

Nos. 13-132 and 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
(Additional caption on inside cover)

**BRIEF FOR THE AMERICAN LIBRARY
ASSOCIATION AND THE INTERNET ARCHIVE
AS AMICI CURIAE
SUPPORTING RILEY AND WURIE**

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UNITED STATES,

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v.

BRIMA WURIE,

Respondent.

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to the United States Court of Appeals
for the First Circuit

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. A Person’s Reading Material Is Quintessentially Private.....	5
II. Searches Incident To Arrest Do Not Extend To Classically Private Zones Implicating No Risk To Officer Safety Or Evidence Preservation	9
III. Modern Smartphones Store A Trove of Personal Reading Material And Other Private Information That Is Accessible During A Routine Search.....	13
IV. Police Are Likely To Examine Private Information While Searching A Smartphone	21
A. Law Enforcement Officers Already Seek And Use Electronic Evidence.....	22
B. Investigators Already Undertake Warrantless Searches of Electronic Devices Whenever Allowed	25
CONCLUSION	26

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Amazon.com LLC v. Lay</i> , 758 F. Supp. 2d 1154 (W.D. Wash. 2010)	6
<i>Arizona v. Gant</i> , 556 U.S. 332 (2009)	11, 12, 13
<i>Barber v. State</i> , 4 So. 3d 9 (Fla. Ct. App. 2009)	24
<i>Board of Ed. v. Pico</i> , 457 U.S. 853 (1982)	5, 6
<i>Chimel v. California</i> , 395 U.S. 752 (1969)	10, 11
<i>City of W. Covina v. Perkins</i> , 525 U.S. 234 (1999)	7
<i>Davidson v. State</i> , 249 S.W.3d 709 (Tex. Ct. App. 2008)	23
<i>Entick v. Carrington</i> , 19 Howell’s State Trials 1029 (C.P. 1765)	7
<i>George v. Rehiel</i> , 738 F.3d 562 (9th Cir. 2013)	24
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<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	9
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<i>Smallwood v. State</i> , 113 So.3d 724 (Fla. 2013).....	17
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STATUTE

18 U.S.C. § 2710.....	2
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**BRIEF FOR
THE AMERICAN LIBRARY ASSOCIATION
AND THE INTERNET ARCHIVE
AS AMICI CURIAE
SUPPORTING RILEY AND WURIE**

INTEREST OF THE AMICI CURIAE¹

The American Library Association (“ALA”) is a nonprofit professional organization of 57,000 librarians dedicated to providing and improving library services and promoting the public interest in a free and open information society. Founded in 1876, the ALA actively defends the right of library users to read, seek information, and speak freely.

The Internet Archive is a public non-profit organization that was founded to build an “Internet library,” with the purpose of offering permanent access for researchers, historians, scholars, and artists to historical collections in digital format. Founded in 1996 and located in San Francisco, California, the Internet Archive collects and receives data and digitizes source material from a multitude of sources, including libraries, educational institutions, government agencies, and private companies. The Internet Archive then provides free access to its data—which include text, audio, moving images, software, TV news, and archived web pages—to researchers, his-

¹ Letters reflecting the parties’ consent to the filing of this brief are on file with the Clerk or being lodged herewith. No counsel for a party authored any portion of this brief. No party and no other entity, except *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

torians, scholars, and the general public throughout the world. As a digital library, the Internet Archive is working to prevent the Internet—a new medium with major historical significance—other “born-digital” materials, and ephemeral physical media from disappearing into the past, by preserving society’s cultural artifacts and providing access to them. Collaborating with institutions including the Library of Congress and the Smithsonian, the Internet Archive is working to preserve a record for future generations.

The ALA and Internet Archive submit this brief because open and free access to literature and other writings and media has long been considered essential to education and to the maintenance of an open society. With their expansive digital collections, traditional libraries and the Internet Archive host a variety of digital material that people have a legal right to view without fear that their beliefs, interests, or curiosities will be exposed to government actors.

In the context of bricks-and-mortar libraries, that right of privacy is well established: almost every state has privacy laws requiring libraries to keep user records and reading lists confidential absent a court order.² People have an equally important interest in being able to privately view legally permissible material on the Internet—whether that be a political manuscript like *The Communist Manifesto*, religious writings such as the Bible or Quran, or

² See ALA, State Privacy Laws Regarding Library Records, <http://www.ala.org/offices/oif/ifgroups/stateifcchairs/stateifcinaction/stateprivacy>. Federal law also restricts “video tape services providers” from disclosing information identifying people who request or obtain videos. 18 U.S.C. § 2710.

medical texts discussing treatment for particular diseases or mental illnesses. These and millions of other texts are now available digitally to people with smartphones from numerous sources, including library websites, the Internet Archive, private suppliers of e-books such as Amazon.com, and individual websites. Millions of Americans read books on their phones, which can often hold thousands of books—all of which would be accessible to a law enforcement officer exploring the device. The ALA and the Internet Archive share an interest in protecting readers' right to view this type of material privately, without the risk that law enforcement officers will conduct a suspicionless search of a person's entire electronic library merely because he or she is arrested while carrying a phone.

