No. 21-1525

In the Supreme Court of the United States

ANTONIO DARON FUTRELL,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment's abandonment exception to the warrant requirement is per-se inapplicable to cell phones that have no password.

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INTRODUCTION

Petitioner Antonio Daron Futrell asks this Court to review an unpublished, non-precedential decision of an intermediate state court. Review is unwarranted because there is no split of authority, this case is a poor vehicle for resolving the question presented, and the Virginia Court of Appeals' decision is correct.

The ruling below that the limited search of Futrell's cell phone did not violate his Fourth Amendment rights does not conflict with any decision by any federal court of appeals or state court of last resort. Every such court to consider the question has held that this Court's decision in *Riley* v. *California*, 573 U.S. 373 (2014), did not exempt cell phones from the traditional abandonment exception to the Fourth Amendment's warrant requirement. *Riley* addressed only the search-incident-to-arrest exception, which protects officers from hidden weapons and preserves evidence during a lawful arrest. *Id.* at 383. Warrantless searches of cell phones incident to an arrest advance neither of those interests. *Id.* at 387–91. The abandonment exception, by contrast, rests on the common-sense proposition that people lack a reasonable expectation of privacy in property that they have voluntarily abandoned. This rationale applies to cell phones, just as to any other form of property. And *Riley* does not address it at all.

Moreover, the police searched Futrell's unlocked phone only to determine the number associated with

the phone and the serial code. This case would therefore be an exceptionally poor vehicle to consider whether the "vast quantities of personal information" that could be stored in a phone's applications or in the "cloud" require some limits on the scope of a warrantless search of an abandoned phone. Pet. 7, 28.

The petition for a writ of certiorari should be denied.

STATEMENT

1. Futrell left a restaurant with three companions around 1:00 a.m. on October 7, 2018. Shortly after walking out of the restaurant, he realized he had left behind his cell phone. Pet. App. 2a. Futrell turned to a waitress and told her, "I want you to go inside and get my phone, B****." *Ibid.* The waitress responded that Futrell "[did not] have to talk to [her] like that, but we can go inside to get your phone." *Ibid.* Instead of accompanying the waitress to retrieve his phone, Futrell insisted, "No, you're going to get me my phone now, B****." *Ibid.*

Because Futrell was "very hostile towards the waitress," a private security guard, Charles Kelley, stepped in front of Futrell and asked him to "stop, wait a minute, and we can see if we can go inside and find your phone." Pet. App. 2a (quotation marks omitted). Despite Kelley reassuring Futrell that the waitress would search for his phone, Futrell "became more hostile." *Ibid.* He stood within two feet of the waitress and

began "swinging his hands and was getting ready to grab her." *Ibid.* (quotation marks omitted).

Futrell then turned to one of his companions and instructed him to "[g]o get my s***." Pet. App. 2a. The companion went to a car and returned with a firearm and a magazine containing ammunition. *Ibid.* Upon seeing the firearm, Kelley stepped approximately five feet from the companion, drew his own weapon, and asked the companion to "[p]lease drop your weapon." Pet. App. 2a–3a. The companion put down the firearm, and Kelley lowered his weapon. Pet. App. 3a.

Futrell then picked up the firearm and loaded it. Pet. App. 3a. Kelley again raised his weapon in response and told Futrell to drop his firearm. *Ibid.* Futrell instead began firing at Kelley. *Ibid.* Kelley returned fire. *Ibid.* After rounds from Kelley's firearm struck the car, Futrell or his companion uttered, "Oh s***," and they both fled in the car. *Ibid.*

2. The police detective who investigated the shooting discovered that officers had recovered a cell phone that had been left behind at the restaurant. Pet. App. 3a. The detective inspected the phone and found that it was not a "typical phone where you can take off the back and expose the battery," which would have shown the phone's International Mobile Equipment Identity (IMEI) number.[1] *Ibid.*

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[1] An IMEI number (which the court below referred to as an "IME number," see, *e.g.*, Pet. App. 3a) is a 15-digit serial code unique

The detective pressed the power button, and the phone turned on. Pet. App. 3a. The phone did not require a password for access. *Ibid.* The detective used the "settings" feature on the phone to locate the phone's number and serial code. *Ibid.* He then placed the phone in "airplane mode"[2] and returned it to the police department's property and evidence department. *Ibid.* The detective never attempted to view call logs, text messages, or any other applications or data on the phone. *Ibid.* The detective did not have a search warrant for the phone. *Ibid*.

