No. 19-1102

IN THE

# Supreme Court of the United States

DONTAE SMALL,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# BRIEF OF ELECTRONIC FRONTIER FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


JENNIFER LYNCH
*Counsel of Record*
ANDREW CROCKER
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
jlynch@eff.org

*Attorneys for Amicus Curiae*



295137

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

## TABLE OF CONTENTS


Page

TABLE OF CONTENTS . . . . . . . . . . i

TABLE OF AUTHORITIES . . . . . . . . . . iii

INTERESTS OF *AMICUS CURIAE* . . . . . . . . . . 1

INTRODUCTION AND SUMMARY OF ARGUMENT . . . . . . . . . . 1

ARGUMENT . . . . . . . . . . 4

I. Cellphones Contain Vast Amounts of Highly Personal Information Accessible Anywhere the Device is, Even If They Are Lost or Misplaced . . . . . . . . 4

II. The Fourth Amendment "Abandonment Doctrine" Should Not Apply to Cellphones Because They are Unlike Other Personal Effects in Abandonment Case Law . . . . . . . . . 9

A. A Pre-digital Doctrine Allowing Physical Searches Cannot Be Mechanically Applied to Searches of Digital Data . . . . . . . . . . 9

B. The Rationale Supporting the Abandonment Doctrine Does Not Support Searches of Digital Data on Cellphones . . . . . . . . . . 11

*Table of Contents*

*Page*

C. Due to the Nature of Cellphones, Courts Should Rarely if Ever Hold that Devices Are Abandoned. . . . . . . . . . . .13

III. EVEN IF THE ABANDONMENT DOCTRINE ALLOWS SEIZURES OF CELLPHONES, SUBSEQUENT WARRANTLESS SEARCHES VIOLATE THEFOURTH AMENDMENT. . . . . . . . . . . . .16

A. The Seizure of a Warrantless Device Must Be Distinguished from Its Subsequent Search . . . . . . . . . . . . . . . . . . . . .16

B. Applying the Abandonment Doctrine to Cellphones Would Create a Loophole in *Riley* that Would Undermine the Court's Reasoning . . . . . . . . . . . . . . . . . .19

IV. Certiorari is Necessary to Address Judicial Disagreement on the Application of the Abandonment Doctrine to Cellphones . . . . . . . .22

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .24

## TABLE OF CITED AUTHORITIES

*Page*

*Abel v. United States*,
362 U.S. 217 (1960) . . . . . . . . . . . . . . . . . . . . . . . . . .3, 12

*Army & Air Force Exch. Serv. v. Sheehan*,
456 U.S. 728 (1982) . . . . . . . . . . . . . . . . . . . . . . . . . . . .24

*Bond v. United States*,
77 F.3d 1009 (7th Cir. 1996) . . . . . . . . . . . . . . . . . . .11, 12

*Boyd v. United States*,
116 U.S. 616 (1886) . . . . . . . . . . . . . . . . . . . . . . . . . . . .12

*California v. Ciraolo*,
476 U.S. 207 (1986) . . . . . . . . . . . . . . . . . . . . . . . . . . . .10

*California v. Greenwood*,
486 U.S. 35 (1988) . . . . . . . . . . . . . . . . . . . . . . . . *passim*

*Carpenter v. United States*,
138 S. Ct. 2206 (2018) . . . . . . . . . . . . . . . . . . . . . . .1, 3, 10

*Heffron v. International Society for Krishna Consciousness*,
452 U.S. 640 (1981) . . . . . . . . . . . . . . . . . . . . . . . . . . . .24

*Herring v. United States*,
555 U.S. 135 (2009) . . . . . . . . . . . . . . . . . . . . . . . . . . . .21

*Hester v. United States*,
265 U.S. 57 (1924) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .12

*Page*

*Johnson v. United States*,
333 U.S. 10 (1948) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .21

*Kyllo v. United States*,
533 U.S. 27 (2001) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .10

*Riley v. California*,
573 U.S. 373 (2014) . . . . . . . . . . . . . . . . . . . . . . . . *passim*

*Skinner v. Ry. Labor Executives Ass'n*,
489 U.S. 602 (1989) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .17

*Smith v. Maryland*,
442 U.S. 735 (1979) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .10

*State v. Brown*,
815 S.E.2d 761 (2018) . . . . . . . . . . . . . . . . . . . . . . . . . . .22

*State v. Hempele*,
576 A.2d 793 (N.J. Sup. Ct. 1990) . . . . . . . . . . . . . . . . .12

*State v. K.C.*,
207 So. 3d 951 (Fla. Dist. Ct. App. 2016) . . . . . . . . . . .23

*State v. Moore*,
No. 2017-002479, 2020 WL 811715
(S.C. Feb. 19, 2020) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .22

*State v. Randolph*,
120 A.3d 237 (N.J. Super. Ct. App. Div. 2015) . . 14, 15

*Page*

*State v. Samalia*,
375 P.3d 1082 (Wash. 2016) . . . . . . . . . . . . . . . . . . . . . .22

*State v. Valles*,
925 N.W.2d 404 (N. Dak. 2019) . . . . . . . . . . . . . . . . . . .20

*United States v. Amerson*,
483 F.3d 73 (2d Cir. 2007) . . . . . . . . . . . . . . . . . . . . . . .18

*United States v. Artis*,
919 F.3d 1123 (9th Cir. 2019) . . . . . . . . . . . . . . . . . .22-23

