No. 21-1525

IN THE

Supreme Court of the United States

ANTONIO DARON FUTRELL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari
To The Virginia Court of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The decision below adds to the pile of lower-court decisions uncritically extending the abandonment doctrine to cell phones. These decisions see no constitutional difference between the warrantless search of an abandoned bottle of moonshine in the 1920s and the warrantless search of an abandoned cell phone today. According to these courts, the "standard" abandonment analysis applies to all property, including cell phones. Pet. App. 10a; *see also* Pet. 15-16.

But there is nothing "standard" about the privacy interests in cell phones. "Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day." *Riley v. California*, 573 U.S. 373, 395 (2014). The abandonment exception—like other Fourth Amendment doctrines—should account for these realities, not ignore them.

Respondent does not dispute that the question presented is important. Instead, Respondent claims that this case is a poor vehicle because the "decision below is an unpublished, state intermediate court opinion." Opp. 14. But if that barred review, the Court never would have decided *Riley*, which also reviewed an unpublished, state intermediate court opinion. *See People v. Riley*, 2013 Cal. App. Unpub. LEXIS 1033 (Feb. 8, 2013), *rev'd*, 573 U.S. 373 (2014).

This case is an excellent vehicle to consider the question presented because (i) the factual record is

simple, clear, and undisputed; (ii) the warrantless search led police to identify and arrest Futrell; (iii) Futrell expressly preserved the abandonment issue in his plea agreement and at every stage of appeal; and (iv) Respondent has not argued an alternative ground for justifying the warrantless search. Futrell's conviction rises or falls on the abandonment issue. It is difficult to imagine a better vehicle for the question presented.

Respondent also tries to minimize lower-court confusion by emphasizing cases that distinguish between password-protected and non-password-protected phones, noting that "Futrell's phone was not password-protected." Opp. 8. That argument actually *supports* the petition by highlighting the confusion and conflict among lower courts: some have recognized the password distinction that Respondent highlights, but some have not. *See* Pet. 23-25.

Ultimately, then, Respondent is left defending the decision below and arguing that the abandonment doctrine "applies to cell phones just like any other form of property." Opp. 23. That argument cannot be squared with *Riley*, which recognized that cell phones are not like other physical objects. *See* Pet. 26-27. It is one thing to hold that police can conduct a warrantless search of the physical aspects of an abandoned cell phone. It is quite another to hold that the search can extend into the "digital record of nearly every aspect of [life]—from the mundane to the intimate." *Riley*, 573 U.S. at 395.

ARGUMENT

I. THIS CASE IS AN EXCELLENT VEHICLE TO CONSIDER THE QUESTION PRESENTED.

This case is a superb vehicle for at least four reasons. First, the factual record is simple and undisputed; it mostly consists of the rulings below and the testimony of two witnesses at a suppression hearing. Second, the abandonment issue is clearly preserved; Futrell entered a conditional guilty plea allowing him to appeal the abandonment ruling, and he has raised the issue in every appeal. *See* Pet. App. 15a; *see also* Opp. 5 (agreeing that Futrell "reserved the right to appeal the adverse suppression ruling"). Third, the warrantless search led police to locate and arrest Futrell; there are no potential "harmless error" or "independent source" arguments. *See* Pet. 4-5; Opp. 3-4. Fourth, Respondent has offered no alternative justification for the warrantless search; the abandonment exception is the only one.

This fourth factor is unique among abandonment cases because the Government often makes several arguments for why a warrantless search complies with the Fourth Amendment. Such alternative arguments can mitigate—or even moot—the importance of the abandonment issue. For example, in *United States v. Small*, 944 F.3d 490 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 2644 (2020), the Government raised exigent circumstances, implied consent, good faith, and harmless error as alternative grounds for allowing the warrantless search of an

abandoned cell phone. *See* Br. of United States of Am., *Small v. United States*, 2018 U.S. 4th Cir. Briefs LEXIS 338 (May 17, 2018). None of those—or any other—alternative grounds is presented here.

Respondent's efforts to erect obstacles to review fall short.

1. Respondent stresses that "the decision below is a nonprecedential ruling of a state intermediate court," Opp. 14, but that is not a vehicle problem. Again, the same was true in *Riley*. The same was true last Term in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (reviewing *Moriana v. Viking River Cruises, Inc.*, 2020 Cal. App. Unpub. LEXIS 6045 (Cal. App. 2d. Dist., Sept. 18, 2020)). And the same was true in other recent cases. *See, e.g.*, *Lange v. California*, 141 S. Ct. 2011 (2021) (reviewing *People v. Lange*, 2019 Cal. App. Unpub. LEXIS 7266 (Cal. App. 1st Dist., Oct. 30, 2019)).

