No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TOYRIEON SESSIONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Following *Riley v. California*, 573 U.S. 373 (2014), may law enforcement seize a person's mobile telephone—without probable cause and without a warrant—and hold it for nearly one year until they develop probable cause to then seek a warrant?

STATEMENT OF RELATED CASES

United States v. Sessions, Case No. 2:17-cr-00767-AB-3, Central District of California (Birotte, J.). Judgment entered May 11, 2021. Docket Entry 311.

United States v. Sessions, Case No. 21-50125, United States Court of Appeals for the Ninth Circuit. Memorandum disposition filed January 18, 2024 at Docket Entry 59; *see also* Pet. Appx.

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JURISDICTION

The court of appeals filed its memorandum on January 18, 2024. The court of appeals denied rehearing on April 25, 2024. This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

These days nearly every person carries the "modern cell phone," which for many Americans contain "the privacies of life." *Riley*, 573 U.S. at 385. For this reason, the Court recognized that in a "search incident to an arrest," the mobile phone will commonly be seized for evidence. But to *search* a cell phone requires getting a warrant, and getting a warrant requires probable cause. *Id.*, at 381, 403. When the Government *seizes* an object without a warrant, this Court's instructions are equally clear: its officers may do so *if* they diligently seek a warrant following the seizure. *Illinois v. McArthur*, 531 U.S. 326, 332 (2001) (warrantless seizure lasting two hours approved where law enforcement immediately proceeded to seek

and obtain warrant to authorize search, *viz.* "this time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant."); *compare United States v. Place,* 462 U.S. 696, 709-710 (1983) (90–minute detention of luggage seized without probable cause is per se unreasonable based on interference with person's travels and lack of diligence of police); *United States v. Van Leeuwen,* 397 U.S. 249, 253 (1970) (29–hour detention of mailed package, based on probable cause, found to be reasonable given unavoidable delay in obtaining warrant and minimal nature of intrusion).

The question presented arises from the LAPD practice of seizing and maintaining mobile telephones, without a warrant and without probable case, for any period deemed necessary to investigate its target. Under *Riley*, and *McArthur*, the LAPD's seizure and retention over Petitioner's mobile phones, after the police detained and then immediately released Petitioner, violated the Fourth Amendment as an unreasonable seizure. AOB 11-17. [1] The reason is that without probable

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[1] "AOB" refers to Appellant's Opening Brief, "GAB" to the Government's Answering Brief, and "ARB" to Appellant's Reply Brief, each followed by the page numbers on the bottom; those briefs may be found on the Ninth Circuit's docket as entries 16, 34, and 46, respectively. "Pet. Appx." refers to Petitioner's Appendix, followed by pin-cite. "ER" refers to Appellant's Excerpts of Record, with the volume number preceding and the page number following.

cause, police will not be able to obtain the immediate search warrant for the cell phone that *Riley*, *McArthur*, and *Segura v. United* States, 468 U.S. 796 (1984) require, and the Government thus lacks legal bases to deprive a person of his property. Worse, this LAPD practice demonstrates a refusal to adhere to *Riley* and this Court's other governing precedent, and to seize and *maintain* personal property without lawful basis. Thankfully, the Court has instructed what to do when law enforcement seizes property it cannot search without a warrant: the seizure is only lawful if the officers then diligently seek a warrant. *McArthur*, 531 U.S. at 331-333.

The Ninth Circuit nevertheless turned aside Petitioner's appeal by finding that *Riley* continues to permit the seizure and retention of mobile telephones incident to arrest. Pet. Appx. 3 citing *Chimel v. California*, 395 U.S. 752, 764 (1969). In a decision that didn't even mention the constitutional amendment at issue, it then excused the nearly year-long retention of the mobile telephone by blaming Petitioner for the seizure, and suggesting incorrectly that he was in custody following the seizure when he wasn't. Pet. Appx. 4 citing *United States v. Johns*, 469 U.S. 478, 487 (1985).

Respectfully, the Ninth Circuit's decision evinces a studied rejection of *Riley*, *Segura*, and *McArthur*, amongst other decisions from this Court. The Court should grant the petition.

