* at 2a, 57a.

Five to ten minutes after respondent arrived at the station, officers noticed that one of respondent's cell phones, a "flip" phone that a user must open to make calls, was repeatedly receiving calls from a number identified as "my house" on the phone's external screen. Pet. App. 2a, 57a-58a. Minutes later, the officers opened the phone to check its call log. *Id.* at 2a-3a. They saw a photo of a woman holding a baby set as the internal screen's "wallpaper." *Id.* at 3a. The officers pressed one button to navigate to the phone's call log, then pressed another button to obtain the number for "my house." *Ibid.* They did not view any other information stored on the phone.

The officers typed the number for "my house" into an online directory and learned that it was associated with an address on Silver Street in South Boston near where respondent had parked his car before his arrest. Pet. App. 3a. After giving a second set of *Miranda* warnings, the officers then further questioned respondent, who denied his participation in the drug

deal and claimed to reside in Dorchester, not South Boston. *Ibid.* Given the amount of cash respondent had been carrying and his possession of two cell phones (a practice known to the police to be common among drug dealers), the officers suspected that respondent kept a "hidden mother cache" of crack cocaine at an address other than the one he had identified during questioning. *Id.* at 58a-59a & n.6.

Accordingly, the officers drove to the Silver Street address, an apartment building, where they found a mailbox labeled with respondent's name and observed through the window of a first-floor apartment a person who closely resembled the woman in the wallpaper on respondent's phone. Pet. App. 3a-4a. The officers then obtained and executed a search warrant for the Silver Street apartment. *Id.* at 4a. They ultimately seized crack cocaine, marijuana, cash, a firearm, and ammunition from inside. *Ibid.*

3. Respondent was charged with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g) (Count 1); distributing crack cocaine, in violation of 21 U.S.C. 841(a) (Count 2); and possessing crack cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a) (Count 3). Pet. App. 4a. He moved to suppress the evidence obtained from the search of the apartment, arguing that it was the fruit of the unconstitutional warrantless search of his cell phone's call log. See *ibid.*

The district court denied respondent's motion. See Pet. App. 63a-69a. The court explained that under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, the police may conduct "[a] full search of the person [of an arrestee], his effects, and the area within his immediate reach

* * * without regard to any exigency or the seriousness of the offense, and regardless of any probability that the search will yield a weapon or evidence of the crime for which the person is arrested." *Id.* at 62a (citing *United States* v. *Robinson*, 414 U.S. 218, 236 (1973)). Further, it stated, the police may conduct the search "when the accused arrives at the place of detention." *Ibid.* (quoting *United States* v. *Edwards*, 415 U.S. 800, 803 (1974)). The court then explained that "[t]he search of [respondent's] cell phone incident to his arrest was limited and reasonable." *Id.* at 66a. The court found that "[t]he officers, having seen the 'my house' notation on [respondent's] caller identification screen, reasonably believed that the stored phone number would lead them to the location of [respondent's] suspected drug stash." *Ibid.*

A jury convicted respondent on all three counts. See Pet. App. 4a. The district court sentenced him to concurrent terms of 262 months on Counts 1 and 3 and 240 months on Count 2. See *ibid.*; 08-10071 Docket entry No. 82, at 2 (June 30, 2011).

4. A divided panel of the court of appeals reversed the district court's denial of respondent's suppression motion and vacated his convictions on Counts 1 and 3. See Pet. App. 1a-53a. In so doing, the court fashioned what it described as a "bright-line rule" 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" in any circumstances. *Id.* at 13a, 27a-28a. The court of appeals acknowledged that that this Court has set forth a "straightforward rule, easily applied, and predictably enforced," that items found on an arrestee may be searched incident to a lawful arrest and has emphasized that the rule is

designed to avoid case-by-case determinations of whether a particular search incident to arrest was lawful. *Id.* at 13a-15a, 25a (citation omitted). But the court nevertheless concluded that this Court's decisions did not foreclose treating cell phones "as a category" differently from other containers. *Id.* at 15a. It found support for such an item-specific exception to the search-incident-to-arrest doctrine in this Court's decisions holding that the police do not have authority to search areas outside of the immediate control of the arrestee. See *ibid.* (citing *United States* v. *Chadwick*, 433 U.S. 1 (1977), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991); *Arizona* v. *Gant*, 556 U.S. 332 (2009)).

The court of appeals accordingly undertook an inquiry into whether "the warrantless search of data within a cell phone can ever be justified" by law-enforcement interests, in particular the preservation of evidence. Pet. App. 21a. It rejected the government's argument that the search of a cell phone is necessary to prevent the destruction of the data stored on the phone through remote wiping. See *id.* at 23a. The court believed that it is "not * * * particularly difficult" for police to prevent that tactic by turning the phone off, removing its battery, placing it in a "Faraday enclosure" (a container that blocks the cell phone from receiving wireless signals), or blindly copying its contents. See *id.* at 23a-24a. The court therefore concluded that the government's concern that evidence on a cell phone could quickly be destroyed was merely "theoretical" and thus insufficient to satisfy the Fourth Amendment when "[w]eighed against the significant privacy implications inherent in cell phone data searches." *Id.* at 24a.

Judge Howard dissented, explaining that "this case requires us to apply a familiar legal standard to a new form of technology." Pet. App. 31a. This Court's decisions, he wrote, "establish that items immediately associated with the arrestee—as a category—may be searched without any * * * justification" related to evidence preservation or officer safety. *Id.* at 43a. Judge Howard recognized concerns "about the privacy interests at stake in cell phone searches" given the amount of personal information that a modern phone can store. *Id.* at 47a. But rather than addressing those concerns through a blanket prohibition on cell-phone searches, he would have evaluated such searches under the Fourth Amendment's basic reasonableness standard. *Id.* at 47a-48a. He ultimately determined, however, that the question of what constitutes an "unreasonable cell phone search should be left for another day," because the limited search here was clearly reasonable. *Id.* at 50a.

SUMMARY OF ARGUMENT

The search of the call log of respondent's cell phone incident to his arrest complied with the Fourth Amendment.

A. The warrantless search, incident to arrest, of a cell phone found on an arrestee's person is constitutionally reasonable.

1. This Court's decisions have steadfastly acknowledged "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Weeks* v. *United States*, 232 U.S. 383, 392 (1914). Under that authority, an officer may conduct a

full evidentiary search of the person of an arrestee and any items found on his person without a warrant. This Court has also recognized a distinct authority to search the area in the immediate vicinity of the arrest, but has limited that authority to the area necessary to serve the more focused law-enforcement interests in preventing the concealment or destruction of evidence and removing weapons. See *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

In *United States* v. *Robinson*, 414 U.S. 218 (1973), this Court confirmed that the narrower interests identified in *Chimel* do not circumscribe officers' "traditional and unqualified authority" to search items found on the person of the arrestee. *Id.* at 229. That is because the historical authority to search items on an arrestee's person rests primarily on the "reduced expectations of privacy caused by the arrest." *United States* v. *Chadwick*, 433 U.S. 1, 16 n.10 (1977). The traditional rule also comports with the realities of police work, in which officers cannot reasonably be expected to undertake an item-by-item legal analysis during arrests. *Robinson*, 414 U.S. at 235. A warrantless search of a cell phone found on the person of the arrestee, like the search of any other such item, is thus "a 'reasonable' search under [the Fourth] Amendment." *Ibid.*

2. Even if it were appropriate to create item-by-item exceptions to officers' authority to search an arrestee, no sound justification exists to exclude cell phones from the general rule. In today's world, cell phones are particularly likely to contain evidence of unlawful activity and to help law-enforcement officers identify suspects they have apprehended. And unlike other containers, their contents can be destroyed or

concealed after the suspect is taken into custody, making it impossible or impracticable for the police ever to retrieve critical evidence. Searches of cell phones at the scene of arrest, moreover, can quickly alert officers that confederates or others are coming to the scene, helping them avoid potentially dangerous encounters. Although cell phones can contain a great deal of personal information, so can many other items that officers have long had authority to search, and the search of a cell phone is no more intrusive than other actions that the police may take once a person has been lawfully arrested.

3. The search-incident-to-arrest doctrine intrinsically limits a warrantless search of a cell phone to those files stored on the phone. The doctrine does not permit officers to use the phone's Internet connection to access files stored elsewhere.

B. Even if the court of appeals were correct in distinguishing cell phones categorically from other objects seized from an arrestee's person, the court erred in imposing a blanket prohibition on searches of cell phones incident to arrest.

1. The court of appeals believed that cell-phone searches do not sufficiently implicate the *Chimel* justifications to be categorically authorized. But even if that were so, it would not mean that a lawful arrest *never* justifies the search of a cell phone. Rather, as this Court has held for searches of automobiles that are no longer within the reaching distance of an arrestee, officers would still be permitted to conduct a warrantless search of a cell phone incident to arrest "when it is reasonable to believe that evidence of the offense of arrest might be found" on the phone. *Arizona* v. *Gant*, 556 U.S. 332, 335 (2009). That rule

would be administrable and would preserve officers' historical authority to conduct a search incident to arrest to "gather[] evidence related to the crime of arrest." *Thornton* v. *United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring in the judgment). It would also dispel any theoretical concern that officers will use arrests for traffic offenses as pretexts to search cell phones.

