No. 13-212

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,
v.
BRIMA WURIE, *Respondent*.

On Writ of Certiorari to the
U.S. Court of Appeals for the First Circuit

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., U.S. Justice Foundation, National Association for Gun Rights Inc., Center for Media and Democracy, Lincoln Institute for Research and Education, Western Journalism Center, Free Speech Coalition, Free Speech Defense and Education Fund, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Respondent

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae U.S. Justice Foundation

ROBERT J. OLSON
HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

**Counsel of Record*
Attorneys for Amici Curiae

April 9, 2014

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INTEREST OF *AMICI CURIAE*[1]

Downsize DC Foundation, Gun Owners Foundation, U.S. Justice Foundation, Center for Media and Democracy, Lincoln Institute for Research and Education, Western Journalism Center, Free Speech Defense and Education Fund, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org, Gun Owners of America, Inc., National Association for Gun Rights Inc., Free Speech Coalition, and Abraham Lincoln Foundation for Public Policy Research are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, including programs to conduct research and to inform and educate the public on important issues of national concern, the proper construction of state and federal constitutions and statutes, questions related to human and civil rights secured by law, and related issues. Each organization has filed a number of *amicus curiae* briefs in this Court and other federal courts. With respect to the Fourth Amendment, many of these *amici* filed an

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae brief in this Court at the petition stage as well as an *amicus curiae* brief on the merits in United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012).

SUMMARY OF ARGUMENT

At issue in United States v. Wurie and its companion case, Riley v. California, is whether the Court will continue to apply its evolving reasonable expectation of privacy test birthed in Katz v. United States to searches incident to arrest, or instead continue with its restoration of property principles begun in United States v. Jones and Florida v. Jardines.

In both Jones and Jardines, this Court ruled that the Fourth Amendment was undergirded primarily by the common law of private property, and only secondarily upon privacy. The Court held that in no case can the absence of a reasonable expectation of privacy undermine a person's property rights against unreasonable searches and seizures. Remarkably, all parties in both Wurie and Riley have urged this Court to resolve the question — whether a warrantless search of a cell phone found on an arrestee is reasonable — solely on the basis of privacy interests, without any regard for the arrestee's private property interests in his person, papers, and effects.

Amici urge this Court instead to resolve the reasonableness of cell phone searches according to the property principles stated in Jones and Jardines. This Court's decisions based upon the Katz "reasonable

expectation of privacy" test have eroded rather than secured the rights originally protected by the Fourth Amendment. Since its first use nearly five decades ago, the privacy test has devolved into a subjective balancing of interests, whereby courts weigh individual privacy interests on the one hand against government interests on the other. Not surprisingly, this weighing of the interests has produced a checkerboard of unprincipled results.

Indeed, the reasonableness of a search incident to arrest should be based on the government's superior property interest in the person of the arrestee, but that property interest does not also extend to that person's house, papers, or effects. While the arrestee may be separated from certain limited items that he may have on his person, any further search into the contents of his papers and effects must be based upon compliance with the warrant, probable cause, and particularity requirements of the Fourth Amendment.

In both Wurie and Riley, once the government fulfilled its purpose of arrest by removing the cell phones from the arrestees, it became no more than a bailee of personal property, subject to the Fourth Amendment's warrant, probable cause, and particularity protections. Instead of honoring those limitations, the government exceeded its authority as a bailee, unconstitutionally trespassing on the exclusive right of the arrestee to be secure in his papers and effects.

ARGUMENT

I. THIS CASE WAS LITIGATED BELOW EXCLUSIVELY ON THE KATZ REASONABLE EXPECTATION OF PRIVACY TEST.

On the surface, it appears that United States v. Wurie and its companion case, Riley v. California, present a single straight-forward question — whether the search-incident-to-arrest doctrine permits a cell phone seized from an arrestee to be the subject of a warrantless search. A closer examination, however, reveals that the very foundation of the search-incident-to-arrest doctrine is at issue.