*United States v. Banks*,
540 U.S. 31 (2003) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .16

*United States v. Carey*,
172 F.3d 1268 (10th Cir. 1999) . . . . . . . . . . . . . . . . . . . .18

*United States v. Colbert*,
474 F.2d 174 (5th Cir. 1973) . . . . . . . . . . . . . . . . . . . . . .13

*United States v. Crumble*,
878 F.3d 656 (8th Cir. 2018) . . . . . . . . . . . . . . . . . . . . . . .2

*United States v. Davis*,
690 F.3d 226 (4th Cir. 2012) . . . . . . . . . . . . . . . . . . . . . .17

*United States v. Di Re*,
332 U.S. 581 (1948) . . . . . . . . . . . . . . . . . . . . . . . . . . . .16

*Page*

*United States v. Galpin*,
720 F.3d 436 (2d Cir. 2013) . . . . . . . . . . . . . . . . . . . . . .18

*United States v. Ganias*,
755 F.3d 125 (2d Cir. 2014) . . . . . . . . . . . . . . . . . . . . . .18

*United States v. Han*,
74 F.3d 537 (4th Cir. 1996). . . . . . . . . . . . . . . . . . . . . . .11

*United States v. Harrison*,
689 F.3d 301 (3d Cir. 2012) . . . . . . . . . . . . . . . . . . . . . .13

*United States v. Hoey*,
983 F.2d 890 (8th Cir. 1993) . . . . . . . . . . . . . . . . . . . . .13

*United States v. Hulscher*,
No. 4:16-CR-40070-01-KES, 2017 WL 657436
(D.S.D. Feb. 17, 2017). . . . . . . . . . . . . . . . . . . . . . . . . .18

*United States v. Jacobsen*,
466 U.S. 109 (1984). . . . . . . . . . . . . . . . . . . . . . . . . . . .17

*United States v. Jones*,
565 U.S. 400 (2012). . . . . . . . . . . . . . . . . . . . . . . . . . .1, 6

*United States v. Knotts*,
460 U.S. 276 (1983). . . . . . . . . . . . . . . . . . . . . . . . . . . .10

*United States v. Nowak*,
825 F.3d 946 (8th Cir. 2016). . . . . . . . . . . . . . . . . . . . . .11

*Page*

*United States v. Robinson*,
414 U.S. 218 (1973) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

*United States v. Sedaghaty*,
728 F.3d 885 (9th Cir. 2013). . . . . . . . . . . . . . . . . . . . . 18

*United States v. Small*,
944 F.3d 490 (4th Cir. 2019). . . . . . . . . . . . . . . . *passim*

*United States v. Sparks*,
806 F.3d 1323 (11th Cir. 2015). . . . . . . . . . . . . . . . . . . 22

*Walter v. United States*,
447 U.S. 649 (1980). . . . . . . . . . . . . . . . . . . . . . . . . . . . 16

**Other Authorities**

1 John Wesley Hall Jr, Search and Seizure
§ 19.07 (2019) (LexisNexis) . . . . . . . . . . . . . . . . . . . . . 14

Aaron Smith, *Americans' experiences with data security*, Pew Research Center (Jan. 26, 2017) . . . 6, 9

Andrew Perrin, *10 facts about smartphones as the iPhone turns 10*, Pew Research Center
(June 28, 2017) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

Calla Dietrick, *Smartphone thefts drop as kill switch usage grows*, Consumer Reports
(June 11, 2015). . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

*Page*

Chris V. Nicholson, *Financial dangers of a lost smartphone*, Bankrate (Sep. 17, 2014) . . . . . . . . .8

Emily A. Vogels, *Millennials stand out for their technology use, but older generations also embrace digital life*, Pew Research Center (Sept. 9, 2019) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .4

Ericsson, *Ericsson Mobility Report* (Nov. 2019). . . . . . .4

Jacob Kastranakes, *Apple and Samsung settle seven-year-long patent fight over copying the iPhone,* The Verge (Jun. 2018) . . . . . . . . . . . . . . .20

Lee Bell, *What is caching and how does it work?*, Wired UK (May 7, 2017) . . . . . . . . . . . . . . . . . . . . . . . . .7

Peter Mell & Timothy Grance, *The NIST Definition of Cloud Computing* [Special Pub. 800-145], National Institute of Standards and Technology (Sept. 2011) . . . . . . . . . . . . . . . . . . . . .6

Pew Research Center, *A third of Americans live in a household with three or more smartphones* (May 25, 2017). . . . . . . . . . . . . . . . . . . . .7

*Page*

Pew Research Center, *Mobile Fact Sheet* (June 12, 2019) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .4, 7

Samsung, *Galaxy S20*. . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

Sarah Perez, *Report: Smartphone owners are using 9 apps per day, 30 per month*, TechCrunch (May 4, 2017). . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .6

Sujeong Lim, *Average Storage Capacity in Smartphones to Cross 80GB by End-2019*, Counterpoint (Mar. 16, 2019) . . . . . . . . . . . . . . . . . . . .5

## INTERESTS OF *AMICUS CURIAE* [1]

The Electronic Frontier Foundation (EFF) is a nonprofit organization that has worked for more than 30 years to protect privacy, free speech, and civil liberties in the digital world. EFF, with over 30,000 active donors, represents the interests of technology users in court cases and broader policy debates surrounding the application of law in the digital age. EFF has served as amicus curiae in this Court in cases addressing the intersection of the Fourth Amendment and new technologies, including those particularly involving or implicating cellphones. *See Carpenter v. United States,* 138 S. Ct. 2206, 2222 (2018); *Riley v. California*, 573 U.S. 373 (2014); *United States v. Jones*, 565 U.S. 400 (2012).