2. The court of appeals also believed that the large storage capacity of cell phones and the frequent presence of personal information on them raise heightened privacy concerns. See Pet. App. 16a-19a. But even if a cell phone were thought materially distinguishable from other objects that officers have long enjoyed authority to search incident to arrest, such as diaries, address books, briefcases, and purses, it would not justify excluding them from officers' search authority entirely—handicapping officers' investigative power whenever lawbreakers use sophisticated technology rather than pen and paper. Instead, courts should apply the Fourth Amendment's basic reasonableness standard to ensure that the *scope* of any cell-phone search does not extend beyond what is reasonably necessary to serve legitimate law-enforcement interests.

Under that standard, a cell-phone search incident to arrest would be lawful if the officer has an objectively reasonable basis to believe that each area of the phone she searches contains information related to a legitimate law-enforcement interest, such as finding evidence of the crime of arrest, identifying the suspect, or protecting officers' safety. In addition, officers would retain plenary authority to search any area of a cell phone containing information in which an in-

dividual lacks a reasonable expectation of privacy, such as a call log.

C. Under any of the rationales discussed above, the search of respondent's call log was constitutional. *Robinson* alone justifies the search. But so would narrower rationales: the search sought to determine respondent's home address and it was directed only at the phone's call log. It was therefore justified to uncover evidence of the crime of arrest and to identify him, and it was reasonable in scope.

ARGUMENT

THE SEARCH OF THE CALL LOG OF RESPONDENT'S CELL PHONE COMPLIED WITH THE FOURTH AMENDMENT

A. The Warrantless Search Of A Cell Phone Seized From The Person Of An Arrestee Is Constitutional

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This Court has explained that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, * * * reasonableness generally requires the obtaining of a judicial warrant." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995) (*Vernonia*). But "a warrantless search of the person is reasonable * * * if it falls within a recognized exception" to the warrant requirement. *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1558 (2013).

The search of respondent's cell phone fell within a long-established exception to the warrant requirement: the "unqualified authority" of law-enforcement officers "to search the person of [an] arrestee," includ-

ing any items found on his person. *United States* v. *Robinson*, 414 U.S. 218, 225 (1973). That exception to the warrant requirement "appl[ies] categorically and thus do[es] not require an assessment of whether the policy justifications underlying the exception * * * are implicated in a particular case." *McNeely*, 133 S. Ct. at 1559 n.3. Rather, any warrantless search of items found on the person of an arrestee is "a 'reasonable' search." *Robinson*, 414 U.S. at 235. Under that settled doctrine, the search of respondent's cell phone was constitutional.

1. Officers have authority to search any item found on the person of an arrestee without a warrant

a. This Court's decisions have recognized "two distinct" search authorities arising out of an arrest situation: (i) the full authority to search the person of an arrestee, including any items found on the person; and (ii) a circumscribed authority to search the area around the arrestee. *Robinson*, 414 U.S. at 224. The former derives primarily from a person's reduced expectations of privacy once he has been lawfully arrested, while the latter derives from the specific law-enforcement interests in preventing the destruction of evidence and protecting the safety of officers.

With respect to the first authority, this Court has long confirmed "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Weeks* v. *United States*, 232 U.S. 383, 392 (1914); see *Carroll* v. *United States*, 267 U.S. 132, 158 (1925); *Agnello* v. *United States*, 269 U.S. 20, 30 (1925). The condition precedent to that search author-

ity is that the arrest is lawful under the Fourth Amendment—either because the arrest is authorized by a warrant or because the arrest itself satisfies one of the recognized exceptions to the warrant requirement.

That settled view comports with the original understanding of the Fourth Amendment. As this Court has explained, "searches incident to warrantless arrests * * * were * * * taken for granted at the founding." *Virginia* v. *Moore*, 553 U.S. 164, 170 (2008) (internal quotation marks and citation omitted). In the American colonies, "[a]nyone arrested could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, at 420, 751 (2009). The authority of officers to conduct a full search of the person incident to arrest was the "one exception" to the warrant requirement that was "established as firmly as the rule [against unreasonable searches and seizures] itself." *People* v. *Chiagles*, 142 N.E. 583, 583 (N.Y. 1923) (Cardozo, J.) (citing *Entick* v. *Carrington*, 95 Eng. Rep. 807 (K.B. 1765)); see *Robinson*, 414 U.S. at 232-233; Francis Wharton, *A Treatise on Criminal Pleading and Practice* § 60, at 45 (8th ed. 1880); 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 211, at 127 (2d ed. 1872).

The traditional authority of officers to conduct a full search of the person of an arrestee reflected a judgment that when a person has been lawfully arrested, the law-enforcement interest in investigating, preventing, and punishing crime outweighs "the diminished expectations of privacy of the arrestee."

Maryland v. *King*, 133 S. Ct. 1958, 1979 (2013). As then-Associate Judge Cardozo explained after canvassing the history of the doctrine, "[t]he basic principle" is that a "[s]earch of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion." *Chiagles*, 142 N.E. at 584.

It was understood, moreover, that the principal law-enforcement interest promoted by search-incident-to-arrest authority was the general interest in "gathering evidence relevant to the crime for which the suspect had been arrested." *Thornton* v. *United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring in the judgment). In describing officers' search authority, courts and treatises most frequently cited the police's interest in "search[ing] th[e] person for evidences of his guilt." *Woolfolk* v. *State*, 8 S.E. 724, 728 (Ga. 1889).[3] Courts also observed that evidence found on the body of a person incident to arrest would often constitute a "means of identifying the criminal." *Holker* v. *Hennessey*, 42 S.W. 1090, 1093 (Mo. 1897).[4]

In addition to officers' authority to conduct a full search of the arrestee's person, this Court has also recognized that the police have authority to search the

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[3] See *Kneeland* v. *Connally*, 70 Ga. 424, 425 (1883); *Thatcher* v. *Weeks*, 11 A. 599, 599 (Me. 1887); *Reifsnyder* v. *Lee*, 44 Iowa 101, 103 (1876); *Ex parte Hurn*, 9 So. 515, 519 (Ala. 1891); *Getchell* v. *Page*, 69 A. 624, 626 (Me. 1908); *State ex rel. Murphy* v. *Brown*, 145 P. 69, 71 (Wash. 1914).

[4] See *Reifsnyder*, 44 Iowa at 103; see also 1 Francis Wharton, *A Treatise on Criminal Procedure* § 97, at 136-137 (James M. Kerr ed., 10th ed. 1918).

area within the "immediate control" of the arrestee. But for many years, that authority, though "conceded in principle, [was] subject to differing interpretations as to the extent of the area which may be searched." *Robinson*, 414 U.S. at 224. In some decisions, this Court held unconstitutional full searches of the premises where a person was arrested. See, *e.g.*, *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 356-358 (1931). In *Harris* v. *United States*, 331 U.S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), however, this Court held that officers were permitted to search the premises of arrest without a warrant, so long as the search was reasonable in scope in light of the "particular circumstances of the particular case," *Harris*, 331 U.S. at 148, 152-153, and was not a "general or exploratory" search, *Rabinowitz*, 339 U.S. at 62. Those holdings rested on the historical evidence-gathering justification for warrantless searches incident to arrest—*i.e.*, "to find and seize things connected with the crime as its fruits or as the means by which it was committed." *Harris*, 331 U.S. at 151, 153 (quoting *Agnello*, 269 U.S. at 30).

In the 1960s, however, this Court's decisions addressing searches of the area around an arrestee began "consistently referring to the narrower interest in frustrating *concealment or destruction* of evidence," rather than evidence-gathering generally, as well as the need for officers to prevent arrestees from gaining access to weapons. *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment) (emphasis added) (citing *Sibron* v. *New York*, 392 U.S. 40, 67 (1968), and *Preston* v. *United States*, 376 U.S. 364, 367 (1964)). The Court ultimately held in *Chimel* v. *California*, 395 U.S. 752 (1969), that those narrower justifications de-

limited the area deemed to be within an arrestee's "immediate control," *id.* at 763, and overruled *Harris* and *Rabinowitz*, *id.* at 768. Thus, under *Chimel*, officers' authority to search the area around the arrestee is generally limited to "the area from within which he might have obtained either a weapon or something that could have been used as evidence against him." *Ibid.* *Chimel* did not curtail, however, officers' plenary authority to search the person of an arrestee.

b. After *Chimel*, the question arose whether the narrowly focused evidence-destruction and officer-safety justifications that circumscribe searches of the area around an arrestee also limit the authority to search particular items found on his person. In *United States* v. *Robinson*, *supra*, this Court held that they do not: when the officer has made a lawful arrest, she need not determine whether the justifications identified in *Chimel* are sufficiently implicated by a particular item before searching it. That holding resolves this case.

