No.

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

PETITION FOR A WRIT OF CERTIORARI

CHARLES E. HADEN
ATTORNEY AT LAW
1 E. Queens Way
First Floor
Hampton, VA 23699
(757) 727-6972
cehaden@mindspring.com

BRANDON L. BOXLER
Counsel of Record
KLEIN THOMAS & LEE LLC
919 E. Main St., Suite 1000
Richmond, VA 23219
(703) 621-2109
brandon.boxler@kleinthomaslaw.com

IAN K. EDWARDS
KLEIN THOMAS & LEE LLC
101 W. Big Beaver Rd., Suite 1400
Troy, MI 48084
(602) 935-8300
ian.edwards@kleinthomaslaw.com

Counsel for Petitioner

QUESTION PRESENTED

Police conducted a warrantless search of the digital data on a cell phone appellant left at a restaurant. The lower courts held that the search did not violate the Fourth Amendment because appellant "abandoned" the phone. The question presented is whether, consistent with *Riley v. California*, 573 U.S. 373 (2014), the abandonment exception to the Fourth Amendment's warrant requirement allows the Government to conduct warrantless searches of the digital data on an abandoned cell phone.

RULE 14.1(b)(iii) STATEMENT

The following proceedings are related to the case in this Court:

Commonwealth v. Futrell, Nos. CR19-110-00 through -07 (Hampton City, Va. Cir. Ct.).

Futrell v. Commonwealth, No. 0470-20-1 (Va. Ct. App.).

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PETITION FOR A WRIT OF CERTIORARI

Antonio Daron Futrell respectfully petitions for a writ of certiorari to review the judgment of the Virginia Court of Appeals.

OPINIONS BELOW

The opinion of the Virginia Court of Appeals is unpublished but is electronically available at 2021 Va. App. LEXIS 111 (Ct. App. July 6, 2021). The order of the Virginia Supreme Court denying discretionary review on March 4, 2022, is unpublished but is available at Pet. App. 12a.

JURISDICTION

The Virginia Court of Appeals issued its decision on July 6, 2021. *See* Pet. App. 1a. The Virginia Supreme Court denied discretionary review on March 4, 2022. *See* Pet. App. 12a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

STATEMENT

"Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of" ordinary "physical items." *Riley v. California*, 573 U.S. 373, 393 (2014). Given these heightened privacy concerns, *Riley* unanimously held that the "search incident to arrest" exception to the Fourth Amendment's warrant requirement allows warrantless searches of the "physical aspects" of a cell phone but not of its "[d]igital data." *Id.* at 387. The Court reserved the question whether "other case-specific exceptions" to the warrant requirement "may still justify a warrantless search of" cell phone data. *Id.* at 401-02.

The Virginia Court of Appeals decided below that abandonment is one such exception. It held that, although "*Riley* noted the expansive privacy interests at stake when police search a cell phone, this heightened privacy concern is not at issue when a suspect abandons a cell phone." Pet. App. 10a. In the court's view, when a person abandons a physical cell phone, the person "has demonstrated the . . . relinquishment of *any* privacy interest at all in the *contents* of the phone" and, therefore, the Government can search all of those contents without a warrant. *Id.* (emphases added).

The decision below adds to lower-court conflict and confusion over whether and how the abandonment exception applies to the digital contents of cell phones. At least 7 state appellate courts and

4 federal courts of appeals have considered this recurring issue in the 8 years since *Riley*, resulting in 11 majority and 4 dissenting opinions, followed by 6 (and now 7) petitions for a writ of certiorari. Applying or distinguishing *Riley* in various ways, all but one of the majority opinions held that the Fourth Amendment allows warrantless searches of the digital contents of an abandoned cell phone.

The Court should grant this petition to unify the law on this recurring and important issue and to confirm that most lower appellate courts are wrong: the Government cannot conduct warrantless searches of data on a person's cell phone—the "digital record of nearly every aspect of" his or her life—just because the person leaves the phone behind while fleeing police, throws it in the trash, or otherwise discards it. *Riley*, 573 U.S. at 395. This case is an opportunity for the Court to confirm the heightened privacy interests citizens have in their cell phone data. It also is an opportunity for the Curt to continue updating its Fourth Amendment jurisprudence and to address what expectations of privacy are "reasonable" in the digital age. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley*, 573 U.S. 373; *United States v. Jones*, 565 U.S. 400 (2012).

This doctrinal refinement is especially important for the abandonment doctrine. The Court has not considered this exception to the Fourth Amendment's warrant requirement in nearly three decades—long before cell phones became "such a pervasive and insistent part of daily life that the

proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 573 U.S. at 385. Lower courts need the Court's guidance on how to apply this pre-digital era doctrine in the 21st century.

A. Trial Court Proceedings.

1. Petitioner Antonio Futrell was leaving a restaurant around 1:00 am. Once outside, he realized he left his cell phone inside. While trying to retrieve it, Futrell got into a dispute with an armed security guard.

