

No. 13-132

In the Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to
the California Court of Appeal, Fourth District

BRIEF OF CENTER FOR DEMOCRACY &
TECHNOLOGY AND ELECTRONIC FRONTIER
FOUNDATION AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Center for Democracy & Technology (CDT) is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The Electronic Frontier Foundation (EFF) is a non-profit, member-supported organization based in San Francisco, California, that works to protect free speech and privacy rights in an age of increasingly sophisticated technology. As part of that mission, EFF has served as counsel or *amicus curiae* in many cases addressing civil liberties issues raised by emerging technologies.

CDT and EFF have participated as *amici* in cases before this Court involving the application of the Fourth Amendment to new technologies, including *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), and *United States v. Jones*, 132 S. Ct. 945 (2012).¹

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

SUMMARY OF ARGUMENT

The Court repeatedly has recognized the importance of carefully assessing the nature and effects of new technologies in determining whether a government search is “unreasonable” within the meaning of the Fourth Amendment. *United States v. Jones*, 132 S. Ct. 945 (2012); *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010); *Kyllo v. United States*, 533 U.S. 27 (2001).

This case presents a question regarding the impact of new technology in a context familiar to most Americans: today’s mobile telephones—known as “smartphones”—which can, and increasingly do, contain the equivalent of millions of physical pages of information, much of it highly personal. The particular issue is whether the search-incident-to-arrest exception to the requirement of a warrant and probable cause permits the government to review all of the information stored in a smartphone simply because an individual is carrying the phone when he or she is arrested.

The lower courts have reached conflicting conclusions regarding that question, with some courts taking account of the effect of new technology and other courts concluding that that effect is irrelevant under the Fourth Amendment. This Court’s review is needed to resolve that clear disagreement and to make clear that here, as in *Jones* and *Kyllo*, the changes resulting from new technology impact significantly the reasonableness determination under the Fourth Amendment.

The Court should address that question in a case, such as this one, that involves some of the extensive capabilities of smartphones, the type of mo-

bile phone that is now used by the majority of Americans. The Solicitor General's petition presenting a question regarding the search-incident-to-arrest exception, *United States v. Wurie*, No. 13-212 (filed Aug. 15, 2013), involves an old-technology mobile phone used by a decreasing minority of Americans. The facts of that case accordingly do not illustrate the dramatic effect of today's technology, which is critically relevant to the Fourth Amendment's reasonableness inquiry.

The Court should therefore grant review in this case, which involves the more prevalent form of technology, to resolve the conflict among the lower courts regarding this important, frequently-arising issue.

ARGUMENT

A. Smartphone Technology Fundamentally Changes The Quantity And Types Of Information That A Person Can Carry.

Prior to the advent of digital technology, an individual could transport information only if the information was printed on paper, etched on vinyl, or recorded on film. That reality restricted the total amount of information that a person could carry. And it meant that individuals did not routinely have on their persons large amounts of personal information, particularly personal financial and medical information.

The first mobile telephones did not alter that state of affairs because they had only one function: enabling an individual to place and receive telephone calls. Subsequent iterations of these phones permitted the owner to create an electronic "contact list" of names and telephone numbers and to save the tele-

phone numbers called and the numbers from which calls were received.

Technological advances have moved far beyond these rudimentary features, however. According to a recent survey, a majority of American adults—56%—now own smartphones with much more expansive capabilities, and that percentage is almost certain to increase significantly in the next few years.² These devices combine the features of a mobile phone and those of a computer, with access to both the voice network and the Internet.³ Typically, smartphones allow individuals to:

- Receive, store, and send emails with attached documents;⁴
- Conduct—and store—private text “conversations” with one or more particular individuals

² Aaron Smith, *Smartphone Ownership – 2013 Update*, Pew Research Center, June 2013, at 2, available at http://pewinternet.org/~/media//Files/Reports/2013/PIP_Smartphone_adoption_2013.pdf. Because “ownership is particularly high among younger adults, especially those in their twenties and thirties” (*id.* at 3), the overall percentage will increase as more individuals enter that age cohort.

³ See AT&T, *What is a smartphone?*, at <http://www.att.com/esupport/article.jsp?sid=KB101001&cv=821#fbid=ePYU9KGCDmS>; PC Magazine Encyclopedia, *Definition of: smartphone*, at <http://www.pcmag.com/encyclopedia/term/51537/smartphone>.