Respondent cites to a dissenting opinion in *Florida v. Meyers*, 466 U.S. 380 (1984), when arguing that "denial of certiorari is appropriate when a case comes to the Court on review of a decision by a state intermediate appellate court," Opp. 14 (cleaned up). But the *majority* opinion in *Meyers* did exactly that, reviewing the decision of an intermediate Florida state court. *See Meyers v. State*, 432 So. 2d 97 (Fla. Dist. Ct. App. 1983), *rev'd*, 466 U.S. 380 (1984). And *Meyers* is not an outlier. This Court frequently reviews decisions of state intermediate appellate courts. *See, e.g.*, *Torres v. Tex. Dep't of Public Safety*,

142 S. Ct. 2455 (2022) (reviewing decision of Texas Court of Appeals); *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (reviewing decision of Mississippi Court of Appeals).

Nor does it matter that "the decision below is unpublished and non-precedential." Opp. 15. The Court routinely reviews "unpublished and non-precedential" decisions—including six last Term. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (reviewing 818 Fed. Appx. 99 (2d Cir. 2020)); *Golan v. Saada*, 142 S. Ct. 1880 (2022) (reviewing 833 Fed. Appx. 829 (2d Cir. 2020)); *Kemp v. United States*, 142 S. Ct. 1856 (2022) (reviewing 857 Fed. Appx. 573 (11th Cir. 2021)); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502 (2022) (reviewing 824 Fed. Appx. 452 (9th Cir. 2020)); *Thompson v. Clark*, 142 S. Ct. 1332 (2022) (reviewing 794 Fed. Appx. 140 (2d Cir. 2020)); *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022) (reviewing 831 Fed. Appx. 748 (6th Cir. 2020)).

Respondent's position seems to be that the only cases worthy of review are published decisions of federal courts of appeals. But as *Riley* and the other cases cited above make clear, that is wrong. Important questions can and do arise in state courts and in unpublished decisions. And here, the Virginia Court of Appeals decided an "important question of federal law that has not been, but should be, settled by this Court," and the question has fractured lower appellate courts, most of which have decided the issue

in a way that conflicts with *Riley* and other "relevant decisions of this Court." Sup. Ct. R. 10(a), (c); *see* Pet. 14-29.

2. Respondent next asserts that this case is a poor vehicle because "Futrell's cell phone was not password-protected," and "multiple cases" have concluded that password protection is "significant." Opp. 15-16. But that assertion does not point to a vehicle problem; it points to a merits argument. It also points to a conflict among lower courts and a reason why this Court should grant review: some lower courts view password-protection as constitutionally significant while others do not. *Compare State v. Brown*, 414 S.C. 14, 20 (Ct. App. 2015) (holding that police can conduct a warrantless search of the contents of an abandoned, password-protected cell phone); *with State v. Valles*, 925 N.W.2d 404, 410 (N.D. 2019) (holding that "[a]ny search of a cell phone that requires bypassing a lock, password, or other security feature of a cell phone must be performed pursuant to a warrant").

Even if a password were relevant to the abandonment analysis, Respondent's vehicle arguments make no sense because a phone can be either password-protected or not. It cannot be both. Respondent does not explain why a case involving a password-protected phone would be "far superior" to a case involving a non-password-protected phone. Either way, the Court would have an equal opportunity to consider whether a password makes any difference.

If anything, that Futrell's cell phone was not password-protected makes this case a superior vehicle because most people are like Futrell and do not secure their cell phones with a password. *See, e.g.*, Kaspersky Lab, *Not Logging On, But Living On* (2017), https://tinyurl.com/4s83em7d ("Less than half [of users] . . . have a password or other form of lock on their mobile devices."); Consumer Reports, *Smart Phone Thefts Rose to 3.1 Million in 2013* (May 28, 2014), https://tinyurl.com/5n7vfs4s (reporting that 64% of smartphone owners do not secure their phones with a 4-digit PIN). The facts of this case therefore involve a more common situation than the hypothetical cases Respondent proposes.

The lack of a password on Futrell's phone also means that this factual record is not saddled with thorny issues about passwords—such as police searching an abandoned phone before it locks, searching it after guessing the correct password, or searching it after cracking the code. These types of issues often arise in abandonment cases. *See, e.g.*, *Valles*, 925 N.W.2d at 406 (noting that an officer "guessed the unlock pattern" and "quickly unlocked" an abandoned phone); *State v. K.C.*, 207 So. 3d 951, 952 (Fla. Dist. Ct. App. 2016) (explaining that a "forensic detective was able to unlock" an abandoned phone); *Brown*, 414 S.C. at 17 n.1 (noting that a detective unlocked an abandoned phone that was password-protected "by entering '1-2-3-4,' which he described as a 'lucky guess'").