In Wurie, the government argues for an almost limitless doctrine, that "an arresting officer may seize and search any items found on an arrestee's person, including closed containers." Petition for a Writ of Certiorari ("Pet.") at 4. The court of appeals below concluded just the opposite, "adopt[ing] a 'bright-line rule' that the ... police [are] never permit[ted] to search the contents of a cell phone found on the person of an arrestee without first obtaining a warrant." *See* United States v. Wurie, 728 F.3d 1, 11 (1st Cir. 2013).

According to the government's reading of applicable precedents, a search incident to arrest, originally designed for "preserving destructible evidence and protecting officer safety," now need not be justified on either, because of "an arrestee's diminished expectation of privacy...." Pet. at 11, 13, 15. However, according to the court of appeals, preserving evidence and protecting officer safety must be "[w]eighed

against the significant privacy implications inherent in cell phone data searches...." Wurie, 728 F.3d at 11, 12.[2]

The government and the court of appeals rely upon the exact same Supreme Court precedents, yet reach diametrically opposite conclusions. Of course, such results can easily be obtained when the test being applied is based not on the fixed constitutional text, history, and tradition, but on a subjective balancing of a person's "reasonable expectation of privacy."[3] Under this approach, the Court considers whatever factors may appear to be persuasive and decides whether to exempt the government from the warrant, probable cause, and particularity requirements of the Fourth Amendment.[4]

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[2] The circuit court based its decision on the fact that "'a modern cell phone is ... not just another purse or address book.'" *Id.* at 8. The circuit court explained that the privacy interest in one's cell phone is far greater than his other belongings, since:

- "The storage capacity of today's cell phones is immense."
- The "information [contained by a phone] is, by and large, of a highly personal nature...."
- "It is the kind of information one would previously have stored in one's home...."
- "'At the touch of a button a cell phone search becomes a house search....'" *Id.* at ___.

Thus, for the circuit court, Wurie's privacy interests in his cell phones outweighed the government's interests in conducting a search incident to a lawful arrest.

[3] *See* Brief for the United States, p. 13. *See also* Brief of Respondent, pp. 9-12.

[4] In his autobiography, Justice William O. Douglas recounted a statement that Chief Justice Charles Evans Hughs made to him

Similarly, the petitioner in Riley, like Wurie, has contended that "[s]earching the digital contents of a smart phone furthers neither of the [historically recognized] governmental interests ... and impinges upon personal privacy to an unprecedented degree." Brief for Petitioners, p. 10 in Riley v. California (No. 13-132). In opposition to Riley's petition for certiorari, the California authorities contended otherwise, relying heavily on People v. Diaz, 244 P.3d 501 (Cal. 2011). In Diaz, the Supreme Court of California, like the federal government in Wurie, ruled that an arrestee has "'reduced expectations of privacy caused by the arrest.'" *Id.* at 506. Indeed the California Supreme Court concluded that "the lawful custodial arrest justifies the infringement of **any** privacy interest the arrestee may have." *Id.* at 507 (emphasis added).

Thus, while the contending parties in these two cases reach opposite conclusions as to the application of the search-incident-to-arrest doctrine to cell phones, all parties assume that the Fourth Amendment test is whether the arrestee has a "reasonable expectation of privacy" in his cell phone.[5]

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about how the Court operates: "Justice Douglas, you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." William O. Douglas, The Court Years, p. 8 (Random House 1980).

[5] *See* Brief for the United States at 9-11, 13-28 and Brief for Respondent Wurie at 9-13 (No. 13-212), and Brief for Petitioner Riley at 13-16 and Brief for Respondent State of California at 7-11, 22, 25-28, 41-58 (No. 13-132).

