No. 13-132 and No. 13-212

IN THE
Supreme Court of the United States

DAVID LEON RILEY,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the California Court of Appeal, Fourth District

UNITED STATES,
Petitioner,
v.
BRIMA WURIE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AND THIRTEEN MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER RILEY AND RESPONDENT WURIE

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INTEREST OF *AMICI CURIAE*[1]

Much is at stake in this Court's review of whether the Fourth Amendment permits police officers to search the digital contents of an arrestee's cell phone incident to arrest. The warrantless search of a cell phone affects not only an individual's rights under the Fourth Amendment, but necessarily implicates First and Fifth Amendment rights as well. These intertwined constitutional protections are of particular concern to *Amici* – news organizations whose members use modern technology to record, document, and report events. Because of the many ways that journalists and others use cell phone technology, these cases go the heart of the concerns that led the Constitution's Framers to adopt not only the Fourth Amendment, but also protections for freedom of expression and against self-incrimination.

Amici's members use new communications technologies, including smart phones, as an integral part of their journalistic endeavors. Coverage of breaking news frequently involves contact with police, and journalists have been threatened, arrested, and sometimes charged for doing nothing more than engaging in newsgathering activities. The same has happened to private individuals who use cell phones to record and document newsworthy

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[1]All parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

events, as advanced technology has made citizen reporting more ubiquitous.

Amici, as described in Appendix A, are fourteen of the nation's leading news organizations, including The National Press Photographers Association, The Reporters Committee for Freedom of the Press, Advance Publications, Inc., the American Society of Media Photographers, the American Society of News Editors, the Association of Alternative News Media, The E.W. Scripps Company, the Investigative Reporting Workshop at American University, The Media Consortium, the Media Law Resource Center, The New York Times Company, the Newspaper Association of America, the Online News Association, and the Student Press Law Center. *Amici's* interest in these cases is to ensure that the crucial role that journalists, members of the press, and citizen reporters play in promoting discussion of matters of public concern is not diminished.

BACKGROUND

These cases involve criminal convictions secured with the help of information obtained from defendants' cellular phones, the contents of which were searched incident to their respective arrests. In neither *Riley* nor *Wurie* were warrants secured or any other step taken to treat the phones differently from any other personal property collected in the course of effectuating arrests.

1. When a traffic-stop inventory search of Riley's car revealed firearms under the hood, Riley was arrested. Riley Pet. Br. 4. Upon his arrest, the police seized his cell phone. The phone was a touch-

screen device that could store voice and text messages, as well as photos and video, and could be used to access the Internet, among other functions.

Police made two separate warrantless searches of the phone. At the scene of the arrest, an officer scrolled through its contents – including the contact list and text messages – and found initials suggesting street-gang association. Hours later at a police station, a detective searched "a lot of stuff" on the phone "looking for evidence," Riley JA 11, 20, and found photos and videos also suggestive of gang affiliation.

Based on this and other evidence, Riley and two others were charged with various offenses, including an allegation that their crimes were gang-related. Riley moved to suppress all evidence obtained during the searches of his cell phone, arguing they violated the Fourth Amendment given the absence of a warrant or any exigency justifying a search. *Id*. 269-70. The court denied the motion on grounds the phone searches were permissible incident to arrest. Riley Br. 7.

Riley's initial trial ended in a hung jury, but on retrial, the State relied on circumstantial evidence, including a photo and video gathered from the cell phone search. Riley was convicted and sentenced to a term of 15 years to life.

2. Wurie was seen by police making from his car an apparent drug sale that the officers believed had been arranged by cell phone. App. 2a, 56a. Officers following Wurie arrested him for drug distribution, brought him to a police station, and seized from him

two cell phones, along with other personal property. *Id.* at 2a, 57a.

