No. 13-132

IN THE

Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

—v.—

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has appeared in numerous cases before the Supreme Court, both as direct counsel and as *amicus curiae*. This case raises an issue of particular importance to the ACLU: the application of Fourth Amendment safeguards to evolving technology that also implicates important First Amendment rights. We therefore submit this brief on behalf of the ACLU and its three California affiliates.

SUMMARY OF ARGUMENT

The ACLU submits this brief to make two principal points. First, given the absence of any meaningful limits on the power to arrest based on probable cause, it is critical for this Court to create some back-end safeguards to ensure that the search-incident-to-arrest doctrine does not allow the police to rummage through our most personal effects without constraint and without a warrant. Second, the Fourth Amendment interests in this case are heightened because cell phones contain both

[1] The parties have submitted blanket letters of consent to the filing of *amicus* briefs in this case. None of the parties authored this brief in whole or in part, and no one other than *amici* and its counsel made a monetary contribution to the preparation or submission of this brief.

expressive material and associational activity protected by the First Amendment.

1. Anglo-American houses and the papers and effects they contain have always commanded the most vigilant protection, even before the Fourth Amendment. *See Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P.) (Eng.) (1765). An officer who wants to search the papers and effects in our homes or offices may not do so without a search warrant. A neutral and detached magistrate must review the existence of probable cause and specify with particularity where the officer may search and what may be seized, preventing officers from ransacking our libraries and personal effects. *See, e.g., Chimel v. California*, 395 U.S. 752 (1969).

Cell phones and other portable electronic devices are, in effect, our new homes. They can contain voluminous quantities of information about the most intimate details of our lives, "papers and effects" of the sort that earlier generations of Americans kept in the bureaus and cabinets of their houses: correspondence (personal texts and emails), records of our commercial transactions and political activities, photographs, contact lists revealing our associations, and access to our activities on the internet and in the cloud. Especially for younger generations, the importance of the worlds of their portable electronic devices rivals the importance of their physical dwellings.

Extending the search-incident-to-arrest exception to the warrant requirement to allow a search of any cell phone accompanying an arrestee would permit circumvention of these fundamental safeguards and open a back door to our most private

papers and effects – indeed to our virtual homes – even when there is no probable cause to search. Police officers, rather than neutral magistrates, would determine whether such a search takes place and how invasive it would be. The only prerequisite to these general searches would be an arrest based on probable cause to believe the target has committed an offense. But this is a feeble protection, given the range of conduct that has been and can be declared unlawful, including minor offenses such as littering, jaywalking, creating a disturbance on a school bus, riding a bicycle without a bell or gong, disobeying police orders at a parade, and all traffic infractions.

Other than the requirement of probable cause, the Fourth Amendment imposes neither objective nor subjective limitations on the power to arrest. Arrests conducted outside the physical home may be made without a warrant, *see United States v. Watson,* 423 U.S. 411 (1976), so no magistrate will have reviewed even whether there is probable cause to arrest. Custodial arrests for minor, fine-only offenses like a seat belt violation are allowed. *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). And, it is irrelevant under Fourth Amendment law that an officer has conducted an arrest as a pretext in order to search a target's cell phone. *See Whren v. United States,* 517 U. S. 806 (1996). Given the absence of front-end protections, this Court should adopt a *per se* rule that, absent exigent circumstances, a cell phone seized incident to arrest can only be searched pursuant to a warrant.

There is no effective and administrable alternative to the warrant requirement. Proposals to

dispense with warrants in some but not all cell phone searches, whether based on the type of device involved or the type of evidence reviewed, draw arbitrary lines that would often be difficult for officers or courts to apply. Allowing a search for evidence of the offense of arrest, an exception adopted in the context of searches of vehicles where there is a reduced expectation of privacy, *see Arizona v. Gant*, 556 U.S. 332 (2009), is not justifiable where our most intimate information is at stake. Furthermore, attempting to impose limiting conditions on searches of cell phones would be ineffectual when officers will decide for themselves how to apply those limits, and would create vexing questions about what parts of the phone's contents should then be considered to be in plain view.

2. The importance of requiring the police to obtain a warrant before searching a cell phone seized incident to arrest is heightened by the First Amendment interests at stake. Cell phones not only provide a means for expression, they contain substantial information about our constitutionally protected associations. Even basic cell phones contain contact lists and call histories, while Internet-enabled smart phones permit their users to access social networking applications that facilitate a panoply of associational activities. A substantial number of Americans use cell phones to send and receive information related to political campaigns. Cell phones have also become a crucial means for organizing political demonstrations and other forms of political action. In this context, the Fourth Amendment's warrant requirement provides an indispensable safeguard for fundamental First Amendment rights.

ARGUMENT

I. ALLOWING WARRANTLESS SEARCHES OF CELL PHONES INCIDENT TO ARREST UNDERMINES FUNDAMENTAL FOURTH AMENDMENT PRINCIPLES.

A. "Papers" And "Effects" That Were Previously Stored In Our "Houses" And Protected By The Fourth Amendment Are Now Stored On Our Cell Phones.

In *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P.) (Eng.) (1765), the historic case described by this Court as the "wellspring" of the rights now protected by the Fourth Amendment, *see Stanford v. Texas*, 379 U.S. 476, 483-84 (1965), *Boyd v. United States*, 116 U.S. 616, 626-627 (1886), Lord Camden declared that John Entick's private papers and books could not be searched pursuant to a general warrant despite the fact that a warrant for his arrest had been issued. "Papers are the owner's dearest property," he said. *Entick*, 19 How. St. Tr. at 1066. "[I]f this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." *Id.* at 1063.