These *amici* take the position that none of the parties has addressed the central constitutional issue, a deficiency which may require the Court to order re-briefing. "Privacy" is not a term mentioned in the Constitution, and the judicially created test of whether a person has a "reasonable expectation of privacy" should not be allowed to displace the text of the Constitution, which certainly restricts physical searches. The correct constitutional test is grounded in the plain language of the Fourth Amendment. Because the Court's expectation-based test is faulty, the search-incident-to-arrest doctrine which has been built upon it cannot be trusted to reach proper conclusions. That approach is both extra-constitutional and has proven insufficient to secure the rights the Founders expressly insisted be protected by the Fourth Amendment.

II. "SEARCHES INCIDENT TO ARREST" MUST BE ANALYZED USING PROPERTY PRINCIPLES EMBODIED IN THE FOURTH AMENDMENT.

A. Court Decisions Based on Reasonable Expectations of Privacy Have Eroded Fourth Amendment Rights.

For many years, the scope of a search incident to arrest was narrow, permissible only in order to effectuate narrow and specific purposes.[6] As late as

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[6] *See*, *e.g.*, Agnello v. United States, 269 U.S. 20, 30 (1925) ("The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search

1968, the Court described a search upon arrest for (i) weapons and (ii) implements of escape as "reasonably **limited in scope** by these purposes," noting with approval that the police officer "did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects." Sibron v. New York, 392 U.S. 40, 67 (1968).

However, the year before Sibron was decided, this Court had already begun to abandon the Fourth Amendment's foundational property principles upon which the search incident to arrest doctrine originally was based. Beginning in Warden v. Hayden, 387 U.S. 294 (1967), and Katz v. United States, 389 U.S. 347 (1967), the Court embraced a newly created right to privacy.[7]

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the place where the arrest is made in order to find and seize things connected with the crime as its [i] **fruits** or as [ii] the **means** by which it was committed, as well as [iii] **weapons** and other [iv] **things to effect an escape** from custody, is not to be doubted." (Emphasis added).)

[7] Such a modification of Fourth Amendment jurisprudence might have been thought necessary after the Court's refusal in Olmstead v. United States, 277 U.S. 438 (1928), to protect a person's electrical communications over telephone lines, based on a cramped view of what constitutes "property" under the Fourth Amendment. Following the logic of the Olmstead decision, a trespass occurs where government agents enter a man's home and break into his desk to read his letters without a warrant, but no trespass occurs when the government agents access his computer from outside his home to read the exact same correspondence in electronic form.

In District of Columbia v. Heller, 564, U.S. 570 (2008), Justice Scalia had no trouble applying constitutional protections to changing technology. He wrote that "[s]ome have made the

In justification of this new, modern privacy-based view of the Fourth Amendment, the Court stated that "[t]he premise that **property** interests control the right of the government to search and seize **has been discredited** ... the principal object of the Fourth Amendment is the protection of privacy rather than property, and [we] have increasingly discarded fictional and procedural barriers rested on property concepts." Warden v. Hayden, 387 U.S. at 304 (emphasis added).

This newly created right to privacy took little time to percolate into the search-incident-to-arrest doctrine. As the court of appeals explained, "the modern search-incident-to-arrest doctrine emerged from Chimel v. California, 395 U.S. 752 (1969)...." Wurie, 728 F.3d at 3. Justice Stewart, writing for the majority in Chimel, noted that the Court's jurisprudence in this area had been a "sw[inging] pendulum," and thus "hardly ... an unimpeachable line of authority."[8] *Id.*, 395 U.S. at

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argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications ... and the Fourth Amendment applies to modern forms of search ... the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582.

Olmstead was wrongly decided, and seems to have contributed to the jettisoning of property in favor of privacy.

[8] Justice White agreed, writing in dissent that "[f]ew areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search 'incident to an arrest.'" *Id.* at 770.

758, 760. In Chimel, however, the Court recognized a fundamental distinction between a search of the arrested **person** and a search of the **place** where the person was arrested, limiting the search to the person. *See* Chimel, 395 U.S. at 754.