Officers noticed that one of the cell phones, a "flip" model that must be opened to make calls, kept receiving calls from a number identified on the phone's external screen as "my house." *Id.* 2a. Officers opened the phone to view its call log, *id.* 2a-3a, and saw a photo of a woman holding a baby, *id.* 3a, then used the phone's navigation buttons to access the call log and obtain the number for "my house." *Id.* The police learned via an online directory that the phone number for "my house" corresponded to an address near where Wurie had parked before his arrest. App. 3a. Officers went to the address, identified a mailbox with Wurie's name, and through the window saw a woman resembling the photo on his phone. App. 3a-4a. Police obtained a search warrant for the premises, and there found cash, drugs, drug paraphernalia, a firearm, and ammunition. *Id.* 4a.

Wurie was charged based on evidence collected from his phone and the apartment, and the district court denied his motion to suppress. The jury convicted him, and Wurie was sentenced to over 20 years in prison.

3. Despite the commonality of Riley's and Wurie's respective convictions and sentences being supported by evidence obtained through warrantless searches of their cell phones, the decisions on review reached opposite conclusions regarding the constitutionality of the searches. In *Riley*, the California Court of Appeal affirmed the conviction, holding the cell phone searches were permissible incident to arrest,

because Riley's cell phone was "immediately associated with [his] person" at the time of arrest. Pet. App. 15a. In doing so, it relied on a California Supreme Court decision, *People v. Diaz*, 51 Cal. 4th 84 (2011), which held such cell phone searches are permissible regardless of whether an exigency for the search exists. Pet. App. 15a. The California Supreme Court denied without comment Riley's petition for discretionary review. *Id.* 24a.

In *Wurie*, the U.S. Court of Appeals for the First Circuit reversed the conviction and remanded for further proceedings. 728 F.3d at 1, 14. It held that warrantless searches of data on cell phones seized from arrestees as part of an arrest categorically exceed the bounds of the Fourth Amendment search-incident-to-arrest exception. *Id.* at 1, 12. This is so, the court reasoned, because the government failed to demonstrate that such searches are ever necessary to promote officer safety or prevent the destruction of evidence, the two bases on which the exception rests. *Id.* at 5-6, 9, 12.

Although the cases were not formally consolidated, the questions they present involve issues of surpassing importance that will determine the future robustness of numerous constitutional protections.

SUMMARY OF ARGUMENT

Neither Riley nor Wurie are reporters, nor were they using their cell phones as tools to facilitate reporting information to the public. But the fact that they were convicted based in part on words and images stored in personal electronic devices

implicates the fundamental purposes underlying not just the Fourth Amendment, but the First and Fifth Amendments as well.

Fourth Amendment analysis must account for technological change, as this Court has endeavored to ensure that "[w]hatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." *United States v. Jones*, 132 S. Ct. 945, 951 n.3 (2012). The Constitution's Framers also understood that "the unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

The Framers adopted strong protections against searches or seizures of persons, houses, papers, and effects so that the government could not engage in fishing expeditions to find seditious writings that could be used to incriminate citizens and thereby stifle free expression. These fundamental rights are vital for all citizens, including the defendants in these cases. But they have particular importance for photographers, journalists, and others who regularly use modern communications technologies to gather and report the news. Allowing warrantless searches of cell phones would have a particularly adverse impact on the press.

It is essential for the Court to make clear that a search warrant is required in cases like these to prevent changing technology from eroding our most basic rights.

ARGUMENT

I. WARRANTLESS SEARCHES OF CELL PHONES THREATEN TO UNDERMINE THE INTERRELATED RIGHTS OF FREEDOM FROM UNREASONABLE SEARCHES, FREE EXPRESSION, AND FREEDOM FROM SELF-INCRIMINATION

A. Cell Phones Are Essential Tools of Self-Expression and Modern Journalism

Smart phones have become an integral part of modern newsgathering technology. A typical journalist's phone contains a wealth of private data, which can include a list of personal and professional contacts, people recently called (including news sources), text messages, email, GPS location data, web browsing history, passwords, and the contents of social media accounts. In addition, journalists use smart phones to take photographs, record video, record audio, and maintain reporting notes. Thus, at any time a journalist's phone may include drafts of stories, interviews, corresponding photos or video, information about sources, and other confidential information necessary for reporting.