In *Robinson*, a police officer had detected an object in the breast pocket of the defendant during his lawful arrest for operating a vehicle without a permit and obtaining a permit by misrepresentation. See 414 U.S. at 220-221, 223. The officer removed the object from the pocket and, after seeing that it was a crumpled cigarette package, opened it, finding heroin capsules inside. See *id.* at 223. This Court held that the warrantless search was lawful under the search-incident-to-arrest doctrine without regard to whether the *Chimel* justifications supported it. "Having in the course of a lawful search come upon the crumpled package of cigarettes," the Court concluded, the officer "was entitled to inspect it; and when his inspec-

tion revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." *Id.* at 236.

Reviewing "the history of practice in this country and in England," *Robinson* explained that law-enforcement officers historically have possessed "unqualified authority" to search "the person of the arrestee by virtue of the lawful arrest" and that "[t]he validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation." 414 U.S. at 224-225, 235 (citing *Weeks*, 232 U.S. at 392) (emphasis omitted). "Throughout the series of cases in which the Court has addressed * * * the permissible area *beyond* the person of the arrestee which such a search may cover," the Court said, "no doubt has been expressed as to the unqualified authority of the arresting authority to search the *person* of the arrestee." *Id.* at 225 (emphases added).

Robinson further rejected the proposition that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting" the authority. 414 U.S. at 235. Nothing in precedent or history, the Court found, supports "case-by-case adjudication." *Ibid.* Rather, "the fact of the lawful arrest * * * establishes the authority to search," and, therefore, "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." *Ibid.*

This Court built on *Robinson* in *United States* v. *Edwards*, 415 U.S. 800 (1974), holding that police may conduct a search incident to arrest of objects found on

an arrestee after detaining him and taking him to the station house. In *Edwards*, the defendant had been arrested late at night for attempted burglary and brought to jail. See *id.* at 801. The next morning, without obtaining a warrant, officers removed the defendant's clothes and sent them to a forensic lab to determine whether they contained paint chips linking him to the crime. See *id.* at 802. This Court held the search lawful, explaining that "both the person and the property in [an arrestee's] immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be seized and admitted in evidence." *Id.* at 803. "[T]aking from [an arrestee] the effects in his immediate possession that constituted evidence of crime," the Court explained, "is a normal incident of a custodial arrest." *Id.* at 805. "[T]he legal arrest of a person," the Court stated, "for at least a reasonable time and to a reasonable extent[,] take[s] his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." *Id.* at 808-809 (citation omitted).

Edwards thus underscored that the authority to search the person of the arrestee, including any items found on his person, rests principally on the reduced expectations of privacy triggered by the fact of arrest. See *King*, 133 S. Ct. at 1979. As Justice Powell explained in *Robinson*, because an arrest is already a "significant intrusion of state power into the privacy of one's person," when an arrest meets the strict requirements of the Fourth Amendment, it "justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evi-

dence and disarming the arrestee." 414 U.S. at 237 (concurring).

Robinson and *Edwards*, and the unbroken understanding of the Fourth Amendment that they reflect, establish that the police may search any items found on the person of an arrestee without first determining "whether or not there [is] present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Robinson*, 414 U.S. at 235; see *Moore*, 553 U.S. at 177 ("The interests justifying search are present whenever an officer makes an arrest."). As this Court reiterated twice last Term, the "constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence." *King*, 133 S. Ct. at 1971 (citation omitted); see *McNeely*, 133 S. Ct. at 1559 n.3.

Equally important, the authority to search the person of the arrestee was traditionally justified by the government's general interest in gathering evidence of crime, not only the narrower interests in preventing the destruction or concealment of evidence and protecting officer safety. See *Weeks*, 232 U.S. at 392. Neither *Chimel* nor any other decision of this Court has held that the narrower interests that limit searches of the *area* around the arrestee also limit searches of items found on the arrestee's *person*.

The court of appeals thus erred in asking whether the specific justifications identified in *Chimel* are sufficiently implicated by cell phones. Officers enjoy a "traditional and unqualified authority" to search any item found on an arrestee, *Robinson*, 414 U.S. at 229, and no historical or doctrinal justification exists to ex-

clude cell phones from the scope of that historical adjunct to officers' arrest power.[5]

c. The court of appeals rested its contrary holding on two post-*Robinson* decisions addressing a different question entirely: the authority of officers to search an area near the arrestee at the time of arrest but not within his reaching distance at the time of the search. Those decisions do not justify diminishing officers' historical authority to search items found on an arrestee.

In *United States* v. *Chadwick*, 433 U.S. 1 (1977), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991), the police searched a locked footlocker that was sitting in the open trunk of the arrestees' automobile, finding marijuana. See *id.* at 4. The search was conducted ninety minutes after the police had taken possession of the footlocker. See *ibid.* In holding the search invalid, the First Circuit had concluded under *Chimel* that the 200-pound footlocker was not even within the arrestees' "immediate control." *United States* v. *Chadwick*, 532 F.2d 773, 780-781 (1976). The government then conceded in this Court that the footlocker "was not within [the arrestees'] immediate control" at the time of their arrests. *Chadwick*, 433 U.S. at 14; see U.S. Br. at *14, *Chadwick*, 1977 WL 189820 (No. 75-1721). The Court

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[5] *Edwards* held that a search, at the stationhouse, of items found on the arrestee the day after arrest was reasonable incident to his arrest, but suggested that such search authority was not unlimited in duration. See 415 U.S. at 808-809. The search of respondent's cell phone here took place at the stationhouse shortly after his arrest and presents no question about the search of a cell phone substantially removed in time from the arrest.

affirmed the First Circuit's judgment, holding that the search was unlawful because "[o]nce law enforcement officers have reduced luggage or other personal property *not immediately associated with the person of the arrestee* to their exclusive control, * * * a search of that property is no longer an incident of the arrest." 433 U.S. at 15 (emphasis added).

Chadwick did not limit searches of the *person* incident to arrest. As *Chadwick* itself explained, those searches stand on a different doctrinal footing altogether. Searches of the person, it said, are "justified by [the] reduced expectations of privacy caused by the arrest," whereas searches of the area around the arrestee are not. 433 U.S. at 16 n.10. And consistent with *Robinson* and *Edwards*, the Court left undisturbed the authority of police to search an item "immediately associated with the person of the arrestee," even once it is reduced to officers' "exclusive control." *Id.* at 15. Far from supporting the court of appeals' holding, therefore, *Chadwick* makes clear that the police have broad authority to search items found on the person of an arrestee without obtaining a warrant.

Arizona v. *Gant*, 556 U.S. 332 (2009), concerned the authority to search the area where an arrest was made after that area is no longer within reaching distance of the arrestee. In *Gant*, the police had searched the passenger compartment of the arrestee's vehicle, finding a firearm and cocaine, after he had been handcuffed and placed in a squad car. See *id.* at 335-336. The Court held that once a vehicle's passenger compartment is no longer within the immediate control of an arrestee, police lack blanket authority to search it (although they may search that area if they have reason to believe it contains evidence of the

crime of arrest, see pp. 45-47, *infra*). 556 U.S. at 343-344. The Court concluded that allowing searches of an area no longer within the immediate control of the arrestee would "untether the rule from the justifications underlying the *Chimel* exception," because an arrestee at that point cannot gain access to that area to destroy evidence or retrieve a weapon. *Ibid.* Like *Chadwick*, however, *Gant* did not cast doubt on officers' longstanding authority to search items found on the *person* of an arrestee and therefore does not support the court of appeals' ruling in this case.

The court of appeals concluded that it was required to apply *Gant*'s methodological approach—which required a correlation between the law-enforcement interests identified in *Chimel* and the scope of the search incident to arrest—to searches of items found on the person of an arrestee. See Pet. App. 20a-24a. For the reasons discussed in Section A.2, *infra*, cell-phone searches readily satisfy that test. But putting that aside, the court of appeals committed a more basic error: unlike the authority to search the area within the arrestee's reaching distance, the authority to search a person incident to arrest derives primarily from the "reduced expectation[] of privacy caused by the arrest." *Chadwick*, 433 U.S. at 16 n.10; see *King*, 133 S. Ct. at 1979. For that reason, "[t]he fact of a lawful arrest, standing alone, authorizes [the] search"; no further justification is necessary. *Id.* at 1971 (quoting *Michigan* v. *DeFillippo*, 443 U.S. 31, 35 (1979)).

d. The search of a cell phone involves not only the search of the body of a person and the seizure of the phone, but also a further inspection of the phone itself. That further examination, however, does not remove the search from the scope of law-enforcement authori-

ty confirmed in *Robinson* and *Edwards*. In both *Robinson* and *Edwards*, the fact that evidence of crime was contained inside the object seized—a crumpled cigarette package and the arrestee's clothing, respectively, neither of which could have reasonably been thought to contain a weapon—was not immediately apparent without a further search of the object's contents. Indeed, in *Edwards*, the clothing was subjected to a forensic analysis, see 415 U.S. at 802, yet this Court had little trouble concluding that the search did not require a warrant. This Court has reached the same conclusion in other cases involving the inspection of items found on the person of an arrestee. See *DeFillippo*, 443 U.S. at 34, 40 (holding valid search at station house of "tinfoil packet secreted inside a cigarette package" found in shirt pocket of arrestee); *Gustafson* v. *Florida*, 414 U.S. 260, 262-263, 265-266 (1973) ("Having in the course of his lawful search [of an arrestee] come upon [a] box of cigarettes, [the officer] was entitled to inspect it."). In all of those cases, officers theoretically could have set the object aside and obtained a warrant before examining it. But this Court has never required that.