The Court in Chimel noted that, although previous cases had upheld searches of the **person**[9] and searches of certain **effects**,[10] those cases "made no reference to any right to search the ***place*** where an arrest occurs." *Id.* at 755 (emphasis added). The Court favorably quoted Judge Learned Hand's analogy that "'[a]fter arresting a man in his house, to rummage at will among his **papers** in search of whatever will convict him, appears to us to be indistinguishable from ... a general warrant.'" *Id.* at 767 (emphasis added).

However, in United States v. Robinson, 414 U.S. 218 (1973), the Court moved in a decidedly different direction from the more restrictive approach that it took in Sibron. The Court rejected language in Sibron as having imposed "a novel and far-reaching limitation on ... the traditional and unqualified authority of the arresting officer to search the arrestee's person." *Id.* at 229. In order to unlink itself from Fourth Amendment property principles, the Robinson Court alleged that the common-law authorities on "search incident to arrest ... are sparse" — an assessment that dissenting Justice Marshall called "disingenuous." Freed from any guiding principles, the Court opted for a "**broad**

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[9] United States v. Weeks, 232 U.S. 383 (1914).

[10] Carroll v. United States, 267 U.S. 132 (1925).

statement of the authority to search incident to arrest," somehow ostensibly reconciling that with Sibron's "**limited**" search.[11]

In an effort to explain the majority opinion and to chart a future course, Justice Powell wrote a concurrence. Eschewing the Fourth Amendment's itemization of "persons, houses, papers, and effects," Justice Powell lumped them all under a new banner: "areas of an individual's life about which he entertains legitimate expectations of privacy." Robinson, 414 U.S. at 237 (Powell, J., concurring). He asserted that an unlimited search incident to arrest was justified "because the **privacy** interest protected by that **constitutional guarantee** is legitimately **abated** by the fact of arrest." *Id.* at 237-38. Justice Powell argued that "an individual [once arrested] retains no significant Fourth Amendment interest in the privacy of his person." *Id.* According to Justice Powell, the search-incident-to-arrest doctrine called for a balancing of the interests between individual privacy and the government's law enforcement interests, where the government's interests would almost always prevail:

> If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is **subordinated** to a legitimate and overriding governmental concern. No reason then exists to frustrate law enforcement by requiring

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[11] *Compare* Robinson, 414 U.S. at 232-33 (emphasis added) with Sibron, 392 U.S. at 67.

> some independent justification.... This seems to me the reason that a valid arrest justifies a full search of the person, **even if that search is not narrowly limited by the twin rationales** of seizing evidence and disarming the arrestee. [*Id.*, 414 U.S. at 237 (emphasis added).]

Four years after Robinson, in United States v. Chadwick, 433 U.S. 1 (1977), a unanimous Court adopted Justice Powell's privacy reasoning in a search of a footlocker pursuant to arrest.[12] Citing Katz, the Court stated that "the Fourth Amendment 'protects people, not places[,]' more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy." Chadwick, 433 U.S. at 7.

The Katz privacy doctrine has led to absurd results, which permit governmental acts of criminal trespass,[13] facilitate and sanction breaches of contract,[14] and even

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[12] Both dissenting opinions also rested upon privacy considerations. *See* Chadwick, 433 U.S. at 20.

[13] *See* Oliver v. United States, 466 U.S. 170, 178, 183 (1984) (a person has no expectation of privacy in his "open fields," and thus government agents may trespass in their investigation, since "[t]he existence of a **property** right [is now] **but one element** in determining whether expectations of **privacy** are legitimate.") (emphasis added).