James Otis, arguing against the despised writs of assistance, the immediate evil that inspired the framers of the Fourth Amendment to protect our "persons, houses, papers, and effects" against unreasonable searches and seizures, *see, e.g., Payton*

v. New York, 445 U.S. 573, 583-84 & n.21 (1980), echoed Lord Camden's fear of enabling oppressive government intrusion into private realms by "plac[ing] the liberty of every man in the hands of every petty officer," William Tudor, THE LIFE OF JAMES OTIS 66 (1823) –today, not just the Secretary of State's messengers but legions of federal, state, and local law enforcement officers who wield enormous discretionary power to arrest without a warrant.

A central reason for the special protection of the home is that our home cabinets, desks, bookshelves, and bureaus traditionally have been the principal repository of our most intimate papers and effects. The correspondence, diaries, address books, commercial records, portraits, books and pamphlets contained in the home can expose all essential aspects of a person's private life, politics, religion, and associations. As Entick's counsel had argued: "Has a secretary of state a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed! And if it were lawful, no man could endure to live in this country." *Entick*, 19 How. St. Tr. at 1038.

Smartphones and other portable electronic devices are the equivalent of the cabinets, desks, bookshelves, and bureaus in an eighteenth century home.[2] As detailed in other briefs, they contain

[2] The security of not only cell phones but a range of smartphones, laptops, thumb drives, and other portable electronic devices is at issue in this case. "Cell phone," the term used in the Question Presented, is being used here as shorthand to refer to the entire range of portable electronic devices capable of storing personal information, which we argue should be

massive quantities of emails and texts (today's letters), personal notes (today's diaries), contact lists (today's address books), reading materials (today's bookshelves), photographs and videos, call logs and voicemails, records of commercial transactions, access to internet browsers showing the owner's range of interests and commercial, political, charitable, and personal habits – and access to the world of information the phone's owner has stored on the cloud. These troves of electronic papers and effects are simply not comparable to other items that might be found in an arrestee's home, suitcase, or pocket.

A world of information about an individual's thoughts, associations, activities, and politics, formerly accessible only by searching the papers and effects in someone's house, is no longer hidden behind physical walls. But the protection provided by the Fourth Amendment for our private papers and effects does not become any less essential simply because we now carry so many of our papers and effects electronically outside our homes.[3]

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treated alike, *see* Point II *infra*. It should be noted that the decision in this case may also affect how extensively a desktop computer, in addition to a cell phone, laptop, etc., in an arrestee's grabbable area, may be searched incident to an arrest in one's home or office.

[3] Americans—especially young Americans—are adopting smart phones at an unprecedented rate. Michael DeGusta, *Are Smart Phones Spreading Faster than Any Technology in Human History*?, MIT Tech. Rev. (May 9, 2012), available at http://www.technologyreview.com/news/427787/are-smart-phones-spreading-faster-than-any-technology-in-human-history/. Non-Caucasians and youths—groups that experience proportionately higher arrest rates—are also especially likely to

This Court has rigorously implemented the Fourth Amendment's protection of the privacy of our houses and the papers and effects they contain by requiring 1) that searches of the home be preceded by a search warrant so that a neutral and detached magistrate can determine before the search whether or not probable cause in fact exists, *Coolidge v. New Hampshire,* 403 U.S. 443, 477-78 (1971); 2) that the scope of searches, especially of one's books and papers, be limited by a magistrate's particular description in the search warrant of what may be searched or seized, *Stanford v. Texas,* 379 U.S. 476, 485-86 (1965); 3) that the scope of any search incident to arrest in a home be carefully circumscribed so as not to become an unwarranted search of the contents of the home, *Chimel v. California,* 395 U.S. 752, 762-63 (1969); 4) that officers must obtain an arrest warrant to conduct an arrest in the home, even though arrests outside the home may be made on an officer's unreviewed assessment of probable cause, *see Payton v. New York*, 445 U.S. 573, 589-90, 602-03 (1980); and 5) that the permissibility of using technology to obtain information from inside a home without a warrant be measured, in part, by whether the intimate details at issue would otherwise have been discoverable only by a physical intrusion into the home, *Kyllo v. United States*, 533 U.S. 27, 34, 40 (2001) ("This assures preservation of that degree of privacy against

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use their cell phones for the majority of their online activity. Aaron Smith, *Cell Internet Use 2012*, Pew Research Internet Ctr. (June 26, 2012), available at http://www.pewinternet.org/2012/06/26/cell-internet-use-2012/.

government that existed when the Fourth Amendment was adopted." *Id.* at 34.)

Our electronic worlds, in a very real sense, *are* our new homes and our Fourth Amendment traditions demand that they be respected as such.

B. Fourth Amendment Limitations on the Power to Arrest Are Insufficient to Protect the Privacy of the Papers and Effects Contained in Cell Phones.

United States v. Watson, 423 U.S. 411, 416-18, 423-24 (1976), ruled that no warrant is required for an arrest, at least outside the home, because there was no such requirement at common law. Justice Powell explained this apparently anomalous result – requiring the protection of warrants before searches but not before the arguably greater intrusion of arrest – as an example of logic deferring to history. *Id.* at 428 (concurring opinion). "There is no historical evidence," he said, "that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers." *Id.* at 429 (citation omitted).

Building on that premise, the Court's decisions in *Robinson v. United States*, 414 U.S. 218, 235 (1973), combined with the subsequent decisions in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), *Virginia v. Moore,* 553 U.S. 164 (2008), and *Whren v. United States,* 517 U. S. 806 (1996), free federal, state, and local officers to arrest individuals for a vast array of minor offenses, thereby triggering

automatic authority to search incident to that arrest, even if the arrest itself was not permitted under state law, or was motivated solely by a desire to view the contents of the arrestee's cell phone.