## INTRODUCTION AND SUMMARY OF ARGUMENT

As cellphones' storage capacity continues to expand, and as the data that a user may store on their phone continues to become more sensitive, detailed, and revealing, the time is ripe for this Court to make clear to lower courts that the "abandonment doctrine" does not apply to cellphones.

Cellphones have become "such a pervasive and insistent part of daily life that the proverbial visitor from

---

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented in writing to the filing of this brief.

Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014). In *Riley*, this Court recognized that the ubiquity of cellphones, combined with their capacity to hold vast quantities of detailed personal information—potentially the "sum of an individual's private life"—makes cellphones so qualitatively and quantitatively different from their analog counterparts as to require a warrant prior to search incident to an arrest. *Id*. at 394.

But cellphones are more readily separated from their owners than true anatomical appendages are. The petition for certiorari in this case asks this Court to address whether the Fourth Amendment prohibits the warrantless search of the information on a phone when law enforcement finds that phone divorced from its owner. In *Riley*, the Court provided what should be a clear answer to this question: "a warrant is generally required before [searching information on a phone], even when a cellphone is seized incident to arrest." *Id*. at 401. However, the Fourth Circuit below and several other appellate courts have held *Riley* applies *only* to cellphone searches if they are performed incident to arrest. *United States v. Small*, 944 F.3d 490, 503 n.2 (4th Cir. 2019); *United States v. Crumble*, 878 F.3d 656, 660 (8th Cir. 2018). For that reason, the Fourth Circuit held a warrantless search of data on a cellphone found apart from its owner survives Fourth Amendment scrutiny.

The Fourth Circuit relied on older case law addressing pre-digital personal effects to hold that a phone found without its owner is "abandoned," and therefore the owner no longer has a privacy interest in information stored on the phone. *Small*, 944 F.3d at 501-502 (citing

*Abel v. United States*, 362 U.S. 217, 241 (1960)); *see also California v. Greenwood*, 486 U.S. 35, 40 (1988) (homeowners who put household garbage out for collection "exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection"). But the same principles supporting the warrant requirement for a cellphone searched incident to arrest apply equally to a phone found unattended by the police. Even outside its owner's possession, that phone is likely to contain "[t]he sum of an individual's private life." *Riley,* 573 U.S. at 394. Citing *Riley* this Court in *Carpenter v. United States* stated, "When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents." 138 S. Ct. 2206, 2222 (2018). Since this Court decided *Riley* in 2014, the number of Americans who own smartphones has nearly doubled, the storage capacity of modern cellphones has quintupled, and the average smartphone owner has at least twice as many apps on their phone.

The Court should grant certiorari to address this issue and hold that owners of cellphones maintain an expectation of privacy in the contents of phones outside their immediate possession. To the extent that law enforcement may sometimes encounter phones that are truly physically "abandoned," the Court's preference for "clear guidance" and "categorical rules" should lead it to the same "accordingly simple" conclusion it reached in *Riley:* "get a warrant." 573 U.S. at 398, 404.

## ARGUMENT

### I. Cellphones Contain Vast Amounts of Highly Personal Information Accessible Anywhere the Device Is, Even If They Are Lost or Misplaced.

Globally, there are 8 billion cellphone subscriptions, including 5.6 billion subscriptions for smartphones.[2] Ninety-six percent of American adults own a cellphone, with 81 percent owning a smartphone.[3] For younger people that number is even higher; 93% of people between ages 23 to 38 now own smartphones.[4] "Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception." *Riley*, 573 U.S. at 395.

This Court recognized in *Riley* that cellphones differ both quantitatively and qualitatively from physical objects and containers. *Id.* at 393. Quantitatively, the sheer volume of information available on cellphones

---

2. Ericsson, *Ericsson Mobility Report* (Nov. 2019), at 4, 7, https://www.ericsson.com/4acd7e/assets/local/mobility-report/documents/2019/emr-november-2019.pdf.

3. Pew Research Center, *Mobile Fact Sheet* (June 12, 2019), http://www.pewinternet.org/fact-sheet/mobile/. *Cf. Riley*, 573 U.S. at 385 (citing A. Smith, Pew Research Center, *Smartphone Ownership—2013 Update* (June 5, 2013) (noting "56% of American adults are now smartphone owners")).

4. Emily A. Vogels, *Millennials stand out for their technology use, but older generations also embrace digital life*, Pew Research Center (Sept. 9, 2019), https://pewresearch-org-preprod.go-vip.co/fact-tank/2019/09/09/us-generations-technology-use/.

makes them fundamentally different from any pre-digital counterpart. The storage capacity of the average smartphone today—at 80GB[5]—is five times as large as when this Court decided *Riley* just six years ago. *Id.* at 394 ("current top-selling smart phone has a standard capacity of 16 gigabytes"). And some phones today can contain as much as 1.5 terabytes of storage—enough space for hundreds of feature-length films.[6] As 5G technology becomes more widely available, this number will continue to increase because "high-capacity storage is essential to support high-speed communication, AI technology, AR/VR and high-definition/4K content."[7] With their "immense storage capacity," cellphones and other electronic devices can contain the equivalent of "millions of pages of text, thousands of pictures, or hundreds of videos." *Riley*, 573 U.S. at 393-394.

