CONSTITUTIONAL DEAD ZONES: PROBLEMATIC TRENDS FOR SEIZURES OF CELL PHONES CONNECTED TO THE RECORDING OF PROTESTS AND POLICE ACTIVITY

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ABSTRACT

Cell phones are free speech machines. They have been particularly important in recent social movements because they allow an individual to record protests or police activity and share such experiences with a world-wide audience on social media. In these circumstances, the Fourth Amendment's protection of an individual's unfettered property right to *possess* their cell phone overlaps with their First Amendment right to *engage* in these core free speech activities. Both rights are put to the test when there is conflict with police in connection with the recording.

My survey of recent case law provides numerous examples where an individual's cell phone was seized without a warrant in connection with the individual's recording of a protest or police activity. Several seizures relied on claimed exigent circumstances, while many others involved seizures incident to an arrest, with the government continuing to hold the individual's cell phone in custody for months (and in some cases more than a year) even though the individual was released *without charges*. These cases reveal three problematic trends facing courts when evaluating the reasonableness of such seizures under the Fourth Amendment.

First, police often mistakenly apply common experience and assumptions from exigent circumstances in other criminal contexts to seize cell phones in protest and police recording situations. Worse, in several instances, police seize the cell phone of the recorder out of apparent retaliation (or agitation) and attempt to use the exigent circumstances exception to later defend against suit. Second, courts disagree on whether police need independent probable cause to seize a cell phone from a recorder that is arrested at a protest or event involving police activity. Though police may have arguable probable cause to detain the recorder at these events, they often lack probable cause to believe that the recorder's cell phone contains evidence of criminal activity. Third, there is a widespread circuit split on whether the Fourth Amendment requires po-

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lice to justify an *extended* seizure of personal property. For many courts, the Fourth Amendment only applies to the initial *taking* of personal property and provides no further protection regarding the duration of that seizure. Extended seizures of cell phones can have particularly harmful consequences, as the individual is deprived for months (or longer) of both their important possessory interest in their phone and their ability to engage in core free speech activities. This includes an extended delay in their ability to share the recording of the protest or police activity.

This Article examines the case law demonstrating each of these problematic trends and provides an approach for future courts to apply universal Fourth Amendment principles that fairly protect both the Fourth and First Amendment rights of recorders.

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INTRODUCTION

My seventh-grade daughter recently told me during breakfast that cell phones are the most important "thing" in the world. My usual response to this kind of broad statement from the middle-school worldview that dominates so much of my life these days is a bit of the dad-required argument for nuance. But I did not here. Because she was right (also

because my wife agreed and there is no coming back when you are down 2-0 to those two). I told her she was probably right in the general sense, but to focus on a more "interesting" point, I added that she was also right in a constitutional sense: cell phones are perhaps the most important item of personal property that exists when it comes to our individual rights. Sensing the wind up for an impromptu mini lecture, my daughter scurried off while I quickly tried to get to my hook: Despite such clear importance, cell phones are vulnerable to warrantless, unjustified, and often lengthy governmental seizures in the critical free speech contexts of public protests and recording of police activity.[1] But there she goes—and now she's gone.

As I finished my cereal, alone, I had the Fourth and First Amendments in mind. The Fourth Amendment provides that the government "shall not" violate the "right of the people to be secure in their persons,