In *Atwater*, *supra*, a divided Court declined to adopt a Fourth Amendment rule prohibiting custodial arrests for non-jailable offenses. Accordingly, the Court upheld Gail Atwater's custodial arrest for a fine-only seat belt violation based on probable cause, *see id.* at 323-24, which precipitated a fruitless search incident to arrest, *see* Linda Greenhouse, *Divided Justices Back Full Arrests on Minor Charges*, N.Y. Times, Apr. 25, 2001, http://www.nytimes.com/2001/04/25/us/divided-justices-back-full-arrests-on-minor-charges.html.

In some states, individuals can be taken into custody in connection with any or all traffic offenses, at the discretion of the officer. *See* Tex. Transp. Code Ann. § 543.001 (2013). Other states restrict their officers' discretion to arrest, *see, e.g.,* Va. Code Ann. §19.2-74 (2013), but the Court has held that the Fourth Amendment's search-incident-to-arrest exception does not require that the predicate arrest be valid under state law – only that there be probable cause, *see Virginia v. Moore*, 553 U.S. at 171 – magnifying the number of predicate arrests potentially at issue.[4]

Given the largely unbridled power to arrest and the lack of any limit on the accompanying

[4] *Devenpeck v. Alford*, 543 U.S. 146, 152-56 (2004), further widened the net by finding an arrest to be reasonable if the officer had probable cause to believe that any offense had been committed even if that offense was not what the officer had in mind.

authority to search at least the person of the arrestee, it is not surprising that searches incident to arrest now apparently constitute the largest exception to the search warrant requirement. *See* Wayne R. LaFave, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §5.2(c) & n.55 (2012) (describing the search incident to arrest as probably the most common type of police search); *see also* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. Rev. 27, 31 (2008) (commenting on the connection between expansive criminal codes and the frequency of searches incident to arrest). Because the power to arrest for traffic and other minor offenses is unlimited by the Fourth Amendment except for the prerequisite of probable cause, a large percentage of the population is subject to arrest at any time. Data for 2011 show that over 62.9 million U.S. residents age sixteen or older, or twenty-six percent of the population, had one or more contacts with police during the prior twelve months. Traffic stops were a very common form of police contact in 2011. Ten percent of the 212.3 million U.S. drivers age sixteen or older (about twenty-one million) were stopped while operating a motor vehicle in 2011. *See* Lynn Langton & Matthew Durose, *Police Behavior during Traffic and Street Stops, 2011* (Sept. 2013), *available at* http://www.bjs.gov/content/pub/pdf/pbtss11.pdf.[5] Millions of Americans are arrested every year for committing misdemeanors.[6]

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[5] The data do not show how many of these individuals were arrested for those offenses or how many could have been.

[6] According to the Uniform Crime Reports (UCR), law enforcement nationwide made an estimated 12,408,899 arrests in 2011 (not including traffic citations). *See Persons Arrested,*

The probable cause requirement alone offers feeble protection for liberty or privacy because legislatures define so much conduct as criminal. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 507 (2001) (discussing how the expanded, extraordinary breadth of American criminal law legislation has left the real boundaries of law to be defined by those who enforce it). Since the California Supreme Court decided in *People v. Diaz*, 244 P.3d 501, *cert. denied*, 132 S. Ct. 94 (2011), that it is permissible to search a cell phone incident to arrest, numerous California cases show similar fact patterns: an arrest for a traffic or other minor offense followed by a cell phone search leading to more serious charges. *See, e.g., People v. Killion*, 2D CRIM. B239876, 2012 WL 6604981 (Cal. Ct. App. Dec. 19, 2012), *rev. denied*, (Feb. 27, 2013) (not designated for publication) (traffic arrest; cell phone search leading to drug prosecution); *In re Alfredo C.*, B225715, 2011 WL 4582325 (Cal. Ct. App. Oct. 5, 2011) (graffiti arrest; digital camera search leading to firearms prosecution).

Crime in the United States 2011, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested. Of these, almost 2 million (1,960,807) were for disorderly conduct, drunkenness, violations of liquor laws, vandalism, curfew and loitering law violations, and vagrancy. *See Estimated Number of Arrests, Crime in the United States 2011,* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29. An additional 3,532,195 were classified as "all other offenses", *Id.,* many if not most of which were other minor offenses.

This phenomenon is not confined to California. *See, e.g., State v. Granville*, No. PD-1095-12, 2014 WL 714730 (Tex. Crim. App. Feb. 26, 2014) (cell phone of high school student arrested for creating a disturbance on a bus searched at jail, leading to additional prosecution); *Thomas v. Florida*, 614 So.2d 468 (Fla. 1993) (search incident to arrest for riding a bicycle without a bell or gong leading to prosecution on other grounds); *Barnett v. United States*, 525 A.2d 197, 198 (D.C. 1987) (search incident to arrest for "walking as to create a hazard" leading to prosecution on other grounds). *See also* Michael C. Gizzi, *Pretextual Stops, Vehicle Searches, and Crime Control: An Examination of Strategies Used on the Frontline of the War on Drugs*, 24 Criminal Justice Studies 139 (2011) (study showing traffic stops leading to drug convictions were overwhelmingly discretionary and seemingly pretextual).

Even if no evidence of criminality is found, the "incidental" search of cell phones radically increases the potential consequences of an arrest. When Nathan Newhard, for example, was arrested for driving while intoxicated, *see* Declan McCullagh, *Police Push for Warrantless Searches of Cell Phones*, CNET NEWS (Feb. 18, 2010, 4:00 AM), http://news.cnet.com/8301-13578_3-10455611-38.html, a search of the cell phone he carried revealed nude photos of him with his girlfriend in sexually explicit positions. *Newhard v. Borders*, 649 F. Supp. 2d 440, 444 (W.D. Va. 2009). A police sergeant shared these intimate photos with various officers, deputies, and members of the public "for their viewing and enjoyment." *Id.* The resulting

scandal led to Newhard losing his job as a school teacher.