⁴ Maeve Duggan & Lee Rainie, *Cell Phone Activities 2012*, Pew Research Center, Nov. 2012, at 7, available at http://www.pewinternet.org/~/media//Files/Reports/2012/PIP_CellActivities-11.-25.pdf.

als in writing using instant messaging and similar features;⁵

- Create and store personal documents;⁶
- Create and store personal photographs and videos;⁷
- Access the Internet (and retain a record of internet sites visited);⁸
- Create and store appointment calendars;⁹
- Conduct personal financial transactions and store financial information;¹⁰ and
- Conduct medical tests and store medical information.¹¹

⁵ John Granby, *Instant Messaging Using an iPhone*, Houston Chronicle, available at <http://smallbusiness.chron.com/instant-messaging-using-iphone-68883.html>; Hugo Miller, *BlackBerry to Offer BBM Messaging App on Apple, Android Devices*, Bloomberg, May 14, 2013, available at <http://www.bloomberg.com/news/2013-05-14/blackberry-to-offer-bbm-messaging-app-on-apple-android-devices.html>; see also Duggan & Rainie, *supra*, at 5.

⁶ Barb Dybwad, *4 Simple iPhone Apps for Creating and Editing Documents*, Entrepreneur, Oct. 31, 2012, available at <http://www.entrepreneur.com/blog/224803>; see also <http://www.apple.com/apps/iwork/pages/>.

⁷ Duggan & Rainie, *supra*, at 4, 8.

⁸ *Id.* at 6.

⁹ *Smallwood v. State*, 113 So.3d 724, 729, 731-732 (Fla. 2013).

¹⁰ Duggan & Rainie, *supra*, at 10.

¹¹ Elizabeth Stawicki, *Need your medical records? There's an app for that*, MPRnews, May 1, 2013, available at <http://minnesota.publicradio.org/display/web/2013/05/01/health-medical-records-application>; Mary Kozelka, *The key to better health care may already be in your pocket ... and it's not your*

With the dramatic growth of “applications” that can be loaded onto smartphones, these are only a few of literally thousands of different functions that these devices can perform, and only a few examples of the types of information that they can and do contain.¹²

Moreover, the amount of information that can be stored on a smartphone is extraordinary. A single phone can hold data equivalent to millions of pages of text.¹³ That is “similar to the typical storage capacity of a home computer sold in 2004.”¹⁴

As the Florida Supreme Court recently explained,

Vast amounts of private, personal information can be stored and accessed in or through these small electronic devices, including not just phone numbers and call his-

wallet, NBC News, Jan. 24, 2013, available at http://rockcenter.nbcnews.com/_news/2013/01/24/16677207-the-key-to-better-health-care-may-already-be-in-your-pocket-and-its-not-your-wallet?lite; Duggan & Rainie, *supra*, at 3.

¹² The “App Store,” at which an iPhone user may obtain “Apps”—applications—that program the iPhone to perform a wide variety of functions, contains nearly 1 million different applications, many of which involve storage of personal information. See *iTunes Preview*, at <https://itunes.apple.com/us/genre/ios/id36?mt=8> (webpage listing iPhone apps).

¹³ “Apple’s iPhone 5 comes with up to sixty-four gigabytes of storage, which is enough to hold about ‘four million pages of Microsoft Word documents.’” *United States v. Wurie*, 2013 WL 2129119, at *6 (1st Cir. May 17, 2013) (citation omitted), petition for cert. filed, No. 13-212 (U.S. Aug. 15, 2013). The memory capacity of most smartphones ranges from 16 to 64 gigabytes.

¹⁴ Orin S. Kerr, *Forward: Accounting for Technological Change*, 36 Harv. J.L. & Pub. Pol'y 403, 404 (2013), available at http://www.harvard-jlpp.com/wp-content/uploads/2013/04/36-2_403_Kerr.pdf.

tory, but also photos, videos, bank records, medical information, daily planners, and even correspondence between individuals * *. The most private and secret personal information and data is contained in or accessed through small portable electronic devices and, indeed, many people now store documents on their equipment that also operates as a phone that, twenty years ago, were stored and located only in home offices, in safes, or on home computers.