These thorny issues also confirm why the password distinction is unworkable and impractical. *See* Pet. 23-25. What if police can guess the password, as in *Valles* and *Brown*? Does the strength of the password matter? How strong is strong enough to maintain a reasonable expectation of privacy? Adopting a rule that gives talismanic significance to password-protection would inject substantial uncertainty and hairsplitting into this area of law.

3. Respondent also argues that this case is a poor vehicle given "the limited information that the police obtained in this case." Opp. 23-24. That argument turns the Fourth Amendment on its head. The reasonableness of a search does not depend on the amount of information police ultimately recover from a search but on "the nature and purpose of the search" and whether it "intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 575 U.S. 306, 310 (2015). This case is an excellent vehicle for the Court to consider those factors because it is undisputed that Detective Rodey looked for evidence of a crime on an abandoned cell phone without a warrant by turning on the phone, pressing buttons to navigate to "settings," and then looking for digital information that he could use to identify and locate the phone's owner. *See* Pet. 4-5; Opp. 4.

Regardless, the so-called "limited" information the detective found during his warrantless search is yet another fact that *supports* granting the petition because it means the Court would not get bogged down in factual line drawing about what exactly was

searched and why. This clean record lends itself to a cleaner, more widely applicable rule. For example, if the Court agrees that the warrantless search of Futrell's phone violated the Fourth Amendment, then so too would a more invasive search where police looked at text messages, call logs, photos, GPS location data, and so on. If the Court were to announce that same rule in a case involving a search that found more extensive information than police found here, then whatever rule the Court adopted could be distinguished by arguing that a search was less invasive than the one the Court considered.

These types of "it could be worse" arguments would lead to more litigation and, eventually, the need for the Court to revisit the abandonment issue in a case with facts like this one. "And during that time, the nature of the electronic devices that ordinary Americans carry on their persons would continue to change," *Riley*, 573 U.S. at 407 (Alito, J., concurring), and "the gulf between physical practicability and digital capacity will only continue to widen," *id.* at 394 (majority op.).

4. Finally, Respondent notes that Futrell contested below whether he had abandoned his cell phone. Opp. 20. That is true but irrelevant. Futrell does not raise that issue here. The sole issue before the Court is whether police could conduct a warrantless search of the digital information on Futrell's abandoned cell phone.

II. THE LOWER COURT CONFUSION IS REAL.

Respondent does not dispute that lower courts considering the question presented often issue fractured decisions, with a majority typically ruling that cell phones are just like other physical objects, and a dissent decrying how such a simplistic application of the abandonment doctrine violates reasonable expectations of privacy. *See* Pet. 14-23.

After repackaging Futrell's explanation of why the decision below is consistent with the decisions of most other appellate courts, Respondent reiterates that some of those courts have found constitutionally significant whether an abandoned cell phone was password protected. *See* Opp. 10-13. But again, these password- no-password cases only highlight how lower courts have disagreed when answering the question presented.

Respondent also argues that the question presented could use "further percolation." Opp. 13. For support, Respondent cites *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019), where the Court refused to consider a second question presented because only one federal court of appeals had considered it. *See id.* at 1782. Here, by contrast, at least 4 federal courts of appeals and 7 state appellate courts have weighed in, often with a dissenting opinion—and many federal district courts and scholars also have considered the issue. *See* Pet. 14-25 & nn.5-6. A robust body of law and scholarship already exists to aid the Court's review.

III. THE DECISION BELOW IS WRONG.

Respondent claims that "the decision below was correct" and "is fully consistent with this Court's Fourth Amendment jurisprudence." Opp. 20. Citing to decades-old cases involving warrantless searches of ordinary physical objects like a satchel, *see United States v. Jones*, 707 F.2d 1169 (10th Cir. 1983), a gym bag, *see United States v. Thomas*, 864 F.2d 843 (D.C. Cir. 1989), and a pencil, *see Abel v. United States*, 362 U.S. 217 (1960), Respondent argues that individuals who "voluntarily abandon property . . . forfeit any expectation of privacy in it that they might have had," Opp. 21 (quotation marks omitted). "The abandonment exception," Respondent contends, "applies to cell phones just like any other form of property." *Id.* at 23.

That reasoning is inconsistent with the Court's modern Fourth Amendment jurisprudence. The Court has called "foolish" the contention that "the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). It has stressed that "cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Riley*, 573 U.S. at 393. And it has warned lower courts "not to uncritically extend existing precedents" when "confronting new concerns wrought by digital technology." *Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018).

An uncritical extension of decades-old abandonment precedents is exactly what happened below, exactly what other lower courts have done, and exactly why the Court's review is urgently needed. Such cursory constitutional analysis fails to recognize the heightened privacy interests Americans have in the digital contents of their cell phones. To say that a warrantless search of the digital contents of an abandoned cell phone is just like a warrantless search of a satchel, a gym bag, or a pencil ignores the realities of our digital world. It also defies reasonable expectations of privacy.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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