Finally, there is no Fourth Amendment limitation on the use of pretextual arrests, *see Whren,* 517 U.S. at 813 (finding no subjective limit to the arrest power). The confluence of *Robinson*, *Atwater, Moore,* and *Watson* with *Whren* creates ample opportunity for any officer so inclined to orchestrate an arrest motivated only by the desire to trawl through the contents of someone's cell phone or electronic device. This virtual blank check creates a perverse incentive for officers to abuse the arrest power even where they do not believe an arrest would otherwise be desirable, transforming the search incident to arrest into an arrest incident to a search. An officer need only wait for a target to commit a traffic offense, or jaywalk, or fail to comply with technical parade permit or leafleting restrictions. Inevitably, some officers will use this vast discretionary power for troubling reasons: political, personal, prejudiced, or even prurient, as in *Newhard*.

It is impossible to document the full extent of the problem of arbitrary or discriminatory arrests because the relevant data are not gathered nationally. We do know, however, that aggressive use of discretionary police power leads to racially discriminatory results. *See, e.g.,* American Civil Liberties Union, *The War on Marijuana in Black and White* (2013), https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report (Blacks are 3.73 times as likely to be arrested for marijuana possession despite comparable usage rates). It can also have significant First Amendment

consequences. *See* Point III, *infra*. If an officer wants to search a political activist's cell phone, it is all too easy to find or manufacture a basis for arresting political demonstrators. [7]

If an increasingly consequential license to conduct searches of a person's private world can evade the tethers of the warrant requirement by disguising itself as a mere incident to arrest, the back door to our cyber-homes stands open.

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[7] *See, e.g.*, New York Civil Liberties Union, *Arresting Protest: A Special Report of the New York Civil Liberties Union on New York City's Protest Policies at the February 15, 2003 Antiwar Demonstration in New York City* (April 2003) at 10, https://www.aclu.org/files/FilesPDFs/nyclu_arresting_protest1.pdf (over 350 people arrested at Feb. 15, 2003 antiwar demonstration in New York City, amid confusion about the parade route and police use of barricades); *Dinler v. City of New York*, 2012 U.S. Dist. LEXIS 141851 * 23-50 (S.D.N.Y. Sept. 30 2012) (mass arrests of demonstrators at 2004 Republican National Convention for blocking the sidewalk, parading without a permit – for deviating from prescribed route – and disobeying police orders).

Josh Schlossberg, an Oregon environmental activist, was arrested for using his electronic camera to record his encounter with an officer who was interrogating him about his leafleting activities. *See* Bryan Denson, *Eugene Verdict Clarifies Legal Protections for Protesters Who Turn Video Cameras on Police*, Jan. 29, 2012, http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/01/eugene_verdict_clarifies_law_p.html. This arrest provided the occasion for the officer to seize the camera and review the contents of the video without obtaining a search warrant. *Schlossberg v. Solesbee*, 844 F.Supp.2d 1165 (D. Or. 2012).

II THE FOURTH AMENDMENT REQUIRES A SEARCH WARRANT BEFORE ANY SEARCH OF A CELL PHONE OR OTHER PORTABLE ELECTRONIC DEVICE.

A. The Expectation of Privacy in One's Papers and Effects Is Not Abated by the Fact of an Arrest.

Given the permissive state of constitutional law regarding arrests, there is no meaningful check available on unwarranted intrusion into our private enclaves other than categorically prohibiting the warrantless search of a cell phone's papers and effects seized incident to arrest.

The California Supreme Court maintains that a bright line rule allowing searches of cell phones incident to arrest is justifiable under this Court's decision in *Robinson, supra*. *See Diaz, supra.* But this Court has held that warrantless intrusions are justifiable only when privacy interests are reduced or the historical record supports an exception to the warrant requirement. As this Court recently said in *Missouri v. McNeely,* ___ U.S. ___, 133 S. Ct. 1552, 1564 (2013), "While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake."

The privacy interests at stake in the context of cell phones searches are profound and dramatically more significant than could have been imagined in the eighteenth century or even in the 1973 world of *Robinson*. *See State v. Smith*, 920 N.E.2d 949, 955

(2009); Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 Harv. J. L. & Pub. Pol'y 403, 404-06 (2013). Forty years ago, the search of effects could plausibly be described as merely incidental to the greater intrusion of an arrest. *See, e.g, United States v. Chadwick*, 433 U.S.1, 20 (1977), *partially abrogated by California v. Acevedo*, 500 U.S. 565 (1991) (Blackmun, J., dissenting). That characterization has become implausible today when the question is whether to give the police easy access to the contents of a virtual library of information..

The *Robinson* Court held that the expectation of privacy in one's *person* is necessarily abated by a lawful arrest. *Id.* at 237-38 (Powell, J., concurring); *see also Maryland v. King*, ___ U.S. ___, 133 S. Ct. 1958, 1979 (2013). But the Court did not hold that the expectation of privacy in one's *effects* is so reduced by an arrest that any search of an arrestee's effects is justified simply by the desire to find evidence – certainly not where the effects contain as much revealing information as a cell phone. *See* Donald A. Dripps, "*Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 53 (2013) ("legitimate textual and historical grounds [exist] for "treating 'papers' and their modern counterparts with more respect than other 'effects.'"). In ruling that the Fourth Amendment did not prohibit the search of a cigarette pack that had been removed from Robinson's pocket incident to arrest, the Court emphasized that the arresting officer might reasonably have feared that the pack contained a dangerous razor blade or (as it did) destructible contraband. 414 U.S. at 223. The Court expressed its unwillingness to require officers

to put themselves at risk by forcing them to guess whether or not an arrestee, even if only a traffic offender, might be armed and dangerous. *Id.* at 34-35 & n.5 (citing statistics about officers killed during traffic stops). Allowing the officer some leeway to neutralize the potential danger that an object within an arrestee's reach might contain a weapon or destructible contraband was found reasonable in *Robinson*.