[14] *See* Smith v. Maryland, 442 U.S. 735, 741 (1979) (police are permitted to capture the numbers dialed by a person on his phone

incentivize theft,[15] based on a subjective determination that a person **had no reasonable expectation that the government would not do so.**

The notion of a reasonable expectation of privacy is a moving target, as the degree of privacy one may reasonably expect depends entirely on what technological powers of intrusion the government has at its disposal. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) (The reasonable expectation of privacy test "has often been criticized as circular, and hence subjective and unpredictable ... The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."). Writing for the majority in Kyllo, Justice Scalia recognized the abandonment of property for

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because he voluntarily conveyed them to the telephone company for the express purpose of placing a call); United States v. Miller, 425 U.S. 435, 442 (1976) (police can obtain a person's bank records from the bank because he voluntarily conveyed the information for the express purpose of banking). But a person who contracts with a third party to perform a service does not lose his property right to information created to perform that service.

[15] *See, e.g.*, California v. Greenwood, 486 U.S. 35, 40 (1988) (police permitted to search garbage bags that were placed at the curb "for the express purpose of conveying it to a third party...."); United States v. Hedrick, 922 F.2d 396, 398 (7th Cir. 1991) (police permitted to seize and search trash placed in cans on a person's property within the curtilage of his home). But the government may not open a person's outgoing mail just because he entrusted it to the Post Office for the express purpose of conveying it to the addressee. The government may not enter a person's home without a warrant on the theory that he had no privacy expectation since he had given a spare key to his neighbor for the express purpose of watering his plants while on vacation.

privacy, and clearly struggled with how to analyze thermal imaging using the Court's privacy precedents.[16]

B. United States v. Jones Returned the Fourth Amendment Jurisprudence to its Property Roots.

In 2012, the reign of Katz's reasonable expectation of privacy test appeared to have come to an end. In United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 953-54 (2012), the Court refused to sanction use of evidence gleaned from a government trespass on a person's private vehicle, and signaled a return to the property foundations of the Fourth Amendment. Writing for the majority in Jones, Justice Scalia recognized that "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise ... the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *Id.* at 949. The Court not only rejected the proposition that the Katz privacy test was the exclusive Fourth Amendment test, but also determined that the privacy test was subordinate to a primary property-based test. *Id.* at 953-54.

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[16] Indeed, the basis for the Kyllo decision has eroded because, since it was decided, thermal imaging technology, which had been experimental, grossly expensive, and "not in general public use," has proliferated to the point that sophisticated thermal imaging scopes are now widely available for under $2,000. *See* http://amzn.to/QXOjtZ.

The Court demoted the Katz privacy test, relegating it to the role of an "add-on," ruling that it would not be employed if it afforded less protection than the "18th century guarantee against unreasonable searches." Jones, 132 S.Ct. at 953. The Jones Court never needed to consider whether Jones had any "reasonable expectation of privacy" in his vehicle.[17] It held that Jones retained a property interest in his vehicle, even though he may not have had a reasonable expectation of privacy. It was enough that the government had engaged in a "physical intrusion of a constitutionally protected area in order to obtain information...." *Id.* at 951.

In Florida v. Jardines, 133 S.Ct. 1409 (2013), this Court went one step further in determining that, in any Fourth Amendment case, the search or seizure was first to be examined according to a property-based test. *Id.* at 1417.

Nevertheless, even after this Court's decisions in Jones and Jardines, the lower courts have persisted in using outdated and discredited "privacy" principles in Fourth Amendment cases, often completely disregarding the property principles at stake. Consistent with this pattern, the circuit court below never mentioned property in its analysis at all, and only once cited Jones, but in support of a privacy

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[17] Indeed, a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." United States v. Knotts, 460 U.S. 276, 281 (1983).

holding! *Id.* 728 F.3d at 14.[18] The circuit court reached the right conclusion in overturning Wurie's conviction, but did so based on privacy grounds. *See* Wurie, 728 F.3d at 11-13.

Remarkably, all parties in both the Wurie and Riley cases urge this Court to decide these cases based on privacy principles, as if Jones and Jardines had never been decided. The Court should resist this effort to re-establish privacy over property, both because the Fourth Amendment rests upon property-based principles, and because the privacy test undermines the historic protections secured by the text.