SUMMARY OF ARGUMENT

Under this Court's precedents, while police could seize a key found in an arrestee's pocket as a search incident to arrest, they could not use that key to enter a home and search the arrestee's personal library. Even carrying out an arrest *in* a home does not license law enforcement to conduct a suspicionless search of every volume in the home library. Today's personal libraries are portable: they can fit on a smartphone, and a smartphone can fit in a pocket in a way that a shelf of books never could. But the contents of those libraries are no less private.

The Constitution affords the strongest possible protection to Americans' right to engage in intellectual inquiry privately and on their own terms. What Americans are reading is ordinarily none of the government's business; this Court has long accepted

“the right to be free from state inquiry into the contents of [one’s] library.” *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). This case threatens that principle, because it allows police officers to peer into the contents of a person’s entire personal library using a device that happens to be found on that person during an arrest.

Given the strong privacy interests implicated by any search of a smartphone, no exception can be justified to the Fourth Amendment’s customary requirements for a search of “persons, houses, papers, [or] effects”: individualized suspicion and a warrant issued by a neutral magistrate. Smartphones pose no danger to officer safety, and the clumsy expedient of a manual search is hardly necessary to prevent the conscious destruction of evidence. This Court has refused to countenance a search of a locked footlocker incident to arrest. A smartphone provides access to a space more private than any footlocker, and can store many footlockers’ worth of private reading material.

Countenancing a suspicionless search like those at issue here will authorize police to use this new investigative technique to gain access to a plethora of private, sensitive information. Police have already shown that they will review private electronic data, ranging from web browsing history to music files, the moment they are allowed to conduct a suspicionless search of a computer. Smartphones are *personal* computers in every sense of the word: if every arrest of a person with a smartphone—a population including more than half the adults in the United States—allows police officers to rummage painstakingly and intrusively through the contents of personal librar-

ies, the loss of constitutionally protected privacy will be great indeed.

ARGUMENT

The Framers held the contents of a person’s library sacrosanct—at the very core of the Constitution’s protection for the people’s “papers and effects.” Today a majority of Americans carry in their pockets or pocketbooks the equivalent of an entire library—a library so capacious that for much of our history it would have been impossible to assemble in one place, much less in a pocket. Smartphones are the repository of Americans’ private thinking: they contain and record the books we read, the websites we browse, and the conversations we have with friends and intimates. And they retain this recorded data indefinitely. Allowing a police officer making a routine arrest free rein to rummage through massive quantities of private data works a profound intrusion into what the Constitution regards as the most private, most protected sphere of all. None of the considerations underlying the search-incident-to-arrest doctrine can justify giving police that license to rummage. If this Court does not put a stop to it, law enforcement has every incentive to use that investigative technique aggressively.

I. A Person’s Reading Material Is Quintessentially Private

“[T]he right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom.” *Board of Ed. v. Pico*, 457 U.S. 853, 867 (1982). Since the Founding, the freedom to read whatever lawful material one chooses has been central not just to the

Constitution, but to the very notion of American self-government: “[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” *Id.* (quoting 9 Writings of James Madison 103 (G. Hunt ed. 1910)).

Because “[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds,” this Court has long recognized “the right to be free from state inquiry into the contents of [one’s] library.” *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). The freedom to read necessarily includes the ability to do so without exposing one’s reading selections to the government. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (striking down statute that required citizens who wished to receive “communist political propaganda” to reveal their identities before being able to receive these expressive materials); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1052-53 (Colo. 2002) (“[T]he First Amendment embraces the individual’s right to . . . read whatever books she wishes to, without fear that the government will take steps to discover which books she buys, reads, or intends to read.”).

Government scrutiny of reading choices creates an unacceptable “deterrent effect” on free inquiry. *Lamont*, 381 U.S. at 307; *United States v. Rumely*, 345 U.S. 41, 57-58 (1953) (Douglas, J., concurring) (“When the light of publicity may reach any student, any teacher, inquiry will be discouraged.”). Just as the people have a right to speak anonymously, *see, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *Talley v. California*, 362 U.S. 60, 64 (1960), they have the corresponding right to receive speech anonymously. *See, e.g., Amazon.com LLC v.*

Lay, 758 F. Supp. 2d 1154, 1167 (W.D. Wash. 2010) (“Citizens are entitled to receive information and ideas through books, films, and other expressive materials anonymously.”); *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 572 (W.D. Wis. 2007) (holding that government could not obtain identities of people who bought books because “customers who bought used books from [seller] through Amazon do have a cognizable First Amendment right”); *see also In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F. Supp. 2d 11, 17, 21 (D.D.C. 2009) (denying motion to compel production of information on customers who purchased movies; “the expressive materials being investigated are presumptively protected by the First Amendment and [the company’s] customers have a correlative right to receive that information anonymously”).