1. *See, e.g.*, Dunn v. Does 1-22, 116 F.4th 737, 743–44, 752 (8th Cir. 2024) (noting that police seized cell phones of several individuals that attended a heated protest after the death of George Floyd and continued to hold such phones for two days after the individuals arrived at jail); Asinor v. District of Columbia, 111 F.4th 1249, 1251–52 (D.C. Cir. 2024) (observing that police arrested individuals and journalists that attended protests and seized cell phones and cameras for months, and for some individuals more than a year, even though such individuals were released without charges); Robbins v. City of Des Moines, 984 F.3d 673, 676–77 (8th Cir. 2021) (outlining that after individual was spotted recording property and police activity, police seized and held cell phone for twelve days even though the individual was immediately released without charges); Crocker v. Beatty, 886 F.3d 1132, 1134–35 (11th Cir. 2018) (remarking that officer noticed individual taking photos and videos of car crash scene from fifty feet away, snatched the phone out of the individual's hand, refused to return the phone, and arrested the individual when he would not leave the scene without getting his phone back); Gibson v. Goldston, No. 5:21-cv-00181, 2022 WL 2719725, at *1–2, *6 (S.D.W.V. July 13, 2022), aff'd, 85 F.4th 218 (4th Cir. 2023) (highlighting that county magistrate judge ordered bailiff to seize individual's cell phone upon noticing that the individual was recording the magistrate's improper attempt to enter the individual's home to search for disputed property in a family law case); Zinter v. Salvaggio, 610 F. Supp. 3d 919, 929, 949 (W.D. Tex. 2022) (noting that police arrested protestors over a series of days after the protestors recorded city officials and police activity and held phones and cameras in custody for "years" without pointing to articulable facts that they "contained evidence of crimes"); Craft v. Billingslea, 459 F. Supp. 3d 890, 899–900 (E.D. Mich. 2020) (observing that police detained individual and seized his phone after individual recorded the officers' physical confrontation with others at a gas station, with the officers continuing to hold the phone even though the individual was released without charges); Durant v. Gretna City, No. 19-147, 2020 WL 263669, at *2, *37 (E.D. La. Jan. 17, 2020) (indicating that the officer struck a detained individual and seized his cell phone when officer learned that individual was trying to broadcast his detainment on social media); Blakely v. Andrade, 360 F. Supp. 3d 453, 463–64 (N.D. Tex. 2019) (explaining that officers seized a wife's cell phone while she was recording a dispute between officers and her husband during a traffic stop); Williams v. City of Paris, No. 5:15-108, 2016 WL 2354230, at *1 (E.D. Ky. May 4, 2016) (noting that police seized a mother's phone after they observed the mother recording an aggressive arrest of her son inside her house, kept the phone in custody for approximately two months, and deleted the recording of the arrest); Gaymon v. Borough of Collingdale, 150 F. Supp. 3d 457, 460 (E.D. Pa. 2015) (stating that police entered an individual's home, arrested the individual, and threatened to seize her cell phone when she refused to stop recording the officer's aggressive behavior); Bacon v. McKeithen, No. 5:14-cv-37, 2014 WL 12479640, at *1 (N.D. Fla. Aug. 28, 2014) (highlighting that police arrested an individual during a traffic stop and seized his phone after learning he had recorded the interaction); King v. City of Indianapolis, 969 F. Supp. 2d 1085, 1088–89 (S.D. Ind. 2013) (outlining that police saw an individual had recorded officers making an arrest during a traffic stop and later arrested the individual and seized his cell phone after the individual refused to turn over his phone to the officers).

houses, papers, and *effects*" from "unreasonable searches and seizures."[2] Courts broadly interpret the term "'effects' as being synonymous with personal property"[3] and apply the Fourth Amendment's protections to a wide array of personal items like luggage,[4] toiletry bags,[5] cars,[6] coats,[7] shoes,[8] video games,[9] cameras,[10] and even pets.[11] And, of course, the Supreme Court has recognized Fourth Amendment protection for the quintessential twenty-first century personal effect—the cell phone.[12]

The Fourth Amendment's protection of personal property is strict, at least before the scope of the often-debated exceptions come into play. The government's "seizure of personal property [i]s *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause" that "particularly" describes the "items to be seized."[13] Given that the Fourth Amendment serves a dual purpose to protect against governmental inter-

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2. United States v. Jones, 565 U.S. 400, 404 (2012) (emphasis added).