The Court has not interpreted *Robinson* to mean that an arrestee's expectation of privacy in all accompanying effects is necessarily abated. Several years later, in *Chadwick*, *supra*, the Court rejected the government's argument that a warrant requirement should only apply to homes, 433 U.S. at 6-11, and held that a warrant was indeed required to search an arrestee's footlocker. Id. at 13, 15. In rebuffing the government's desire to conduct a warrantless search for evidence on the basis of probable cause, Chief Justice Burger's discussion strongly suggests that the touchstone of when a warrantless search is reasonable is whether it is necessary to ensure an officer's safety or to preserve evidence. *See id.* at 14-15.[8] The Court also recognized in *Arizona v. Gant*, 556 U.S. 332 (2009), that a permissive bright line search incident to arrest rule unmoored from its justifications can be

[8] A footnote distinguishing *Robinson* and *United States v. Edwards*, 415 U.S. 800 (1974) (allowing a search of an arrestee's clothing), *id.* at 16 n.10, did not need to explore whether there was or should be any limitation to the permission to search effects found closer to the arrestee's person than the *Chadwick* footlocker.

inappropriately overinclusive, even in the context of vehicular searches, where a lesser expectation of privacy prevails. *See also Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia & Ginsburg, JJ, concurring). As Justices Scalia and Ginsburg had observed in *Thornton*, "if carried to its logical end, the broader rule is hard to reconcile with the influential case of *Entick v. Carrington* [citation omitted]." *Id.* at 631,

If *Robinson* is interpreted as giving automatic permission to search the highly sensitive contents of an arrestee's cell phone, it is indeed inconsistent with *Entick*. The point of *Entick* is that the interests surrounding arrest of a person and the interests surrounding the privacy of one's papers and effects, even if they are in the physical vicinity of an arrest, are quite distinct. *See also United States v. Lefkowitz*, 285 U.S. 452, 463-64 (1932) (books and papers in arrestee's office were not subject to search). The fundamental importance of respecting the privacy of personal papers is not reduced by the fact that an officer has probable cause to believe that a cell phone's owner has committed an offense, or that the owner will be in custody.

Given the significance of the privacy interest in the contents of a cell phone and the fact that cell phones ordinarily do not pose any danger -- either to officer safety or to the preservation of evidence -- that cannot be handled by less intrusive means, there is no justification for a *per se* rule exempting a cell phone from the warrant requirement because it is seized incident to arrest. As the Court said in circumscribing the search incident to arrest of a home in *Chimel*, *supra*, "We can see no reason why,

simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." 395 U.S. at 766-767 n. 12.

History does not teach otherwise. *See* Tracey Maclin, *Annex Perspectives: Cell Phones, Search Incident to Arrest, and the Supreme Court*, 94 B.U.L. Rev. 3 (2014) (neither precedent nor history establishes an unqualified right to search effects); LaFave, *supra*, at § 5.2(c) (accord). In tracing the origins of the search incident to arrest authority it is important to note that in those "simpler times" when the common law was being forged, the targets of that authority were usually felons who had committed violence or stolen property. The purpose of the search incident to arrest was to relieve them of the weapon used or the goods stolen. *See* Telford Taylor, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28 (1969). This may explain why, as the Court concluded in *Watson* and *Atwater*, the framers were not overly concerned with limiting arrests by local constables and peace officers. But the justification for those common law searches does not extend to a jaywalker bearing a cell phone.

B. A Per Se Rule Prohibiting Cell Phones Searches Absent A Warrant Or Exigent Circumstances Is More Easily Administrable Than Alternative Approaches.

As Chief Justice Burger observed in *Chadwick,* "when no exigency is shown to support the need for an immediate search, the Warrant Clause places the

line at the point where the property to be searched comes under the exclusive dominion of police authority." 433 U.S. at 15. Officers may remove a cell phone from the arrestee, search it immediately if exigent circumstances exist, and seek a search warrant if they have probable cause to search for something in particular. This is an easily administrable rule because it is familiar and because it is grounded in logic – the kind of logic officers regularly employ in deciding whether exigent circumstances exist.

All available alternatives pose problems, both because they are overly permissive and because they cannot be easily and reliably applied by lower courts or officers in the field.

The supposedly bright line *Diaz* rule, *see* 244 P.3d at 509, presents the same questions about degrees of temporal and physical proximity as the now-discarded recent occupant rule of *Thornton*, *supra*. *Diaz* allowed the search of a cell phone ninety minutes after an arrest because, unlike the footlocker in *Chadwick*, it had been on the arrestee's person. 244 P.3d at 505-06. Logically, why should it matter whether a man keeps his cell phone in his pocket, a woman keeps hers in her purse, and another woman in a rolling duffle bag or a footlocker? How long do the police have to search the cell phone of a recent arrestee? *Thornton* posed those same questions, conditioning permission to search an automobile on the temporal and physical proximity of the arrestee and the vehicle, 541 U.S. at 623-24. The Court in *Gant, supra,* replaced that problematic approach with more logical limits: whether an arrestee has access to the object in question at the time of the

proposed search, or whether it is reasonable to believe that evidence of the offense of arrest may be found. *Gant,* 556 U.S. at 335.