FACTS

In early May 2017, while executing a search warrant authorizing the seizure of clothing and a gun related to a robbery of a 7-Eleven store, and *not* authorizing seizure of any electronic devices, officers of the LAPD seized Petitioner's mobile telephones "incident to arrest." The LAPD then kept them for nearly a year—until April 2018—before seeking a warrant to search their contents. But the officers didn't really arrest Petitioner; instead, they detained him, brought him to the police station, and released him. GAB 13. [2] While they detained Petitioner rather than book *him* into custody to face charges, they instead seized his mobile telephones and booked them into evidence. *See* GAB 13, 15.

Petitioner challenged that the LAPD officers' seizure and then prolonged seizure of his mobile telephone were unconstitutional under *Riley*, *McArthur*, and

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[2] California law establishes that the Petitioner's seizure constituted a detention because the authorities did not thereafter charge him with a crime. *See* Cal. Penal Code § 849.5; *Schmidt v. Department of California Highway Patrol*, 1 Cal.App.5th 1287 (2016); 8-ER-1434.

Segura based on undisputed facts. Notably, the Government did not dispute the absence of probable cause to search or seize the mobile phones at the time of Session's detention. *See* GAB 43-51. This concession was not surprising because the May 2017 warrant did not authorize the seizures *or* searches of mobile devices, and neither the warrant nor any subsequent filings by the Government in the trial court identified mobile phone use as part of the 7-Eleven robbery under investigation. 1-ER-88; 8-ER-1307, 1310–11.

Moreover, the search warrant came up empty: officers did not find the primary items (matching clothes and gun) authorized for seizure. 8-ER-1318-19. The police instead located and seized three cell phones under the "search-incident-to-arrest exception" to the warrant requirement. ER 1289 citing *Chimel,* 395 U.S. at 763.[3] One phone, the iPhone 7 from which they authorities obtained the

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[3] The parties disputed as a factual matter whether the telephones were seized incident to arrest. The searching officers offered the wild claim that Petitioner, while at home, was carrying all three mobile telephones in one pants pocket. 8-ER-1318; GAB 13. Respectfully, this seems atypical at best, and quite convenient for the LAPD. More importantly, Petitioner challenged that claim and asserted that the phones were recovered during the search of his apartment and not from his person. 2-ER-182. With the burden on the Government to establish, as fact, which version of facts were correct, Petitioner stood on the pleadings, and the Government never sought an evidentiary hearing to sustain its burden. 1-ER-84. Because the record stood in equipoise on the "incident to arrest" predicates, the Government failed to do so.

inculpatory evidence relied upon at trial, was a model that did not even exist at time of the 7-Eleven robbery under investigation. AOB 16-17.

Three weeks later, the Los Angeles District Attorney declined charges against Petitioner for the 7-Eleven robbery based on "insufficient evidence." 8-ER-1434. But the authorities never informed Petitioner of that decision. So too, the LAPD officers investigating the 7-Eleven robbery made no effort, much less a diligent one, to obtain the immediate search warrant *Riley*, *McArthur*, *Place, Van Leeuwen*, and *Segura* so require. *See* GAB 20, 38 (the phones sitting there "collecting dust").

Petitioner thus argued that seizure became unreasonable on May 4, 2017, when local authorities did not return his cell phones upon releasing him and then didn't pursue a warrant; the seizures certainly became unreasonable no later than May 31, 2017, the date on which the prosecuting authorities officially declined charges. 8-ER-1434; *see also* AOB 2 n.2 and AOB 14 n.6. The authorities' search of Petitioner's phones took place 10-11 months later, on April 3, 2018, for a different crime—LAPD/FBI investigation of an April 21, 2017, credit union robbery. 8-ER-1321–27.[4]

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[4] The fruits of the April 2018 warrant let the authorities to obtain additional warrants to validate the material already uncovered, *viz.*, July and September

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's refusal to apply settled constitutional precedent undermines *Riley* and subjects the citizenry to unlawful police practices in Los Angeles and throughout the Ninth Circuit.

In *Riley,* the Court addressed the Fourth Amendment concerns raised by the ubiquitous modern cell phone seized during searches incident to an arrest and held that authorities may not perform a mobile telephone search at all without a warrant. *Riley,* 573 U.S. at 386, 403. The Court clarified what police must do before searching a cell phone seized incident to an arrest: "get a warrant." *Id.* at 403. *Riley* further contemplated that officers may seize and secure the cell phone to prevent destruction of evidence *while* seeking a warrant. *See Riley,* 573 U.S. at 388. *Riley* did *not* authorize officers to otherwise maintain custody over the cell phone, for 11 months (in this case), without a warrant.