3. Altman v. City of High Point, 330 F.3d 194, 202 (4th Cir. 2003) (citing United States v. Place, 462 U.S. 696, 705–06 (1983)) (personal luggage qualifies as an "effect"); United States v. Jacobsen, 466 U.S. 109, 114 (1984) (wrapped parcel qualifies as an "effect"); *see also* Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523, 543 (6th Cir. 2002) ("The text of the Fourth Amendment therefore extends protection against unreasonable seizures of personal property, i.e., 'papers[] and effects,' as well as seizures of the person.") (citing *Place*, 462 U.S. at 700; *Jacobsen*, 466 U.S. at 120–21); Brown v. Muhlenberg Twp., 269 F.3d 205, 209 (3d Cir. 2001) ("The people's 'effects' include their personal property) (citing *Place*, 462 U.S. at 700–01).

4. *Place*, 462 U.S. at 705–06.

5. *See* United States v. Lesane, 361 Fed. App'x 537, 539 (4th Cir. 2010) (holding that officer could only search the defendant's vehicle and toiletry bag because the officer had probable cause to believe that they may contain marijuana since the officer could smell the odor of marijuana); United States v. Goudreau, No. 14-cr-10190, 2015 WL 1538773, at *2–3 (D. Mass. Apr. 7, 2015) (requiring analysis of exceptions to a warrantless search of the defendant's toiletry bag).

6. *Jones*, 565 U.S. at 404 ("It is beyond dispute that a vehicle is an 'effect' as that term is used in the [Fourth] Amendment.") (citation omitted).

7. Maxwell v. Stephens, 348 F.2d 325, 337 (8th Cir. 1965) (explaining that the party's coat was "presumably an 'effect' within the meaning of the Fourth Amendment").

8. Little v. City of Saginaw, 731 F. Supp. 3d 814, 825 (E.D. Mich. 2024), *aff'd*, No. 23-1535/24-1335, 2025 WL 553008 (6th Cir. Feb. 19, 2025) ("Shoes are 'effects' under the Fourth Amendment.") (citation omitted).

9. *See* Brown v. City of Fort Wayne, 752 F. Supp. 2d 925, 939–41 (N.D. Ind. 2010) (holding the seizure of fur coat and video games violated the Fourth Amendment because these items were not listed on the search warrant).

10. Robbins v. Youngblut, 619 F. Supp. 3d 870, 884 (S.D. Iowa 2022) ("Cameras and cell phones are protected personal effects for the purposes of a seizure analysis.") (citation omitted).

11. Plowright v. Miami Dade Cnty., 102 F.4th 1358, 1364–65 (11th Cir. 2024) ("Even as living creatures—and often, beloved members of the family—domestic animals qualify as 'effects' for purposes of the Fourth Amendment.") (citing Altman v. City of High Point, 330 F.3d 194, 202 (4th Cir. 2003)).

12. Riley v. California, 573 U.S. 373, 386 (2014) (holding that the Fourth Amendment generally requires law enforcement to obtain a warrant to search a cell phone); *see also Robbins*, 619 F.Supp.3d at 884 ("Cameras and cell phones are protected personal effects for the purposes of a seizure analysis.") (citation omitted); In re Application for Tel. Info. Needed for a Crim. Investigation, 119 F. Supp. 3d 1011, 1019 (N.D. Cal. 2015) ("Cell phones plainly qualify as 'effects' under the meaning of the Fourth Amendment.") (citation omitted).

13. United States v. Place, 462 U.S. 696, 701 (1983) (citing Marron v. United States, 275 U.S. 192, 196 (1927)); *see also* Crocker v. Beatty, 886 F.3d 1132, 1136 (11th Cir. 2018) ("Generally, the seizure of personal property is per se unreasonable when not pursuant to a warrant issued upon probable cause.") (citing United States v. Virden, 488 F.3d 1317, 1321 (11th Cir. 2007)).

ference with property rights and privacy rights, it is hard to imagine another item of personal property holding greater interest for protection than the modern cell phone.[14]