Of particular concern to *Amici*, media outlets increasingly rely on issuing reporters smart phones to take photographs and to record other story elements. Cell phone cameras are capable of taking high quality photographs and audio-visual recordings. And, because smart phones can connect to the Internet, it is easy for journalists to upload

photo, video, audio, or text files to the Internet to file reports. Unfortunately, the availability of smart phone photographic technology also has led to the loss of staff positions by long-time photojournalists from newspapers and television stations.[2] But whatever else this may say about the current state of the news business, the increased reliance by media organizations on such technology only heightens the importance of the issues raised by these cases.

These new technologies have greatly expanded the ability to gather and report news, but the same capabilities that make them a boon to journalists create a grave threat if they are subject to unrestricted warrantless searches incident to arrest. Unfortunately, the threat is not just hypothetical, and the enhanced newsgathering capacity may have made reporters more frequent targets of police action. There has been an epidemic of arrests for nothing more than the journalistic enterprise of photographing public events.[3] Frequently, such

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[2] *See, e.g.*, Tim Worstall, This Might Not Work: Chicago Sun Times Fires All Its Photographers To Replace Them With iPhones, Forbes, June 3, 2013, http://www.forbes.com/sites/timworstall/2013/06/03/this-might-not-work-chicago-sun-times-fires-all-its-photographers-to-replace-them-with-iphones/; Georgia newspaper chain closes its photo department, tells reporters to take pictures, July 12, 2013, http://jimromenesko.com/2013/07/12/georgia-newspaper-chain-closes-its-photo-department-tells-reporters-to-take-pictures/.

[3] *See, e.g.*, Wills Citty, NYPD Officer Indicted After Investigation of NPPA Member's Unlawful Arrest, Aug. 28, 2013, http://blogs.nppa.org/advocacy/2013/08/28/nypd-officer-indicted-after-investigation-of-nppa-members-unlawful-arrest/; Steve Myers, News photographer arrested on Long Island for

arrests are made on generalized charges of "disorderly conduct" or "disturbing the peace," and often charges are dismissed without further action. But such circumstances could be used, and in some cases have been used, as a predicate to search or seize photographic equipment.

For example, two online journalists were arrested and removed from a public meeting of the Washington D.C. Taxicab Commission in 2012 for taking photographs (including video of the arrest of the first of the two reporters).[4] Both were charged

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videotaping police, Aug. 2, 2011, http://www.poynter.org/latest-news/mediawire/141291/news-photographer-arrested-on-long-island-for-videotaping-police/; Photographers arrested during rioting, imprisoned overnight, Aug. 24, 1998 http://www.rcfp.org/browse-media-law-resources/news/photographers-arrested-during-rioting-imprisoned-overnight; Mayor apologizes to photographer for arrest at football game, Aug. 24, 1998, http://www.rcfp.org/browse-media-law-resources/news/mayor-apologizes-photographer-arrest-football-game; Charges dropped against photographers arrested in Idaho and New Mexico, Sept. 25, 1995, http://www.rcfp.org/browse-media-law-resources/news/charges-dropped-against-photographers-arrested-idaho-and-new-mexico; Police launch investigation after wrongful arrest of editor, photographer, Aug. 14, 1985, http://www.rcfp.org/ browse-media-law-resources/news/police-launch-investigation-after-wrongful-arrest-editor-photographe; Times Photographer Is Arrested on Assignment, N.Y. Times, Aug. 5, 2012, available at 2012 WLNR 16502285; Henry K. Lee, UC pays to settle photographer's suit over arrest, July 2, 2012, http://www.sfgate.com/bayarea/article/UC-pays-to-settle-photographers-suit-over-arrest-3679859.php.