So too, *Segura* established that officers may not seize property in which a person has a possessory interest to prevent evidence destruction, while it did nothing to obtain a warrant to justify the seizure. "Of course, a seizure reasonable at its inception because based upon probable cause may become unreasonable as a

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warrants seeking CSLI of the iPhone 7, *see* 8-ER-1409, 1413, and then a federal warrant for the all the iPhone 7 data already obtained by LAPD. 8-ER-1329.

result of its duration or for other reasons." *Segura,* 468 U.S. at 812. Only *with* probable cause may officers secure the property to prevent evidence destruction *while* a search warrant is being sought—and not otherwise. *See Riley,* 573 U.S. at 388; *Segura,* 468 U.S. at 812.

McArthur provided the final guidance necessary to decide this case: warrantless seizures of items not authorized for search in the absence of a warrant are justified only when law enforcement then diligently pursues and obtains a warrant by making the requisite showing to a neutral and detached magistrate.

Most plainly, after *Riley*, the Government *must* justify any seizure of a mobile telephone—whether incident to arrest or any exigent circumstances—by diligently seeking and obtaining a search warrant for that mobile telephone or returning it. This rule is most applicable in cases like this one, where Petitioner is not arrested, but only detained for a few hours, but is nonetheless deprived of his "minicomputer", *see Riley*, 573 U.S. at 393, without a warrant.

Despite Petitioner's reliance on *McArthur*, the lower court ignored it and instead held that *Riley* permits seizures incident to arrest. Pet. Appx. 3 quoting *Riley*, 573 U.S. at 401. True enough, but with three important qualifications the Ninth Circuit failed to heed.

First, the first clause of the portion of *Riley* the panel quotes, *see* Pet. Appx. 3, proves the district court's error: "the search incident to arrest exception *does not* apply to cell phones[.]" *Id*. For this reason, the district court erred when it relied on the "*search* incident to arrest" doctrine to justify the Government's conduct, ER 101-04. Five years earlier, this Court instructed the opposite: "the search incident to arrest exception does not apply to cell phones." 573 U.S. at 401-02.[5]

Second, *seizure* incident to arrest is constitutional if, and only if, law enforcement thereafter diligently seek and obtain a warrant. *Riley*, at 388-91, citing *McArthur*, at 331-33. But the Ninth Circuit missed this established law too before ruling the opposite: that *Riley* permits seizure incident to arrest, without diligent follow up by the authorities. Pet. Appx. 2-3 citing *Chimel*, 395 U.S. at 764. This ruling further transgresses settled Supreme Court authority. *See e.g., McArthur*, *Segura*.

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[5] The district court later confessed a deeper ignorance of the law when it declared it was not aware of "any legal authority to suggest [LAPD] couldn't keep [the phones] for that period of time[.]"1-ER-103. This is surprising as a general proposition, and only made worse because the briefing cited *Segura*. *See* 8-ER-1291–94. This misstatement of law establishes a clear error.

And third, there was no seizure "incident to arrest" because the LAPD didn't arrest Petitioner at all; rather, they detained him for a few hours only. *Chimel*'s rule arises from two interests:

> The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody.

Riley, 573 U.S. at 391. *Riley* then declared that mobile telephones do *not* fit into the first basis for application of *Chimel*. 573 U.S. at 386-91. And the undisputed facts of this case—Petitioner was *not* taken into police custody, and his detention ended a few hours after it began—proved that Petitioner always maintained a possessory interest in his mobile telephone.

But not only did the Ninth Circuit disregard these instructions from *Riley*, the court went further, and suggested that Petitioner lacked such possessory interest because he was "incarcerated and [could] not make use of [the] seized property." Pet. Appx. at 3-4. The facts prove the lower court's clear factual error: even the Government conceded that Petitioner was detained but a few hours that day, and then returned to liberty. GAB 13.

For these reasons and each of them, the Ninth Circuit opinion resolved an important constitutional challenge in a criminal case—Petitioner is serving a sentence of 11 years—by declining to apply settled, on-point Supreme Court

precedent that compelled finding of constitutional error. The Court should grant this petition on this basis alone.

B. The Ninth Circuit misunderstands, and thus fails to apply correctly, this Court's precedent in *Johns*, *Riley*, and *Segura*.