The detective entered the phone number into a database that consolidated police reports in the region. Pet. App. 4a. The program indicated that there was "some kind of association" between Futrell's name and the phone number recovered from the cell phone. *Ibid.* The database also provided a photograph of Futrell. *Ibid.* The police showed this photograph to Kelley as part of a photo lineup, and Kelley identified Futrell as the shooter. *Ibid.*

The police subsequently discovered that Futrell had obtained a new cell phone after the shooting. Pet. App. 4a, 9a. The detective obtained a real-time GPS track search warrant for that new cell phone, and the police located Futrell. Pet. App. 4a.

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to each device, that can be "used to find the phone number associated with a particular cell phone." *Ibid.*

[2] "Airplane mode" refers to sequestering a phone from its network in order to "disable[] transmissions to the phone." *United States* v. *Cleveland*, 907 F.3d 423, 432 n.3 (6th Cir. 2018).

3. Futrell was charged with attempted malicious wounding in violation of Va. Code §§ 18.2-26 and 18.2-51, use of a firearm in the commission of a felony in violation of Va. Code § 18.2-53.1, possession of a firearm by a convicted felon in violation of Va. Code § 18.2-308.2, and shooting into an occupied building in violation of Va. Code § 18.2-279. Pet. App. 14a–15a.

Before trial, Futrell moved to suppress "any and all evidence obtained as a result of a search" of his cell phone, contending that "he had not abandoned his phone," and that the warrantless search violated the Fourth Amendment under *Riley*. Pet. App. 4a. The trial court denied his motion to suppress, holding that Futrell abandoned the phone by leaving it at the restaurant, and that *Riley* did not "address abandonment." Pet. App. 4a–5a. Futrell subsequently pleaded guilty but reserved the right to appeal the adverse suppression ruling. Pet. App. 15a.

On appeal, Futrell argued that the trial court erred when it denied his motion to suppress the evidence obtained from the search of his cell phone, because he did not abandon his phone and had a reasonable expectation of privacy in its contents. Pet. App. 2a. The Court of Appeals of Virginia rejected this argument. It held that Futrell abandoned his phone because he "decided to flee the area after firing his weapon at a security guard, leaving his cell phone behind at the restaurant," and because he "did not return to the restaurant that night to retrieve the cell phone, even though he knew where it was located." Pet. App. 8a–9a. Futrell's

use of "a new cell phone after the incident" further clarified his intention to abandon his cell phone in the restaurant. Pet. App. 9a. Therefore, although Futrell "did not deny ownership of the cell phone, he did relinquish physical control of it and did not attempt to retrieve it." *Ibid.*

The Court of Appeals of Virginia also rejected Futrell's argument that *Riley* required suppression of evidence obtained from the abandoned cell phone. See Pet. App. 9a. The court concluded that *Riley* "does not prevent courts from considering whether cell phones have been abandoned for Fourth Amendment purposes," because *Riley* "d[id] not alter the standard analysis of determining whether an accused has relinquished his or her privacy interest in property, including a cell phone, by abandoning an item." Pet. App. 10a–11a. The court noted that *Riley* had found that "the expansive privacy interests at stake when police search a cell phone" outweigh the government's limited interest in searching cell phones incident to an arrest, "because such searches do not meaningfully advance the search incident to arrest exception's dual purposes of protecting officers and preventing the destruction of evidence." Pet. App. 9a–10a. But the court reasoned that "this heightened privacy concern is not at issue when a suspect abandons a cell phone" because "that abandonment has demonstrated the suspect's relinquishment of any privacy interest at all in the contents of the phone." Pet. App. 10a. The search of Futrell's phone "violated no protected Fourth

Amendment right" and, accordingly, the court affirmed the trial court's denial of the suppression motion. Pet. App. 11a.