Things escalated quickly. Futrell told a companion to get his gun from a car. He loaded the weapon and began shooting at the guard. The guard fired back. Futrell and his companion fled in the car.

Around 8:00 a.m.—seven hours after the shooting event—Detective Steven Rodey went to the restaurant to investigate. App. 43-44.[1] He learned that the officers who immediately responded to the shooting had collected a cell phone from inside. *Id.* at 44-45. Detective Rodey did not know who owned the cell phone, and there was nothing in the police record identifying its owner. *Id.* at 45. The phone was being stored at the police station. *Id.*; *see also id.* at 51.

Sometime later, Detective Rodey went to the police station and got the phone. App. 45. The phone was off. Without seeking or obtaining a warrant,

[1] "App." refers to Futrell's appendix in the Virginia Court of Appeals.

Detective Rodey turned on the phone, which was not locked. *Id.* at 46. Detective Rodey then pressed additional buttons to navigate to the "settings," where he located and recorded the cell phone's number and IMEI information. *Id.*

Detective Rodey entered the information into the "LInX" police database, which revealed that the cell phone was associated with Futrell. App. 47. The database search also returned photos of Futrell. Detective Rodey used the photos in a photo array with the security guard, who identified Futrell as the shooter. *Id.* at 48; *see also id.* at 52.

Detective Rodey used the information he learned to get an informant to identify another cell phone associated with Futrell. App. 48. This time, Detective Rodey got a warrant to track the second cell phone, locate Futrell, and arrest him. *Id.* at 48-49.

2. Before trial, Futrell moved to "suppress any and all evidence, as well as any fruit of the poisonous tree," obtained from the warrantless search of the cell phone recovered from the restaurant. Pet. App. 19a. He argued that "the police did not have any basis upon which to conduct a search of the cell phone without obtaining a search warrant." *Id.* "Therefore," Futrell continued, "the search of the cell phone violated the Fourth Amendment to the United States Constitution." *Id.* (citing *Riley*).

The Government opposed the motion, arguing that the cell phone was "abandoned property." Gov't Opp. to Mot. to Suppress 2. According to the

Government, Futrell "abandoned any privacy interest he had in the phone" because "rather than waiting at the restaurant and reclaiming his phone," he "began shooting at restaurant employees and fled the scene to avoid apprehension." *Id.* at 4. In the Government's view, *Riley* is a "narrow[ ]" decision that "merely held that the Search Incident to Arrest exception does not apply to cell phones." *Id.* (emphasis omitted).

At a hearing on the motion to suppress, Detective Rodey admitted that he "could have served a search warrant on that phone" left at the restaurant, but he "chose not to do that." App. 52. He also admitted that failing to get a warrant before searching the phone violated police protocol. *Id.*

Futrell reiterated at the hearing that he did not abandon the phone but instead left it at the restaurant because he was "getting shot at." App. 59. He also argued that, under *Riley*, "you have to use a search warrant in order to search a phone." *Id.* at 60.

The Government countered by comparing Futrell's cell phone to a non-digital physical object: "Just as the Courts have held for many years, when someone abandons property, when they flee from a car, for example, leave a box behind, leave a gun behind, leave narcotics behind, they abandoned their privacy interest in those things." App. 53. "Cell phones are not a special case," and so when Futrell "abandoned" the cell phone, the Government could search its contents without a warrant just as they

could do with a box, a gun, or any other ordinary physical item. *Id.* at 54.

The trial court agreed with the Government that Futrell abandoned the cell phone. App. 62. It then reasoned that *Riley* applies only when "a cell phone [is] taken from the person," and thus *Riley* does not apply in the context of abandonment. *Id.* The court denied the motion to suppress. *Id.*

3. Futrell later entered conditional guilty pleas to four felony counts, including one count for using a firearm in the commission of a felony. The condition of the pleas allowed Futrell to appeal the order denying his motion to suppress. App. 66; *see also* Pet. App. 15a ("This is a conditional plea agreement . . . and expressly allows the Defendant to appeal the adverse ruling on his pretrial motion to suppress.").

Futrell timely appealed to the Virginia Court of Appeals.

B. Proceedings On Appeal.

1. Futrell argued on appeal that the trial court erred in denying his motion to suppress because he maintained a "reasonable expectation of privacy regarding the contents of his cell phone." Opening Br. 16. He explained that cell phones "place vast quantities of personal information literally in the hands of individuals," which is why *Riley* declined to extend the search-incident-to-arrest exception to cell phone data and "held instead that officers must

generally secure a warrant before conducting such a search." *Id.* at 25.

The Virginia Court of Appeals affirmed. It reasoned that Futrell abandoned the cell phone because he left it at the restaurant when he "decided to flee." Pet. App. 8a. And because Futrell abandoned the phone, he "surrender[ed] *any* privacy interest he may have had in it *or in its contents*." *Id.* at 9a (emphases added).