Nor does the fact that evidence contained on a cell phone will often consist of written material—names, phone numbers, text messages—render the search-incident-to-arrest doctrine inapplicable. Officers' historical authority to conduct searches incident to arrest extended to the examination of documents found on the person of the arrestee, which are often the most critical evidence of criminal conspiracies. As a 19th Century Irish court explained in one of the landmark search-incident-to-arrest cases, "from the earliest times it has been the settled and unvarying practice to

seize * * * proofs of guilt" such as "letters from co-traitors evidencing the common treasonable design, found in the possession of a traitor" who has been arrested, so that they may be produced "in evidence at the trial." *Dillon* v. *O'Brien & Davis*, 16 Cox C.C. 245, 248 (Exch. Div. Ir. 1887) (cited at *Weeks*, 232 U.S. at 392; *Carroll*, 267 U.S. at 158; *Robinson*, 414 U.S. at 230) (discussing rule "in treason and felony"). Thus, for example, in *Chiagles*, *supra*, Judge Cardozo upheld the warrantless search of papers found on a suspect arrested for arson, two of which turned out to be incriminating letters, against a challenge under a New York analogue to the Fourth Amendment. See 142 N.E. at 583. He explained that officers have the authority to "search[] the person of the prisoner for anything that may be of use as evidence upon the trial, or for anything that will aid in securing the conviction," and that it would be inconsistent with that historical understanding to draw a line "between books and papers on the one hand and other articles on the other." *Id.* at 584 (internal quotation marks and citations omitted); see *Welsh* v. *United States*, 267 F. 819, 821 (2d Cir.) (letter), cert. denied, 254 U.S. 637 (1920).

This Court's decisions have accordingly found "no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." *Gouled* v. *United States*, 255 U.S. 298, 309 (1921), overruled on other grounds, *Warden* v. *Hayden*, 387 U.S. 294, 300-301 (1967). This Court approved, for example, the examination incident to arrest of "two diary pages * * * [that] contained what was in effect a full confession of [the defendant's]

participation in [a] robbery," *Hill* v. *California*, 401 U.S. 797, 799-802 & n.1 (1971), rejecting the defendant's argument that the search was not authorized in light of the diary's "personal" nature. See Pet. Br. at 19, *Hill*, *supra* (No. 51). Similarly, the Court permitted the introduction into evidence of "a ledger and certain bills" seized during a search incident to arrest. *Marron* v. *United States*, 275 U.S. 192, 193, 198-199 (1927).[6] The examination of a cell phone is thus materially indistinguishable from the inspection of items found on the person of an arrestee that this Court and common-law courts historically have upheld under the search-incident-to-arrest doctrine.

e. The categorical authority of officers to conduct a full search of any item found on an arrestee makes eminent practical sense in light of the realities of police work. In arrest situations, officers are called upon "to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989). They must decide how best to advance a criminal investigation and to protect the public from what may be ongoing criminal activities. They are also subject to myriad other rules and standards imposed by the Constitution and statutory law that regulate everything from what officers must say to arrestees to how much force they can use to apprehend them to the scope of the

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[6] Because the searches in *Hill* and *Marron* occurred before this Court's decision in *Chimel*, *supra*, the Court applied "pre-*Chimel* standards" permitting a search of the premises of arrest. *Hill*, 401 U.S. at 802. *Chimel*, however, did not affect the police's pre-existing authority to search written material properly seized incident to arrest.

permissible area of a search. To ask a law-enforcement officer to render a lawyer's judgment about whether the circumstances of the arrest, or the nature of a particular object, supports search authority—particularly when the officer may have limited information about the crime or the background of the arrestee—"would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field." *Kentucky* v. *King*, 131 S. Ct. 1849, 1860 (2011).

Requiring an item-by-item analysis of whether the *Chimel* justifications are sufficiently implicated would also cast doubt on common police practices that lower courts have long allowed, following this Court's straightforward guidance in *Robinson*, *Edwards*, *Chadwick*, and other cases. It has been well settled in lower courts for at least three decades that "it is proper for the police to seize a briefcase or package in the possession of a person at the time of arrest, and subsequently to search the property without a warrant after the arrested person has been taken into custody," *Chadwick*, 433 U.S. at 21 n.2 (Blackmun, J., dissenting). Courts of appeals have consistently applied *Robinson* and *Edwards* to uphold the warrantless search of a variety of personal items seized from the arrestee's person at the time of his arrest, such as pagers, wallets, purses, address books, and briefcases.[7] Were this Court to conclude that cell phones de-

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[7] See, *e.g.*, *United States* v. *Ortiz*, 84 F.3d 977, 984 (7th Cir.) (pager), cert. denied, 519 U.S. 900 (1996); *United States* v. *Diaz-Lizaraza*, 981 F.2d 1216, 1223 (11th Cir. 1993) (wallet, address book, and pager); *United States* v. *Uricoechea-Casallas*, 946 F.2d 162, 166 (1st Cir. 1991) (wallet); *United States* v. *Carrion*, 809 F.2d 1120,

mand an item-specific analysis, it would destabilize the settled framework for evaluating those kinds of searches, see *Hill*, 401 U.S. at 802, and sow confusion among officers making quick decisions in the multitude of unexpected circumstances they confront each day.[8]

2. Even if officers' search authority were subject to item-by-item exceptions, a cell-phone exception would not be warranted

Even if the Fourth Amendment required courts to draw item-by-item exceptions to officers' search-incident-to-arrest authority, no sound reason would justify excluding cell-phone searches from the general rule. The historical justifications that this Court and common-law courts identified for the authority to search a person incident to arrest—obtaining evidence, identifying the suspect, and protecting officer safety—apply with far greater force, in fact, to searches of cell phones than to searches of virtually

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1123, 1128 (5th Cir. 1987) (billfold and address book); *United States* v. *Watson*, 669 F.2d 1374, 1383-1384 (11th Cir. 1982) (wallet, address book, and papers); *United States* v. *Smith*, 565 F.2d 292, 294 (4th Cir. 1977) (address book); *United States* v. *Eatherton*, 519 F.2d 603, 610-611 (1st Cir.) (briefcase), cert. denied, 423 U.S. 987 (1975); *United States* v. *Lee*, 501 F.2d 890, 892 (D.C. Cir. 1974) (purse); see also *United States* v. *Frankenberry*, 387 F.2d 337, 339 (2d Cir. 1967) (diary).

[8] Even without authority to search an arrestee incident to arrest, some searches of items found on the person of an arrestee will be justified because of "exigent circumstances," a Fourth Amendment doctrine that the government did not raise in this case. See *McNeely*, 133 S. Ct. at 1559. But that exception requires the police to predict whether a court will later conclude that the totality of the circumstances justified the search. See *ibid.*

any other containers. It would therefore be historically and doctrinally anomalous to require prior judicial authorization for searches only of those devices.

a. As explained above, until the 1960s, the principal law-enforcement interest that this Court cited for the search-incident-to-arrest exception was the "interest in gathering evidence relevant to the crime for which the suspect had been arrested." *Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment). Indeed, in its first decision discussing the doctrine, this Court grounded the authority in the need to "discover and seize the fruits or evidences of crime," *Weeks*, 232 U.S. at 392, and that understanding comported with views of 19th Century courts and legal commentators, see pp. 13-15, *supra*. In *Chimel*, this Court focused on the narrower interest in preventing the concealment or destruction of evidence (as well as disarming the suspect). That focus was sensible in determining the spatial reach of officers' authority to search the area around the arrestee, for which the common law did not provide a clear answer.

But in determining whether to fashion exceptions for particular items found on the *person* of an arrestee, which officers have historically enjoyed "unqualified authority" to search, *Robinson*, 414 U.S. at 247, this Court should not limit its consideration to the justifications set forth in *Chimel*. Rather, it should measure the search against the more general evidence-gathering justification that underpinned officers' search authority as an original matter. And under that justification, law-enforcement officers have a compelling interest in searching cell phones found on persons whom they have arrested.

i. Cell phones are now critical tools in the commission of crimes. Cell phones can memorialize communications among confederates, capture criminal activities on camera, and contain clues as to the location of victims or contraband. Certain crimes, such as respondent's offense of drug distribution, are very likely in today's world to be facilitated through the use of cell phones. As cell phones acquire more sophisticated features in the future, moreover, they will only become more useful in the commission of criminal offenses. Law-enforcement officers therefore have a powerful interest in searching the cell phone of an arrestee as soon as possible to advance an investigation and disrupt ongoing criminal enterprises.