First, with respect to cell phones as important items of personal *property* under the Fourth Amendment, ninety-eight percent of adults in the United States own a cell phone, with ninety-one percent of adults owning a smartphone of some kind.[15] This smartphone ownership figure is up from thirty-five percent of adults only fourteen years ago in 2011.[16] This is no typical personal property relationship, as "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with [twelve percent] admitting that they even use their phones in the shower."[17]

Even back in 2014, the Supreme Court observed that smartphones were "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[18] This is because modern cell phones do so much for the individual (even beyond the near-magical ability to make calls and send messages/letters from anywhere on demand), as cell phones can also "easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."[19] The Eleventh Circuit recently commented that "[g]iven the ubiquity of cell phones—and our increasing reliance on them—it's no stretch to hazard that a modern-day traveler would likely rather arrive in a strange place without her luggage than without her phone."[20] Indeed, without luggage, this traveler "may be left with only the 'clothes on [her] back,'" but without her cell phone "she may be left without directions, hotel reservations, and payment and ride-share apps, not to mention voice, text, and email communications—in short, isolated and incapacitated."[21]

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14. *See* Asinor v. District of Columbia, 111 F.4th 1249, 1253–54 & n.1 (D.C. Cir. 2024) (explaining that the Fourth Amendment includes both a "property-based approach" preventing common law trespass and a reasonable expectation of privacy approach to prevent unjustified invasion of privacy interests (citing United States v. Jones, 565 U.S. 400, 405 (2012)) (other citations omitted); United States v. Hunt, 505 F.2d 931, 937 (5th Cir. 1974) (explaining both the privacy interest and property rights bases for Fourth Amendment protection) (citations omitted).

15. *Mobile Fact Sheet*, PEW RSCH. CTR. (Nov. 13, 2024), https://www.pewresearch.org/internet/fact-sheet/mobile/; *see also* Risa Gelles-Watnick, *Americans' Use of Mobile Technology and Home Broadband*, PEW RSCH. CTR. (Jan. 31, 2024), https://www.pewresearch.org/internet/2024/01/31/americans-use-of-mobile-technology-and-home-broadband/.

16. *Id.*

17. *Riley*, 573 U.S. at 395.

18. *Id.* at 385.

19. *Id.* at 393.

20. United States v. Babcock, 924 F.3d 1180, 1191 (11th Cir. 2019).

21. *Id.* (quoting United States v. Puglisi, 723 F.2d 779, 786 (11th Cir. 1984)).

Cell phones are also important to most people because they provide a primary point of access to the internet and social media.[22] As of 2023, over ninety-six percent of "U.S. internet users accessed the internet via their cell phones."[23] Moreover, "social media apps" have become the "most used" apps amongst "U.S. mobile internet users."[24] For better or worse, the Supreme Court acknowledges that the internet, and "social media in particular[,]" is the "most important place[] (in a spatial sense) for the exchange of views."[25] "Young people now turn primarily to social media to get the news."[26] "[F]or many of them, life without social media is unimaginable."[27] This is because "[i]n just a few years," social media platforms "have transformed the way in which millions of Americans communicate with family and friends, perform daily chores, conduct business, and learn about and comment on current events."[28] Indeed, the "average person spends more than two hours a day on various [social media] platforms."[29]

Second, turning to Fourth Amendment *privacy* interests in cell phones, the Supreme Court recognizes that "[i]t is no exaggeration to say that many of the more than [ninety percent] of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."[30] Cell phones hold voluminous text messages, emails, photos, internet search histories, and app data that can reveal incredibly private information such as an individual's health conditions, family issues, romantic relationships, addictions, religious or political beliefs, financial information, and travel or location history.[31] As such, "a cell phone search would typically expose

22. Stacy Jo Dixon, *Mobile Social Media Usage in the United States – Statistics & Facts*, STATISTA (Dec. 12, 2024), https://www.statista.com/topics/4689/mobile-social-media-usage-in-the-united-states/#topicOverview.