The Supreme Court of Virginia refused Futrell's petition for appeal on March 4, 2022. Pet. App. 12a. Futrell timely filed a petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

The petition should be denied. The ruling below does not conflict with any decision from a United States court of appeals or a state court of last resort. Further, this unpublished decision of a state intermediate court would be an exceptionally poor vehicle to consider the question presented given the limited scope of the search and the fact that Futrell had not password-protected his phone before abandoning it. Finally, review is unwarranted because the judgment below is correct, as every court to consider the issue has similarly held.

I. The decision below does not conflict with rulings of any federal court of appeals or state court of last resort

First, this Court's review is unwarranted because there is no split in authority. Futrell notes that "[a]t least 7 state appellate courts and 4 federal courts of appeals have considered" how "the abandonment exception applies to the digital contents of cell phones" in the 8 years after *Riley*, Pet. 2–3, but none of those decisions conflicts with the ruling below. To the

contrary, every federal court of appeals and state court of last resort to consider the question presented has held that the government may conduct warrantless searches of the digital data on abandoned cell phones consistent with the Fourth Amendment.

Futrell attempts to manufacture a split of authority by pointing to the holding of a single Florida state intermediate court. See Pet. 3, 14–23. But the decision on which he relies does not conflict with the judgment below. The Florida court held that the abandonment exception to the warrant requirement prohibits the warrantless search of abandoned cell phones only where they are password-protected, and Futrell's phone was not password-protected. And, in any event, the judgment of the Florida court was not from a "state court of last resort or of a United States court of appeals," and therefore does not create a conflict warranting this Court's review. Sup. Ct. R. 10(b).

1. As Futrell notes, Pet. 20–23, multiple federal courts of appeals have considered the question presented since this Court decided *Riley*, and each agrees with the holding of the Court of Appeals of Virginia below. See *United States* v. *Small*, 944 F.3d 490, 503 n.2 (4th Cir. 2019) (rejecting argument that even if the petitioner "abandoned his physical phone, he did not abandon its digital contents," because *Riley* "emphasized that 'other case-specific exceptions may still justify a warrantless search of a particular phone'" and "this is such a case" (quoting *Riley*, 573 U.S. at 401–02)), cert. denied 140 S. Ct. 2644 (2020); *United States*

v. *Crumble*, 878 F.3d 656, 660 (8th Cir. 2018) (declining to "categorically deny application of the abandonment doctrine to cell phones" because "*Riley*'s holding is limited to cell phones seized incident to arrest"), cert. denied 139 S. Ct. 187 (2019); *United States* v. *Escamilla*, 852 F.3d 474, 485–86 (5th Cir. 2017) (concluding that defendant "abandoned any privacy interest he had in the phone" when he "expressly disclaimed ownership of the phone and left it in the possession of DEA agents"), cert. denied 138 S. Ct. 336 (2017); see also *United States* v. *Sparks*, 806 F.3d 1323, 1343–44 (11th Cir. 2015) (holding that defendants who abandoned cell phone lacked standing to challenge law enforcement delay in obtaining search warrant), cert. denied 136 S. Ct. 2009 (2016), overruled by *United States* v. *Ross*, 963 F.3d 1056 (11th Cir. 2020) (holding that abandonment "runs to the merits of [a defendant's] Fourth Amendment challenge" rather than implicating Article III standing), cert. denied 141 S. Ct. 1394 (2021).