Reading choices thus are at the heart of the personal privacy that the Fourth Amendment guarantees. The Fourth Amendment was drafted, in part, as a response to officers of the King who, acting pursuant to general warrants, searched citizens’ book collections. *See Wilkes v. Wood*, 98 Eng. Rep. 489 (1763) (several of the King’s officers seized all of Wilkes’s books and papers with the intent of finding anti-government pamphlets); *Entick v. Carrington*, 19 Howell’s State Trials 1029 (C.P. 1765) (officers entered Entick’s home and seized his personal “books and papers” in their search for “very seditious papers”). Those “celebrated cases . . . profoundly influenced the Founders’ view of what a ‘reasonable’ search entailed.” *City of W. Covina v. Perkins*, 525 U.S. 234, 247 (1999) (Thomas, J., concurring); *see also* Akhil Reed Amar, *The Fourth Amendment, Bos-*

ton, and Writs of Assistance, 30 Suffolk U. L. Rev. 53, 77 (1996) (noting that the words of the Fourth Amendment “seem to track *Wilkes* and *Entick*”).

The constitutional protection of private correspondence is well established, *see, e.g., Weeks v. United States*, 232 U.S. 383, 393 (1914), and private reading material is, if anything, more personal and more intimate in nature: a person may read a book, a political pamphlet, or a website in complete solitude, and complete privacy. Indeed, some reading choices—including many offered by *amici* in their traditional and electronic libraries—call for the utmost privacy protection. People may read to explore controversial ideas, such as those contained in the *Communist Manifesto* or *Mein Kampf*. Or they may read to better understand themselves, including aspects of human sexuality that are deeply personal and private. *Cf., e.g., Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (holding that “[plaintiff’s] sexual orientation was an intimate aspect of his personality entitled to privacy protection”); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (concluding that “the Constitution does indeed protect the right to maintain the confidentiality of one’s transsexualism”). Whatever the reason, the choice remains the individual’s to make, free from the government’s gaze. That expectation of privacy is not just “reasonable,” in Fourth Amendment parlance, but essential.

II. Searches Incident To Arrest Do Not Extend To Classically Private Zones Implicating No Risk To Officer Safety Or Evidence Preservation

The federal and state governments in these cases submit that a lawful arrest grants the police access to *anything* on the arrestee’s person, no matter how grave the intrusion on privacy rights or how attenuated the connection to the arrest. The search-incident-to-arrest doctrine does not extend so far. As this Court has repeatedly held, an arrest is not an unlimited license to search. Rather, the search-incident-to-arrest doctrine takes account of, and is limited by, “Fourth Amendment values” of personal privacy. *United States v. Chadwick*, 433 U.S. 1, 13 n.8 (1977). Nothing in this Court’s cases requires it to overlook the drastic loss of personal privacy that permitting suspicionless searches of smartphones would create. A smartphone functioning as an e-reader is a powerful, portable tool not just of communication, but of free inquiry. Protecting that tool against arbitrary search serves the Fourth Amendment’s role “safeguarding not only privacy . . . but conscience and human dignity and freedom of expression as well.” *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (citation and internal quotation marks omitted).

The Fourth Amendment “protect[s] personal privacy and dignity against unwarranted intrusion by the State.” *Schmerber v. California*, 384 U.S. 757, 767 (1966); *see also McDonald v. United States*, 335 U.S. 451, 453 (1948) (“[The Fourth Amendment] marks the right of privacy as one of the unique values of our civilization . . .”). The warrant require-

ment is a key safeguard of those privacy rights. *McDonald*, 335 U.S. at 455-56 (“The presence of a search warrant serves a high function. . . . It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.”).

Searches presumptively require a warrant; searches without a warrant are exceptions to the norm. The government’s authority to conduct a warrantless search incident to arrest, therefore, “has always been considered to be a strictly limited right.” *Chimel v. California*, 395 U.S. 752, 759 (1969). The limitation reflects the importance of privacy rights. For a search to be permissible, the government’s legitimate justification must outweigh the “intrusion on the individual’s Fourth Amendment interests.” *Maryland v. Buie*, 494 U.S. 325, 331 (1990). Privacy interests thus help the Court define the boundary between a permissible and impermissible search incident to arrest.

“[S]imply because” a person has been arrested, and thus “some interference with [his] privacy and freedom of movement has lawfully taken place,” does not mean that “further intrusions should automatically be allowed.” *Chimel*, 395 U.S. at 766 n.12. Rather, this Court has examined “the invasion of privacy that results” from a search incident to arrest, and whether that invasion is sufficiently justified to be reasonable “despite the absence of a warrant that the Fourth Amendment would otherwise require.” *Id.*

Governmental interests related to “officer safety and evidence preservation,” *Arizona v. Gant*, 556 U.S. 332, 337 (2009), can justify some searches incident to arrest. See *United States v. Robinson*, 414 U.S. 218, 234 (1973) (discussing the “justification or reason for the authority to search incident to a lawful arrest”); *New York v. Belton*, 453 U.S. 454, 461 (1981) (lawful arrest “justifies the infringement” of arrestee’s privacy interest). But those interests must be balanced against the personal privacy interest at the core of the Fourth Amendment. *Gant*, 556 U.S. at 335.