[4] *See, e.g.*, Tom Sherwood, Journalists Handcuffed, Removed From Taxi Commission Meeting, June 23, 2011, http://www.nbcwashington.com/news/politics/Journalists-Handcuffed-Removed-From-Taxi-Commission-Meeting-124384719.

with disorderly conduct and "unlawful entry/remaining" by U.S. Park Police, but the government did not press charges. If the police had sought to use the search-incident-to-arrest exception in that case, it could have conducted a generalized search of the journalists' cameras and electronic notes.[5]

Similarly, a photojournalist for the *Detroit Free Press* was arrested and her camera seized while covering a police action in July 2013. At the arrest scene, the reporter captured video on her newspaper-issued iPhone. Wright was held in police custody before being released without being charged. Police returned her smartphone, but with the memory card missing. However, the video she shot of the incident, which showed Wright identifying herself as a newspaper photographer before an officer grabbed

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html. Charges were dismissed almost immediately after the actions were widely criticized in the press. *See* Mark Seagraves, Journalists won't face charges, June 24, 2011, http://www.wjla.com/articles/2011/06/journalists-won-t-face-charges-62814.html.

[5] The Privacy Protection Act of 1980 makes it illegal for government officials to search for documents and materials that are intended for publication. 42 U.S.C. § 20000aa(b). The Act, however, contains a "suspect exception," and its restrictions on searches generally do not apply where "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." Thus, notwithstanding the scope of the Act, if the holding in *Riley* is affirmed, journalists subjected to warrantless searches and seizures could be deprived of First and Fourth Amendment protections.

for the phone, was preserved in the camera's internal memory.[6]

Mistreatment of members of the news media by police during various Occupy Wall Street protests well illustrates this problem. Many media advocates, including *Amici*, reported numerous instances where news reporters and photojournalists were arrested along with protesters, merely for attempting to cover the events.[7] During a one-year period beginning in September 2011, more than 90 journalists were arrested in 12 U.S. cities while covering Occupy protests. *See* Josh Stearns, Tracking Journalist Arrests at Occupy Protests Around the Country, http://storify.com/jcstearns/tracking-journalist-arrests -during -the-occupy-prot (last visited Mar. 6, 2014). To allow warrantless searches of journalists' cell phones incident to such arrests raises obvious constitutional concerns.

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[6] *See* Jim Schaefer, No charges for Detroit Free Press photographer or police officer after cell-phone seizure and arrest, Aug. 24, 2013, http://www.freep.com/article/20130823/NEWS01/308230111/detroit/free/press-photographer-mandi-wright-officer-Lamar-Penn; David Becker, Detroit Newspaper Photographer Arrested While Covering Police Action, July 16, 2013, http://petapixel.com/2013/07/16/detroit-newspaper-photographer-arrested-while-covering-police-action/.

[7] *See, e.g.*, Sara Rafsky, Protest Puts Coverage in Spotlight, N.Y. Times, Nov. 21, 2011, available at 2011 WLNR 24091906; At Occupy protests, U.S. journalists arrested, assaulted, Nov. 11, 2011, http://www.cpj.org/blog/2011/11/at-occupy-protests-us-journalists-arrested-assault.php; Josh Stearns, Citizen Journalist Arrests on the Rise at Occupy Protests, Jan. 10, 2012, http://www.freepress.net/blog/12/01/10/citizen-journalist-arrests-rise-occupy-protests.

In addition to issues facing the institutional press, the general proliferation of smart phone use by individuals to capture news events in photos and video has generated an exponential increase in "citizen journalism." Members of the public increasingly are "playing an active role in the process of collecting, reporting, analyzing and disseminating news and information."[8]

In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), for example, a citizen was arrested after using his cell phone to photograph Boston police officers he believed were using excessive force in effectuating an arrest. Charges against him were later dropped, and Glik filed a civil action against the Boston police. In denying the individual officers' claim of qualified immunity, the First Circuit observed, "[t]he proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper." *Id*. at 84.