The Ninth Circuit next strayed from settled Supreme Court precedent in its assessment of Petitioner's prolonged seizure claim. The court found that the Government's conduct didn't offend *Segura* because (1) Petitioner lacked a possessory interest in his mobile telephones due to his custodial status and (2) he never sought their return. Pet. Appx. 3 citing *United States v. Johns*, 469 U.S. 478 (1985), which didn't even mention *Segura* (decided the previous Term) because it didn't apply to the issue under consideration.

On the first point, the circuit court is indisputably wrong as a matter of fact, and thus erred by adopting the district court's factual error. To be clear, Petitioner was not arrested and not booked into custody when the LAPD seized and booked his telephones. Rather, as the Government finally conceded on appeal, Petitioner was released that very day and then remained at liberty, with a complete possessory interest in his telephones, on the day of the seizure and for five months thereafter. GAB 13 ("The phones were seized from defendant's pants pocket at the time of his arrest [sic]. (2-ER-896; 8-ER-1317, 1323, 1340, 1412.) Defendant had

been released from custody later the same day, but the phones remained in LAPD custody[.]").

On the second point, the Ninth Circuit proved it doesn't understand *Johns*. *Johns* was a vehicle search case where (1) the authorities had probable cause to search two trucks for contraband, and (2) search the contents withing the trucks, without a warrant, at the time of seizure. 469 U.S. at 480-87.[6] For this reason, the Court sustained the Government's petition that a search of the vehicles three days later was of no moment because the officers had the right to search the truck and its packages at the time of the seizure. *Id.*, at 486-87.

Johns plainly doesn't apply to mobile telephones because *Riley* recognized the need for a warrant to search a mobile telephone, *viz.*, the opposite of the warrantless vehicle search authorized in *Johns*. In addition, the officers in *Johns* had probable cause to believe the trucks and the packages within them contained

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[6] No person has a legitimate possessory interest in contraband, *see United States v. King,* 985 F.3d 702, 710 (9th Cir. 2021), and contraband need not be returned to any citizen claimant. *United States v. Martinson,* 809 F.2d 1364, 1369-70 (9th Cir. 1987); *United States v. Mulder,* 889 F.2d 239, 241-42 (9th Cir. 1989) (citing *Warden v. Hayden,* 387 U.S. 294, 306 n. 11(1967)). In contrast, *Riley* elevated the legitimate possessory and privacy interests we have in our mobile telephones, which it noted were in fact "minicomputers." 573 U.S. at 393.

marijuana, whereas the officers in this case lacked probable cause to believe evidence of a crime would be found on the devices at the time of their seizure.

Equally concerning is the Ninth Circuit's truncated quotation of *Johns*, which only serves to distort the Court's ruling. *See* Pet. Appx. at 3. At the end of its opinion, the *Johns* Court observed:

> We note that in this case there was probable cause to believe that the trucks contained contraband and there is no plausible argument that the object of the search could not have been concealed in the packages. Respondents do not challenge the legitimacy of the seizure of the trucks or the packages, and they never sought return of the property. Thus, respondents have not even alleged, much less proved, that the delay in the search of packages adversely affected legitimate interests protected by the Fourth Amendment. Inasmuch as the Government was entitled to seize the packages and could have searched them immediately without a warrant, we conclude that the warrantless search three days after the packages were placed in the DEA warehouse was reasonable and consistent with our precedent involving searches of impounded vehicles.

Johns, 469 U.S. at 487-88.

The differences are obvious: unlike *Johns*, Petitioner maintained a legitimate possessory interest in his mobile devices, no probable cause existed to seize or search them, a warrant was required by law under *Riley*, and Petitioner in fact "challenge[d] the legitimacy of the seizure."

Which only leaves the most controversial impact of the Ninth Circuit's opinion: a "takers keepers" rule where the authorities may make a warrantless

seizure under color of law, inform the aggrieved person his property has been booked into evidence, and then obtain all rights over the property because the indigent individual doesn't know how to challenge that state of affairs. *See* Pet. Appx. 3.

But the authorities never informed Petitioner that the District Attorney declined all charges based on "insufficient evidence" three weeks after the seizure, or that Petitioner had a right to the return of his property. 8-ER-1433–34.

