No. 13-212

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BRIMA WURIE

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Constitution:

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Respondent agrees with the government that courts of appeals and state supreme courts have reached conflicting conclusions over the question whether the Fourth Amendment permits a police officer, without obtaining a warrant, to search the contents of a cell phone found on a person who has been lawfully arrested. See Br. in Opp. 4. And he does not dispute that, in light of the modern ubiquity of cell phones, law-enforcement officers in the field need clarity on the scope of their legal obligations. Respondent has identified no significant countervailing considerations that favor postponing resolution of this critical issue. Accordingly, the petition should be granted.

1. Respondent accurately describes (Br. in Opp. 4-10) the division of authority among federal courts of appeals and state supreme courts over the question

presented. But he argues that this Court should delay resolving that conflict because not every circuit has addressed the issue. That contention is unsound. Although eight circuits with criminal jurisdiction have not addressed the question in a published opinion, a total of nine circuits or state supreme courts have now resolved it, dividing 6-3.

Given how many arrestees now carry cell phones, law-enforcement officers need clarity about the scope of their authority to search the contents of a cell phone held on the person of an arrestee, and "the differing standards which the courts have developed provide confusing and often contradictory guidance." Pet. App. 71a (Lynch, C.J.) (statement on denial of rehearing). As Chief Judge Lynch explained below, that problem is especially acute in Massachusetts, where the police are currently subject to two conflicting legal rules. See *ibid.*; see also *Commonwealth* v. *Phifer*, 979 N.E.2d 210 (Mass. 2012); *Commonwealth* v. *Berry*, 979 N.E.2d 218 (Mass. 2012).

Respondent also contends (Br. in Opp. 4, 10-12) that "the impact of technological advances involved in this area" favors delay. Although cell-phone technology is constantly evolving, that factor does not justify leaving for another day the basic issues that have produced lower-court conflicts over cell-phone searches. It will be just as true two years—or ten years—from now that cell-phone technology will be undergoing change. Yet police making arrests need guidance on the fundamental principles that will govern cell-phone search authority today. The technology of cell phones is sufficiently well-developed to addresses these issues. And the parties and amici can provide the Court with a wide variety of views on how the advancing ca-

pabilities of cell phones bear on Fourth Amendment principles.

Respondent also poses (Br. in Opp. 10) a series of questions that might be thought relevant to the question presented. The majority of those questions are conceptual inquiries that this Court is fully capable of answering if it deems them relevant, not practical issues that might be clarified after further consideration in the courts of appeals. And in any event, in light of law-enforcement officers' pressing need for guidance in this area, any benefit to be gained by further postponing resolution of the issue would be outweighed by the cost of delay.

2. This case is an ideal vehicle to resolve the question presented.

a. As the government explained in its petition (at 25-26), the record in this case readily facilitates the Court's consideration not only of the argument that cell-phone searches incident to arrest are categorically lawful under *United States* v. *Robinson*, 414 U.S. 218 (1973), and *United States* v. *Edwards*, 415 U.S. 800 (1974), but also of other legal justifications for cell-phone searches. It is particularly important that the Court have the opportunity to consider these additional doctrinal bases that may guide police practice when an arrestee possesses a cell phone.

Significantly, the district court in this case found in a published opinion that "[t]he officers, having seen the 'my house' notation on [respondent's] caller identification screen, reasonably believed that the stored phone number would lead them to the location of [respondent's] suspected drug stash." Pet. App. 66a. Based on that finding, the government raised the alternative argument in the court of appeals that the

search here was justified on the ground that officers had reason to believe the search would lead them to evidence relevant to the crime of arrest. See Gov't C.A. Br. 40-41; *Arizona* v. *Gant*, 556 U.S. 332, 351 (2009) (holding that officers may search vehicle out of reaching distance of arrestee when "it is reasonable to believe the vehicle contains evidence of the offense of arrest"). Four Justices recently described this as a general basis for a search incident to arrest. See *Maryland* v. *King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting). This Court should have the opportunity to consider the crime-of-arrest theory as a basis for sustaining cell-phone searches incident to arrest.

b. Respondent argues (Br. in Opp. 12) that because "[t]he cell phone at issue here was a comparatively unsophisticated flip phone" and the search was "comparatively limited," this case is an unsuitable vehicle for the Court to articulate the basic Fourth Amendment principles governing cell-phone searches. But the legal issue in this case—the circumstances in which a police officer may search a cell phone found on the person incident to a lawful arrest—is unlikely to have a different outcome depending on the storage capacity of the phone, the phone's multimedia capabilities, or other features that distinguish smartphones from the phone in this case. As the Seventh Circuit has observed, "even the dumbest of modern cell phones gives the user access to large stores of information." *United States* v. *Flores-Lopez*, 670 F.3d 803, 806 (2012). And "to require police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule." *United States* v. *Murphy*, 552 F.3d 405, 412 (4th Cir.), cert. denied, 556 U.S. 1196 (2009). If

this Court were to fashion a special exception from the categorical rule of *Robinson* and *Edwards* for cell phones, it is not likely that the exception would turn on the model or capabilities of the particular phone.[1]

c. Respondent also argues (Br. in Opp. 12-13) that the fact that the court of appeals did not vacate his conviction on Count 2 militates against further review.[2] But as respondent acknowledges, Count 2 carried a lesser sentence than the two vacated counts. See Pet. 5. If this Court reverses the decision below, respondent will serve an additional 22 months in prison. Accordingly, this case would provide the Court with a clean vehicle to resolve whether the police may

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[1] Petitioner in *Riley* v. *California*, No. 13-132, suggests that his case provides a better vehicle to resolve the question presented (see Cert. Reply Br. at 4-6 & n.3 (No. 13-132)), because in that case the police conducted a warrantless search of a smartphone, which had an "immense storage capacity and multimedia components." *Riley*, however, appears to have similarly involved a search only of files or information stored on the phone itself. See, *e.g.*, *Riley* Pet. 3 (describing searches of the phone's contacts list, text messages, photographs, and videos). To the extent that the Court would be inclined to draw a line between the search of the call log in this case and the search of the files in *Riley*, either case would provide an opportunity to set out that distinction. And whichever case is granted, this Court will undoubtedly be fully apprised by the parties and amici of the capabilities of a modern cell phone, including its ability to access information on the cloud. See, *e.g.*, Br. of Amici Curiae Ctr. for Democracy & Tech. & Elec. Frontier Found. at 3-9 (No. 13-132). The Court would encounter no difficulty articulating the basic principles governing the authority to search a digital telephone device with multiple capabilities on the facts of this case; the court of appeals did just that.

[2] As respondent notes (Br. in Opp. 3), after the petition was filed, the court of appeals denied his motion for reconsideration of its order clarifying that his conviction on Count 2 was not upset by its judgment.

conduct a warrantless search of the contents of a cell phone found on a person who has been lawfully arrested.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

NOVEMBER 2013