Thus, for instance, the Court refused to countenance a search of an entire home incident to an arrest. *Chimel*, 395 U.S. at 767-68. The search created an additional “intrusion” on personal privacy, the Court explained, and not a “minor” one. *Id.* at 766 n.12. It was acceptable to search an arrestee’s “person and the area ‘within his immediate control,’” but there was no “comparable justification” for searching in other rooms in the arrestee’s house or “for searching through all the desk drawers or other closed or concealed areas in that room [where the arrest occurred].” *Id.* at 763. Private papers are supposed to remain private whether or not they are in the same house as an arrestee. See *id.* at 767-68. So too here: “it is small consolation to know that one’s papers are safe only so long as one [does not carry them].” *Id.* at 768 (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (L. Hand, J.)).

Similarly, the Court refused to allow a search incident to an arrest to extend to a locked footlocker. *Chadwick*, 433 U.S. at 14-16 & n.10. Luggage is “not

open to public view”; its contents are kept private, and for that reason government agents could not open the footlocker until they could get a warrant. *Id.* at 14. The defendants’ “privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest.” *Id.* at 16 n.10. So too with the passenger compartment of a car, not to mention “every purse, briefcase, or other container within that space.” *Gant*, 556 U.S. at 345.

The federal government submits that those decisions are distinguishable because they involved searches *beyond the person* incident to arrest. *E.g.*, U.S. Br. 13, 21-23. That arbitrary distinction (which apparently would treat “persons” differently from “papers and effects”) is one without any real difference. But even if it made sense to declare an arrestee’s “person” subject to fewer limitations, that rationale would not apply to the contents of a phone in the arrestee’s pocket. As discussed below, a smartphone is far more than a physical object; it is a tool for storing, searching, and viewing incredible amounts of data. It is a sizeable chunk of the arrestee’s personal papers, reduced to electrons and “not open to public view.” It can carry more books than Chadwick’s locked footlocker could. It stands to reason that it should receive equivalent protection.

Allowing the search-incident-to-arrest doctrine to override the privacy interest in access to a smartphone would impair the “central concern underlying the Fourth Amendment”—namely, “the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.” *Gant*, 556 U.S. at 345. To allow a search in that cir-

cumstance “creates a serious and recurring threat to the privacy of countless individuals.” *Id.*

III. Modern Smartphones Store A Trove of Personal Reading Material And Other Private Information That Is Accessible During A Routine Search

If a person were arrested while carrying a key to his personal library of 6000 books, including his highlights in the books and notes relating to the books, there would be no constitutional basis to search those books incident to arrest. Yet by permitting a police officer to search today’s smartphone upon arrest, that is exactly what this Court would be permitting. A smartphone is a portal to a person’s entire electronic library; in fact, for millions of Americans, it *is* their primary library. Searching a smartphone would give the officer access to many times more books than an arrestee could ever carry in his pocket. And because of the way smartphones work, they often contain not just what the arrestee is reading *today*, but also what he read yesterday, and perhaps years ago—his entire reading history. The mere fact of an arrest does not justify allowing law enforcement to rummage through that massive quantity of often deeply personal data.

Using smartphones, tablets, and dedicated e-readers, millions of Americans now do some or all of their reading on small, portable electronic devices—and the numbers are rapidly increasing.³ Numerous

³ Lee Rainie et al., Pew Internet & Am. Life Project, *The rise of e-reading* (Apr. 4, 2012), <http://libraries.pewinternet.org/2012/04/04/the-rise-of-e-reading/> (21% of American adults read an e-book in the past year); Bob Minzesheimer, *The changing world*

programs—known as apps—allow people to read e-books on their smartphones.⁴

Millions of e-books are available for people to download onto their smartphones.⁵ People can also borrow e-books: traditional public libraries started lending e-books in the 1990s,⁶ and the numbers have greatly increased since then as libraries make digital books (and often e-readers themselves) available to borrowers.⁷

of book reading, USA Today, Oct. 6, 2013, <http://www.usatoday.com/story/life/books/2013/10/06/e-books-reading/2877471/> (noting two- and three-fold increases in e-reader and tablet ownership between 2011 and 2013); see also Aaron Smith, Pew Research Internet Project, *Smartphone Ownership 2013* (June 5, 2013) <http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/> (percentage of American adults who own a smartphone has increased from 35% in 2011 to 56% in 2013).

⁴ See, e.g., Android Authority, *Top 5 eBook Reader Apps for Android Phones/Tablets*, <http://www.androidauthority.com/top-5-ebook-reader-apps-for-android-phonetablets-44253/>; Mashable, *5 Fantastic Free iPhone E-book Reader Apps* (Apr. 6, 2010), <http://mashable.com/2010/04/06/free-iphone-ebook-readers/>.