Likewise, in *Sharp v. Baltimore City Police*, No. 1:11-cv-02888-CCB (D. Md.), a Section 1983 action is pending based on search and seizure (and destruction) of cell phone photographs depicting the

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[8] Shane Bowman and Chris Willis, "We Media: How Audiences are Shaping the Future of News and Information," July 2003, The Media Center at the American Press Institute, available at http://www.mediacenter/org/mediacenter/research/wemedia/.

arrest of another individual. The U.S. Department of Justice took the extraordinary step of filing a "statement of interest" supporting the plaintiff in the case, stressing that "[t]he interests animating the Fourth Amendment's prohibition against unreasonable searches and seizures are heightened when the property at issue is also protected by the First Amendment." *Id.*, DOJ Statement of Interest, at 11 (available at http://www.justice.gov/crt /about/spl/documents/Sharp_SOI_1-10-12.pdf). The DOJ filing added that "the seizure of material protected by the First Amendment is a form of prior restraint," *id.*, and that the search incident to arrest exception did not justify the search and seizure of the cell phone in these circumstances. *Id.* at 13-14. Unfortunately, arrests in similar circumstances are not uncommon.[9]

Such disturbing cases are becoming more frequent as cell phone technology proliferates and becomes more fully integrated into newsgathering activities. To the extent cell phones are treated as just another piece of property for purposes of the "search incident to arrest" exception, the frequency with which basic rights are violated will only increase over time.

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[9] The facts of another pending civil rights action illustrate this problem (although it does not involve the search of a cell phone). In *Garcia v. Montgomery County Police*, No. 8:12-cv-03592-JFM (D. Md.), the plaintiff, an experienced photojournalist, alleges that a defendant officer illegally seized the memory card from his camera. The Department of Justice filed a Statement of Interest supporting Garcia's claims. *Id.*, DOJ Statement of Interest (available at http:// www. justice.gov/crt/about/spl/documents/garcia_SOI_3-14-13.pdf).

It therefore is necessary for this Court to clarify that a warrant is required to permit such searches. Doing so is imperative not to fashion some new right based on developing technology, but to vindicate basic guarantees of liberty as old as the Constitution itself.

B. Fourth Amendment Analysis Must Take Into Account Changes in Technology

Smart phones could not have been in the minds of the Framers when they wrote the Fourth Amendment to protect "persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const. amend. IV, but the information contained in these devices falls squarely within the amendment's purpose. As the First Circuit recognized in *Wurie*, cell phones are mini-computers that contain information of a "highly personal nature," including "photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records." 728 F.3d at 8. "It is the kind of information one would previously have stored in one's home and that would have been off-limits to officers performing a search incident to arrest." *Id.*

This reality necessarily must inform the Court's analysis of the cases now before it, as it has long sought to assure "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). This includes drawing a line so as not to permit "technology to

erode the privacy guaranteed by the Fourth Amendment." *Id.* As this Court stressed in *Jones*, 132 S. Ct. at 951 n.3, "[w]hatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment."

Past technological innovations have challenged the Court to reconcile the Framers' concern for protecting privacy with new circumstances. And while the law over time has adjusted to these changes, it has not done so immediately. In 1928, for example, this Court considered whether warrantless wiretapping violated the Fourth Amendment. At the time, it found electronic surveillance did not violate the Constitution because it was accomplished without intruding on the physical property of the defendant. The five-vote majority concluded that the Fourth Amendment "does not forbid what was done here" because "[t]he United States takes no such care of telegraph or telephone messages as of mailed sealed letters." *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

Justice Brandeis, whose views ultimately prevailed, argued in dissent that constitutional principles were undermined to the extent the Court focused excessively on the method chosen for communication. He argued forcefully that constitutions must be interpreted with technological advancements in mind to preserve fundamental rights. In particular, Justice Brandeis wrote, constitutions must be designed "to approach immortality" and "our contemplation cannot only be

what has been but of what may be." *Id.* at 472-73 (Brandeis, J., dissenting).

Foreshadowing the rise of a computer-based society, he warned that:

> Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.
>
> * * *
>
> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

Id. at 473-74.

Justice Brandeis concluded that, if the courts did not adapt to new realities, then constitutional principles would be "converted by precedent into impotent and lifeless formulas" and that "[r]ights declared in words might be lost in reality." *Id.* (internal quotation marks omitted).

Four decades later, the Court finally caught up with Brandeis. In *Katz v. United States*, 389 U.S.