Cellphones differ qualitatively as well. They "collect[] in one place many distinct types of information . . . that reveal much more in combination than any isolated record." *Id.* at 394. Average smartphone users now have 60-90 different apps on their devices and use 30 different apps over the course of a month.[8] Apps generate vast and

---

5. Sujeong Lim, *Average Storage Capacity in Smartphones to Cross 80GB by End-2019*, Counterpoint (Mar. 16, 2019), https://www.counterpointresearch.com/average-storage-capacity-smartphones-cross-80gb-end-2019.

6. Samsung, *Galaxy S20*, https://www.samsung.com/global/galaxy/galaxy-s20/design.

7. Lim, *supra* note 5.

8. *See Riley*, 573 U.S. at 396 (describing various apps and noting, at that time, that the average smartphone user "has installed

varied data, including call logs, emails, text messages, voicemails, browsing history, calendar entries, contact lists, shopping lists, notes, photos and videos, books read, TV shows and movies watched, financial and health data, purchase history, dating profiles, metadata, and so much more. This information, in turn, can reveal an individual's political affiliations, religious beliefs and practices, sexual and romantic life, financial status, health conditions, and family and professional associations. *See Riley* at 394-96. Additionally, "[h]istoric location information is a standard feature on many smartphones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." *Id.* at 396 (citing *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

Cellphones also allow users to store personal information in the "cloud"—that is, not on the devices themselves, but on servers accessible via the Internet.[9] "Virtually any digital action that internet users may take—from using credit cards to logging into social media sites—creates data that is stored by companies, governments or other organizations."[10] For many

33 apps, which together can form a revealing montage of the user's life.") Sarah Perez, *Report: Smartphone owners are using 9 apps per day, 30 per month*, TechCrunch (May 4, 2017), https://techcrunch.com/2017/05/04/report-smartphone-owners-are-using-9-apps-per-day-30-per-month.

9. *See* Peter Mell & Timothy Grance, *The NIST Definition of Cloud Computing* [Special Pub. 800-145], National Institute of Standards and Technology (Sept. 2011), http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf.

10. Aaron Smith, *Americans' experiences with data security*, Pew Research Center (Jan. 26, 2017) , https://www.pewresearch.org/internet/2017/01/26/1-americans-experiences-with-data-security.

cellphone users, cloud storage allows them to synchronize information across devices. For example, a user may open up the Facebook website on their home computer in the morning, check the Facebook app on their phone on the way to work, and then close out the day by checking Facebook yet again on their tablet device while reading in bed at night. Although the user has accessed Facebook on three separate devices, each device can access the same account, and Facebook automatically records the user's actions and updates their account with their latest activity.[11] This is useful because 74 percent of Americans own a laptop or desktop computer in addition to a phone.[12] In fact, most 18-49 year olds live in households with five to six devices.[13] "And nearly one-in-five American households (18%) are "hyper-connected"—meaning they contain 10 or more of these devices."[14]

Today's electronic devices enable the reconstruction of "the sum of an individual's private life" covering a lengthy amount of time—"back to the purchase of the [device], or even earlier." *Riley*, 573 U.S. at 394. While

11. Depending on how an app or browser is designed, copies of cloud data often are also temporarily cached on the device itself. *See* Lee Bell, *What is caching and how does it work?*, Wired UK (May 7, 2017) , https://www.wired.co.uk/article/caching-cached-data-explained-delete.

12. Pew Research Center, *Mobile Fact Sheet* (June 12, 2019), http://www.pewinternet.org/fact-sheet/mobile/.

13. Pew Research Center, *A third of Americans live in a household with three or more smartphones*, (May 25, 2017), https://www.pewresearch.org/fact-tank/2017/05/25/a-third-of-americans-live-in-a-household-with-three-or-more-smartphones/.

14. *Id.*

people cannot physically "lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read," they now do so digitally. *Id.* at 393. But it is not just that a cellphone "contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." *Id.* at 396-97.

Despite the fact that cellphones may contain the sum of people's lives, cellphone owners frequently get separated from their devices. In the United States, "113 cellphones are lost or stolen every minute, and on average, an individual misplaces their phone about once a year."[15] According to Consumer Reports National Research Center, Americans lost 3.1 million smartphones in 2013 alone.[16] One would think that this would encourage users to lock their devices to prevent unauthorized access to all of their sensitive data. However, even though Apple and other phone manufacturers have introduced default security features,[17] a 2016 Pew Research Center survey found that 28% of American "smartphone owners say they do not use a screen lock or other features to secure

---

15. Chris V. Nicholson, *Financial dangers of a lost smartphone*, Bankrate (Sep. 17, 2014) , https://www.bankrate.com/finance/banking/financial-dangers-of-lost-smartphone-1.aspx.

16. Calla Dietrick, *Smartphone thefts drop as kill switch usage grows*, Consumer Reports (June 11, 2015), https://www.consumerreports.org/cro/news/2015/06/smartphone-thefts-on-the-decline/index.htm. An additional 2.1 million phones were stolen that year. *Id.*

17. Apple made "Activation Lock" a default feature in 2014 with the launch of the iPhone 6 and 6 Plus. Dietrick, *supra* note 16.

their phone."[18] For those with only a high school diploma or less, this number jumps to 34%.[19]

Given cellphones' "immense storage capacity" and vast collection of varied, sensitive, and revealing data, it is no wonder this Court held that a warrant is generally required to search the information stored on a phone.

