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Supreme Court of the United States

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization

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

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 war( )-21(feem.0k)-111(a)6( )-/dtedsu.s4(g)-2(et)-732(ha

ARGUMENT

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

A. ´3DSHUWQG ´IHFWVµ That Were Previously Stored In OXU ´+RXVHVµ 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

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

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*

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

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 pri 7m2647 48[(c)con( ) 0 1e-91(for)7( )-6(c)4239.11 466

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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*,

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 sexuall

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

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

A. The Exception For Privacy in 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:*

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.

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 admi

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

[9] It should be noted that this digital analog argument assumes, as some lower courts have, that it is indeed permissible for an

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

the offense of “

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

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

of public demonstrations and advocacy campaigns

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.

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

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

* * * * * *

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 -