C. The Fourth Amendment Protects Property Interests.

Contrary to Katz and its myriad progeny, the original foundation of the Fourth Amendment was never based upon an evolving expectation of privacy, but upon fixed property principles. The prefatory clause states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." All four protected categories involve property rights. First and foremost, "every man has a property in his own person...." J. Locke, Second Treatise of Civil Government, Chapter 5, Sec. 27

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[18] In like manner, the defendants in Wurie and Riley rely on Justice Alito's concurring opinion in Jones, which rests upon privacy, not property. *See* Wurie Brief for Respondent at 11-12; Riley Brief for Petitioner at 56-57.

(1690).[19] From that property right in the person derives the private property right in "houses, papers, and effects," which are "[t]he labour of his body, and the work of his hands...." *Id.*

Indeed, to protect private property, man instituted civil government. W. Blackstone, Commentaries on the Laws of England, Book 2, Chapter 1, p. 8. *See also* Entick v. Carrington, 19 Howell's State Trials 1029 (1765) ("The great end, for which men entered into society, was to secure their property").

A person's private property rights protect him not only as against his fellow man, but also — and increasingly more importantly — against the government. Only when the government demonstrates that it has a superior property interest may it search or seize one's property — including his person. This Court embraced that principle in Boyd v. United States, 116 U.S. 616, 623 (1886).

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[19] *See also* Genesis 1:26 ("Let us make man in our image, after our likeness: and let them have **dominion** over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.") (emphasis added). Similar to that Biblical grant of authority, "property" is defined as "[t]hat **dominion** or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects." Black's Law Dictionary, West Publishing Co., Revised Fourth Edition, 1968, p. 1382 (emphasis added). Private property is defined as "that sole and despotic dominion which one man claims and exercises ... in total exclusion of the right of any other individual in the universe." *See* W. Blackstone, Commentaries on the Laws of England, Book 2, Chapter 1, "Of Property, in General," Univ. of Chicago facsimile ed: 1766, p. 2.

When the government intrudes upon a person's property without first demonstrating such a superior property interest, it is nothing more than a trespasser. Judge Cardozo wrote that "[t]he basic principle is this: Search of the person is unlawful when the seizure of the body is a **trespass**.... Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its **physical dominion**." People v. Chiagles, 237 N.Y. 193, 197 (N.Y. 1923) (emphasis added).

In this case, the dissenting circuit court judge attempted to downplay the government search, arguing that "[t]he police officers' **limited search** of one telephone number in Wurie's call log was even less intrusive than the searches in" other cases. United States v. Wurie, 728 F.3d 1, 15 (1st Cir. 2013) (emphasis added). In Jones, the government argued similarly that the placement of a GPS tracking device was at best a "**technical trespass**." Reply Brief for the United States in United States v. Jones, No. 10-1259, p. 2 (emphasis added). That *de minimis* type of argument was rejected in Jones, and should be rejected here, since "every [unjustified] invasion of private property, **be it ever so minute**, is a trespass." Entick v. Carrington, 19 Howell's State Trials 1029 (1765) (emphasis added).

D. The Fourth Amendment Protects Four Categories of Property Interests Which Are Afforded Separate and Distinct Protection.

Simply because the government is entitled to possess either a "person," "house," "paper," or "effect" does not mean it is thereby entitled to possess any, or all, of the other protected property interests. This principle is reflected in the second clause of the Fourth Amendment, which states that "no Warrants shall issue,[20] but upon probable cause, supported by Oath or affirmation, and **particularly describing the place to be searched, and the persons or things to be seized**." *Id.* (emphasis added). This "particularity requirement" ensures that each of the protected classes of property remains separate and distinct from the others.

Compromising one category does not negate the protections afforded to the others.[21] For example, police armed with an arrest warrant may be permitted

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[20] As Justice Scalia has noted in a concurrance, the "warrant requirement" has acquired problems of its own, and "had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions ... Since then, we have added at least two more." California v. Acevedo, 500 U.S. 565, 582 (1991).