Of course, the police always have an interest in investigating crime, and that is ordinarily insufficient, standing alone, to justify a warrantless search. See *Vernonia*, 515 U.S. at 653. But a search for evidence incident to arrest is fundamentally different from other evidence-gathering searches. For one, "it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended." *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment). A warrantless search incident to arrest will often accompany a warrantless arrest prompted by conduct that the officers recently observed or that otherwise occurred close in time to the arrest. And because cell phones are communication devices, they are particularly likely to contain evidence of a just-completed illegal act—a text message between gang members, for example, or a call to a drug dealer.

More generally, the point of arrest marks the beginning of a critical phase in a criminal investigation. Once confederates or family members learn that the

suspect has been detained, they may take action to inhibit the ensuing investigative activities. Drugs may be flushed, records destroyed, or witnesses intimidated, and co-conspirators may flee. Officers may have no specific reason to suspect such conduct (and therefore no legal ground to invoke the exigency exception to the warrant requirement, see note 8, *supra*). After witnessing a drug deal, for example, they may know nothing about the seller or his confederates. But they may infer from experience that it is critical to act quickly during the period immediately following a probable-cause arrest to obtain evidence and disrupt further crimes, even absent an articulable exigency. The search-incident-to-arrest doctrine embodies a judgment that the government's interests at that moment outweigh the suspect's diminished privacy interest in items held on his person.

Searches of cell phones can be especially important in crime investigation and prevention. A cell phone can quickly tell an officer the names of the arrestee's confederates or other parties to an unlawful transaction, the location of his stash of contraband or weapons, or the time and place for a planned assault or robbery. The usefulness of that information will be at its apex immediately upon the suspect's arrest. Once that critical period begins, officers, "for at least a reasonable time and to a reasonable extent," *Edwards*, 415 U.S. at 808-809 (citation omitted), should retain their "traditional and unqualified authority" to search the phone for evidence of crime. *Robinson*, 414 U.S. at 229.

Excluding cell phones from officers' general authority to search an arrestee would also leave an anomalous gap in their investigative tools. For centu-

ries, officers who lawfully apprehend suspects have been able to examine documents and other items found on their persons to facilitate an investigation. A cell-phone exception would handicap officers' efforts where the criminal suspects employ technological replacements. That would foster the inequity that those offenders who use more advanced technology would have a special protection from police investigation that does not apply to those who keep records of their criminal activity with only pen and paper.

ii. Cell-phone searches also serve the time-sensitive law-enforcement interest in determining or confirming the identity of an arrestee. This Court has recognized that "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." *King*, 133 S. Ct. at 1971 (quoting *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cnty.*, 542 U.S. 177, 191 (2004)). "An 'arrestee may be carrying a false ID or lie about his identity,'" *ibid.* (quoting *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510, 1521 (2012)), and therefore law-enforcement officers will often seek confirmation that he is who he claims to be. The "inspection of an arrestee's personal property," this Court has further explained, "may assist the police in ascertaining or verifying his identity." *Illinois* v. *Lafayette*, 462 U.S. 640, 646 (1983) (discussing booking searches). Indeed, officers' authority to search arrestees was traditionally justified in part by the need to identify them. See p. 15, *supra*.

Cell phones are particularly useful in identifying an arrestee. A cell phone is likely to contain information indicating its possessor's real name, such as text or email messages. It also may include a landline telephone number or address. In this case, for example,

the police were able to determine the number associated with respondent's home, and from that information they determined his address from a public database. Quickly ascertaining that information can aid the police in processing an arrestee and can expedite an investigation. This Court has made clear, moreover, that "[a]n individual's identity is more than just his name or Social Security number," and includes such matters as his criminal history. *King,* 133 S. Ct. at 1971. Confirming a suspect's name and phone number can help police determine if he has a criminal history, a mental disability, or an outstanding warrant.

This Court has also recognized that police officers have a crucial interest in determining whether an arrestee is a member of a criminal organization such as a street gang—information that may be critical to determining where to place him in the jail population and to addressing other safety issues. See *King*, 133 S. Ct. at 1972 (citing *Florence*, 132 S. Ct. at 1519). Indeed, this Court has approved a close visual inspection of an arrestee's naked body to ascertain gang affiliation, explaining that "[t]he identification and isolation of gang members before they are admitted protects everyone in the facility." *Florence*, 132 S. Ct. at 1518-1519. The comparatively less intrusive search of a cell phone to determine gang affiliation advances that safety purpose as well. See Pet. at 3, *Riley* v. *California*, cert. granted, No. 13-132 (oral argument scheduled for Apr. 29, 2014).

b. Even if this Court considers only the narrower justifications that *Chimel* cited in defining the permissible search area around the arrestee, cell-phone searches should be deemed lawful. The interests iden-

tified in *Chimel*—preventing the destruction or concealment of evidence and protecting officer safety—apply with far greater force to searches of cell phones than to searches of virtually any other objects or containers that might be seized incident to arrest.

i. *Chimel*'s concern with preventing the destruction or concealment of evidence is implicated more directly by cell phones than by any of the objects at issue in searches that this Court has approved under the search-incident-to-arrest doctrine. See *DeFillippio*, 443 U.S. at 34 ("tinfoil packet secreted inside a cigarette package"); *Edwards*, 415 U.S. at 802 ("clothing"); *Gustafson*, 414 U.S. at 262 ("cigarette box"); *Robinson*, 414 U.S. at 223 ("crumpled up cigarette package"). Unlike other containers, which could be stored by the police to prevent their destruction until a warrant is obtained, cell phones contain information that is susceptible to destruction or concealment after the suspect has been taken into custody and denied access to the device. That threat has presented tremendous challenges to law-enforcement officers, and it is only growing more severe as rapidly changing cell-phone technology becomes even more sophisticated.

In the current technological landscape, law-enforcement officers face two types of problems, both of them serious. First, many modern cell phones allow users to lock their contents behind a password. See, *e.g.*, iPhone User Guide For iOS 7, at 36 (Oct. 2013) (iPhone Manual).[9] Importantly, a phone typically locks automatically after a period of inactivity, which a

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[9] http://manuals.info.apple.com/en_US/iphone_user_guide.pdf.

user can adjust. *Id.* at 10, 36. At that point, the password must be entered to access the phone's contents. *Ibid.* In addition, on the iPhone, the user can select a setting that ensures that "[a]fter ten failed passcode attempts * * * all [his] information and media are erased." *Id.* at 36.

Even in the most sophisticated law-enforcement forensic labs, overcoming a password lock is a difficult, time-consuming task, if it can be done at all. See Rick Ayers et al., National Institute of Standards and Technology, U.S. Department of Commerce, *Guidelines on Mobile Device Forensics* (*Draft*) 24 (Sept. 2013) (NIST Draft Guidelines);[10] see also, *e.g.*, *United States* v. *Brown*, No. 12-79-KKC, 2013 WL 1185223, at *5 (E.D. Ky. Mar. 20, 2013). It might take weeks or months. "Burner" phones popular among drug traffickers can be particularly difficult to unlock because they often have no port that can be attached to forensic tools that law-enforcement agencies use to override passwords. Some smartphones are effectively impenetrable once the password is triggered. See Simson Garfinkel, *The iPhone Has Passed a Key Security Threshold*, MIT Technology Review (Aug. 13, 2012).[11] And because of the time and expense it takes to override a password, it is unlikely that most law-enforcement agencies will have the resources to expend on the effort in any but the most serious cases. For cash-strapped local police agencies, information

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[10] www.nist.gov/forensics/research/upload/draft-guidelines-on-mobile-device-forensics.pdf.

[11] www.technologyreview.com/news/428477/the-iphone-has-passed-a-key-security-threshold/.

that is password-protected on even a comparatively simple smartphone may be as good as gone.

That means that if an officer seizes an arrestee's cell phone, the clock is ticking. The officer will not know if the phone is password-protected. Critical information to the investigation may be stored on the phone but will be effectively lost if it automatically locks. Many officers, however, now carry digital cameras, and if an officer has an opportunity to quickly search the phone at the scene for evidence, she can take pictures of the incriminating material, preserving it in case the phone locks. See NIST Draft Guidelines 29. But if a warrant were required, the delay in obtaining the evidence from a password-protected phone is not likely to be the time it takes to get in touch with a magistrate judge. The evidence might not be accessible for weeks or months, or it might be permanently lost. Thus, for password-protected phones that lock, it often will not be true that "police officers can reasonably obtain a warrant * * * without significantly undermining the efficacy of the search." *McNeely*, 133 S. Ct. at 1561; see NIST Draft Guidelines 35 ("Where possible, devices supporting encryption, such as Android and iOS devices, should be triage processed at the scene if they are found in an unlocked state, as the data may no longer be available to an investigator once the device's screen is locked, or if the battery exhausts.").