The Virginia Court of Appeals acknowledged that "*Riley* noted the expansive privacy interests at stake when police search a cell phone." Pet. App. 10a. The court reasoned, however, that "this heightened privacy concern is not at issue when a suspect abandons a cell phone." Pet. App. 10a. According to the court, "abandonment has demonstrated the suspect's relinquishment of any privacy interest at all in the contents of the phone." *Id.* "Nothing in *Riley* . . . alter[s] 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." *Id.* "Therefore, . . . the trial court did not err in determining that the warrantless search of [Futrell's] cell phone did not violate the Fourth Amendment, despite the heightened privacy interests regarding cell phones discussed in *Riley*." *Id.* at 11a.

2. Futrell timely petitioned for discretionary review in the Virginia Supreme Court. He again argued that "the police lacked any basis to conduct a

warrantless search of the contents of the cell phone and should have first obtained a search warrant." Pet. for Appeal 17. He maintained that, given the "substantial privacy rights" involved in cell phone searches, *Riley* requires that the abandonment doctrine not apply the same way to cell phones as it might apply to bags, boxes, or other ordinary physical objects. *Id.* at 30-32.

The Virginia Supreme Court declined discretionary review. Pet. App. 12a.

REASONS FOR GRANTING THE PETITION

The Virginia Court of Appeals gave no weight to the Fourth Amendment distinction—recognized in *Riley*—between searches of the physical aspects of a cell phone and searches of a cell phone's digital contents. That failure further fractures lower-court decisions addressing whether the Government may search the digital contents of abandoned cell phones without a warrant.

The Court should use this case to correct the error and to announce "a uniform rule" on this important issue, *Comm'r v. Bilder*, 369 U.S. 499, 501 (1962), which police and courts are increasingly confronting in the wake of *Riley*.

I. THE DECISION BELOW COMPOUNDS LOWER-COURT CONFUSION OVER WHETHER THE ABANDONMENT EXCEPTION APPLIES TO THE DIGITAL CONTENTS OF CELL PHONES.

The question presented—whether the Government can search the digital contents of abandoned cell phones without a warrant—has confused and divided lower courts since *Riley*, which distinguished between searching a cell phone's "physical aspects" and searching its "digital data." 573 U.S. 373, 387 (2014). Courts have struggled with whether to recognize and apply that distinction in the abandonment context—an issue with huge implications for privacy rights given the ubiquitous presence of cell phones in everyday life and everyday police work.

A. The Court's Antiquated Abandonment Authorities Need Updating.

The Court first recognized the abandonment exception in *Hester v. United States*, 265 U.S. 57 (1924), holding that a Fourth Amendment "seizure" does not occur if a person "abandon[s]" the seized property. *Id.* at 58. In *Hester*, "there was no seizure in the sense of the law" when officers examined a bottle of moonshine that a defendant "threw away" while fleeing police. *Id.* Likewise, in *Abel v. United States*, 362 U.S. 217 (1960), a defendant who "paid his [hotel] bill and vacated the room" could not complain about a warrantless search of a "hollowed-out pencil" and a "block of wood" left in the room's trash can

because he had "abandoned these articles." *Id.* at 240-41 (citing *Hester*, 265 U.S. at 58).

Later, in *California v. Greenwood*, 486 U.S. 35 (1988), the Court held that a warrantless search of garbage bags containing drug paraphernalia that were left on a curb did not violate the Fourth Amendment because people do not have an "objectively reasonable" expectation of privacy in such garbage. *Id.* at 40-41.[1] Two years later, the Court held that a defendant who merely puts a paper bag on the hood of a car when police approach "clearly has not abandoned that property." *Smith v. Ohio*, 494 U.S. 541, 543-44 (1990) (per curiam). And a year later, the Court held that a defendant abandoned drugs when he "tossed [them] away" while fleeing police. *California v. Hodari D.*, 499 U.S. 621, 623, 629 (1991) (citing *Hester*, 265 U.S. at 58).

This Court has not considered the abandonment doctrine since *Hodari D.* Much has changed in the last thirty years. Not only are "[t]he facts of the digital world . . . different from the

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[1] Although *Greenwood* did not mention "abandonment," lower courts have since approached "abandonment in terms of the view that the Fourth Amendment protects individuals against official intrusion into areas where they have a 'reasonable expectation of privacy,' defining and analyzing abandonment as an intentional relinquishment of that expectation with regard to the property in question." John P. Ludington, *Search and Seizure: What Constitutes Abandonment of Personal Property Within Rule That Search and Seizure of Abandoned Property Is Not Unreasonable—Modern Cases*, 40 A.L.R. 4th 381, § 2(a) (1985) (footnote omitted).

physical world," Orin S. Kerr, *Implementing* Carpenter, *in* The Digital Fourth Amendment (Oxford University Press) (forthcoming), but *Riley* recognized those differences as constitutionally significant. Because cell phones "implicate privacy concerns far beyond those implicated by the search of" ordinary physical objects, *Riley*, 573 U.S. at 393, the "search incident to arrest" doctrine allows warrantless searches of the physical aspects of a cell phone but not of its digital contents, *id.* at 403.