At bottom, the Ninth Circuit's decision washes away the protections afforded aggrieved person by California's forfeiture statutes, *see e.g.*, California Health & Safety Code § 11488.4j, and rejects the federal protections the Government must afford aggrieved persons before forfeiting their property, *see* 18 U.S.C. § 981, *et seq*. But according to the Ninth Circuit, none of those protections, including rights to notice and hearing on the forfeiture question apply to mobile telephones seized in excess of a warrant's authority, under color of law, unless the aggrieved person takes affirmative action to stop them.

Respectfully, Petitioner's acquiescence to the Government's misconduct does nothing to cure the Government's violation of his constitutional rights. *See Bumpur v. North Carolina*, 391 U.S. 543, 549 n.14 (1968) ("Orderly submission to law-enforcement officers who, in effect, represented to the defendant that they had the

authority to [maintain custody over his phones,] against his will if necessary, was not such consent as constituted an understanding, intentional and voluntary waiver by the defendant of his fundamental rights under the Fourth Amendment to the Constitution.")

The Court should grant this petition to address the proper limits to prolonged seizures of mobile telephones.

C. The Ninth Circuit misunderstands the attenuated basis exception, and its misapplication only exacerbates its failure to enforce *Riley* against the LAPD.

The lower court concluded its decision by accepting the possibility that its prior analysis was wrong, but that doesn't matter because suppression here would not deter the LAPD from seizing and maintaining mobile telephones, without any judicial oversight, after *Riley*. Pet. Appx. 4. That finding itself is illogical: this unlawful practice would stop *immediately* upon suppression in this case, and no reasonable argument can be made to the contrary.

So too, the circuit court's opinion demonstrates a profound misunderstanding of the attenuated basis exception, which simply asks: was the evidence subsequently obtained "an exploitation of the illegal" seizure. *See New*

York v. Harris, 495 U.S. 14, 19 (1990).[7] The facts here prove as much: LAPD officers' ability to further investigate the telephones one year after the unlawful seizure plainly exploited the original misconduct. Put another way, but for the unlawful police activity, the mobile telephones would not have been seized, and would not have been maintained.

This difference is all the more important in cases where the seized item is not contraband. Petitioner possessed a legitimate expectation of privacy and a property interest in the iPhone 7*,* and the Government may not establish a possessory interest in a person's cell phone without a warrant. *Riley* and *Segura* protect a person's Fourth Amendment right to be free from unreasonable searches and seizures in the manner the Ninth Circuit blessed in this case.

The lower court's failure to see the "appreciable deterrent purpose in suppressing the evidence" here reflects its misunderstanding of *Riley* and *Segura,* and the purposeful, flagrant official misconduct in this case. This Court has

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[7] Worth noting too is the Ninth Circuit's refusal to apply this Court's and its own precedent on waiver. The Government waived the "attenuated basis exception" by first raising it on appeal. *See United States v. Alvarez-Sanchez,* 511 U.S. 350, 360 n.5 (1994); *United States v. Lara,* 815 F.3d 605, 613-14 (9th Cir. 2016).

spelled out in clear terms that we don't want to give police the authority to search our cell phones without a warrant.

> A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Riley, 573 U.S. at 395 (citations omitted). If police don't have the probable cause to "get a warrant," they don't otherwise have any authority to claim a possessory interest over our cell phones. *Segura,* 468 U.S. at 812. The exclusionary rule applies to deter the police from seizing any person's phone without probable cause, as *Elkins's* quotation of Justice Jackson makes clear:

> Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made,

> about which courts do nothing, and about which we never hear.
>
> Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.

Elkins, 364 U.S. 206, 217-18 (1960) quoting *Brinegar v. United States*, 338 U.S. 160, 181 (dissenting opinion). (parallel citations omitted).

The official misconduct in this case purposefully and flagrantly defied well-established Supreme Court authority. The Court should grant this petition to make clear the limits of seizing a mobile telephone without the probable cause: to obtain a warrant diligently, or return the seized property.

D. This case is an excellent vehicle to address the constitutional question presented.

This case presents an excellent vehicle to address the constitutional scope of police's ability to seize and maintain mobile telephones incident to arrest following *Riley*. The suppression challenge was raised in the district court and preserved for *de novo* review. As shown by the Ninth Circuit's cavalier rejection of this Court's authority regarding warrantless seizures, this Court's further guidance is badly needed to ensure the faithful application of *Riley* and will thus guarantee the privacy interests guaranteed by the Fourth Amendment.

CONCLUSION

For the reasons set forth above, the Court should grant the petition.

Respectfully submitted,

DATED: July 18, 2024

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