[21] *See. e.g.*, Ybarra v. Illinois, 444 U.S. 85, 92 (1979) ("a warrant to search a **place** cannot normally be construed to authorize a search of each **individual** in that place") (emphasis added); Chimel v. California, 395 U.S. 752 (1969) (An arrest of a **person** does not carry with it the authority to search the **place** within which he was found.).

to search a house in order to find the person named, but may not open a desk too small for the person to hide to search for papers and effects.[22] In this case, simply because the police may have been justified in making an arrest does not give them carte blanche authority to seize and conduct an exhaustive search of any property found on the arrestee, including the cell phone at issue.

III. SEARCHES INCIDENT TO ARREST ARE LIMITED TO EFFECTUATING THE ARREST, AND ARE NOT A GENERAL AUTHORITY TO SEARCH A PERSON'S BELONGINGS.

At common law, the authority to arrest was accompanied by a very limited power to separate the person being arrested from various objects that may be on his person. The purpose of this "search incident to arrest" is to effectuate the arrest, and "merely involve[s] a search of [the] person [not] a separate search of effects found on his person." United States v. Robinson, 414 U.S. 218, 255 (1973) (Marshall, J., dissenting). Thus, "[a]n officer, having made an arrest, is required to keep the prisoner **safely** until lawfully discharged; and, if the latter is **violent**, or if for any other reason an attempt at escape is apprehended, he may search his person to ascertain whether he has **implements to aid his escape**, and may take them away." J.P. Bishop, Criminal

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[22] *See* United States v. Ross, 456 U.S. 798, 824 (1982).

Procedure at § 210, Little, Brown & Co., 1880 (emphasis added).

Additionally, with respect to "either goods or money which he reasonably believes to be connected with the supposed crime, as its **fruits**, or as the **instruments** with which it was committed, **or as supplying evidence** relating to the transaction, he may **take them, and hold them** to be disposed of as the court shall direct." *Id.* at § 211 (emphasis added). It is important to note that this authority is only to "take and hold" the items, not to conduct a further warrantless, detailed examination of them, as was done with Wurie's cell phone here.

A. Upon Arrest, the Police Become the Bailee of the Person Arrested.

Indeed, the "arrest" underlying a search — the seizure of a person by the state — is best understood according to property principles. An "arrest" is defined as "the taking into custody of a person, or a person and his goods, in pursuance of some lawful command or authority." Criminal Procedure, § 156.

When a person is lawfully arrested, it is because the state has a superior property interest over his person. He is no longer free to exercise dominion over his body, to go where he wants, and to do as he pleases.

After a person is arrested, a judge may release a person eligible for "bail" on conditions. The bailment of a person is "the delivery, in legal form, of one under

arrest to another or others who thereby become entitled to his custody, and, with him, responsible for his appearance...." Criminal Procedure, § 248. However, even after a prisoner is "bailed out," he does not reacquire full property rights in his person. Instead, he is often limited in where he may go, what he may do, whom he may see, etc. Moreover, a bail bondsman who posts a bond obtains a property interest in the prisoner, and if it is believed the prisoner might "jump bail," "he may be detained by them and enforced to appear...." *Id.* at § 249.

B. The Government Is No More than a Bailee of Personal Property Seized Incident to Arrest.

The police arrested Wurie on suspicion of selling drugs, and "drove him to a nearby police station, where they seized two cell phones, a set of keys, and more than one thousand dollars in cash from his person." Pet. at 3. Seizures of such items might be justified — the cell phones and keys being possible implements of escape, and the cash being possible fruits of selling drugs, the crime of which Wurie was suspected. However the police search went much further than that. When one of the cell phones began receiving calls, the police "opened the phone to check its call log [and] obtain[ed] the number for 'my house.'" Pet. at 3.