The "privacy concerns" that animated *Riley* eight years ago are more substantial today. In 2014, for example, 91% of American adults owned a cell phone. *See* Mobile Fact Sheet, Pew Research Ctr., Internet & Tech. (Apr. 7, 2021), https://tinyurl.com/mu5p9n2n. That number is now 97%. *Id.* And today's cell phones are more sophisticated. At the time of *Riley*, 55% of American adults owned a smartphone capable of searching the Internet; now that number is 85%. *Id.* "Wireless has never played a more central role in how we live, work, and play." 2019 Annual Survey Highlights 1, CTIA (2019), https://tinyurl.com/ufkw4zn.

Further, in light of the "immense storage capacity" of modern cell phones, *Riley*, 573 U.S. at 393, a search of their digital data "would typically expose to the government far *more* than the most exhaustive search of a house," *id.* at 396 (emphasis added). The search could include years—if not decades—of bank records, medical records, emails, text messages, and a "broad array of [other] private

information." *Id.* at 397. A search of data on cell phones thus "implicate[s] privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 393.

These unique privacy concerns raise important constitutional questions about when, if ever, a person abandons the digital contents of a cell phone. The issue arises not only when a suspect discards or leaves a phone behind while fleeing police, but also could arise when a person discards or exchanges an old phone—something that happens tens of millions of times a year. *See* Nathan Proctor, *Americans Toss 151 Million Phones a Year. What if We Could Repair Them Instead?*, wbur.org (Dec. 11, 2018), https://tinyurl.com/mvwrvkzp.

Given the substantial privacy rights at stake and the passage of time since the Court last considered the abandonment doctrine, the Court's guidance is urgently needed to ensure that the rules governing "the protection of privacy . . . keep up with technological advances." *State v. Moore*, 429 S.C. 465, 490 (2020) (Beatty, C.J., dissenting). If the Fourth Amendment *allows* warrantless searches of the digital contents of abandoned cell phones, a contrary court holding needlessly removes a significant arrow from the law-enforcement quiver. But if the Fourth Amendment *prohibits* those searches, courts holding otherwise have allowed the Government to invade the legitimate privacy expectations of Americans.

To ensure that citizens "know the scope of [their] constitutional protection," *New York v. Belton*, 453 U.S. 454, 460 (1981), and to give police officers "workable rules" for applying the Fourth Amendment, *Riley*, 573 U.S. at 398 (quotation marks omitted), the Court should provide much-needed clarity as to how, if at all, the abandonment doctrine applies to the "privacies of life" stored in the digital contents of modern cell phones, *id.* at 403 (quotation marks omitted).

B. The Question Presented Has Confused And Divided Lower Appellate Courts.

At least 7 state appellate courts and 4 federal courts of appeals have considered the Fourth Amendment status of the digital contents on abandoned cell phones after *Riley*. The resulting 11 majority and 4 dissenting opinions, which often followed similarly fractured lower courts, highlight the confusion over this issue and the need for the Court to intervene. Moreover, most majority opinions have allowed warrantless searches of the digital data on an abandoned cell phone—a conclusion that defies *Riley* and reasonable expectations of privacy.

1. State Appellate Courts.

1. Seven state appellate courts now have concluded post-*Riley* that the Fourth Amendment allows warrantless searches of the digital contents of abandoned cell phones. *See Futrell v. Commonwealth*, 2021 Va. App. LEXIS 111, at *11 (Ct. App. July 6, 2021); *Wiltz v. State*, 595 S.W.3d 930

(Tex. App. 2020), *cert. denied* 141 S. Ct. 1742 (2021); *State v. Rousset*, 2020 La. App. LEXIS 866 (La. Ct. App. June 3, 2020); *Flores v. State*, 2020 Nev. App. Unpub. LEXIS 420, *7-8 (May 20, 2020); *State v. Valles*, 925 N.W.2d 404 (N.D.2019); *State v. Brown*, 815 S.E.2d 761 (S.C. 2018), *cert. denied*, 139 S. Ct. 486 (2018); *State v. Samalia*, 375 P.3d 1082 (Wash. 2016).

These courts rely on abandonment cases from the pre-digital era that involved ordinary physical objects, such as the drug paraphernalia in *Greenwood*. According to these courts, *Riley*'s recognition that "[c]ell phones differ in both a quantitative and a qualitative sense" from ordinary physical objects, 573 U.S. at 393, does *not* impact the abandonment analysis for cell phones. As the Virginia Court of Appeals put it below, *Riley* "does not alter the standard analysis of determining whether an accused has relinquished his or her privacy interest in property." Pet. App. 10a. Or as the Washington Supreme Court put it, *Riley* "demonstrate[s] that no special rules are necessary for cell phones because they can be analyzed under established rules." *Samalia*, 375 P.3d at 1088;[2] *see also Rousset*, 2020 La. App. LEXIS 866, at *18 (holding that *Riley* does not alter the abandonment

[2] *Samalia* involved the Washington Constitution, but the provision at issue "encompasses the privacy expectations protected by the Fourth Amendment to the United States Constitution," and both the court and the parties extensively discussed *Riley*. 375 P.3d at 1085-89.

analysis); *Flores*, 2020 Nev. App. Unpub. LEXIS 420 at *18 (same).