An officer could, theoretically, keep the phone from locking by continually touching the screen until a warrant can be secured. But that is impracticable, if not completely ineffective. The officer has things to do when she has arrested someone other than keep a cell phone awake until a judge issues a warrant. And if a

suspect has multiple phones, or the officer has arrested multiple suspects each of whom has a phone, it will not be logistically feasible to keep each phone active while taking the suspects to the detention facility and handling other matters. Moreover, before the officer has an opportunity to obtain a warrant, the phone's battery could have drained. For many phones, once their batteries are either drained or removed, encryption is deployed that makes it harder or impossible for law-enforcement officers to overcome the password when power is restored. See NIST Draft Guidelines 30-31; *United States* v. *Smith*, No. S1-4:11CR288, 2012 WL 1309249, at *13 (E.D. Mo. Mar. 13, 2012) (Adelman, M.J.).

The second problem is remote wiping. Commonly known techniques enable co-conspirators without physical access to a cell phone to erase information stored on it. Doing so requires no great technological acuity. Even on older-model phones like respondent's, for example, the list of "missed calls" could be entirely erased by calling the phone repeatedly from another number, because such phones typically store only the most recent missed calls. See NIST Draft Guidelines 29; see, *e.g.*, *United States* v. *Santillan*, 571 F. Supp. 2d 1093, 1102 (D. Ariz. 2008).

Smartphones have tremendously increased the ability to remotely destroy evidence contained on a cell phone because their entire contents can be erased from a different location. See NIST Draft Guidelines 29. As the Seventh Circuit has explained, "remote-wiping capability is available on all major cell-phone platforms," and "if the phone's manufacturer doesn't offer it, it can be bought from a mobile-security company." *United States* v. *Flores-Lopez*, 670 F.3d 803,

808-809 (2012) (Posner, J.) (citing websites offering remote-wiping software for Apple and Android smartphones). For example, Apple's iPhone manual explains that a user can employ its "Find My iPhone" application to "remotely wipe the data" on the phone. iPhone Manual 18. That can be accomplished simply by logging into a website from a computer or another phone and clicking "Erase."[12] Third-party applications allow users to remotely wipe a phone by sending it a text message. See NIST Draft Guidelines 29.[13] Even if the phone is off or not connected to the network, the phone's contents will be wiped as soon as it comes back online.

Remote-wiping technology is improving. A smartphone application currently in development called "Zones" would enable "geofencing": a person could preset his phone to perform certain actions automatically, including wiping itself of all user-inputted data and applications by returning to its factory settings, or sending an alert to other people, when it is brought into certain geographic areas. See Richard Chirgwin, *WhisperSystems creates "suicide pill" for phones*, The Register (Jan. 28, 2014) ("[I]f Alice is arrested * * * the phone can be programmed to send a preset e-mail or SMS to a defined recipient list; or the Super lock (unlock) or wipe functions can be assigned to a lo-

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[12] Apple Support, *iCloud: Erase your device*, http://support.apple.com/kb/ph2701 (last modified Feb. 17, 2014)

[13] *E.g.*, Sean Bianco, *Remote Wipe Mobile Devices via SMS* (Feb. 6, 2012), www.mobiledevicemanager.com/mobile-device-security/remote-wipe-mobile-devices-via-sms/.

cation."); [14] see also NIST Draft Guidelines 31. On a webpage for Zones, one recommended use is "draw[ing] zones around police stations" so that the phone will "factory reset on entry."[15]

The court of appeals dismissed the risk of remote wiping because it believed that the government can take measures to prevent it. The court suggested, for example, "simply turn[ing] the phone off or remov[ing] its battery." Pet. App. 23a. As discussed above, however, either of those steps could encrypt the contents of the phone, making it especially difficult for law-enforcement agencies ever to access them. Officers may be able to put a phone into "Airplane Mode," thus blocking access to a network, but this may inadvertently lead to the destruction of evidence. See NIST Draft Guidelines 30-31. Citing a law-review article, the court of appeals also said that officers "can put the phone in a Faraday enclosure, a relatively inexpensive device 'formed by conducting material that shields the interior from external electromagnetic radiation.'" Pet. App. 23a-24a (citation omitted). A Faraday bag can be effective in blocking signals from cell-phone towers. But it may fail if the phone passes close to a tower, where the signal is particularly strong. See NIST Draft Guidelines 30, 32. In addition, the phone expends a large amount of power when it searches for a signal, so placing a phone in a Faraday bag risks draining its battery—potentially triggering encryption of its contents, and at minimum re-

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[14] www.theregister.co.uk/2014/01/28/whispersystems_creates_suicide_pill_for_phones/.

[15] See https://github.com/WhisperSystems/Zones (last visited Feb. 28, 2014).

quiring police officers to obtain a power cord that works with the phone before searching it (a challenge given the wide variety of phones on the market). See *id.* at 30. And because the remote-wiping command will operate as soon as the cell phone reconnects to the network, officers would need access to special rooms or equipment enveloped in protective material in order to eventually examine the phone. See *id.* at 33. Even if a local police department has built such a room or has access to such equipment, it may not be feasible for officers to use it for routine investigations.[16]

These two threats—password protection and remote wiping—pose significant problems for law-enforcement officers who seek to preserve evidence contained on a cell phone. And even the court of appeals acknowledged that these threats may grow in the future. See Pet. App. 28a n.12 ("We acknowledge that we may have to revisit this issue in the years to come, if further changes in technology cause warrantless cell phone data searches to become necessary under one or both of the *Chimel* rationales.").

More generally, even under the most optimistic view of the government's ability to preserve evidence contained on cell phones, it cannot be doubted that cell phones implicate *Chimel*'s evidence-destruction justi-

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[16] The court of appeals also suggested that officers could blindly copy a phone's contents at the scene of arrest. Although some law-enforcement agencies have the sophisticated devices that can copy the contents of some phones, it would be very costly to provide every law-enforcement agent in the field with those devices, which may not work with a particular phone or be feasibly used given the other tasks officers must perform.

fication to a far greater degree than the objects at issue in this Court's precedents, all of which could have been stored by the police without examining them until a warrant could be secured. To hold that cell phones do not sufficiently implicate the *Chimel* evidence-destruction justification would therefore amount to a wholesale rejection of this Court's settled jurisprudence.

ii. Cell-phone searches also implicate the government's "most critical[]" interest in "ensur[ing] [officers'] safety during 'the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.'" *Moore*, 553 U.S. at 177 (quoting *Robinson*, 414 U.S. at 234-235). When officers arrest a suspect in a residence or other building, or even in a public area such as a road, they always face a risk that confederates or family members could arrive unexpectedly during and after the arrest, creating a dangerous situation for officers. As this Court has explained, "[u]nexpected arrivals by occupants or other persons accustomed to visiting the premises might occur in many instances." *Bailey* v. *United States*, 133 S. Ct. 1031, 1039 (2013).

The Court has advised that police can "mitigate that risk" during the execution of a search warrant for a residence "by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door." *Bailey*, 133 S. Ct. at 1039. Another way that officers can mitigate the risk of danger from sudden arrivals is by reviewing the recent calls and text messages of an arrestee's cell phone. That can alert the officers that confederates are headed to the scene of the arrest and that they should take safety precautions or call for backup.

As with the evidence-destruction justification, the search of a cell phone implicates *Chimel*'s safety concern more directly than the search of almost any other container found on the person of an arrestee. Although a bag might contain a gun or a knife, it could be moved out of reach of the suspect, eliminating the threat. But a cell phone, even once it is within the exclusive possession of the police, may have information that will warn officers about an imminent dangerous encounter.

c. The court of appeals thus clearly erred in its conclusion that cell phones do not implicate the basic justifications for the search-incident-to-arrest doctrine. The justifications identified in *Chimel*, as well as the evidence-gathering justification that originally gave rise to officers' authority to search a person incident to arrest, are more strongly implicated by the search of a cell phone than by the search of virtually any other object.

The court of appeals expressed the concern that cell-phone searches are not "self-limiting," by which it appeared to mean that individuals often have "more personal information on their cell phones than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers." Pet. App. 18a, 20a. It is true that cell phones can contain a great deal of personal information, but it is equally true that they can contain precisely the sort of information that police need to serve critical, time-sensitive law-enforcement interests in the period after an arrest is made. Moreover, numerous other items that courts have long permitted officers to search, such as diaries, address books, briefcases, and purses (see p. 27 & n.7,

supra), can also contain a great deal of personal information.