Futrell also recognizes, see Pet. 14–20, that every state court of last resort to consider the question following *Riley* has likewise held that the abandonment exception permits warrantless searches of cell phones. See *North Dakota* v. *Valles*, 925 N.W.2d 404, 408 (N.D. 2019) (explaining that "[i]f truly abandoned, a phone is ownerless and thus the former owner lacks a continuing possessory interest to assert a Fourth Amendment claim"); *South Carolina* v. *Brown*, 815 S.E.2d 761, 764 (S.C. 2018) ("*Riley* does not alter the

standard abandonment analysis."), cert. denied 139 S. Ct. 486 (2018); *Washington* v. *Samalia*, 375 P.3d 1082, 1088–89 (Wash. 2016) (holding that "the rationale driving the abandonment doctrine fits cell phone searches" because "[w]hen an individual voluntarily abandons an item . . . that individual voluntarily exposes that item—and all information that it may contain—to anyone who may come across it").[3]

2. Against that unanimous weight of authority, Futrell attempts to manufacture a split by citing the lone opinion of an intermediate state appellate court in *Florida* v. *K.C.*, 207 So.3d 951 (Fla. Dist. Ct. App. 2016). See Pet. 19–20. But that decision does not conflict with the decision below. The defendant in *K.C.* abandoned a password-protected phone, 207 So.3d at 952; Futrell's phone had no password. The state intermediate court's judgment expressly turned upon this

[3] Numerous state intermediate courts have similarly concluded that the abandonment doctrine applies to cell phones. See *Louisiana* v. *Rousset*, 302 So.3d 55, 64 (La. Ct. App. 2020) ("We agree that the holding in *Riley* does not apply in this case."), cert. denied 304 So.3d 416 (La. 2020); *Flores* v. *Nevada*, 462 P.3d 1236, at *5–6 (Nev. Ct. App. May 20, 2020) (concluding that *Riley* was inapplicable and that warrantless search of phone was permissible because "any reasonable expectation of privacy in the phone that [the defendant] may have had after fleeing was severely diminished, especially considering the phone was not password protected," and because "the search was limited to uncovering the phone's owner"); *Wiltz* v. *Texas*, 595 S.W.3d 930, 932 (Tx. Ct. App. 2020) ("Because appellant abandoned the cell phone in his open car when he fled from the police, we conclude he lacked standing to challenge the constitutionality of the cell-phone search."), pet. refused 609 S.W.3d 543 (Tex. Crim. App. 2020), cert. denied 141 S. Ct. 1742 (2021).

distinction. *K.C.* held "that a categorical rule permitting warrantless searches of abandoned cell phones, the contents of which are *password protected*, is . . . unconstitutional." *Id.* at 956 (emphasis added); *id.* at 958 ("[W]e conclude that the abandonment exception does not apply to cell phones whose contents are protected by a password."). The court emphasized that the "contents [of the defendant's] phone were still protected by a password, clearly indicating an intention to protect the privacy of all of the digital material on the cell phone or able to be accessed by it." *Id.* at 955. Indeed, the court continued, "the password protection that most cell phone users place on their devices is designed specifically to prevent unauthorized access to the vast store of personal information which a cell phone can hold when the phone is out of the owner's possession." *Ibid*. Thus, *K.C.* held that the defendant had not "relinquished his reasonable expectation of [privacy as to] the *contents* of the phone because of the password protection on the phone." *Id.* at 956 (citing *Brown*, 776 S.E.2d at 926–27 (Konduros, J., dissenting)).

There is no split between *K.C.* and the decision below. Unlike the defendant in *K.C.*, Futrell did not protect his phone with a password. Therefore, under *K.C.*'s own reasoning, once Futrell had abandoned the phone in a public place without a password "indicating an intention to protect the privacy of all the digital material," *id.* at 955, Futrell no longer had a reasonable expectation of privacy in the contents of that cell

phone. Indeed, by abandoning the phone with no password, Futrell "ran the risk that complete and total strangers would come upon it," and clearly "relinquished his reasonable expectation of privacy in it." *Small*, 944 F.3d at 504.

In any event, a decision from an intermediate state court disagreeing with every federal court of appeals and every state court of last resort to consider the issue does not create a split. See Sup. Ct. R. 10(b) (explaining that petitions may be granted on the ground that there is a conflict with "the decision of another *state court of last resort* or of a United States court of appeals" (emphasis added)). The lack of any split demonstrates that this Court's review is not warranted here.