## II. The Fourth Amendment "Abandonment Doctrine" Should Not Apply to Cellphones Because They Are Unlike Other Personal Effects in Abandonment Case Law.

### A. A Pre-digital Doctrine Allowing Physical Searches Cannot Be Mechanically Applied to Searches of Digital Data.

By granting certiorari in this case, the Court has an opportunity to address the contours of its pre-digital rule—the "abandonment doctrine" and clarify its application to cellphones. In doing so, the Court can provide much needed guidance to lower courts and the government. *Id.* at 398 (noting the Court's preference for "clear guidance" and "categorical rules").

As this Court recognized in *Riley*, cellphones have no true equivalent in the pre-digital world. For that reason, the Court unanimously rejected the government's "strained" attempt to analogize searches of cellphones

---

18. Andrew Perrin, *10 facts about smartphones as the iPhone turns 10*, Pew Research Center (June 28, 2017), https://www.pewresearch.org/fact-tank/2017/06/28/10-facts-about-smartphones/.

19. Smith, *supra* note 10.

incident to arrest to searches of physical items—like a pack of cigarettes—which the Court had approved decades earlier. *See id.* at 396-97; *id*. at 393-94 (discussing *United States v. Robinson*, 414 U.S. 218 (1973)). In several other cases, this Court has refused to mechanically apply old doctrine and risk letting new technologies "shrink the realm of guaranteed privacy" under the Fourth Amendment. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). For example, in *Kyllo* the Court diverged from *California v. Ciraolo*, 476 U.S. 207, 213 (1986), when it found intimate details inside the home were protected even though police were able to "see" those details from a public street. *Kyllo*, 533 U.S. at 33. Similarly, in *United States v. Jones*, 565 U.S. 400 (2012), a majority of justices recognized a privacy interest in a person's movements while in a car traveling on "public thoroughfares," despite the Court's earlier holding to the contrary in *United States v. Knotts*, 460 U.S. 276, 281 (1983). *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring); *id*. at 430 (Alito, J., concurring in the judgment). And in *Carpenter*, the Court refused to extend the "third party doctrine," developed in cases like *Smith v. Maryland*, 442 U.S. 735 (1979), to location data held by third party phone carriers, despite the fact that the carriers collected and retained the data. *Carpenter*, 138 S. Ct. at 2216. In each of these cases, the Court has recognized that automatically extending case law from a different era involving less intrusive and revealing technologies to novel contexts would risk eroding Fourth Amendment protections. As a result, any extension of rules allowing physical searches to "digital data has to rest on its own bottom." *Riley*, 573 U.S. at 393. The Court should grant certiorari in this case to similarly cabin the abandonment doctrine to pre-digital personal effects.

### B. The Rationale Supporting the Abandonment Doctrine Does Not Support Searches of Digital Data on Cellphones.

In this case, the Fourth Circuit upheld the warrantless search of Mr. Small's cellphone, holding he voluntarily abandoned his physical device and thus also relinquished his expectation of privacy in any information stored on the device. *Small*, 944 F.3d at 498. The court linked the phone to a shirt and hat found nearby, holding that the facts and rationale supporting a finding of abandonment for those articles of clothing also supported such a finding for the phone. *See id.* at 503. In doing so, the court cited to earlier cases involving abandonment of physical objects, including a bag of heroin, a backpack, and a suitcase. *Id.* at 502 (citing *United States v. Han*, 74 F.3d 537, 539 (4th Cir. 1996); (*United States v. Nowak*, 825 F.3d 946, 948 (8th Cir. 2016); (*Bond v. United States*, 77 F.3d 1009, 1013 (7th Cir. 1996)).

However, indicia that might support an inference that articles of clothing or drugs or physical containers were abandoned should not be mechanically applied to a phone, which "contains in digital form" more sensitive and private information than one could find "in a home in any form—unless the phone is." *Riley*, 573 U.S. at 396-97.

This Court has articulated the contours of what is frequently referred to as the "abandonment doctrine" through several cases, the most recent of which was *California v. Greenwood*, 486 U.S. 35, 40 (1988). In *Greenwood*, the Court held that people have no reasonable expectation of privacy in garbage left out for collection because they have knowingly exposed their trash to

any member of the public. *Id.* The Court has similarly held that people have no Fourth Amendment privacy or property interest in items they knowingly abandon. *See Abel v. United States*, 362 U.S. 217, 239 (1960) (no warrant required for police to seize items a suspect left behind in a hotel room after checking out); *Hester v. United States*, 265 U.S. 57, 58 (1924) (no Fourth Amendment seizure when police obtain jug containing moonshine whiskey after suspect abandoned the jug).

However, this doctrine is a poor fit for a cellphone—a device that "hold[s] for many Americans 'the privacies of life.'" *Riley*, 573 U.S. at 403 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

As described above, and as this Court recognized in *Riley*, cellphones contain more, and more varied, information than anything one could find in the trash left outside of a person's home. While trash, too, contains "[c]lues to people's most private traits and affairs," *State v. Hempele*, 576 A.2d 793, 802 (N.J. Sup. Ct. 1990) , the trash left outside one's house is limited by the size of a bag or trash bin and by the nature of items placed in the trash.