By doing so, the police exceeded any property right they had in the cell phone and trespassed on Wurie's property, much the same as occurred in Jones when, without a warrant, the police placed a GPS tracking

device on Jones' car. If the police had probable cause sufficient to demonstrate Wurie's cell phone contained contraband or evidence of any crime, they could have applied for a warrant to search it.

A person retains a property interest in his belongings after his arrest. Criminal Procedure concludes that "[t]his taking of things from the arrested person **does not change the property in them**." *Id.* at § 212 (emphasis added). Since the purpose of searching someone upon arrest is to separate him from certain items, "once the [items are] in the officer's hands," the purpose of the search is complete and the officer is simply holding the property on behalf of the arrestee. *See* Robinson at 256 (Marshall, J. dissenting). Opening Wurie's cell phone is analogous to the improper police action taken in Robinson, where "[o]pening the package ... did not further the ... purpose of the search." *Id.*

When the police take possession of personal property incident to an arrest, they have no property interest in the items greater than that of a common law bailee. An officer "holds all such property, whether money or goods, subject to the order of the court; and, in proper circumstances, he will be directed to restore it, in whole or in part, to the prisoner." Bishop, Criminal Procedure, § 212. A bailment of the arrestee's property is properly viewed as "a delivery of goods or personal property ... in trust ... and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same...." Black's Law Dictionary, p. 179.

Story explained that "[i]n respect to property in the custody of the officers of a court, pending process and proceedings, such officers are undoubtedly responsible for good faith and reasonable diligence." J. Story, Commentaries on the Law of Bailments, sec. 620, Little & Brown, 1840. *See, e.g.*, American Ambassador Casualty Co. v. Chicago, 205 Ill. App. 3d 879 (Ill. App. Ct. 1st Dist. 1990) (police became involuntary bailees of a vehicle after the driver of the vehicle was arrested).

Having only the authority of a bailee of Wurie's cell phone, the police were required to hold it for safekeeping, but had no right to examine its contents without a warrant.

CONCLUSION

Justice Frankfurter explained the problem faced by courts in cases like Wurie when he wrote in Rabinowitz that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). However, the Court's decision in this case could affect virtually anyone.

This Court already has determined that police may arrest a person for any minor infraction, even if the maximum penalty does not include jail time. *See* Atwater v. Lago Vista, 532 U.S. 318 (2001). Consider the case of a lawyer arrested for a traffic offense. Is it to be the law that the police may scrutinize his smartphone, laptop, flash drive, iPad, briefcase, and

client files[23] — without warrant or suspicion of any wrongdoing — simply because he has failed to use his turn signal when merging?[24] If a lawyer's confidences should not be searched, why should any other person be given fewer rights?

It is widely believed that the Court's jurisprudence governing "searches incident to arrest" is in disarray, and this case presents the Court with the opportunity to establish principled limitations on the scope of such searches — limitations based on textual, well-established property principles, rather than on judge-made tests which balance away constitutional protections based on subjective notions of "expectations of privacy."

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[23] *See* U.S. v. Wurie, 728 F.3d at 7.

[24] The government argues in its opening brief that it may **always** search cell phones incident to arrest. U.S. Br. at 8. Only in the **alternative** does it argue that it may search cell phones **sometimes**, "'when it is reasonable to believe that evidence of the offense of arrest might be found....'" *Id.* at 10 (citation omitted). That alternative argument, the government suggests, "**would also dispel any theoretical concern that officers will use arrests for traffic offenses as pretexts to search cell phones**." *Id.* at 11 (emphasis added). But again, that is only the government's **alternative** argument. In the government's perfect world, the police could comb through a person's entire electronic life after arresting him because one of his tires touched the double yellow line.

The decision below should be affirmed.

Respectfully submitted,

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D STREET, STE. 2
Ramona, CA 92065
Attorney for Amicus Curiae U.S. Justice Foundation

ROBERT J. OLSON
HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com

**Counsel of Record*
Attorneys for Amici Curiae
April 9, 2014