⁵ iBooks, <http://www.apple.com/ibooks> (over 2 million books at the iBooks Store, many of them free); Google Play Books, <https://play.google.com/store/apps/details?id=com.google.android.apps.books> (“Choose from millions of books,” which can be read on Android smartphones).

⁶ Doris Small Helfer, *E-Books in Libraries: Some Early Experiences and Reactions*, Searcher (Oct. 1, 2000), <http://www.highbeam.com/doc/1G1-66217098.html>.

⁷ Barbara A. Genco, *It’s Been Geometric! Documenting the Growth and Acceptance of eBooks in America’s Urban Public Libraries*, World Library And Information Congress: 75th IFLA General Conference and Council (July 24, 2009); *Libraries Connect Communities: Public Library Funding & Technology Access*

The growing use of smartphones to read e-books means that the mere fact of an arrest threatens to expose to government agents wide-ranging aspects of people's reading habits—including what books they read, what parts of books they thought interesting or intellectually provocative, what thoughts they had about books. Smartphones now have 64 gigabytes of storage space, enough to fit more than 50,000 copies of *War and Peace*, so a person's entire library can be accessible with a few clicks using a tiny device.⁸ Equally problematic is that readers' interaction with their books is also easy for police officers to see: e-books allow users to take notes, highlight text, or clip what they read.⁹ Thus, an officer thumbing through a person's smartphone would see not only the person's books, but what passages the reader thought were compelling or important and what notes the reader took.

The technology works seamlessly across devices, so a person's reading habits (as well as those of a

Study 2011-2012, American Libraries (Summer 2012) Digital Supplement at 6 (as of 2012, over 76 percent of libraries offer access to e-books, and 39 percent allow patrons to borrow e-book readers).

⁸ See *WAR AND PEACE*, Project Gutenberg, The Internet Archive, <https://archive.org/details/warandpeace030164mbp> (file size for "epub" version); see also *How Many Books Can a Kindle Hold?*, http://www.ehow.com/info_12223761_many-books-can-kindle-hold.html (estimating that an 8 gigabyte e-reader introduced in March 2012 can store about 6,000 books).

⁹ Amazon, *Customize Your Reading on Kindle DX*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200375680> (Amazon, *Customize Your Reading*) ("Kindle allows you to add comments, make notes, and mark up passages just as you might in a printed book.")

spouse or child) may be exposed even if no one was reading the book on the seized smartphone.¹⁰ Reading can be synchronized across devices, including across a family’s shared devices, so someone who read part of a book at home on a tablet computer can continue reading on a smartphone or note text for a family member to read—but so could an officer who, upon searching the phone, would be able to see what the person read at home, as well as highlights and notes the person took.¹¹

The officer searching the phone could do the same with the user’s audio and video files, which are growing in popularity as alternative, smartphone-friendly ways to consume intellectual content. The Internet Archive and other libraries offer numerous forms of audio and video content that can reside on smartphones, including audiobooks, radio programs, podcasts, music, documentaries, and other films.¹²

¹⁰ iBooks, <http://www.apple.com/ibooks> (“[Y]ou can read one of your favorites on your iPhone during your morning commute, page through a few chapters on your Mac later in the day, and pick up right where you left off on your iPad at bedtime.”).

¹¹ iBooks, <http://www.apple.com/ibooks> (“When you take notes, highlight passages, or create bookmarks, iCloud pushes them to all your devices automatically. And it remembers which page you’re on, so you can pick up right where you left off.”); Amazon, *Customize Your Reading* (“When you open the title on any registered device, you’ll be right where you were the last time you read and your annotations will be included.”).

¹² See, e.g., Internet Archive, *Audio Archive*, <https://archive.org/details/audio>; Internet Archive, *Moving Image Archive*, <https://archive.org/details/movies>; N.Y. Pub. Library, *Audio & Video Produced by NYPL*, <http://www.nypl.org/voices/audio-video>; Multnomah County Library, *E-books, streaming media and downloadables*, <https://multcolib.org/ebooks-and-downloadables> (providing service that “enables li-

Audiobooks, Internet radio, podcasts, and other multimedia sources are entitled to the same protection for private intellectual inquiry as words on the printed page: they often allow people to see and hear different perspectives, explore controversial ideas, and learn new information, using a medium far more friendly to instant, widespread dissemination than the printing of a traditional book.

A person's expansive digital library is one of the many private things that might be stored on a smartphone, which contributes to the sentiment that "[f]ew things are more precious, intimate and personal than the data on your smartphone."¹³ "Vast amounts of private, personal information can be stored and accessed in or through these small electronic devices." *Smallwood v. State*, 113 So.3d 724, 731-32 (Fla. 2013). Smartphones are thus not much different from personal computers in terms of the types of information that they possess. *United States v. Flores-Lopez*, 670 F.3d 803, 805 (7th Cir. 2012) ("Judges are becoming aware that a computer (and remember that a modern cell phone is a computer) is not just another purse or address book. . . . computers hold so much personal and sensitive information

brary patrons to watch and listen to a wide selection of movies, television shows, educational and instructional videos, documentaries and music through a browser, smartphone or tablet").