Cellphones have no such limits; instead the storage capacity of the average cellphone has more than quintupled since the Court decided *Riley*, and phones contain more detailed information than one could ever find in a bag of trash.

Further, cellphones regularly connect with and store data in the cloud. This means that accounts that people can access on their phone—such as personal email, banking records, and social media—can also be accessed from

many other devices, including devices owned by the same person (like a home laptop) or owned by someone else (like a work computer or a computer at the local library). As this Court recognized, even if officers conceded, as they did similarly in *Riley*, that the abandonment exception to the warrant requirement would not extend to a search of remotely stored data, those officers "would not typically know whether the information they are viewing was stored locally at the time of the arrest or has been pulled from the cloud." 573 U.S. at 397. It would be a vast and unwarranted expansion of the abandonment doctrine if merely losing one's phone meant a person abandoned all privacy interests, not just in the data stored on the phone but in their data stored in the cloud and accessible from other devices as well.

### C. Due to the Nature of Cellphones, Courts Should Rarely If Ever Hold that Devices Are Abandoned.

An additional reason not to apply the abandonment doctrine from *Greenwood* is that cellphones cannot be considered abandoned simply because police find them unattended. Courts commonly describe abandonment as "primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts." *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973); *United States v. Hoey,* 983 F.2d 890, 892 (8th Cir. 1993)).

Like certain other property, cellphones should rarely if ever be considered abandoned. For example, courts are extremely reticent to find that owners, occupants, and tenants have abandoned dwellings. *See, e.g., United States v. Harrison,* 689 F.3d 301, 309-311 (3d Cir. 2012) (difficult

to show abandonment of house through "objective facts" because, for example, it "is unreasonable to assume that a poorly maintained home is an abandoned home"); *State v. Randolph*, 120 A.3d 237, 248-49 (N.J. Super. Ct. App. Div. 2015) (apartment with only a couch and "debris on the floor" with door left open not abandoned); 1 John Wesley Hall Jr, Search and Seizure § 19.07 (2019) (LexisNexis) (collecting cases). Given this Court's recognition that cellphones may contain even more sensitive personal information than the home itself, abandonment is a poor fit for cellphones. *Riley*, 573 U.S. at 396-97.

Moreover, as even the Fourth Circuit itself noted below, "[a]bandonment should not be casually inferred," especially because "[p]eople lose or misplace their cell phones all the time." *Small*, 944 F.3d at 502.

Yet the Fourth Circuit's reasoning for upholding a finding of abandonment in this case would put nearly any unattended phone at risk of being deemed abandoned and thus unprotected by the Fourth Amendment. For example, the Fourth Circuit held it was "sensible" to infer that Mr. Small's phone was abandoned in light of circumstantial evidence that "depict[ed] a fleeing suspect tossing aside personal items while attempting to evade capture." *Id.* at 503. The court noted that officers found articles of clothing "in the vicinity of the crashed car." *Id.* However, the government conceded the phone was not discovered until several hours later and was located fifty yards away from the clothing. *See id.* at 503; Pet. for Certiorari at 6 (noting phone was found "nearly eight hours after the crash" after a search requiring approximately 200 state and federal officers).

These facts, which the Fourth Circuit interpreted as indicia of abandonment, are difficult to square with the court's recognition that "phones occasionally slip out of pockets," and the common-sense fact that "people lose or misplace their cell phones all the time." 944 F.3d at 502, 503. By contrast, due the importance and sensitivity of the contents of phones, it is also common sense that individuals will rarely voluntarily choose to abandon them. As a result, unattended phones should nearly always be considered misplaced, not abandoned.

Other factors relied on the by the Fourth Circuit in its finding of abandonment should not have any bearing on the analysis at all. The court noted that the phone "wasn't password protected," and Mr. Small apparently did not try to "retrieve his phone at any point," supporting an inference that he discarded it because he knew it could incriminate him or be used to track him using GPS. *Id.* at 503.

But as described above, whether a phone is password protected frequently depends on decisions made by the manufacturers of the device and its operating system. Research also shows that although millions of phones are lost or stolen every year, a substantial portion of people living in the United States still do not lock their phones. Therefore, failing to lock a phone does not indicate a user's intent to disclaim an expectation of privacy in the phone or its contents. If that were true, users would assume the risk of snooping any time they left a phone unlocked and unattended. *See* Section I, *supra*. *cf., State v. Randolph*, 120 A.3d at 248 (apartment with door left open not abandoned).

Nor should an owner's apparent failure to retrieve a misplaced phone indicate abandonment, even when the contents might be incriminating. A similar argument arose in *Walter v. United States*, in which a private party mistakenly received a shipment of cartons containing allegedly obscene films, which it handed over to the FBI. 447 U.S. 649, 651-52 (1980). Over the objections of the dissenting justices, Justice Stevens rejected the idea that the intended recipient's failure to claim the films was evidence of abandonment: "[w]e cannot equate an unwillingness to invite a criminal prosecution with a voluntary abandonment of any interest in the contents of the cartons." 447 U.S. at 658 n.11. (Stevens, J., joined by Stewart, J.); *see also id.* at 664-65 (Blackmun, J., dissenting). Moreover, such a rule would contradict this Court's admonition that the reasonableness of a search is based on "the facts known to the police" at the time it occurs. *United States v. Banks*, 540 U.S. 31, 39-40 (2003); *United States v. Di Re*, 332 U.S. 581, 595 (1948) (a search "is good or bad when it starts"). Officers who find an unattended phone have no way of making a contemporaneous assessment that the phone's owner has made no effort to reclaim it.