Most of these decisions were deeply fractured, overturned a lower-court decision, or demonstrated other signs of judicial disagreement.

2. For example, in *State v. Brown*, a divided South Carolina Court of Appeals allowed the warrantless search of the contacts list on an abandoned, password-protected cell phone, analogizing the inquiry to warrantless searches of abandoned, locked containers. 776 S.E.2d 917, 919, 923-24 (S.C. Ct. App. 2015). The dissent rejected that analogy, explaining that cases involving locked containers "occurred decades before the technology on which modern cell phones are based was fully conceivable." *Id.* at 926 (Konduros, J., dissenting); *see also Riley*, 573 U.S. at 397 (noting the analogy between "a cell phone" and "a container" "crumbles entirely"). The dissent further reasoned that, although the defendant did not have a reasonable expectation of privacy "in the physical object of the phone, . . . a person preserves their [sic] reasonable expectation of privacy in its contents, which is precisely what provides a phone its significance." 776 S.E.2d at 927 (Konduros, J., dissenting).

A divided South Carolina Supreme Court affirmed, holding that "*Riley* does not alter the standard abandonment analysis." 815 S.E.2d 761, 764 (S.C. 2018). That decision also drew a dissent, which criticized the majority for "fail[ing] to

appreciate the full import of . . . *Riley*." *Id.* at 766-67 (Beatty, C.J., dissenting). According to the dissent, *Riley* points to "a categorical rule that, absent exigent circumstances, law enforcement must procure a search warrant before searching the data contents of a cell phone." *Id.* The "logic behind the Supreme Court's need to protect cell phones during arrests applies just as convincingly to cell phones left behind by their users." *Id.* at 768 (quotation marks omitted).[3]

The Washington Supreme Court also fractured in *State v. Samalia*, which affirmed a fractured decision of the Washington Court of Appeals. The Washington Court of Appeals upheld the warrantless search of the contacts list of an abandoned cell phone and found *Riley* inapposite "because the cell phone was not seized from [the defendant's] person during his arrest, but was found abandoned in a stolen vehicle." 344 P.3d 722, 726 (Wash. Ct. App. 2015). The dissent countered that *Riley* and other "[r]ecent search and seizure jurisprudence recognize[ ] that conventional cell phones are fundamentally different from other property, and that exceptions to the warrant requirement might not apply or might apply

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[3] The South Carolina Supreme Court later revisited this issue, fracturing yet again but resolving the case on alternative grounds. *See State v. Moore*, 429 S.C. 465 (2020). The majority "acknowledge[d] a close question . . . on the issue of abandonment" and recognized judicial disagreement over the issue, *id.* at *24 & n.4, and the dissent would have reached the issue and held that, "absent exigent circumstances," police cannot perform warrantless searches of "the data contents of a cell phone," *id.* at *9 (Beatty, C.J., dissenting) (quotation marks omitted).

more narrowly where a cell phone or a similar device is at issue." *Id.* at 727 (Siddoway, J., dissenting).

The Washington Supreme Court affirmed over a three-judge dissent. 375 P.3d at 1090-91, 1096. The majority held that "the abandonment doctrine applies to cell phones" and that *Riley* "do[es] not create [an] exception[ ] for cell phones." *Id.* at 1087-88. The dissenting judges agreed that the abandonment doctrine applies to "the phone as a physical object," but they reasoned that the strong privacy interests that attach to data on a cell phone compel a rule that "a search of digital data . . . on an abandoned cell phone . . . must be pursuant to a lawfully issued warrant, supported by probable cause." *Id.* at 1093, 1966 (Yu, J., dissenting) (quotation marks omitted).

Another recent case is *Wiltz*, where the Texas Court of Appeals found no Fourth Amendment violation when an officer searched the text messages of a cell phone found in an abandoned vehicle. The court rejected the defendant's argument that, under *Riley*, he maintained a legitimate expectation of privacy in the "phone's contents." 595 S.W.3d at 935-36. The Texas Court of Criminal Appeals denied discretionary review, but that denial drew a dissenting opinion that cited *Riley* and stressed that "the heightened privacy interests associated with the information within a cell phone [are] distinct from the privacy interests associated with a cell phone as a physical object." *Wiltz v. State*, 609 S.W.3d 543, 548 (Tex. Crim. App. 2020) (Walker, J., dissenting from denial of petition for review); *see also id.* at 547

("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.").