In any event, *Chimel*, together with *Robinson*, *Edwards*, *Chadwick*, and other decisions of this Court, stand at minimum for the proposition that when a person is arrested, and where the *Chimel* justifications are present, the government's law-enforcement interests outweigh the diminished expectation of privacy of the arrestee in items found on his person. Indeed, the fact of arrest triggers numerous other very substantial intrusions on an individual's privacy. He may be confined in facilities that lack any personal privacy, see generally *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-56 (1991), and potentially subjected to a strip search, including the requirement "to lift [his] genitals or cough in a squatting position," *Florence*, 132 S. Ct. at 1520. Given that baseline, it would be incongruous to confer on cell phones a special immunity from the "one exception" to the warrant requirement that was "established as firmly as the rule [against unreasonable searches and seizures] itself." *Chiagles*, 142 N.E. at 583 (Cardozo, J.).

3. The search-incident-to-arrest doctrine justifies a search of files stored on the phone, not files accessed remotely from the phone

The search-incident-to-arrest doctrine contains an intrinsic limitation that avoids concerns that a cell-phone search will result in unlimited acquisition of remotely stored data. See Pet. App. 18a. As discussed above, *Chimel* held that a search incident to arrest is generally limited to the area within the arrestee's immediate control, defined as his reaching distance. For obvious reasons, *Chimel*'s spatial limi-

tation ordinarily does not restrict a search of an item found on an arrestee's person. But because smartphones can connect to the Internet, they can be used to view computer files that are stored elsewhere—*e.g.*, on the Internet's "cloud," or on a home computer connected to a network.

Using a cell phone to retrieve files beyond those stored on the phone could not be justified as a search incident to arrest. *Chimel*'s spatial limit on searches incident to arrest would apply: accessing remotely stored files would not be a search of the phone, but rather a search of computer servers or hard drives located some distance from the place of arrest. Such a search might be reasonable based on some other Fourth Amendment doctrine, depending on where the files are stored (*e.g.*, folders accessible to third parties versus a private account), the law-enforcement interests at stake, and the public's expectation of privacy in those files as opposed to files stored on the phone. See, *e.g.*, *Maryland* v. *Buie*, 494 U.S. 325, 334 (1990) (approving protective sweep of home incident to arrest). But those searches would require a different basis than the search-incident-to-address doctrine.

B. Even If The Police Are Not Always Authorized To Search An Arrestee's Cell Phone, The Court Of Appeals Erred In Imposing A Blanket Prohibition

Robinson and *Edwards* set forth a categorical rule that the police may always search items found on the person of an arrestee without conducting "an assessment of whether the policy justifications underlying the exception * * * are implicated in a particular case." *McNeely*, 133 S. Ct. at 1559 n.3. Under those decisions, "a full search of the person" incident to ar-

rest "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Robinson*, 414 U.S. at 235. The court of appeals, however, held that cell phones "as a category" are not encompassed by that authority because (i) cell phones do not sufficiently implicate the *Chimel* justifications, and (ii) cell phones can store a great deal of personal information. See Pet. App. 15a-24a. But even if either of those objections were meritorious, the court of appeals erred in holding that a lawful arrest never authorizes a cell-phone search.

1. Officers may search an arrestee's cell phone when they have reason to believe that it contains evidence of the offense of arrest

The court of appeals believed that cell phones do not fall within the search-incident-to-arrest doctrine because they do not sufficiently implicate the *Chimel* justifications. See Pet. App. 20a-24a. Even if cell phones could be excepted from *Robinson*'s categorical rule and the court's *Chimel* analysis were correct, it would not mean that a lawful arrest never authorizes the search of a cell phone. Rather, as the Court has held in the context of vehicle searches incident to arrest that do not serve the *Chimel* justifications, law-enforcement officers would still be permitted to search a cell phone when they have reason to believe that it contains evidence of the offense of arrest.

a. In *Gant*, *supra*, this Court held that under *Chimel*, officers' search-incident-to-arrest authority does not uniformly encompass the passenger compartment of an arrestee's vehicle once the arrestee has been handcuffed and placed in a squad car. Like

the court of appeals here, the Court concluded that allowing officers to search the passenger compartment even when it is no longer within the arrestee's reaching distance would "untether the rule from the justifications underlying the *Chimel* exception." 556 U.S. at 343. But this Court's response to that problem was not to prohibit such searches categorically. Instead, "following the suggestion in Justice Scalia's opinion concurring in the judgment" in *Thornton*, *supra*, the Court held that officers could conduct a "search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Gant*, 556 U.S. at 335.

Although *Gant* cited "circumstances unique to the automobile context" as support for that authority, 556 U.S. at 335, Justice Scalia's opinion in *Thornton* (joined by Justice Ginsburg) had relied primarily on the common-law justification for search-incident-to-arrest authority: "the general interest in gathering evidence related to the crime of arrest." 541 U.S. at 629. That interest, he explained, justifies the search of an arrestee's automobile entirely apart from the *Chimel* rationales. He also pointed to the fact that "motor vehicles" are "a category of 'effects' which give rise to a reduced expectation of privacy and heightened law enforcement needs." *Id.* at 631 (citation omitted).

The "practical consequence" of anchoring officers' search authority to the traditional evidence-gathering justification, Justice Scalia explained in *Thornton*, is that the authority is not categorical. Rather, officers may conduct a search only when it is reasonable to believe that the car contains evidence relevant to the offense of arrest: "When officer safety or imminent evi-

dence concealment or destruction is at issue, officers should not have to make fine judgments in the heat of the moment[,] [b]ut in the context of a general evidence-gathering search, the state interests that might justify any overbreadth are far less compelling." 541 U.S. at 632.

Following the reasoning of Justice Scalia's *Thornton* concurrence and *Gant*, last Term, four Members of the Court joined an opinion explaining that the search-incident-to-arrest authority can rest on either of two independent bases. "The objects of a search incident to arrest," that opinion said, "must be *either* (1) weapons or evidence that might easily be destroyed, *or* (2) evidence relevant to the crime of arrest." *King*, 133 S. Ct. at 1982 (Scalia, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.) (emphases added).

b. Under that framework, even if the Court were to hold that officers lack categorical authority to search cell phones because such searches do not sufficiently accord with the *Chimel* justifications, officers should be authorized to search a cell phone when they reasonably believe that it contains evidence relevant to the crime of arrest.[17] Such a holding would be supported by *Gant*'s rationale. As with automobiles, individuals who have been arrested have "reduced expectations of privacy" in items found on their person. *Chadwick*, 433 U.S. at 16 n.10. And the search-incident-to-arrest doctrine was traditionally under-

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[17] That authority should extend to any crime for which officers have probable cause to charge the arrestee. See *Devenpeck* v. *Alford*, 543 U.S. 146, 152-156 (2004).

stood to provide a means for officers to gather evidence of the crime of arrest. See p. 15, *supra*.

A *Gant*-based standard would preserve officers' authority to search cell phones for evidence of many serious crimes while ensuring that police will not search individuals' cell phones "whenever an individual is caught committing a traffic offense." *Gant*, 556 U.S. at 345. A person "may be arrested for a wide variety of offenses," and not all give rise to a "reasonable basis to believe relevant evidence might be found" on his phone. *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment). But for those arrestees for whom it is reasonable to believe that their cell phones contain evidence relevant to the offense of arrest—such as individuals arrested for drug trafficking, gang-related offenses, financial frauds, and terrorism—officers would retain the authority to search their cell phones. See *ibid.* (concluding that because the "petitioner was lawfully arrested for a drug offense," it "was reasonable * * * to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted").

A *Gant*-based limitation on the authority of officers to search incident to arrest would dispel any concern that the government will use minor traffic violations as pretexts to search the cell phones of citizens for whom they lack probable cause to arrest for more serious offenses. Cf. *Gant*, 556 U.S. at 345. No one has demonstrated that law-enforcement officers are engaging in such behavior. But to the extent that theoretical possibility would raise unique concerns in the cell-phone context, a *Gant*-based standard would bar

officers from searching cell phones that have no reasonable relation to the offense of arrest.

2. If the Court concludes that cell phones raise materially greater privacy concerns than other items, the scope of those searches could be limited under the Fourth Amendment's reasonableness standard

The court of appeals distinguished cell phones from other objects on the ground that the "storage capacity of today's cell phones is immense" and information stored on a phone can be "of a highly personal nature." Pet. App. 16a-17a. As discussed above, that suggestion provides no ground to draw a special exception for cell phones from officers' otherwise plenary search authority. Neither this Court nor lower courts have excluded items like diaries, letters, briefcases, or purses from the search-incident-to-arrest doctrine on the ground that they can contain a potentially large volume of personal information. See p. 27 & n.7, *supra*.

But if it were thought that cell phones raise such unique privacy concerns that a special rule is necessary, the appropriate response is not to require a warrant for a type of search that has never required one—conferring on cell phones a greater immunity from officers' traditional search authority than any other object. Rather, any assertedly unique privacy concerns should be addressed by limiting the *scope* of cell-phone searches incident to arrest under the Fourth Amendment's basic reasonableness standard. Cf. *Edwards*, 415 U.S. at 808 n.9 ("This type of police conduct must [still] be tested by the Fourth Amendment's general proscription against unreasonable

searches.") (internal quotation marks omitted; alteration in *Edwards*).

a. In assessing the reasonableness of warrantless searches, this Court "balance[s] the privacy-related and law enforcement-related concerns" at stake. *King*, 133 S. Ct. at 1970. That balancing weighs "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States* v. *Knights*, 534 U.S. 112, 119 (2001) (quoting *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999)). Where a challenged search authority relates only to arrestees, this Court has conducted this balancing in light of the substantially diminished expectation of privacy enjoyed by a person who has been lawfully taken into custody. *E.g.*, *King*, 133 S. Ct. at 1977-1979; *Florence*, 132 S. Ct. at 1516; see also *Bell* v. *Wolfish*, 441 U.S. 520, 557 (1979).