## III. Even If the Abandonment Doctrine Allows Seizures of Cellphones, Subsequent Warrantless Searches Violate the Fourth Amendment.

### A. The Seizure of a Warrantless Device Must Be Distinguished from Its Subsequent Search.

The Fourth Circuit below also erred by failing to distinguish the seizure of Mr. Small's phone from the search of its contents. Although the government may

warrantlessly seize physical objects under certain circumstances, it is not necessarily entitled to search them, especially where the search would be deeply revealing of individuals' private information, as with a cellphone.

Under this Court's abandonment cases, police can effect a warrantless seizure of an abandoned item because the owner has relinquished a possessory interest in the object. If the owner has relinquished an expectation of privacy in the object, police may also search it and its contents. In the case of traditional containers, the same factors may support abandonment and allow both seizure and search. But they are doctrinally distinct questions. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (describing respective tests for search and seizure).

In circumstances analogous to this case, courts have analyzed seizure and search as separate Fourth Amendment events. *See, e.g. Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 616 (1989) (disaggregating initial physical collection of a blood or breath sample from secondary search through "ensuing chemical analysis of the sample to obtain physiological data"). For example, in *United States v. Davis*, police warrantlessly seized Davis' shirt from a hospital room where he was being treated for a gunshot wound. 690 F.3d 226, 239 (4th Cir. 2012). They later extracted his DNA from the shirt, analyzed it, and retained the results in a criminal database. *Id.* The Fourth Circuit determined the initial seizure of the shirt was lawful pursuant to the plain view doctrine. *Id.* However, the court distinguished the extraction and analysis of the DNA—which it deemed a Fourth Amendment search—on the grounds that "a person who is solely a crime victim

does not lose all reasonable expectation of privacy in his or her DNA material simply because it has come into the lawful possession of the police."[20] *Id.* at 244; *see also United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007) (in addition to the collection of the DNA sample from a probationer, determining that "[t]here is . . . a second and potentially much more serious invasion of privacy" because the "analysis and maintenance of [offenders'] information in [a government database] . . . is, in itself, a significant intrusion") (citation omitted).

Similarly, case law shows that even when the government has lawfully collected digital data, a warrant may be required to conduct subsequent searches of the data. For example, in *United States v. Sedaghaty*, the Ninth Circuit required investigating agents to obtain a new warrant before searching computer hard drives that had been lawfully seized pursuant to an earlier warrant. 728 F.3d 885, 913 (9th Cir. 2013); *see also United States v. Ganias*, 755 F.3d 125 (2d Cir. 2014) (reversed on other grounds) (same); *United States v. Galpin*, 720 F.3d 436, 446–47 (2d Cir. 2013); *United States v. Carey*, 172 F.3d 1268, 1276 (10th Cir. 1999); *United States v. Hulscher,* No. 4:16-CR-40070-01-KES, 2017 WL 657436 (D.S.D. Feb. 17, 2017) (law enforcement must obtain a warrant to search data lawfully-collected by a different agency for a different purpose).

Thus, to the extent that a cellphone can be viewed as "abandoned," that abandonment should permit only a

---

20. The court found the search was unreasonable because "the precise concern that the warrant requirement was designed to alleviate is plainly before us here." 690 F.3d at 251.

warrantless seizure of the phone, not a later warrantless search of the phone's data. *See Riley*, 573 U.S. at 401 (police must get a warrant to search a phone, even when it is warrantlessly seized incident to arrest).

### B. Applying the Abandonment Doctrine to Cellphones Would Create a Loophole in *Riley* that Would Undermine the Court's Reasoning.

Regardless of the legality of an initial seizure, allowing a warrantless search of a phone under the abandonment doctrine articulated in *Greenwood* would be inconsistent with this Court's reasoning in *Riley*. In fact, it would create a significant loophole that risks undermining the clear, privacy-protective rule articulated by the Court. As described above, *Riley*'s holding that police must generally seek a warrant to search cellphones stemmed from the recognition that "[w]ith all they contain and all they may reveal, they hold for many Americans the privacies of life." *Riley* at 403 (citations omitted).

The Fourth Circuit held that this Court's holding in *Riley* did not apply to a phone found without its owner because this fact pattern fit into one of the "case-specific exceptions" that this Court recognized "may still justify a warrantless search of a particular phone." *Small*, 944 F.3d at 503 n. 2 (citing *Riley*, 573 U.S. at 402). However, the lower court's citation to this minor point in *Riley* misses the much larger point of the case—that cellphones contain such sensitive and private information that they cannot be blindly compared to pre-digital personal effects and deserve special protection. The examples of limited exceptions described by this Court in *Riley* support this point, and none of the concerns supporting those examples

apply to phones separated from their owners. *See Riley*, 573 U.S. at 402 (describing exigent circumstances including "the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury"); *cf. id.* at 389-90 (government's concerns that phone could be wiped remotely do not require exception to warrant requirement).