Futrell also contends that "4 dissenting opinions" in the cases he cites evince lower-court "confusion" on the application of the abandonment exception to cell phone data. Pet. 2–3. Dissenting opinions, of course, are not splits of authority weighing in favor of this Court's review. See Sup. Ct. R. 10(b) (writ of certiorari appropriate if "a state court of last resort has *decided* an important federal question in a way that conflicts with the *decision* of another state court of last resort or of a United States court of appeals" (emphasis added)). And four dissenting opinions in eleven decisions is hardly evidence of "confusion." Every federal court of appeal and state high court to have considered the question reached the same conclusion that the Court of Appeals of Virginia reached here.

3. In any event, even if one intermediate state court decision on different facts and a handful of dissents could demonstrate lower-court "confusion," Pet. 2, this Court should permit further percolation on the question presented. No court of appeals to have considered the question since *Riley* has disagreed on the application of the abandonment exception to cell phones like Futrell's. This Court has repeatedly denied petitions for writs of certiorari presenting the same question as this petition, but no split has developed. See, *e.g.*, *Wiltz* v. *Texas*, 141 S. Ct. 1742 (2021); *Small* v. *United States*, 140 S. Ct. 2644 (2020); *Brown* v. *South Carolina*, 139 S. Ct. 486 (2018); *Crumble* v. *United States*, 139 S. Ct. 187 (2018); *Sparks* v. *United States*, 136 S. Ct. 2009 (2016). And the vast majority of federal courts of appeals and state courts of last resort have not yet considered the question since this Court decided *Riley*. Given the unanimous authority on the side of the ruling below, a split may well never develop. If a split were to develop, however, this Court could review the question presented at that time, with the benefit of the perspectives of additional federal courts of appeals and state courts of last resort. See, *e.g.*, *Box* v. *Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) ("We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals."); *Stanton* v. *Sims*, 571 U.S. 3, 10 (2013) (granting petition for certiorari and noting that "the federal and state courts of last resort around the Nation were sharply divided").

II. This case is a poor vehicle to consider the question presented

Second, the petition should be denied because this case would be a poor vehicle to resolve the question presented. The decision below is an unpublished, state intermediate court opinion; it is not precedential in Virginia. Further, the relevant facts—that Futrell's phone was not password-protected and that the detective looked only at the phone's number and serial code—make this case particularly ill-suited to decide the doctrinal and policy questions that the petition raises regarding privacy interests in digital data. In addition, Futrell contested below whether he abandoned the phone at all, posing another potential barrier to deciding the question presented.

1. This Court's review is not warranted because the decision below is a nonprecedential ruling of a state intermediate appellate court. This Court's Rule 10 contemplates whether the decision below was made by a state court of last resort. See Sup. Ct. R. 10(b) (certiorari considered when "a *state court of last resort* has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" (emphasis added)). Thus, a "denial of certiorari is appropriate" when a case "comes to [the Court] on review of a decision by a state intermediate appellate court." *Huber* v. *New Jersey Dep't of Envt'l Prot.*, 562 U.S. 1302, 1302 (2011) (statement of Alito, J., joined by Roberts, C.J., and Scalia and Thomas, JJ., respecting

the denial of certiorari); see also *Florida* v. *Meyers*, 466 U.S. 380, 385 (1984) (Stevens, J., dissenting) ("[I]f we take it upon ourselves to review and correct every incorrect disposition of a federal question by every intermediate state appellate court, we will soon become so busy that we will either be unable to discharge our primary responsibilities effectively, or else be forced to make still another adjustment in the size of our staff in order to process cases effectively."); Stephen Shapiro et al., *Supreme Court Practice*, 180 n.50 (10th ed. 2013) (explaining that this Court "may be less willing to grant certiorari to review a decision from [a] state intermediate appellate court").

These concerns are compounded by the fact that the decision below is unpublished and non-precedential. See Pet. App. 1a; Va. Code § 17.1-413(A) (only published opinions "hav[e] precedential value" or "significance" in Virginia). Not even future panels of the Court of Appeals of Virginia are bound by the decision below and, of course, nothing prevents the Supreme Court of Virginia from coming to a different conclusion in a future case. There is no reason for this Court to weigh in on an issue when the state high court can still adopt a different view and when the intermediate court may change course too. This Court should follow its regular practice here and deny the petition.