23. *Id.*

24. *Id.*

25. Packingham v. North Carolina, 582 U.S. 98, 104 (2017).

26. Moody v. NetChoice, LLC, 603 U.S. 707, 767 (2024) (Alito, J., concurring).

27. *Id.* at 767–68.

28. *Id.* at 767.

29. *Id.*

30. Riley v. California, 573 U.S. 373, 395 (2014) (citing Ontario v. Quon*,* 560 U.S. 746, 760 (2010)).

31. *See id.* at 395–96; *see also* United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008) (observing that "cell phones contain a wealth of private information, including emails, text messages, call histories, address books, and subscriber numbers"); United States v. Park, No. CR 05-375, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) (explaining that "modern cellular phones have the capacity for storing immense amounts of private information" as they "record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures" and observing that "[i]ndividuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages"); Hibbert v. Schmitz, No. 3:16-cv-3028, 2017 WL 59075, at *5 (C.D. Ill. Jan. 5, 2017) (observing that "society recognizes the reasonableness of the expectation of privacy in one's cell phone" because much of the "information" stored on a cell phone "can be extremely personal, including text messages and email conversations with loved ones, geographical location data about the user's movements, purchase history, internet viewing prefer-

to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."[32]

It is apparent from the connection between the cell phone and internet/social media activities that an individual's unfettered property right to *possess* their cell phone under the Fourth Amendment overlaps with their First Amendment right to *engage* in core free speech activities. Cell phones are free speech machines. Just to name a few of these speech-related activities, cell phones allow individuals to create and share art and music online, observe and interact in public discourse on social media, find people and causes so as to associate and communicate as groups, protest virtually (or communicate and organize so as to protest in person), access vast amounts of news and information on public issues and social movements, and report such news.[33] Cells phones are particularly important for recent social movements given their ability to allow an individual to exercise the right to record public events on matters of public concern, which includes protests and police activity.[34]

Both rights are put to the test when there is conflict with police in connection with the recording. My survey of recent case law provides numerous examples of warrantless cell phone seizures in connection with the individual's recording of a public protest or police activity.[35] Many of

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ences, and the user's photographs[,]" rendering "modern cell phones a cornucopia of personal information").

32. *Riley*, 573 U.S. 373 at 396–97 (emphasis in original); *see also* United States v. Fletcher, 978 F.3d 1009, 1019 (6th Cir. 2020) ("The Supreme Court in *Riley* recognized that the search of a cell phone is unique and—as compared to the search of a home—infringes far more on individual privacy.").

33. *See* Moody v. NetChoice, LLC, 603 U.S. 707, 767–68 (2024) (Alito, J., concurring); Packingham v. North Carolina, 582 U.S. 98, 104 (2017).

34. *See* Gaymon v. Borough of Collingdale, 150 F. Supp. 3d 457, 459 (E.D. Pa. 2015) (stating that plaintiff's claim about improper seizure of her cell phone "can only be described as having particular resonance when viewed against the backdrop of recent events nationally, where videotapes by citizens have proven to be indispensable in bringing to light instances where police unfortunately misused their power").

35. *See, e.g.*, Dunn v. Does 1-22, 116 F.4th 737, 752–53 (8th Cir. 2024) (noting that police seized cell phones of several individuals that attended a heated protest after the death of George Floyd and continued to hold such phones for two days after the individuals were released); Asinor v. District of Columbia, 111 F.4th 1249, 1251–52 (D.C. Cir. 2024) (observing that police arrested individuals and journalists that attended protests after the death of George Floyd and seized cell phones and cameras for months, and for some individuals more than a year, even though such individuals were released without charges); Robbins v. City of Des Moines, 984 F.3d 673, 676–77 (8th Cir. 2021) (highlighting that after an individual was spotted recording protest and police activity, police seized and held cell phone for twelve days even though the individual was immediately released without charges); Crocker v. Beatty, 886 F.3d 1132, 1134–35 (11th Cir. 2018) (describing an instance during which an officer noticed an individual taking photos and videos of car crash scene from fifty feet away, snatched the phone out of the individual's hand, refused to return the phone, and arrested the individual when he would not leave the scene without getting his phone back); Gibson v. Goldston, No. 5:21-cv-00181, 2022 WL 2719725, at *1–4 (S.D.W.V. July 13, 2022) (describing how a county magistrate judge ordered bailiff to seize individual's cell phone upon noticing that the individual was recording the magistrate's improper attempt to enter the individual's home to search for disputed property in a family law case); Zinter v. Salvaggio, 610 F. Supp. 3d 919,