3. On the other hand, a unanimous Florida District Court of Appeal concluded in *State v. K.C.*, 207 So. 3d 951 (Fla. Dist. Ct. App. 2016), *cert. denied* 137 S. Ct. 2269 (2017), that the Fourth Amendment does not allow police to search the digital contents of an abandoned, password-protected cell phone. The court reasoned that, "[i]n light of *Riley*, the United States Supreme Court treats cell phones differently, for the purposes of privacy protection, than other physical objects." *Id.* at 955. Although *Riley* left room for "some 'case-specific' exceptions [to] apply to justify a warrantless search of a cell phone," "the example given was a search based upon exigent circumstances," and "[t]he abandonment exception does not compel a similar conclusion that a warrantless search is authorized." *Id.* (quoting *Riley*, 573 U.S. at 401). Accordingly, police officers may not search the digital contents of an abandoned, password-protected cell phone unless they "get a warrant." *Id.* at 958 (quoting *Riley*, 573 U.S. at 403).

The Florida District Court of Appeal noted the judicial disagreement over this issue, explaining that "the dissents in *Brown* and *Samalia* hew closer to the analysis in *Riley* than do the majority opinions in those cases." *K.C.*, 207 So. 3d at 956-57. In the court's view, *Riley* compels the conclusion that "the quantitative and qualitative nature of the information contained on a cell phone sets it apart

from other physical objects, even locked containers." *Id.* at 958. The court "thus side[d] with the dissents" in *Brown* and *Samalia*, suppressing evidence obtained from a warrantless search of the digital contents of a cell phone. *Id.* at 956; *cf. United States v. Camou*, 773 F.3d 932, 943 (9th Cir. 2014) (emphasizing that, under *Riley*, "cell phones are not containers" and "differ from any other object officers might find").[4]

The decision of the Florida District Court of Appeal in *K.C.* is irreconcilable with the decision of the Virginia Court of Appeals in this case.

2. Federal Appellate Courts.

Four federal courts of appeals have concluded post-*Riley* that police may search the digital contents of an abandoned cell phone. *See United States v. Small*, 944 F.3d 490 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 2644 (2020); *United States v. Crumble*, 878 F.3d 656 (8th Cir.), *cert. denied*, 139 S. Ct. 187 (2018); *United States v. Escamilla*, 852 F.3d 474 (5th Cir.), *cert. denied*, 138 S. Ct. 336 (2017); *United States v.*

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[4] Although it has not directly addressed the question presented, the Arizona Supreme Court has given significant Fourth Amendment protection to the digital contents of cell phones. In *State v. Peoples*, 378 P.3d 421 (Ariz. 2016), an officer conducted a warrantless search of a defendant's non-password-protected cell phone left in an apartment. *Id.* at 424. The Arizona Supreme Court recognized that the defendant "had a legitimate expectation of privacy in his cell phone . . . at the time of the search," explaining that *Riley* "recognized a uniquely broad expectation of privacy in cell phones because they essentially serve as their owners' digital alter egos." *Id.* at 425.

Sparks, 806 F.3d 1323 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016), *overruled in part on other grounds by United States v. Ross*, 963 F.3d 1056 (11th Cir. 2020) (en banc).

In *Sparks*, a divided Eleventh Circuit concluded that the Fourth Amendment allowed officers to search photographs and videos on an abandoned cell phone. 806 F.3d at 1331-32, 1349. According to the majority, the defendants abandoned their cell phone—including its digital contents—at a Walmart because, after accidentally leaving it there, they made "a considered and voluntary choice over a three-day period" not to retrieve the phone. *Id.* at 1344. The dissent disagreed, noting that, in light of *Riley*, courts must "be mindful of the status cell phones now have as property," and that when the defendants "lost their cell phone, they lost troves of information necessary for navigating modern life." *Id.* at 1354 (Martin, J., dissenting).

Similarly, in *Crumble*, the Eighth Circuit refused to "deny application of the abandonment doctrine to cell phones." 878 F.3d at 660. The magistrate judge in *Crumble* had found that, in light of *Riley*, the defendant's "cell phone was lawfully seized but his privacy interest in its contents [was] not extinguished merely by his lack of possession." 2015 WL 13687910, at *5 (D. Minn. July 22, 2015), *report and recommendation adopted in part, rejected in part*, 2015 WL 13687911 (D. Minn. Sept. 28, 2015). The district court disagreed but recognized "that the issue [was] admittedly complex in light of . . . *Riley*."

Crumble, 2015 WL 13687911, at *2. The Eighth Circuit affirmed, concluding that "*Riley*'s holding is limited to cell phones seized incident to arrest." *Crumble*, 878 F.3d at 660.

In *Escamilla*, the Fifth Circuit concluded that a defendant "abandoned any privacy interest" in the digital contents of his cell phone because he "expressly disclaimed ownership of the phone and left it in the possession of DEA agents." 852 F.3d at 485-86. As a result, he could not challenge the DEA agents' use of Cellebrite—an invasive forensic examination program—to conduct a warrantless search of the phone's digital data. *Id.* at 484, 486. The Fifth Circuit's reasoning relied on a prior panel decision issued before *Riley*, which held that a defendant abandoned the digital contents of his cell phone because he "'disclaim[ed] personal connection to the phone.'" *Id.* at 485-86 (quoting *United States v. Powell*, 732 F.3d 361, 374 (5th Cir. 2013), *cert. denied*, 571 U.S. 1219 (2014)).