2. Further, this case would be an exceptionally poor vehicle to consider the question presented because Futrell's cell phone was not password-protected; police located merely the phone's number and serial

code before returning it to the evidence department; and Futrell contested below whether he abandoned the phone at all.

The lack of password protection makes this case a poor vehicle. As Futrell acknowledges, several courts have drawn a "Fourth Amendment distinction between password- and non-password-protected phones" with regard to the abandonment exception. Pet. 24. Although Futrell contends that this "distinction is irrelevant, unworkable, and wrong," *ibid*, multiple cases he cites—including the *K.C.* case—concluded that this factor was significant. See, *e.g.*, *K.C.*, 207 So.3d at 955 ("While we acknowledge that the physical cell phone in this case was left in the stolen vehicle by the individual, and it was not claimed by anyone at the police station, its contents were still protected by a password, clearly indicating an intention to protect the privacy of all of the digital material on the cell phone or able to be accessed by it."); *Wiltz*, 595 S.W.3d at 935 ("The record contains no evidence that the cell phone was password-protected or that appellant otherwise had attempted to limit another person's ability to access the phone and search through it to ascertain ownership."); *Flores*, 462 P.3d at *2 ("Further, any reasonable expectation of privacy in the phone that Flores may have had after fleeing was severely diminished, especially considering the phone was not password protected and anyone, including the police, may have found the phone and opened it in an attempt to identify and locate its owner."); *Valles*, 925 N.W.2d at

411 ("[T]he clear message of a lock is that the owner does not intend someone who picks up the phone to examine the contents for any purpose.").

In addition, this Court indicated in *Riley* that a phone's lack of password protection may affect what steps officers can take with that phone. Specifically, this Court noted that, "if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data" for the purpose of preserving evidence. *Riley*, 573 U.S. at 391. A case in which the digital contents of an abandoned phone were protected by a password would be a far superior vehicle to consider whether a person abandons his reasonable expectations of privacy in data stored on or accessible from a phone by abandoning the phone.

This case is also a poor vehicle because of the extremely limited nature of the warrantless search. Futrell notes hypothetical privacy incursions arising from the "vast quantities of personal information" that can be stored on cell phones or in "the cloud." Pet. 7, 28. But this case does not involve sensitive personal information stored on a cell phone, much less "vast quantities" of such information stored in the "cloud." *Ibid*. Unlike other cases in which the police "examined the phone's photos, videos, Facebook messenger application, text messages, and call log," *Valles*, 925 N.W.2d at 406, the detective here located only the phone's number and serial code before returning the

phone to the evidence department, Pet. App. 3a. The detective never attempted to view call logs, text messages, emails, photos, personal information, or any other data on the phone, much less in the "cloud." *Ibid.*

These basic identifiers—the phone's number and serial code—represent the sort of information that might readily be discovered by the government or any other third party, given the diminished expectation of privacy in abandoned physical property. *California* v. *Greenwood*, 486 U.S. 35, 40–41 (1988) (abandoning property "in an area particularly suited for public inspection and, in a manner of speaking, public consumption" results in "no reasonable expectation of privacy in the inculpatory items . . . discarded" (quotation marks and citation omitted)); *Smith* v. *Maryland*, 442 U.S. 735, 744 (1979) (holding no expectation of privacy in phone numbers dialed); *Abel* v. *United States*, 362 U.S. 217, 241 (1960) (holding no reasonable expectation of privacy in "abandoned property" left in vacated hotel room). Any official or Good Samaritan attempting to return a lost phone might locate the same information—or more, like a contacts list or recently called numbers—to aid in finding the phone's owner. As courts have recognized, "there is a legitimate government interest, as well as a personal interest, in police officers returning lost cell phones to their rightful owners." *Valles*, 925 N.W.2d at 410; see also *Gudema* v. *Nassau Cnty.*, 163 F.3d 717, 722 (2d Cir. 1998) ("[A]lthough an owner retains some privacy interest in property that is merely lost or stolen, rather

than intentionally abandoned, that interest is outweighed by the interest of law enforcement officials in identifying and returning such property to the owner."); *United States* v. *Sumlin*, 909 F.2d 1218, 1220 (8th Cir.), cert. denied 498 U.S. 1000 (1990) (holding investigation of purse contents warranted to confirm purse was same as one reported stolen).