¹³ Mat Honan, *Break Out a Hammer: You'll Never Believe the Data 'Wiped' Smartphones Store*, *Wired.com* (Apr. 1, 2013, 6:30 AM), <http://www.wired.com/gadgetlab/2013/04/smartphone-data-trail/all/> ("It tracks your location and logs your calls. It's your camera and your mobile banking device; in some cases it is a payment system in and of itself that knows what you bought and when and where and for how much.").

touching on many private aspects of life.”); *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) (“[C]ell phones contain a wealth of private information, including emails, text messages, call histories . . . A cell phone is similar to a personal computer that is carried on one’s person”).¹⁴ Indeed, the pure volume of information that a smartphone can store is remarkable, and rivals that of computers.¹⁵ Moreover, with the convenience that a phone affords, and the exponential growth and increasing utility of downloadable applications,¹⁶ individuals may want

¹⁴ Tim Bajarin, *Why Your Smartphone Will Be Your Next PC*, TIME Tech (Feb. 25, 2013), <http://techland.time.com/2013/02/25/why-your-smartphone-will-be-your-next-pc/> (“The basic idea here is that the smartphone itself is your PC and then docks into the back of either a portable screen or some type of laptop shell . . . Keep in mind that the smartphone has all of your personal data, personal user interface and personal apps”); John C. Dvorak, *Should We Consider the Smartphone a Computer?*, PCmag.com (Dec. 4, 2012), <http://www.pcmag.com/article2/0,2817,2412850,00.asp> (“I think the argument can be made that the smartphone is in the same market as the desktop computer”).

¹⁵ Charles E. MacLean, *But Your Honor, A Cell Phone Is Not A Cigarette Pack: An Immodest Call For A Return To The Chimel Justifications For Cell Phone Memory Searches Incident To Lawful Arrest*, 6 Fed Cts. L. Rev. 37, 42 (2012) (“A cell phone with just one gigabyte of memory can store over 64,000 pages of Microsoft Word text, or over 100,000 pages of e-mails, or over 675,000 pages of text files. . . . modern cell phones are capable of storing at least sixty-four gigabytes of private information equaling four million pages of Microsoft Word documents”).

¹⁶ Reportbuyer.com, Press Release, *Mobile Data and Applications: State of the Industry, Market Prospects, and Forecast 2013-2018* (Feb. 24, 2014), <http://www.marketwatch.com/story/mobile-data-and-applications-state-of-the-industry-market-prospects-and-forecast-2013-2018-2014-02-24> (“Mobile applications continue an explosive growth phase. . . . Mobile apps are

to put more private information on their smartphone than even on their home computer.¹⁷

In many ways, storing and consuming media on a smartphone offers increased privacy for users over physical media. Unlike hardcopy books, records, tapes, CDs, or DVDs, digital books, audio, and video on a smartphone need not be hidden when a person has visitors. And digital media, especially e-books, can be experienced in a crowded public setting with-

more than just a direct to consumer phenomenon as leading enterprise companies take mobile apps seriously. . . . [T]oday leading companies are focused on compelling mobile apps.”); see, e.g., Elizabeth Stawicki, *Smartphones Help Bridge Gaps in Electronic Medical Records*, NPR (Jun. 17, 2013, 4:00 AM), <http://www.npr.org/2012/06/17/192596386/smartphones-help-bridge-gaps-in-electronic-medical-records> (“Hospitals, doctors and Medicare are making it easier for people to have access to their own health records. Some [mobile] app developers have even created ways to have health information available even on a smartphone.”)

¹⁷ See Adam Pash, *Your Smartphone Is a Better PC than Your PC Ever Was or Will Be*, Lifehacker.com (Nov. 4, 2010, 9:15 AM), <http://lifehacker.com/5681573/your-smartphone-is-a-better-pc-than-your-pc-ever-was-or-will-be> (“Smartphones are PCs . . . only they’re more personal . . . what’s more personal than a gadget that . . . comes with you wherever you go, knows where you are, is always connected to the internet, handles every form of electronic communication short of Morse code . . . And so on.”); Sebastian Anthony, *There can only be one: Smartphones are the PCs of the future*, ExtremeTech (Aug. 23, 2012), <http://www.extremetech.com/computing/134868-there-can-only-be-one-smartphones-are-the-pcs-of-the-future> (“In a few years, everything you do on your laptop today will be achievable on a smartphone. So why continue to use a laptop? . . . In a world where smartphones rule supreme, and extra connectivity is provided by docking stations, there really is no hope for the PC. If it helps, you can simply think of a smartphone as a really small PC.”).

out drawing the attention of snoops. In these ways, a person's digital library is more private than a physical library in his or her home.