Another problem with the *carte blanche* rule of *Diaz* is that once the police are allowed to search a cell phone without a warrant, it is impossible to impose any logical and administrable rule that will set appropriate boundaries to their explorations. The search incident to arrest doctrine dispenses not only with the requirement of a search warrant, but also with the requirement of probable cause. Thus, there is no way to define the scope of the search permitted by applying logic. The proper scope of the search would have to be determined by post-hoc litigation, or by ill-fitting general rules set in advance.

A variety of compromise categorical distinctions have been proposed that would allow some warrantless searches of cell phones incident to arrest and not others, but each has significant drawbacks. *See, e.g.,* Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 183, 209–2 (2010) (examining and rejecting various compromise proposals); Gershowitz, *supra,* at 45-58 (examining six compromise positions and finding all unsatisfying).

Type of Device -- One type of compromise would determine whether a particular device could be searched based on its features, distinguishing, for example, between old-fashioned flip phones and more computer-like smartphones. *See* Orso, *supra*, at 219-22; 223-224. This approach is highly impractical. Technology is evolving so rapidly that a constitutional rule based on today's cell phones will

quickly become outmoded. *Cf. City of Ontario, Cal. v. Quon*, 560 U.S. 746, 759 (2010). "Because [even] basic cellphones in today's world have a wide variety of possible functions, it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly." *State v. Smith*, 920 N.E.2d at 954. The majority and dissenting judges in *Diaz* agreed that such a line would be impossible for officers in the field to apply, *see* 244 P.3d at 508-09; *id.* at 514 (Werdegar, J., dissenting). *See also United States v. Murphy*, 553 F.3d 405, 411 (4th Cir. 2009).

Type of information seized -- Some suggest that police should be allowed to search any kind of information that has a physical analog, seeing no difference between a digital contacts list and a physical address book.[9] *See, e.g., United States v. Valdez*, No. 06-CR-336, 2008 WL 360548, at 3 (E.D. Wis. Feb. 8, 2008). It was this kind of failure to recognize the distinctive properties of new technology that led the Supreme Court to the infamously

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[9] It should be noted that this digital analog argument assumes, as some lower courts have, that it is indeed permissible for an officer to read the contents of an arrestee's physical address book without a warrant, *see, e.g., United States v. Holzman*, 871 F.2d 1496, 1504-05 (9th Cir. 1989), rather than confining the scope of a search incident to arrest to what is necessary to protect against danger – like shaking the pages to ensure that no razor blades are present and taking the address book from the arrestee. It can certainly be argued that the permission to search physical effects should never be so broad as to allow the exception to exceed its rationales. *See United States v. Flores-Lopez*, 670 F.3d 803, 805, 807 (7th Cir. 2012); *cf.* LaFave,, *supra*, at § 5.2(c).

mistaken majority decision in *Olmstead v. United States*, 277 U.S. 438 (1928), that the Fourth Amendment does not prohibit warrantless wiretapping of telephones. *Id.* at 465. The voluminous and revealing contents of a cell phone are as far removed from a physical object like a cigarette pack or even a paper address book (either of which might contain a razor blade) as wiretapping is from a constable lurking near a window hoping to overhear a conversation.

Evidence of Offense of Arrest -- Finally, the United States proposes borrowing a standard from *Gant*, 556 U.S. at 343-44, 351, and allowing a cell phone to be searched incident to arrest if there is reason to believe that evidence of the crime of arrest might be found. Brief for Petitioner at 45-49, *United States v. Wurie*, 728 F.3d 1 (1st Cir 2013), *cert. granted*, 134 S.Ct. 999 (2014) (No. 13-212). But this proposal ignores a critical distinction. In *Gant*, the reasonable belief standard was adopted in the context of the search of a vehicle. This Court decided long ago that the search warrant requirement does not apply to vehicles, *see Carroll v. United States*, 267 U.S. 132 (1925). The automobile exception was initially based on the ready mobility of a vehicle as compared to a home, *id.* at 153. The Court has since explained that the exception is also justified by the lesser expectation of privacy in vehicles, first, because they operate in public, and second, because they are subject to pervasive regulation. *See, e.g., South Dakota v. Opperman,* 428 U.S. 364, 368-69 (1976). *Gant* authorized a certain number of evidence-seeking searches incident to arrest of a vehicle in the absence of probable cause, in a context

where a search warrant would not have been required in any event.

This narrow exception should not be carried over to cell phones, whose contents are neither public nor highly regulated. Because the papers and effects in cell phones are so revealing, these devices are far more like the inner sanctum of the home, at the pinnacle of Fourth Amendment protection, than like a vehicle. As *Chadwick* has established, the warrant requirement does apply to at least some effects within an arrestee's possession, 433 U.S. at 11 ("In this case, important Fourth Amendment privacy interests were at stake. . . .There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides."). The *Gant* exception should not be extended to undermine both the warrant and probable cause requirements that, under *Chadwick*, protect our effects as well as our homes.

Furthermore, this seemingly limited exception would be destined to sprawl. There is such a variety of information available within a cell phone that it would often be possible for a creative officer to concoct a connection between the offense of arrest and something potentially somewhere on the phone. After-the-fact litigation would then be necessary to review whether there was a sufficient nexus between the offense of arrest and where the officer searched. And the officer could also be creative in choosing an offense of arrest that would arguably implicate the kind of evidence sought – perhaps an arrest at a demonstration in order to search for evidence of whether the demonstrator and her associates were aware of the permitted parade route, or an arrest for

the offense of "boy dressing as a girl," *see* Walnut City [CA] Code, Title III, Ch 17-31 § 4237.1, *available at* http://qcode.us/codes/walnut/, so the officer could search through photographs for evidence of similar prior conduct. Finally, permitting an officer to search generally for evidence of the offense of arrest without a magistrate's assessment of what in particular may be searched for and where, would raise a host of problems about the proper scope of the search. Additionally, once an officer has begun to search a device looking for one kind of evidence, no matter how defined, questions about what should be regarded as within plain view will be inevitable.[10] Only a *per se* rule, allowing a magistrate to decide the proper scope of a search in an individual case, can offer reasonable and accountable boundaries.