As the detective in this case remarked, a "typical phone" would allow an officer to "take off the back and expose the battery," which would have shown the serial code. Pet. App. 3a. The identifying information the detective viewed on the phone would thus frequently be available from a mere physical inspection of the phone itself. Even the dissenting opinions Futrell relies upon conclude that the abandonment exception should allow warrantless physical inspections of phones. See, *e.g.*, *Wiltz* v. *State*, 609 S.W.3d 543, 547 (Tex. Crim. App. 2020) (Walker, J., dissenting from denial of petition for review) ("There is a distinction between the privacy interests of a cell phone as a physical object and the digital contents stored on a cell phone."); *State* v. *Brown*, 776 S.E.2d 917, 927 (S.C. Ct. App. 2015) (Konduros, J., dissenting) ("While under these circumstances I would not find a reasonable expectation of privacy existed in the physical object of the phone, I believe a person preserves their reasonable expectation of privacy in its *contents*."). Indeed, this Court recognized in *Riley* that law enforcement officers "remain free to examine the physical aspects of a phone" without a warrant pursuant to the search-

incident-to-arrest exception. 573 U.S. at 387. It would be peculiar to draw a constitutional distinction between obtaining information from the inside of the phone case and obtaining the same information from the phone's settings. The extremely limited nature of the search here makes this case a poor vehicle to decide how the Fourth Amendment may apply to a far more intrusive or extensive search of personal data accessible from a cell phone.

This case is also a poor vehicle because Futrell vigorously contested below whether he had abandoned the phone at all. Pet. App. 4a–5a, 8a. While the court correctly rejected those arguments, they could complicate this Court's review, or potentially even prevent this Court from reaching the question presented.

This issue has come to this Court frequently since it decided *Riley*. See p.13, *supra*. To the extent this Court believes the question presented may warrant review, there will be superior vehicles in which to consider it. The petition in this case should be denied.

III. The decision below is correct

Finally, review predicated on fact-bound error correction is unwarranted because the decision below was correct. It is fully consistent with this Court's Fourth Amendment jurisprudence, especially given the lack of a password on the phone and the extremely limited nature of the search.

The "ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley*, 573 U.S. at 381 (quoting *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006)). The "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978). Accordingly, the Fourth Amendment's "warrant requirement is subject to certain reasonable exceptions," including when the object being searched is a cell phone. *Kentucky* v. *King*, 563 U.S. 452, 459 (2011). This Court recognized as much in *Riley*, which held "not that the information on a cell phone is immune from search" but that "a warrant is *generally* required before such a search" when "a cell phone is seized incident to arrest." *Riley*, 573 U.S. at 401 (emphasis added). *Riley* addressed only searches incident to an arrest, not searches of abandoned property. *Id.* at 401–02 (holding that "the search incident to arrest exception does not apply to cell phones"). Indeed, this Court explicitly noted that "other case-specific exceptions may still justify a warrantless search of a particular phone." *Ibid.*

Such an exception applies here. "There can be nothing unlawful in the Government's appropriation of . . . abandoned property," *Abel*, 362 U.S. at 241, because "[w]hen individuals voluntarily abandon property, they forfeit any expectation of privacy in it that they might have had," *United States* v. *Jones*, 707 F.2d

1169, 1172 (10th Cir. 1983); see also *United States* v. *Thomas*, 864 F.2d 843, 845 (D.C. Cir. 1989) ("A warrantless search or seizure of property that has been 'abandoned' does not violate the [F]ourth [A]mendment."). The "law is well established that a person who voluntarily abandons property loses any reasonable expectation of privacy in the property and is consequently precluded from seeking to suppress evidence seized from the property." *United States* v. *Ferebee*, 957 F.3d 406, 412 (4th Cir. 2020).