these cases involve a seizure incident to an arrest, with the government continuing to hold the individual's cell phone in custody for months (and in some cases more than a year) even though the individual was released *without charges*.[36] These cases reveal two problematic trends facing courts under the Fourth Amendment.[37] First, officers often exploit Fourth Amendment exceptions that allow the *initial* seizure of a cell phone during protest or other police interaction.[38] Second, many courts fail to recognize an important Fourth Amendment protection which requires that police justify an *extended* seizure of personal property like cell phones.[39]

Police often apply common experience and assumptions from exigent circumstances in other criminal contexts to justify warrantless seizures of cell phones in protest or police-recording situations.[40] In doing so, police fail to recognize that the core justification for the exigent circumstances exception is lacking because the recorder in these contexts is not likely to destroy the "evidence" on their phone before the officer can obtain a warrant.[41] To the contrary, the recorder is likely to preserve the recording for their own recollection, legal purposes, or to share with others (including on social media).[42] Worse, police may seize a recorder's cell phone out of retaliation (or agitation) and attempt to use the exigent

929–33 (W.D. Tex. 2022) (highlighting that police arrested protestors over a series of days after the protestors recorded city officials and police activity and held phones and cameras in custody for years without pointing to articulable facts that they contained evidence of crimes); Craft v. Billingslea, 459 F. Supp. 3d 890, 899–900 (E.D. Mich. 2020) (noting that police arrested an individual and seized his phone when he refused to stop recording the officers' physical confrontation with others at a gas station, with the officers continuing to hold his phone even though the he was released without charges); Durant v. Gretna City, No. 19-147, 2020 WL 263669, at *2 (E.D. La. Jan. 17, 2020) (outlining that officer struck detained individual and seized his cell phone when officer learned that individual was trying to broadcast his detainment on social media); Blakely v. Andrade, 360 F. Supp. 3d 453, 463–64 (N.D. Tex. 2018) (stating that officers seized a wife's cell phone while she was continuing to record a dispute that had arisen between officers and her husband during a traffic stop); Williams v. City of Paris, No. 5:15-108, 2016 WL 2354230, at *1 (E.D. Ky. May 4, 2016) (noting that police seized a mother's phone after they observed the mother recording an aggressive arrest of her son inside her house, kept the phone in custody for approximately two months, and deleted the recording of the arrest); Gaymon v. Borough of Collingdale, 150 F. Supp. 3d 457, 459–60 (E.D. Pa. 2015) (describing an instance in which police entered individual's home, arrested her, and seized her cell phone when she refused to stop recording the officer's aggressive behavior from inside her home); Bacon v. McKeithen, No. 5:14-cv-37, 2014 WL 12479640, at *1 (N.D. Fla. Aug. 28, 2014) (outlining that police arrested individual and seized his phone when officers learned that he had recorded the officers' traffic stop of the individual); King v. City of Indianapolis, 969 F. Supp. 2d 1085, 1088–89 (S.D. Ind. 2013) (noting that police saw that the individual had recorded the officers arresting his neighbor and later arrested the individual and seized his cell phone when he refused to turn over his phone to officers).