347, 351 (1967), this Court declared that the Fourth Amendment "protects people, not places" and held that wiretapping is allowable only after a valid warrant is issued – the same as for any other search. The Court reasoned that "[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id*. at 352. The decision expressly overruled *Olmstead*, replacing the previous focus on the means of communication with an appreciation of the fact of communication as the source of constitutional rights. It concluded that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied." *Id*. at 353.

The instant cases come at a seminal moment that will define the scope of constitutional protections going forward. As this Court continues to debate whether the Fourth Amendment primarily protects property or privacy, *Jones*, 132 S. Ct. at 949-52; *id*. at 958-61 (Alito, J., concurring), these cases implicate both interests: a cell phone is personal property and is an "effect" that deserves Fourth Amendment protection, and it is one that necessarily involves concerns about personal privacy. As the First Circuit observed in *Wurie*, a warrantless search of a modern cell phone "would give law enforcement automatic access to 'a virtual warehouse' of an individual's 'most intimate communications and photographs without probable cause' if the individual is subject to a custodial arrest, even for something as minor as a traffic violation." 728 F.3d at 9 (citation omitted).

Smart phones are now ubiquitous, providing capabilities that were unheard of just a few short years ago. Such mobile devices are also evolving into mobile payment devices capturing financial transactions by the owner, thus magnifying the intrusiveness of warrantless searches.[10] We are also at the dawn of the age of "wearable" devices – *e.g.*, glasses and watches and other "clothing" – that will contain even more sensitive information.[11] Whatever rule this Court fashions here will determine the level of protection accorded to these evolving technologies.

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[10] *See* Erin F. Fonté, Overview of Mobile Payments in the United States, 32 Banking & Financial Services Policy Report No. 8, 9 (Aug. 2013) (noting that "[t]he ubiquity of mobile phones is changing the way consumers access financial services (21 percent of mobile phone owners used mobile banking within last 12 months . . .)" and that "[m]obile phones are also changing the way consumers make payments (most common use was online bill payment, and 21 percent of mobile payments users transferred money directly to another person's bank, credit card or PayPal account)").

[11] *See, e.g.*, Google Glass, Google+, https://plus.google.com/+GoogleGlass/posts#+GoogleGlass/posts (last visited Mar. 6, 2014); Gary Marshall and Kate Solomon, Apple iWatch release date, news and rumors, Feb. 17, 2014, http://www. techradar. com/us/news/ portable-devices/apple-iwatch-release-date-news-and-rumours-1131043 (describing available wearable technology and commenting on anticipated Apple iWatch); Memoto Lifelogging Camera, Memoto, https://www.kickstarter.com/projects/martinkallstrom/memoto-lifelogging-camera (last visited Mar. 6, 2014) ("The Memoto camera is a tiny camera and GPS that you clip on and wear.").

C. Fourth Amendment Protections Also Implicate First and Fifth Amendment Rights

The First, Fourth and Fifth Amendments to the United States Constitution are all predicated on protecting various aspects of individual privacy from governmental intrusion. The First Amendment guarantees that the government may not abridge freedom of speech, or of the press; the Fourth Amendment prohibits unreasonable searches or seizures, including those relating to a person's papers; and the Fifth Amendment protects individuals against government-coerced self-incrimination.

It is essential that the Fourth Amendment be scrupulously applied in cases that involve sophisticated communications technologies because of the inherent intrusion of warrantless searches on these other fundamental rights. Indeed, "[t]he Bill of Rights was fashioned against the background of knowledge that the unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus*, 367 U.S. at 729. This Court has long understood that "the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." *Id.* at 724.

The Constitution's Framers well understood the connection between the protection of privacy and freedom of speech, for it was a part of their common routine. Thomas Jefferson and James Madison corresponded with one another over a sixty-year period, exchanging views on politics, philosophy and

constitutional theory. "Sometimes they wrote in code (later deciphered) so thoughts they exchanged would not fall into the hands of political foes." Alan Pell Crawford, Founding Fathers' Forum, Wall St. J., Feb. 2, 1995 at A16. Before the American Revolution, colonial patriots frequently concealed their authorship or circulation of literature to avoid reprisals by English-controlled courts. *Talley v. California*, 362 U.S. 60, 65 (1960). The Letters of Junius, opposing the tea tax and other oppressive measures, were written anonymously "and the identity of their author is unknown to this day." *Id.* Similarly, some of Thomas Paine's pamphlets were written under pseudonyms. *Id.* at 63 n.3. After the Revolution, the Federalist Papers, debating the merits of the Constitution, were published pseudonymously. *Id.* at 65.