The concerns the Court enunciated in *Riley* with respect to law enforcement searches of cellphones incident to arrest apply with at least the same force to searches of abandoned devices. For the same reasons that "technology now allows an individual to carry such information in his hand," it also increases the likelihood that devices containing the "privacies of life" will be misplaced or fall into unintended hands. *Id.* at 403. Mobile devices are small, they are carried everywhere people go, and many models look similar if not identical.[21] *Cf. Small*, 944 F.3d at 502 (people lose or misplace their cell phones all the time).

Because phones are so easily misplaced, this Court should be wary of setting rules that risk underprotection of the sensitive data they contain. *See State v. Valles*, 925 N.W.2d 404, 410 (N. Dak. 2019) ("[A]n individual's privacy interest in a cellphone remains high even when it is lost."). Prohibiting police from warrantlessly searching a phone incident to arrest but allowing them to do so if a phone is "abandoned" creates a perverse incentive. To understand

21. *See, e.g,* Jacob Kastranakes, *Apple and Samsung settle seven-year-long patent fight over copying the iPhone,* The Verge (Jun. 2018) https://www.theverge.com/2018/6/27/17510908/apple-samsung-settle-patent-battle-over-copying-iphone.

the problem, one need only walk into a coffee shop and count the number of phones sitting temporarily unattended while their owners use the restroom, retrieve an order from the counter, or step outside for a cigarette. All of these devices are protected by the warrant requirement if they remain in their owners' pockets, but under the Fourth Circuit's rule, when left unattended they are subject to a real-time assessment of abandonment by police. Officers "engaged in the often competitive enterprise of ferreting out crime" could seek a warrant to search an unattended phone, or they can simply rely on abandonment and risk having evidence suppressed. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

These concerns cannot be mitigated even with a rigorous application of the abandonment doctrine's objective standard. Law enforcement officers in the field cannot reliably distinguish a lost phone from an "abandoned" one, and reviewing courts will be reluctant to second-guess officers' determinations. Even in *Valles*, where the North Dakota Supreme Court suppressed evidence found in a warrantless search of a *lost* phone, the court noted that "[m]ost courts that have faced the issue have allowed warrantless searches of abandoned phones," so long as the phone had some connection to a crime scene. 925 N.W.2d at 408 (collecting cases).

Moreover, so long as it is doctrinally possible for individuals to abandon the contents of a phone, courts will be unlikely to find deterrent value in suppressing evidence based on an officer's mistaken judgment that the phone was abandoned. *See Herring v. United States*, 555 U.S. 135, (2009) (deterrent value of exclusionary rule depends on "culpability of the law enforcement conduct").

And if police warrantlessly trawl through the intimate contents of an unattended phone and fail to find evidence of criminal activity, its owner will likely have no notice that the search ever took place.

## IV. Certiorari Is Necessary to Address Judicial Disagreement on the Application of the Abandonment Doctrine to Cellphones.

Although several appellate courts have held that the abandonment doctrine applies to searches of cellphones, this precedent does not indicate uniformity of opinion among the judiciary. In fact, many state and federal judges have forcefully argued for *Riley*'s application to lost or abandoned phones. *See, e.g., State v. Samalia*, 375 P.3d 1082, 1091 (Wash. 2016) (Yu, J., dissenting) (distinguishing between "a cell phone as a physical object and a cell phone as a tool for accessing digital data that may touch on virtually every detail of a person's private affairs"); *State v. Brown,* 815 S.E.2d 761, 767 (2018) (Beatty, C.J., dissenting) (arguing there is "no reason why the Supreme Court's rationale [in *Riley*] is not equally applicable with respect to the abandonment exception to the Fourth Amendment"), *cf. State v. Moore*, No. 2017-002479, 2020 WL 811715, at *2 n.4 (S.C. Feb. 19, 2020) (distinguishing between search of contents of flip phone (which was conducted with a warrant) and physical search of phone's SIM card and noting court has "expressly declined to rule" on abandonment of cell phones); *United States v. Sparks*, 806 F.3d 1323, 1354 (11th Cir. 2015) (Martin, J., dissenting) (citing *Riley* and noting that when defendants replaced lost phone, it "does not mean they abandoned their interest in the unique information contained in the lost phone"); *United States v. Artis*, 919 F.3d 1123, 1128

(9th Cir. 2019) (noting in dicta that under *Riley*, police were "definitely required" to obtain a warrant to search abandoned phone); *State v. K.C.*, 207 So. 3d 951, 955-56 (Fla. Dist. Ct. App. 2016) (abandonment is not an exception to *Riley*'s warrant requirement).

Given lower court disagreement over the proper application of the abandonment doctrine to cellphones and the fact that the Court has not reconsidered the doctrine since a time when personal devices with the capabilities of modern smartphones were confined to science fiction, the time is ripe for the Court to address the application of the Fourth Amendment in this context.

## CONCLUSION

Given "the important constitutional issues presented" in this case, "the conflicting results reached" by lower courts and judges, and the fact that the spirit of the Fourth Circuit and other courts' opinions on this issue conflicts with this Court's analysis in *Riley*, the Court should grant certiorari to clarify the contours of the abandonment doctrine and its application to cellphones in the digital age. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 646 (1981); *see also Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982) (certiorari granted because court of appeals ruling appeared to be in conflict with Supreme Court precedents).

March 27, 2020

Respectfully submitted,

By: <u>*/s/ Jennifer Lynch*</u>

JENNIFER LYNCH
*Counsel of Record*
ANDREW CROCKER
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
jlynch@eff.org

*Attorneys for Amicus Curiae*