Smallwood v. State, 113 So. 3d 724, 731-732 (Fla. 2013); see also *United States v. Wurie*, 2013 WL 2129119, at *7 (1st Cir. May 17, 2013) (“information [stored in smartphones] is, by and large, of a highly personal nature: photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records”), petition for cert. filed, No. 13-212 (U.S. Aug. 15, 2013); *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (same), cert. denied, 131 S. Ct. 102 (2010).

Indeed, smartphone owners use these devices to replicate—and in some cases to replace entirely—the functions performed on personal computers. That is why companies such as Facebook are now focused on using smartphones as a platform for their services. See, e.g., Michael Gorman, *Facebook's move to mobile powered by intensive internal training*, Engadget, Mar. 4, 2013, available at <http://www.engadget.com/2013/03/04/facebook-s-move-to-mobile-powered-by-intensive-internal-training/> (“Facebook’s made no bones about the fact that its focus has shifted from a desktop web- to a mobile-focused company”).

Some observers predict that a “new computing paradigm could emerge in which the smartphone actually becomes the center of our personal computing universe.” Tim Bajarin, *Why Your Smartphone Will Be Your Next PC*, TIME Tech, Feb. 25, 2013, available at <http://techland.time.com/2013/02/25/why-your-smartphone-will-be-your-next-pc/#ixzz2dIA7OWki>.

Because “the smartphone has all of [the user’s] personal data, personal user interface and personal apps,” the smartphone could simply be connected to a desktop monitor or a laptop computer with no permanent memory to enable the user to use a keyboard and larger screen; personal information would be stored only on the smartphone. *Ibid.*; see also Paul Ridden, *Casetop ‘laptop’ uses your smartphone as its brains*, Gizmag, May 7, 2013, available at <http://www.gizmag.com/livi-design-casetop/27418/> (observing that “modern smartphones are just like mini computers that can be carried around in your pocket” and reviewing a new product that “uses a smartphone for its computing power” and as the source of the user’s personal information).

Smartphone technology has thus produced an incredible change in the quantity and type of information that individuals routinely have in their immediate possession. Previously, no individual could carry, either on his or her person or in a container, even a small fraction of the information contained in today’s smartphones. In physical form—paper documents, photographs, etc.—the information would be too bulky and too heavy to carry. Because of those physical limitations, moreover, no individual could routinely carry all of his or her personal financial or medical information.

Today, it is no exaggeration to state that an individual can, and often does, carry at all times the extremely personal information that formerly would have been stored in the individual's residence.

B. The Changes Resulting From Smartphone Technology Are Highly Relevant To Application Of The Search-Incident-To-Arrest Doctrine.

"In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical." *Jones*, 132 S. Ct. at 963 (Alito, J., with whom Ginsburg, Breyer, and Kagan, JJ., joined, concurring in the judgment). Thus, the amount of information that the government could obtain under the search-incident-to-arrest exception was circumscribed by the physical limitations on the quantity of documents and other materials that an individual could carry or otherwise have within reach at the time of arrest. See *Chimel v. California*, 395 U.S. 752, 763 (1969) (police may search incident to arrest only the space within an arrestee's "immediate control," which means "the area from within which he might gain possession of a weapon or destructible evidence").

Although the exception is justified by the need to "seize weapons" and 'to prevent the destruction of evidence" (*Chimel*, 395 U.S. at 764), the Court has not required a showing that those justifications were in fact present in order to uphold a search incident to arrest. "The authority to search the person incident to a lawful custodial arrest * * * does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *United States v. Robinson*, 414 U.S. 218,

235 (1973). The Court has said that the arrest “for at least a reasonable time and to a reasonable extent” takes the arrestee’s “own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.” *United States v. Edwards*, 415 U.S. 800, 808-809 (1974) (internal quotation marks omitted).

But the “reasonableness” of that across-the-board rule—in terms of the types and quantity of information that may be accessed by the government—plainly rested in large measure on the practical limitations on the reach of such a search. Those practical limitations are not present in the case of smartphones.