Futrell contends that this Court's "antiquated" abandonment authorities "need updating" in light of *Riley*, which Futrell believes "compels a categorical rule allowing the Government to conduct warrantless searches of the physical aspects of an abandoned cell phone but not its digital contents." Pet. 10, 28–29. But every federal court of appeals and state court of last resort to reach the issue has concluded that *Riley* "does not alter the standard abandonment analysis." *Brown*, 815 S.E.2d at 764; see also *Samalia*, 375 P.3d at 1088 (*Riley* demonstrates "that no special rules are necessary for cell phones because they can be analyzed under established rules.").

Riley held that the two rationales on which the search-incident-to-arrest exception is based—avoiding "harm to officers and destruction of evidence," 573 U.S. at 386—do not support searches of data on cell phones. "Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape," *id*. at 387, and

"once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone," *id*. at 388. The abandonment exception, by contrast, turns on the principle that people have no reasonable expectation of privacy in property that they have voluntarily abandoned. See pp.21–22, *supra*; *Greenwood*, 486 U.S. at 40–41; *Abel*, 362 U.S. at 241. This principle applies to cell phones just like any other form of property. *Valles*, 925 N.W.2d at 408; *Brown*, 815 S.E.2d at 764 ("*Riley* does not alter the standard abandonment analysis."); *Samalia*, 375 P.3d at 1089 ("When an individual voluntarily abandons an item . . . that individual voluntarily exposes that item—and all information that it may contain—to anyone who may come across it. Cell phones are no different in this respect than for any other item; the abandonment doctrine applies to all personal property equally."). Accordingly, courts have correctly declined to "categorically deny application of the abandonment doctrine to cell phones." *Crumble*, 878 F.3d at 660.

That conclusion stands on especially firm ground here because Futrell did not protect his cell phone with a password, and the search was extremely limited. Futrell abandoned an unlocked phone in a public restaurant, where any passerby could access the phone's data simply by pushing the power button. Pet. App. 3a. Under those circumstances, Futrell could not have a reasonable expectation of privacy in the phone—particularly in the limited information that

the police obtained in this case. See, *e.g.*, *United States* v. *Barrows*, 481 F.3d 1246, 1248–49 (10th Cir. 2007) (concluding that defendant did not have subjective or reasonable expectation of privacy, given his "failure to password protect his computer"); *Trulock* v. *Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (recognizing reasonable expectation of privacy because defendant password protected his files); *Sparks*, 806 F.3d at 1330 (describing how person who discovered unlocked phone "was able to access the content stored on the phone").

Even if the large amounts of personal information potentially accessible on cell phones could justify treating an abandoned password-protected cell phone differently than other abandoned property, there is no reasonable expectation of privacy in such basic identifying numbers on an unlocked and abandoned phone. See *State* v. *Hill*, 789 S.E.2d 317, 319 (2016) ("[W]e do not construe *Riley* to recognize a legitimate expectation of privacy in identifying noncontent information such as the person's own phone number . . . simply because that information was associated with a cellular phone account rather than a landline phone account or a piece of physical mail."); *Smith*, 442 U.S. at 744 (1979) (holding no expectation of privacy in dialed numbers); see also *Berry* v. *Federal Bureau of Investigation*, 2020 WL 13065178, at *2 (1st Cir. Feb. 27, 2020) ("Berry failed to show that he had any legitimate expectation of privacy in . . . Berry's own cell phone number.").

The Court of Appeals of Virginia was thus correct in holding that *Riley* "does not prevent courts from considering whether cell phones have been abandoned for Fourth Amendment purposes." Pet. App. 11a. This Court's review is unwarranted.

* * *

There is no split in authority to merit this Court's review, this case is a poor vehicle for considering the question presented, and error-correction review is not appropriate. Futrell chose to abandon his unlocked phone in a public place after shooting at a restaurant's staff members. A detective's brief use of the phone to identify the phone number and serial code was entirely reasonable. This case does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

September 15, 2022 Respectfully submitted,

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