36. *See, e.g.*, *Dunn*, 116 F.4th at 752–53; *Asinor*, 111 F.4th at 1251–52; *Robbins*, 984 F.3d at 676–77; *Zinter*, 610 F. Supp. 3d at 929–33; *Craft*, 459 F. Supp. 3d at 899–900; *Bacon*, 2014 WL 12479640, at *1.

37. *See infra* Sections II.A, B.

38. *See infra* Section II.A.1.

39. *See infra* Sections II.A.1, 2.

40. *See infra* Section I.A.1.

41. *See infra* Section I.A.1.

42. *See infra* Section I.A.1.

circumstances exception as a shield in a subsequent suit.[43] Ironically, in some instances, it is the officer who wants to delete the recording.[44]

Moreover, courts disagree whether police need independent probable cause to seize a cell phone from a recorder that is arrested at the scene of a protest or event involving police activity.[45] Generally, while police can search the person incident to the arrest regardless of the likelihood that the person is carrying contraband or weapons,[46] police *should* only seize personal property found during the search if the officer has independent probable cause to believe that the item(s) (1) are evidence of criminal conduct (even if unrelated to that particular arrest) or (2) present a danger to officer safety.[47] However, my survey of case law shows a current debate amongst courts about whether independent probable cause is actually required for the seizure of personal property when the individual is arrested.[48] This debate is particularly important for recorders of protests or police activity. Though police may have arguable probable cause to arrest the recorder under the circumstances of the protest or police-related event, the police in many instances do not also have probable cause to believe that the recorder's cell phone contains evidence of criminal activity—which would allow the police to seize and keep the cell phone even if the individual is released without charges.[49]

Finally, there is a wide-spread circuit split on whether the Fourth Amendment separately requires police to justify an *extended* seizure of personal property.[50] Specifically, even if the initial seizure of personal property was valid, should the Fourth Amendment require police to justify the continued seizure of personal property when legitimate need for the seizure has arguably ended?[51] For many courts, the Fourth Amendment only applies to the initial *taking* of the personal property and provides no further protection regarding the duration of that seizure.[52] Extended seizures of cell phones can have particularly harmful consequenc-

43. *See infra* Section I.A.3.
44. *See infra* Section I.A.3.
45. *See infra* Section II.A.1.
46. *See* United States v. Robinson, 414 U.S. 218, 235 (1973).
47. *See* Katz v. Morgenthau, 892 F.2d 20, 23 (2d Cir. 1989) ("[P]olice officers may seize items incident to a lawful arrest which pose an immediate threat to their safety or constitute evidence in danger of being destroyed, they may not embark upon a general search of the premises beyond the arrestee's body or area of reach."); Smith v. District of Columbia, 387 F. Supp. 3d 8, 25 (D.D.C. 2019) (explaining that "police can seize weapons found in plain view or following a lawful search incident to arrest to ensure officer safety and to preserve incriminating evidence") (citing Chimel v. California, 395 U.S. 752, 762–63 (1969)); United States v. Castellanos, 731 F.2d 979, 984 (D.C. Cir. 1984); United States v. Herron, 18 F. Supp. 3d 214, 223 (E.D.N.Y. 2014) ("A police officer may seize personal effects discovered during a search incident to arrest if the officers find that these are evidence of criminal conduct, even if unrelated to that for which a suspect had been arrested.") (citations omitted).
48. *See infra* Section II.A.2.
49. *See infra* Section II.A.2.
50. *See infra* Section II.A.2.
51. *See infra* Section II.A.2.
52. *See infra* Section II.A.2.

es, as the individual is deprived for months (or longer) of both the important possessory interest they have in their phone and the ability to engage in core free speech activities.[53] This includes an extended deprivation of the ability to share the recording of the protest or police activity.[54]

This Article analyzes each of these problematic trends and provides an approach for future courts to apply universal Fourth Amendment principles to fairly protect both the Fourth and First Amendment rights of recorders in these situations. First, courts should significantly limit the exigent circumstances exception, curtailing seizure of cell phones related to the recording of protests or police activity, because recorders likely intend to preserve and share recordings.[55] A limited application of the exigent circumstances exception also allows for recorders to adequately pursue claims against police that seize cell phones out of retaliation in these sometimes-heated circumstances.[56]