Early Fourth Amendment cases emphasized the extent to which these rights are interconnected. In *Boyd v. United States*, 116 U.S. 616 (1886), for example, this Court struck down a U.S. customs law that required a person to produce in court his private books, papers or invoices or else government allegations would be taken as confessed. The Court traced the practice of issuing general warrants to the Star Chamber, which would search a suspect's papers for evidence of seditious libel. It discussed the case of John Wilkes, publisher of the North Briton, whose house was searched pursuant to a general warrant, and his books and papers indiscriminately seized to support a libel allegation. Such events "were fresh in the memories of those who achieved our independence and established our form of government." *Id.* at 625-28. *See also*

Marcus, 367 U.S. at 724-29 ("[E]ven when the device of prosecution for seditious libel replaced licensing as the principal governmental control of the press, it too was enforced with the aid of general warrants.").

This Court found that the prohibition of such "grievous abuses" and "outrage[s]" provided by the Bill of Rights represented "the true and ultimate expression of constitutional law" and constituted "the very essence of constitutional liberty and security." *Boyd*, 116 U.S. at 625-26, 630. It stressed that

> extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime . . . is contrary to the principles of a free government. . . . [I]t is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

Id. at 631-32. In protecting such interests, the Court found that "the Fourth and Fifth Amendments run almost into each other." *Id*. at 630.

Another early case, *Ex Parte Jackson*, 96 U.S. 727, 733 (1877), established the principle that the Fourth Amendment protection for papers did not require that they be physically located in a person's home. Rather, "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be" such as "in the mail."

As in *Boyd*, the additional connection to First Amendment concerns was close to the surface. The Court discussed the attempt by President Andrew Jackson to exclude from the mails "incendiary publications" advocating the abolition of slavery in the southern states, and concluded in dictum that such a measure would "more effectually control the freedom of the press than any sedition law, however severe its penalties." *Id.* at 734 (quoting Senator Calhoun). It noted that "[l]iberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Id.* at 733.

Given our constitutional history, it is unreasonable to permit the warrantless search of a smart phone incident to arrest as if it were indistinguishable from any other piece of property. This Court has found that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973). This principle applies with particular force to the search or seizure of expressive materials, because courts must "examine what is 'unreasonable' in the light of the values of freedom of expression." *Id.* at 504.

Just as books and films cannot be compared to "instruments of a crime, such as a pistol or a knife, or contraband or stolen goods or objects dangerous in themselves," *id.* at 502 (internal quotation marks and citation omitted), neither can a cell phone. Search and seizure of a device that serves as the repository of personal communications including

photographs, documents, texts, web browsing habits, lists of associates, and much more "calls for a higher hurdle in the evaluation of reasonableness." *Id.* at 504. *Cf. Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring) ("I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year.").

II. THIS COURT MUST MAKE CLEAR THAT SEARCH OF A CELL OR SMART PHONE REQUIRES A WARRANT

The decisions now before this Court place the overlapping concerns of the First, Fourth, and Fifth Amendments in bold relief. In *Riley*, the California Court of Appeal simply locked onto what it viewed as the "key question" of merely "whether [Riley's] cell phone was personal property immediately associated with hi[m]" at the time of arrest. *People v. Riley*, 2013 WL 475242, at *4 (Cal. App. 4th Feb. 8, 2013) (quoting *Diaz*, 51 Cal. 4th at 93) (internal edits omitted). It thus treated the smart phone the same as any other piece of property, without regard to its storage capacity or other functions, or extent to which they implicate critical privacy interests.