The extraordinary capabilities of modern smartphones encourage users to expose every facet of their lives to their devices. With the enhanced productivity and connectedness comes increased risk: if the information stored on the individual's phone may be accessed by a police officer incident to every arrest, the privacy interests of individuals will be severely compromised. Virtually every single activity on a smartphone is logged and stored. Someone looking at a smartphone can see a person's text messages, emails, and internet search and browsing history.¹⁸ Just as books read at home can show up on a smartphone, searches that a person runs from a home computer may show up in the search history on his or her phone.¹⁹ Even more alarming, regardless of

¹⁸ See, e.g., Eva Galperin, *How to Remove Your Google Search History Before Google's New Privacy Policy Takes Effect*, Electronic Frontier Foundation (Feb. 21, 2012), <https://www.eff.org/deeplinks/2012/02/how-remove-your-google-search-history-googles-new-privacy-policy-takes-effect>; Peter Eckersley, Seth Schoen, Kevin Bankston, and Derek Slater, *Six Tips to Protect Your Search Privacy*, Electronic Frontier Foundation (Sept. 14, 2006), <https://www.eff.org/wp/six-tips-protect-your-search-privacy> ("Google, MSN Search, Yahoo!, AOL, and most other search engines collect and store records of your search queries."); Scott Orgera, *How to Manage Your Browsing History in Safari for the iPhone*, <http://browsers.about.com/od/allaboutwebbrowsers/ss/iphonehistory.htm> ("The Safari Web browser on your iPhone keeps a log of Web pages that you have visited in the past.").

¹⁹ Frank McPherson, *Access Your Google Search History On A Smartphone*, Social Times (Aug. 3, 2010, 9:11 PM), <https://socialtimes.com/access-your-google-search-history-on-a-a>

whether an individual wants to record the information or even knows that the information is being stored, more likely than not, that information can be found by someone who gains access to the individual's phone.²⁰ Digital books are just one important example among the numerous categories of personal material that can easily be exposed.

IV. Police Are Likely To Examine Private Information While Searching A Smartphone

If this Court approves the routine search of smartphones incident to arrest, the privacy impact will be immediate and dramatic. That is not a prediction; it is a certainty. Evidence of the sort available on smartphones is commonly used by the gov-

smartphone_b47793 (“If you have a Google account, and sign in to it from a web browser, then all of the searches that you perform in Goggle are stored by Google.”).

²⁰ For example, even after a modern cell phone (albeit not the newest version) was disposed of, and its personal data mostly deleted, a mobile forensics expert was able to find hundreds of phone numbers from a contacts database and “a list of nearly every Wi-Fi and cellular access point the phone had ever come across – 68,390 Wi-Fi points and 61,202 cell sites. . . . Even if the phone had never connected to any of the Wi-Fi access points, iOS was still logging them, and [the forensics expert] was able to grab them and piece together a trail of where the phone had been turned on.” Honan, *supra*; see also *How selling on your smartphone leaves you vulnerable to fraud and blackmail: How personal information stored on devices can be easily accessed by new owners*, Daily Mail (U.K.), Feb. 6, 2014, <http://www.dailymail.co.uk/news/article-2553412> (reporting that “[p]hotos, passwords and credit cards are just some of the intimate details” that smartphone owners “unwittingly” store on their devices, and “can be easily accessed”).

ernment in criminal cases of all kinds, and investigators already undertake frequent warrantless searches of electronic devices where courts have allowed it,.

A. Law Enforcement Officers Already Seek And Use Electronic Evidence

Law enforcement officers are trained to view electronic devices as a potent source of potential evidence. If permitted, they will fully exploit any authorization to search smartphones without individualized suspicion or a warrant.

Reference materials for first responders advise them to be zealous in collecting electronic devices, including smartphones, as evidence. In a 2008 guide for “First Responders,” the Justice Department’s National Institute of Justice advised that “handheld devices such as mobile phones [and] smart phones . . . may contain software applications, data, and information such as documents, e-mail messages, Internet browsing history, Internet chat logs and buddy lists, photographs, image files, databases, and financial records that are valuable evidence in an investigation or prosecution.” Nat’l Institute of Justice, U.S. Dep’t of Justice, *Electronic Crime Scene Investigation: A Guide for First Responders* 8 (2d ed. 2008). When securing a scene, first responders are advised to “[i]mmediately secure *all* electronic devices, including personal or portable devices.” *Id.* at 15. And mobile devices are listed as “potentially valuable digital evidence” for every category of crime addressed by the guide. *Id.* at 35-46.

The Secret Service and the Federal Bureau of Investigation have similarly advised first responders of the value of smartphone evidence for investigations

of all sorts. See U.S. Secret Service, U.S. Dep't of Homeland Security, *Best Practices for Seizing Electronic Evidence: A Pocket Guide for First Responders* 6, 12-14 (3d ed. 2007); Federal Bureau of Investigation, U.S. Dep't of Justice, *Digital Evidence Field Guide: What Every Peace Officer Should Know* 4-6 (1.1 ed. 2007).