III. CELL PHONES ARE ENTITLED TO HEIGHTENED PROTECTION UNDER THE FOURTH AMENDMENT BECAUSE THEY CONTAIN FIRST AMENDMENT-PROTECTED ASSOCIATIONAL INFORMATION.

Amici agree with petitioner and others that because cell phones contain vast quantities of expressive material, they merit heightened protection from searches incident to arrest. Rather than repeat those arguments, we focus on the additional point that cell phones also deserve

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[10] "Computer hard drives store a tremendous amount of private information that can be exposed even in a targeted search. If everything comes into plain view, the plain view exception threatens to swallow the rule." Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 566 (2005).

heightened protection because they contain substantial quantities of associational materials.

It is well-established that the First Amendment protects the right to associate free from government scrutiny. It is equally clear that searches of First Amendment-protected materials merit heightened protections. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'"); *Maryland v. Macon*, 472 U.S. 463, 468 (1985) ("The First Amendment imposes special constraints on searches for and seizures of presumptively protected material").

Traditionally used for coordinating and connecting with friends and family, cell phones are increasingly organizing tools used by political and other associations. Cell phone interconnectivity has evolved from such basic features as contact lists and call displays to a staggering array of interactive features, including social networking applications. A growing proportion of cell phone users send and receive information about political campaigns through their phones. As gateways to larger social networks, cell phones are uniquely conducive to real-time organizing and contingency planning. Police searches through a person's cell phone are likely to reveal the sort of rich associational details that this Court has traditionally forbidden the government from compelling an individual to divulge absent extraordinary circumstances.

A. This Court Has Long Recognized That The First Amendment Protects The Right To Associate In Private.

It is has long been clear that the First Amendment protects against compelled disclosure of one's associations. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (recognizing right to be free from compelled disclosure of membership list because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.").

The right to associate would be stymied if government could require disclosure of individuals' private associations. *Id.* at 462. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* Were it otherwise, individuals would feel pressured to "adhere to the most orthodox and uncontroversial views and associations." *Watkins v. United States*, 354 U.S. 178, 197-98 (1957); *see also Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

Moreover, this Court has recognized that forcing a person to disclose his associations to the government not only harms that person, but also inflicts injury on those with whom he chose to associate. *Watkins*, 354 U.S. at 197 ("Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy."). This is true even when officials do not abuse their authority by acts of retaliation or public exposure. *Id.* at 197-98.

Just as the right of association protects an organization from having to identify all of its members to government officials, so, too, are individuals protected from efforts to compel disclosure of all of their private associations. *Shelton,* 364 U.S. at 480, 485-86 (striking down statute that required all teachers to identify "every organization to which he has belonged or regularly contributed within the preceding five years" on grounds that "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association.")

Given the longstanding protections for associational information, the government faces a heavy burden when it curtails associational rights. *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91-92 (1982). "The right to privacy in one's political associations and beliefs will yield only to a subordinating interest of the State [that is] compelling, and then only if there is a substantial relation between the information sought and [an] overriding and compelling state interest." *Id.* (alteration in original) (internal quotation marks and citations omitted).

B. Cell Phones Contain A Substantial Amount Of Associational Material.

Given the robust protections for freedom of association, this Court must grapple with the fact that cell phones contain an array of information about a person's associations that is far richer than the disclosures required of teachers in *Shelton*, 364 U.S. at 480-81. Moreover, cell phones play a crucial role in sending and receiving information about political campaigns, and in organizing the very sorts

of public demonstrations and advocacy campaigns that are at the core of the First Amendment's protections.

Cell phones contain substantial quantities of information about our associations because their very purpose is to connect individuals. Contacts lists and call histories, which reveal the identity of an individual's contacts and the frequency of their interactions, as well as text messaging and voicemail, which further disclose the substantive content of a user's communications with associates, are standard features of even basic cell phones.

The advent of internet-enabled "smart phones" has accelerated the development of these standard associational features. A smart phone user can access her associations on social networking sites such as Twitter and Facebook. Through social networking "apps", people engage in quintessential associational activity. They join with others to promote particular viewpoints on pressing questions of the day. They create, distribute and sign petitions. In *Reno v. ACLU*, 521 U.S. 844 (1997), this Court accorded the Internet full First Amendment protection because it recognized the medium's great power to facilitate the speech of ordinary Americans. *Id.* at 870 ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."). Particularly after the advent of social networks, the Internet is now a medium through which individuals can engage in the full panoply of associational activities.

Internet users primarily engage in social networking on mobile platforms, so that this type of

associational information is very likely to be on their phones, rather than (or in addition to) their home computers. Vindu Goel, *Big Profit at Facebook as It Tilts to Mobile*, N.Y. Times, Jan. 29, 2014 (three quarters of Facebook's 757 million users log on using mobile devices); Nick Wingfield, *The Numbers Behind Twitter*, N.Y. Times, Oct. 3, 2013 (reporting that three quarters of Twitter's 218.3 million users log on from a mobile device).

The right of association applies to all associations, not just those that are political in nature. *See NAACP v. Alabama*, 357 U.S. at 460 ("[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters."); *NAACP v. Button*, 371 U.S. 415, 430-31 (1963). Critically, however, cell phones play a crucial role in facilitating political engagement.