Finally, the Fourth Circuit in *Small* rejected a defendant's argument that, "even if he abandoned his physical phone" while fleeing police, he did not "abandon its digital contents." 944 F.3d at 503 n.2. The court reasoned that, although *Riley* held that the "search incident to arrest exception" does not apply to the digital contents of cell phones, this Court recognized that "other case-specific exceptions may still justify a warrantless search of a particular phone," and abandonment "is such a case." *Id.*

In short, since the Court decided *Riley* eight years ago, a robust and fractured body of law has developed in the lower appellate courts addressing the question presented.[5]

3. The Unworkable Password Distinction.

In an effort to craft a rule for when the Government may conduct warrantless searches of an abandoned cell phone, some courts have tried to draw what they view as a meaningful Fourth Amendment distinction between password- and non-password-protected phones. *See, e.g.*, *Valles*, 925 N.W.2d at

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[5] Federal district courts also routinely confront the question presented. *See, e.g.*, *United States v. Hunt*, 2022 U.S. Dist. LEXIS 71455, at *11 (D. Or. Apr. 19, 2022) ("Defendant has no standing to object to the seizure and search of the black iPhone because Defendant lacked a reasonable expectation of privacy in the black iPhone—evinced through his abandonment of it."); *United States v. Daniels*, 2022 U.S. Dist. LEXIS 54632, at *25-26 (S.D. Fla. Mar. 25, 2022) (finding no Fourth Amendment violation when police conducted a warrantless search of text messages and photographs on a cell phone because the phone had been "abandoned"); *United States v. Hooper*, 482 F. Supp. 3d 496, 510 (E.D. Va. 2020) (similar); *Ward v. Lee*, 2020 U.S. Dist. LEXIS 216159, at *24 (E.D.N.Y. Nov. 18, 2020) ("When a cellphone is abandoned, it may be searched without a warrant by police."); *United States v. Robinson*, 2018 U.S. Dist. LEXIS 192567, at *3, 9 (E.D.N.C. Nov. 9, 2018) (allowing a warrantless search of "text messages, contacts, and recently dialed phone numbers" on an abandoned phone and concluding that *Riley* did not change the abandonment analysis); *cf. In re A Single-Family Home*, 2021 U.S. Dist. LEXIS 144396, at *16 (N.D. Ill. June 3, 2021) (describing the "developing progeny" of *Riley* "that law enforcement must obtain a search warrant before searching a smart cellular telephone").

410; *K.C.*, 207 So. 3d at 955. These courts reason that a person who discards a phone abandons its digital contents if the phone is not password protected but does not abandon the digital contents if the phone is password protected. That is purportedly because passwords "indicat[e] an intention to protect the privacy of all of the digital material on the cell phone or able to be accessed by it." *K.C.*, 207 So. 3d at 955; *see also Valles*, 925 N.W.2d at 410 ("A security lock on a cell phone signals that the information within is not intended for public viewing.").

This distinction is irrelevant, unworkable, and wrong—and only further highlights lower-court confusion. *Riley* did not distinguish between password- and non-password-protected phones; it applied the warrant requirement to the digital data of *all* cell phones, including a "flip" phone that was not password protected and remained unlocked at least "[f]ive to ten minutes" after officers seized it. *Riley*, 573 U.S. at 380. The argument that "the lack of a password or passcode on the phone shows the absence of a reasonable expectation of privacy in the phone's contents, or a diminished expectation of privacy[,] . . . runs directly afoul of the Supreme Court's seminal opinion on the subject, *Riley*." *People v. Hergott*, 2020 Cal. App. Unpub. LEXIS 8276, at *9 (Dec. 14, 2020).

The password–no password distinction is also unworkable. Police officers in the field who see a defendant discard a phone or otherwise "come upon . . . a phone in an unlocked state" might not know whether the phone is password protected—e.g.,

whether it would automatically lock after a period of inactivity. *Riley*, 573 U.S. at 389. And even if officers could implement the rule in the field, it would give talismanic significance to one consideration—password protection—whose connection to modern Fourth Amendment doctrine is gossamer thin: less than half of people protect their cell phones with a password or other form of lock. *See* Kaspersky Lab, *Not Logging On, But Living On* (2017), https://tinyurl.com/4s83em7d. It strains credulity to say, as some courts do, that society would not accept as reasonable a privacy expectation that these people have in the digital contents of their cell phones.