Further driving investigators to search electronic devices, a growing number of criminal cases have involved the sort of evidence available on smartphones. In a 2010 California case, the jury was told that the defendant had “viewed the Military Library portion” of a website, “which involved silencers, body armor, explosives, and the like” and which “listed several books about silencers.” *People v. Mares*, No. A121521, 2010 Cal. App. Unpub. LEXIS 871, at *9-10 (Cal. Ct. App. Feb. 5, 2010). The *Mares* jury also learned that the defendant had visited a website about videos depicting various forms of extreme violence—violence entirely unrelated to the crime at issue. *Id.* Other evidence of internet search results has also been used in prosecutions. See *Davidson v. State*, 249 S.W.3d 709, 716 (Tex. Ct. App. 2008) (jury learned that the defendant had conducted an internet search for “decomposition of a body in water”); *United States v. Graziano*, 558 F. Supp. 2d 304, 314-15 (E.D.N.Y. 2008) (investigators found internet search for “arson rico laws”). So has evidence about what people looked at on online maps. See *People v. Zirko*, 976 N.E.2d 361, 373 (Ill. App. Ct. 2012) (defendant searched MapQuest.com for directions to the crime scene); *State v. Cooper*, 747 S.E.2d 398, 402 (N.C. Ct. App. 2013) (defendant used Google Maps to “zoom[] in on the exact spot” where the victim’s body was later found). And the jury in a Florida case

learned about a song that the defendant downloaded on the day that his wife was killed. *Barber v. State*, 4 So. 3d 9, 10-11 (Fla. Ct. App. 2009) (the Guns N’ Roses song “Used to Love Her (But I Had to Kill Her)”).²¹

As an increasing number of people read books on their smartphones, law enforcement officers are likely to examine this information to see what books arrestees have been reading to gain evidence of criminal activity. Police already do that with printed books. See *George v. Rehiel*, 738 F.3d 562, 586 (9th Cir. 2013) (college student detained by Transportation Security Administration and questioned about Arabic flash-cards and a book “critical of United States foreign policy” from his luggage); *United States v. Seljan*, 547 F.3d 993, 998 (9th Cir. 2008) (en banc) (police seized a “fiction book about pedophilia and incest” in connection with a sex-crimes prosecution); *Tattered Cover*, 44 P.3d at 1061 (law-enforcement officials served bookstore with an administrative subpoena demanding to know every book a particular suspect had ever ordered); *Simmons v. State*, 912 P.2d 217, 220 (Nev. 1996) (police seized a book about Satanism and read portions of it at defendant’s murder trial). For every example in a reported opinion,

²¹ Other cases—particularly child-pornography cases—involve electronic material that is itself contraband. See, e.g., *United States v. Cotterman*, 709 F.3d 952, 957-58 (9th Cir. 2013). *Amici* do not host contraband, but officers searching for it might well come across private and personal material of the sort that *amici* do host. And the possibility of discovering such contraband gives investigators another reason to search electronic devices eagerly, and thereby increases the chance that investigators will discover the sort of “research” evidence discussed above that does implicate *amici*’s interests.

it is likely that there are far more instances in which police rummaging through someone's reading material find no useful evidence—but the infringement on privacy has already occurred.

B. Investigators Already Undertake Warrantless Searches of Electronic Devices Whenever Allowed

Law enforcement officers are entirely capable of finding private and personal information on electronic devices. In *United States v. Brown*, for example, a detective executing a warrant saw a computer and quickly “look[ed] at the search history for Google, the site to which it was opened.” 374 F. App'x 927, 937 (11th Cir. 2010). Similarly, Customs officers often examine files on electronic devices. See *People v. Endacott*, 79 Cal. Rptr. 3d 907, 908 (Ct. App. 2008) (Customs officer regularly powers up laptops and looks for pictures and video); *United States v. Kyle*, No. CR 10-00245-1 JSW, 2011 U.S. Dist. LEXIS 6791, at *2-3 (N.D. Cal. Jan. 19, 2011) (customs officer conducted “a media examination” of cell phone and laptop).

Given the extraordinary growth in the use of smartphones and correspondingly increasing role of electronic evidence, the Court can expect an explosion of warrantless smartphone searches if it upholds them here—such searches will be standard operating procedure. And the increase would reflect searches that, under the law in force today, cannot be conducted without individualized suspicion and a warrant. Investigators hoping to find evidence of the sort identified above already exploit any opportunity to search electronic devices. As discussed above, the

wealth of information available on a smartphone makes those devices much like a modern computer, but more personal, because people carry the devices with them everywhere they go. As a result, while many of the cases discussed above involved warrants, investigators also take advantage of exceptions to the warrant requirement to conduct warrantless searches of electronic devices wherever courts have permitted them.

If this Court announces a rule allowing a suspicionless search of every cell phone that is found on an arrestee's person, law enforcement will not pass up the opportunity. The result will be precisely the sort of suspicionless "rummaging" that this Court's cases forbid, and the impact on privacy will be severe.

CONCLUSION

The judgment in *Riley* should be reversed, and the judgment in *Wurie* should be affirmed.

Respectfully submitted.

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