The evidence suggests that substantial numbers of Americans use their cell phones to send and receive information about political campaigns. Aaron Smith & Maeve Duggan, The State of the 2012 Election—Mobile Politics, Pew Research Center (Oct. 9, 2012), *available at* http://www.pewinternet.org/2012/10/09/the-state-of-the-2012-election-mobile. According to a Pew Research survey of phone usage during the 2012 election, eighty-eight percent of registered voters owned a cell phone, and twenty-seven percent of these "used their phone in this election campaign to keep up with news related to the election itself or to political issues in general." *Id.* Of those in the twenty-seven percent who used text messages, nineteen percent sent campaign-related text messages, and five percent signed up to receive

text messages from a candidate or other group involved in the election. *Id.* Given the rapid adoption of smart phones, political discourse on mobile platforms is the wave of the future.

Of smartphone owners who were surveyed, forty-five percent used their phones to read comments posted by others on social media about the campaign and thirty-five percent used their phone to verify a claim about a candidate or campaign. *Id.*

For the rapidly growing percentage of Americans who use their cell phones to associate with particular candidates and campaigns, then, a police search of these phones entails the substantial risk that the law enforcement agent conducting the search would uncover information about their political associations and beliefs.

For the most politically active and engaged Americans, the risks are even more acute. This is because cell phones have become crucial tools for organizing political demonstrations and promoting other associational activities, as the following examples attest:

- **University of California Tuition Hike Protests.** In November 2009, the University of California regents were set to vote on a 32 percent tuition increase. Students, staff, and faculty mounted major protests in response, including one well-reported demonstration that "was, in part, made possible because students sent last-minute text messages to their friends inviting them to join the march." Bob Samuels, *Facebook, Twitter, YouTube—and Democracy*, 97 Academe (2011).

- **Tea Party Political Campaigns.** American Majority Action, a Tea Party-affiliated, non-profit organization, has invested heavily in a smartphone app that will facilitate more efficient communication between campaign field organizers and their volunteers going door-to-door in neighborhoods. The app, Gravity, allows the volunteers to submit information back to the field organizer about each interaction. Field organizer can then, in real time, change the volunteers' scripts and edit the list of houses to approach. American Majority Action plans to give away the app to local Tea Party groups. Alexander Bolton, *Conservative Group Makes $1M High-Tech Investment to Help Tea Party*, The Hill (Apr. 12, 2012), http://thehill.com/blogs/hillicon-valley/technology/221151-conservative-group-makes-1m-high-tech-investment-to-help-tea-party-groups.

- **Bay Area Rapid Transit (BART) protests.** Activists planned to protest the killing of Charles Blair Hill, who was shot by BART police on July 3, 2011, by coordinating through cell phones. In implicit acknowledgment of the crucial role of cell phones in organizing, BART asked cell phone service providers to halt service in four San Francisco metro stations. In response, activists planned more protests using a Twitter hashtag to communicate. Zusha Elinson, *After Cellphone Action, BART Faces Escalating Protests*, N.Y. Times, Aug. 20, 2011, *available at* http://www.nytimes.com/2011/08/21/us/21bcbart.html?pagewanted=all&_r=2&.

- **Anti-Abortion Organizing and Fundraising.** The Archdiocese of Los Angeles and the non-profit organization Options United have

developed a cell phone app that connects "crisis pregnancy centers," pregnant women and anti-abortion activists. The app, "ProLife," allows any of the 78 crisis pregnancy centers in Southern California to send out "urgent prayer alerts" requesting users to pray for a woman considering an abortion. The app will also send out a "save alert" when a woman decides not to have an abortion. Additionally, the app allows supporters to donate money to the crisis pregnancy centers and invite other people to join the network. LA Archdiocese Launches Pro-Life Networking App, Cath. News Agency (Jan. 23, 2014), http://www.catholicnewsagency.com/news/la-archdiocese-launches-pro-life-networking-app/.

The risk that a person engaged in political activism would be arrested and subject to a search that would reveal substantial information about his private associations is not merely theoretical. A Californian housing rights activist, for example, arrested during a protest of California's anti-lodging law, was occupying the vestibule of his tent when police seized his standard cell phone. Verified Complaint for Injunctive Relief at ¶¶ 16-21, *Offer-Westort v. City & Cnty. of S.F.*, 2013 WL 1149257 (Cal. Super. Mar. 20, 2013) (No. 13-529730). On it, they found organizing communications with other activists and text messages about a City Board of Supervisor who would vote on the anti-lodging bill. *Id.* at ¶¶ 22-32. The identity of other activists in the arrestee's coalition, and their views on the bill and the politician, were all revealed to the police. *Id.* Moreover, the police seized and detained Mr. Offer-Westort's cell phone, chilling his activism and

depriving him of an important tool for organizing activists and lobbying government. *Id.* at ¶¶ 34-38.

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As Justice Robert Jackson once said, expansive power to search incident to arrest is "an easy way to circumvent the protection [the Fourth Amendment] extended to the privacy of individual life." *Harris v. United States*, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting). That circumvention is not justified where the privacy interests at stake are so great, and the actual need to search – except for the purpose of rummaging for evidence among private papers and effects – is so slight.

"[T]he mischief - the threat to liberty and privacy - that led to the inclusion of the Fourth Amendment in the Bill of Rights has not disappeared; it has only changed in form." M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave it Birth*, 85 N.Y.U. L. Rev. 905, 930-31 (2010). The same is equally true for threats to our First Amendment rights. It can be challenging to recognize and address the significance of those changes in form. But, as Justice Louis Brandeis said, in protesting the 1928 decision that failed to come to terms with the unique attributes of the telephone, "Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?" *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting). Justice

Brandeis was prescient in asking the question and correct in suggesting that the plain answer is no, that cannot be.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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