The short of it is that "personal belongings need not be locked for a legitimate expectation of privacy to exist." *Peoples*, 378 P.3d at 426. "Cell phones are intrinsically private," so "the failure to password protect access to them is not an invitation for others to snoop." *Id.*

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Lower courts are confused about how abandonment cases from the pre-digital era apply to searches of the digital contents of abandoned cell phones.[6] Until this Court resolves that confusion, a

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[6] Many scholars have noted this post-*Riley* judicial struggle. *See, e.g.*, Maureen E. Brady, *The Lost 'Effects' of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 955 (2016) ("[*Riley*] indicate[s] a desperate need for some guidance as to the interaction of privacy and personal property in the Fourth Amendment calculus."); Sarah Tate Chambers, *Cybercrime Roundup: Searching and Seizing*,

current or even former cell-phone owner "cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Belton*, 453 U.S. at 460.

II. THE FOURTH AMENDMENT PROHIBITS WARRANTLESS SEARCHES OF THE DIGITAL CONTENTS OF ABANDONED CELL PHONES.

Review is also warranted because the decision below—like the decisions of most other appellate courts that have considered this issue—is wrong. The Virginia Court of Appeals' failure to address the substantial privacy interests at stake flouts *Riley*'s recognition that "[c]ell phones differ in both a quantitative and a qualitative sense from" ordinary physical objects. 573 U.S. at 393. Nor did the Virginia Court of Appeals attempt to explain why these differences are constitutionally *significant*—indeed, dispositive—in the context of the search incident-to-arrest exception, but are somehow

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Lawfare (Feb. 22, 2017), https://tinyurl.com/uf8mrzm ("[C]ourts on both the state and federal level are grappling with these issues."); Abigail Hoverman, Note, Riley *And Abandonment: Expanding Fourth Amendment Protection of Cell Phones*, 111 Nw. U. L. Rev. 517, 543 (2017) ("In light of the modern developments of personal technological devices and the Court's analysis in *Riley*, courts should . . . require police officers to obtain a search warrant before searching cell phones left behind by their owners."); Erica L. Danielsen, *Cell Phone Searches After* Riley: *Establishing Probable Cause and Applying Search Warrant Exceptions*, 36 Pace. L. Rev. 970, 995 (2016) ("[Although] the [*Riley*] decision left open the possibility of applying warrant exceptions, . . . courts should not analyze these exceptions lightly.").

constitutionally *insignificant* in the context of the abandonment exception.

To say that abandoning a physical cell phone is materially indistinguishable from abandoning its digital contents "is like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Riley*, 573 U.S. at 393. And it defies this Court's admonition that, "[w]hen confronting new concerns wrought by digital technology," courts must be "careful not to uncritically extend existing precedents." *Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018); *see also Riley*, 573 U.S. at 406-07 (Alito, J., concurring) ("[W]e should not mechanically apply the rule used in the predigital era to the search of a cell phone."); *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

Because cell phones are not ordinary physical objects, their searches—and the resulting privacy invasions—"bear[ ] little resemblance to the type of . . . physical search[es]" considered in the Court's past abandonment cases. *Riley*, 573 U.S. at 386. Failing to recognize these differences upsets legitimate privacy expectations in the digital contents of cell phones—technology that was "nearly inconceivable" when the Court last considered the abandonment doctrine. *Id.* at 385; *cf. Commonwealth v. Shaffer*, 653 Pa. 258, 289 (2019) (noting the "profound" ramifications of applying the abandonment doctrine

to computer searches, "as the abandonment theory, unlike the private search doctrine, lacks the constitutional safeguard of a restricted scope of the government's subsequent examination").

The advent of cloud computing has further increased these privacy expectations. Cloud computing allows cell phones to "display data stored on remote servers rather than on the device" itself. *Riley*, 573 U.S. at 397. The cloud lets people view their digital data from many devices—computers, tablets, other cell phones, etc.—*even after relinquishing possession of only one device with access to the cloud*. Just as people do not abandon all contents of their house merely by discarding a copy of their house key, they do not abandon all data in the cloud accessible on their cell phone merely by abandoning one physical object that allows them to access that data.

The "touchstone" of the constitutionality of any warrantless search is "reasonableness." *Samson v. California*, 547 U.S. 843, 855 n.4 (2006). "[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.'" *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (citation omitted).

Applying that framework 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. This case presents an opportunity for the Court to modernize its abandonment jurisprudence, resolve lower-court disagreement over an important and recurring constitutional question, and reaffirm the legitimate privacy interests people have in the "digital record of nearly every aspect of their lives—from the mundane to the intimate." *Riley*, 573 U.S. at 395.

CONCLUSION

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

Respectfully submitted,

CHARLES E. HADEN
ATTORNEY AT LAW
1 E. Queens Way
First Floor
Hampton, VA 23699-4001
(757) 727-6972
cehaden@mindspring.com

BRANDON L. BOXLER
Counsel of Record
KLEIN THOMAS & LEE LLC
919 E. Main St., Suite 1000
Richmond, VA 23219
(703) 621-2109
brandon.boxler@kleinthomaslaw.com

IAN K. EDWARDS
KLEIN THOMAS & LEE
101 W. Big Beaver Rd., Suite 1400
Troy, MI 48084
(602) 935-8300
ian.edwards@kleinthomaslaw.com

Counsel for Petitioner

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