In *Wurie*, by contrast, the First Circuit painstakingly explored the principles underlying the Fourth Amendment, the importance of requiring warrants for searches, and the exception for searches incident to arrest, carefully considering how modern smart phones fit within that framework. Tracing back to the pre-constitutional roots of the search warrant requirement, 728 F.3d at 3, 9, and the law's evolution to the "modern search-incident-to-arrest"

doctrine, *id.* at 3, the court rejected the government's urging "that a cell phone, like any other item carried on the person, can be thoroughly searched incident to a lawful arrest." *Id.* at 6. Such an approach, it found, "would give law enforcement broad latitude to search any electronic device seized from a person during his lawful arrest, including a laptop computer or a tablet device." *Id.* at 7.

The court noted that "[t]he storage capacity of today's cell phones is immense . . . , enough to hold about 'four million pages of documents,'" information that "by and large, [is] of a highly personal nature: photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records." *Id.* at 8 (citation omitted). It added that cell phones may also provide direct access to the home through the use of remote-controlled webcams, so that "[a]t the touch of a button a cell phone search becomes a house search[.]" *Id.* at 8-9 (quoting *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012)).

In short, the issues now before the Court embody Justice Brandeis' foreboding that "[w]ays may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home." *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting). They also bring to mind the use of general warrants, by which governmental authorities would indiscriminately peruse personal papers in search of seditious writings.

The question here is not whether this Court should create new rights by divining constitutional "penumbras" and "emanations." It is whether it must preserve existing protections in the face of technological change that otherwise would allow unfettered searches to unravel guarantees for freedom of expression and against forced self-incrimination.

These interconnected rights have long been "part of the intellectual matrix within which our own constitutional fabric was shaped," *Marcus*, 367 U.S. at 729, and failure to protect them in light of changing technology would risk converting constitutional principles into "impotent and lifeless formulas" whereby "[r]ights declared in words might be lost in reality." *Olmstead*, 277 U.S. at 473-74 (Brandeis, J., dissenting).

Although the defendants in the cases below were not journalists, the issues raised by the warrantless searches of their phones incident to their arrests are of special concern to members of the press and others who use such portable electronic devices to record public events and to store private thoughts. *Amici* urge this Court to hold that a warrant must be obtained for the search of a cell phone incident to arrest because of the inherent interconnected nature of rights protected by the Fourth, First, and Fifth Amendments.

CONCLUSION

For the reasons set forth above, *Amici* respectfully ask this Court to overturn the decision of the State of California in *Riley v. State*, and affirm the decision of the First Circuit in *United States v. Wurie*.

Respectfully submitted,

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APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

American Society of Media Photographers, Inc. represents professional publication-based photographers, and is the oldest and largest organization of its kind in the world. Its roughly 7,000 members include all manner of professional photographers whose works appear in books, magazines, newspapers, web uses, corporate reports, publicity, and advertising.

With some 500 members, American Society of News Editors (ASNE) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Association of Alternative Newsmedia (AAN) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and

Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company's portfolio of locally focused media properties includes: 19 TV stations (ten ABC affiliates, three NBC affiliates, one independent and five Spanish-language stations); daily and community newspapers in 13 markets; and the Washington-based Scripps Media Center, home of the Scripps Howard News Service.

The Investigative Reporting Workshop, a project of the School of Communication at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Consortium is a network of the country's leading, progressive, independent media outlets. Our mission is to amplify independent media's voice, increase our collective clout, leverage our current audience and reach new ones.

The Media Law Resource Center, Inc. (MLRC) is a non-profit professional association for content providers in all media, and for their defense lawyers,

providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

The National Press Photographers Association (NPPA) is the nation's leading professional organization for photojournalists. NPPA's membership includes photographers, members of the press generally, and citizen journalists. As a nationally recognized authority on the right to photograph and record audio-visual images, the NPPA advocates for visual journalists in disputes involving interference with that right.

The New York Times Company is the publisher of *The New York Times*, *The Boston Globe*, and *International Herald Tribune* and operates such leading news websites as nytimes.com and bostonglobe.com.

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers.

The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

Online News Association (ONA) is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Student Press Law Center (SPLC) is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and

responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

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