The governmental interests at stake in a search incident to arrest are those that this Court and common-law courts have long identified: searching for evidence of crime, identifying the arrestee, and protecting officers. Those interests have historically been understood to be so significant that they justified a categorical authority to search any item found on the person of the arrestee, with no requirement that officers demonstrate a reasonable relationship between the object and a law-enforcement objective. See *McNeely*, 133 S. Ct. at 1559 n.3; see also *Robinson*, 414 U.S. at 235. That categorical authority also rested on officers' need to make "quick ad hoc judgment[s]" in arrest situations. *Ibid.*

On the other side of the balance, a person's phone may store a great deal of personal information, such as private communications, photographs, and videos. See Pet. App. 17a. But an *arrestee's* privacy interest is substantially diminished, particularly with respect to evidence of crime and his identity. Because the police have always been permitted to conduct a full evidentiary search of any items found on his person, including personal documents or photographs, an arrestee's expectation of privacy in those items is, at best, minimal.

In light of that balance, if a scope limitation were warranted, a reasonable search would extend to information on the phone that is reasonably related to the legitimate governmental objectives in discovering evidence of crime, identifying the arrestee, and protecting officers—but not to information that has no such connection. Accordingly, an officer should, at minimum, be permitted to search every area of a cell phone's contents in which she has an objectively reasonable basis to believe that information relevant to one of those objectives will be discovered. See *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) ("The scope of a search is generally defined by its expressed object."). That standard would prohibit officers from exploring an arrestee's phone in the mere hope that they might discover evidence of some crime. But unlike the court of appeals' blanket prohibition, it would not entirely vitiate officers' traditional authority to search a suspect incident to arrest in the context of cell phones.

That standard would come with a cost, because it would require an officer in the field to ask herself whether the steps she is taking in conducting a cell-phone search are reasonably tied to legitimate objec-

tives. One of the virtues of the traditional understanding reflected in *Robinson* and *Edwards* is that it does not require such case-by-case judgments. Nevertheless, a standard anchored to an objectively reasonable relationship between the scope of the search and legitimate law-enforcement objectives should, in the run of cases, coincide with officers' reasonable interests in conducting legitimate investigative activities.

b. Under such a scope-limited approach, officers should always be permitted to conduct a quick search of a cell phone to confirm a suspect's identity. As the facts of this case illustrate, a quick search of a cell phone can reveal that a suspect is lying about basic identifying information, such as his name, phone number, or address. That information can often be ascertained from a phone without a close examination of any particularly personal content. For example, a brief scan of the phone's list of contacts will show whether, as in this case, the phone has a saved contact for "my house."

In addition, officers should be permitted, at least where they have reason to believe that a suspect is involved in gang activity, to conduct a more extensive search of the phone to confirm or dispel that suspicion. Ascertaining whether an arrestee is a member of a street gang serves a multitude of significant law-enforcement interests, not least of which is the safety of officers and other detainees. See *King*, 133 S. Ct. at 1970-1975. For that reason, this Court has approved exceptionally intrusive searches designed to determine gang affiliation. See *Florence*, 132 S. Ct. at 1518-1519. Finally, officers would also be permitted to conduct a brief search of a cell phone's recent mes-

sages to determine if confederates or others might be headed to the scene of the arrest.

c. A more extensive search would be objectively reasonable if an officer has reason to believe the phone contains evidence of the offense of arrest. The scope of that search would depend on the nature of the offense. Drug traffickers, for example, can reasonably be expected to have evidence related to their transactions stored in the areas of the phone concerned with its communication functions—the call log, contacts list, text messages, and emails. But whether it is reasonable to believe that evidence related to drug trafficking will be stored in the multimedia features of the phone—*e.g.*, saved photos and videos—might require a case-by-case determination. Those sorts of files, however, would be categorically searchable for offenses particularly likely to involve photographic evidence, such as the distribution of child pornography.

In contrast to those broader searches, for a crime such as "texting while driving," officers would have authority only to search the text messages and emails sent or received during the period when the offense occurred. And for some crimes, such as routine traffic violations, it would not be reasonable to conduct a search of the cell phone for evidentiary purposes at all (although it would still be appropriate to conduct a quick search for identity-related information).

In some circumstances, an officer might reasonably believe that a particular folder, application, or document on a cell phone contains information related to a legitimate law-enforcement objective, but it becomes clear upon opening that item that it does not. The officer then should terminate her review of an area of the phone as soon as it becomes apparent that it is un-

likely to contain information relevant to a legitimate law-enforcement objective. To that end, as this Court has held in the context of other warrantless searches designed to meet a specific objective, an officer could be permitted to conduct "a cursory visual inspection" to confirm or dispel her reasonable belief that a particular area of a phone—for example, the text messages—contains evidence relevant to the crime of arrest. *Buie*, 494 U.S. at 327.

d. Regardless of any other limitation the Court might establish, the police should always be able to search areas of the phone for which individuals have no reasonable expectation of privacy—in particular, call logs. This Court held in *Smith* v. *Maryland*, 442 U.S. 735 (1979), that an individual lacks "a legitimate expectation of privacy regarding the numbers he dialed on his phone." *Id.* at 742 (internal quotation marks omitted). Under that holding, this Court has authorized law-enforcement officers to use pen registers to record the numbers dialed from a suspect's phone without a warrant. The Court explained that "[a]ll telephone users realize that they must convey phone numbers to the telephone company" and "that the phone company has facilities for making permanent records of the numbers they dial." *Ibid.* A person therefore "assume[s] the risk that the information w[ill] be divulged to police." *Id.* at 745.

Under the reasoning of *Smith*, this Court should, at minimum, preserve the authority of officers to search a cell phone's call log incident to arrest. It is true that unlike a pen register, the search of a cell phone is a Fourth Amendment "search," because the owner has a property right in the phone entirely apart from any reasonable expectation of privacy in its contents. See

United States v. *Jones*, 132 S. Ct. 945, 951-952 (2012). But to the extent that the Court creates a novel exception to officers' otherwise-plenary authority to search items found on an arrestee because of special privacy concerns raised by cell phones, it would be incongruous to apply that holding to information on the phone in which an individual lacks any reasonable expectation of privacy.

C. The Search Of The Call Log Of Respondent's Cell Phone Was Lawful

The search of the call log of respondent's cell phone complied with the Fourth Amendment. For the reasons set forth in Section A, *supra*, officers have plenary authority to search a cell phone found on an arrestee without a warrant. But even if the Court imposed either or both of the two limitations discussed in Section B, *supra*, the search here was reasonable.

1. If the Court categorically limited warrantless cell-phone searches to cases in which it is reasonable to believe that the phone contains evidence of the offense of arrest, the search here was permissible. The officers had reason to believe that the phone contained evidence relevant to the crime for which respondent was arrested: drug trafficking. The district court found that "[t]he officers, having seen the 'my house' notation on [respondent's] caller identification screen, reasonably believed that the stored phone number would lead them to the location of [respondent's] suspected drug stash." Pet. App. 66a. As one of the officers explained by affidavit, given "the large amount of cash" on respondent, his possession of "two cell phones," "the amount of drugs found" on the buyer, and other factors, he believed that respondent might

"have a large quantity of drugs stored somewhere." J.A. 21. And the officer knew from his "training and experience that when a drug dealer sells relatively large amounts of drugs, he typically keeps the drugs at his residence or a 'stash house.'" J.A. 21-22. The officer also had reason to believe that respondent was lying about the location of his true residence, in part because the buyer had told him that respondent lived in South Boston. J.A. 22.

Evidence indicating the location of contraband was relevant to the drug-distribution offense for which respondent was arrested. At minimum, it would tend to prove that respondent was in fact the person ("B") who sold the drugs to the buyer. Accordingly, if this Court establishes a *Gant*-like standard for cell-phone searches incident to arrest, it should conclude that the police did not need a warrant to search respondent's cell phone.

2. If the Court were to adopt scope limitations to avoid exploratory searches, the search here was also valid. The search of the call log was an objectively reasonable way to determine the number associated with the "my house" notation that was publicly displayed on the phone's external screen. The search was directed exclusively at determining identity-related information: respondent's true address. In addition, because the officers reasonably believed that respondent's home address would contain his drug stash, the scope of the search was also tailored to discovering evidence of the crime of arrest. Moreover, because officers searched only respondent's call log, he had no reasonable expectation of privacy in the information they reviewed in any event.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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