That significant change in the amount and types of information routinely within an individual’s possession is highly relevant to the application of the Fourth Amendment in this context. Cf. *Jones*, 132 S. Ct. at 964 (Alito, J., with whom Ginsburg, Breyer, and Kagan, JJ., joined, concurring in the judgment) (finding a Fourth Amendment violation because “society’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period”); *id.* at 956 (Sotomayor, J., concurring) (recognizing that the “attributes of GPS monitoring” must be taken into account “when considering the existence of a reasonable societal expectation of privacy in the sum of one’s public movements”); *Quon*, 130 S. Ct. at 2629 (“[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior”

producing expectations of privacy protected by the Fourth Amendment).

Here, as in *Jones*, the consequences of new technology render unreasonable the application of a legal standard formulated in a dramatically different factual context. The search-incident-to-arrest exception may allow the seizure of a smartphone, but it cannot justify automatic review by the government—without a warrant and showing of probable cause—of the myriad types of information contained in the device.

**C. This Court Should Consider The Search-
Incident-To-Arrest Issue In The Context
Of A Search Implicating The New Capa-
bilities Of Today's Smartphones.**

As petitioner explains (Pet. 11-13), the lower courts have reached conflicting conclusions regarding the application of the search-incident-to-arrest exception in the context of searches of cell phone contents. This Court's intervention is needed to resolve that conflict.

The Court's analysis of the constitutional issue will be aided substantially by granting review in a case—such as this one—that involves a smartphone and a search of photographs and other information that today's technology allows to be stored on a cell phone. See Pet. 2-3. That factual setting will enable the Court to assess the effect of this new technology, and particularly how the technology alters the “pre-computer age, * * * practical” protections of privacy. *Jones*, 132 S. Ct. at 963 (Alito, J., with whom Ginsburg, Breyer, and Kagan, JJ., joined, concurring in the judgment).

A number of lower court decisions have involved old-style cell phones with limited capabilities in which the government search involved review of what probably were the only categories of information contained on the phone: the call log—the list of the telephone numbers called from the cell phone and numbers from which calls were received by the cell phone—and, in some cases, the list of names and phone numbers inserted by the phone's owner. *E.g.*, *Commonwealth v. Phifer*, 979 N.E.2d 210, 216 (Mass. 2012).

Some judges upholding searches of the contents of old-style cell phones have analogized the search to review of an address book contained in the arrestee's pocket. *E.g.*, *Wurie*, 2013 WL 2129119, at *15 (Howard, J., dissenting). Whatever the merits of that analogy, it obviously does not apply to the millions of pages of information that can be stored on a smartphone but could not be carried by any individual in physical form.

The case in which the Solicitor General seeks review of a search-incident-to arrest decision, *United States v. Wurie*, No. 13-212 (filed Aug. 15, 2013), suffers from this defect. It involves an old-style phone and a search limited to the call log and name/phone number listings.

Indeed, the government observed in its court of appeals rehearing petition in *Wurie* that the phone involved was “a simple ‘flip’ phone rather than a computer-like ‘smartphone,’” and that “[t]o the extent that some cell phones may implicate more serious privacy concerns * * * those concerns are not present in this case, which involved a brief examination of the call log of a flip phone.” Government’s Pe-

tition for Rehearing En Banc at 2, 6, *United States v. Wurie*, No. 11-1792 (1st Cir. July 16, 2013).

In this Court, however, the government seeks a broad rule applying the search-incident-to-arrest exception to *all* information stored on *all* types of cell phones. See, *e.g.*, No. 13-212 Pet. 11, 16 (advocating a “bright-line rule” authorizing the search of cell phones notwithstanding the “large amount of personal information” stored on smartphones). But the government’s observations in its rehearing petition regarding the narrow factual context presented in *Wurie* explain why that case is an inappropriate vehicle for addressing that broad question.

As one commentator observed in comparing the present case with *Wurie*,

[g]iven that the argument for treating cell phones differently from physical items hinges on the storage capacity and services available through smartphones, I think it would be very helpful for the Court to take a case involving a smartphone instead of a more primitive model. * * * * Reviewing a case with an earlier model phone would lead to a decision with facts that are atypical now and are getting more outdated every passing month.

Orin Kerr, *Two Petitions on Searching Cell Phones Reach the Supreme Court*, The Volokh Conspiracy, Aug. 19, 2013, available at <http://www.volokh.com/2013/08/19/doj-files-cert-petition-in-wurie/>.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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