Second, courts must require that police establish independent probable cause to seize the cell phone of an individual that is arrested in connection with protest or police recording activity.[57] A strict rule in this context acknowledges the Supreme Court's universal principle that specific probable cause is required for *all* seizures of personal property.[58] This rule also *prevents* the situation where police seize the phone of a recorder based upon the arrest and keep the phone for months (or sometimes for more than a year) even though the recorder was released without charges.[59]

Third, future courts should follow the recent holding and reasoning of the D.C. Circuit in *Asinor v. District of Columbia*[60] (a minority case in the circuit split) that the Fourth Amendment applies to the *extended* seizure of personal property.[61] Universal principles used to evaluate unreasonable seizures—as well as historic recognition of property rights protected by the Fourth Amendment at its founding—demonstrate that the Fourth Amendment not only protects against an unreasonable *taking* of personal property, but also against an unreasonable duration of such seizures.[62] Courts facing this question in the context of an extended seizure of cell phones related to recording of protests or police activity should be

53. *See infra* Section II.A.1.
54. *See generally infra* Section II.A.1.
55. *See infra* Section I.A.1.
56. *See infra* Section I.A.1.
57. *See generally infra* Section II.B.1.
58. *See infra* Section I.B.
59. *See infra* Section I.B.
60. 111 F.4th 1249 (D.C. Cir. 2024).
61. *See generally infra* Section II.B.
62. *See infra* Section II.B.

particularly cognizant of the ongoing harm to both possessory interests and an ability to engage in core free speech activities.[63]

I. FOURTH AMENDMENT EXCEPTIONS THAT ALLOW THE INITIAL SEIZURE OF CELL PHONES

As a baseline, the Fourth Amendment's protection of personal property should be strict. The government's "seizure of personal property [i]s *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause" that "particularly" describes the "items to be seized."[64] "Accordingly, absent either a warrant or probable cause plus an exception, police may not seize private property."[65] As is often the case, the devil lies in the details, or in this context, the warrantless seizure exceptions. Case law demonstrates two particularly common exceptions used by police to seize cell phones in these contexts: (1) exigent circumstances and (2) search incident to arrest.[66]

B. Exigent Circumstances

The "exigent circumstances" exception allows police to seize personal property without a warrant when reasonably necessary to prevent the imminent destruction of evidence or to ensure officer safety.[67] "A warrantless seizure" under this exception "requires both probable cause and exigent circumstances."[68] Probable cause is established if "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[69] The exigent circumstances exception requires that the

63. *See infra* Section II.B.

64. United States v. Place, 462 U.S. 696, 701 (1983) (citing Marron v. United States, 275 U.S. 192, 196 (1927)); *see also* Crocker v. Beatty, 886 F.3d 1132, 1136 (11th Cir. 2018) ("Generally, the seizure of personal property is *per se* unreasonable when not pursuant to a warrant issued upon probable cause.") (citing United States v. Virden, 488 F.3d 1317, 1321 (11th Cir. 2007)).

65. United States v. Babcock, 924 F.3d 1180, 1186 (11th Cir. 2019).

66. Though the exigent circumstances exception and search and seizure incident to arrest exception are discussed as the most likely exceptions to the seizure of cell phones and cameras, it is conceivable that the "plain view" exception may also be relied upon by the government in certain cases. The "plain view" exception comes into play when the officer openly observes an item that carries an "incriminating character" that is "immediately apparent." United States v. Agbodjan, 871 F. Supp. 2d 95, 100–01 (N.D.N.Y. 2012) (quoting Horton v. California, 496 U.S. 128, 136–37 (1990)). The officer may seize such an item based upon this "plain" observation so long as the officer did not violate the Fourth Amendment by being in the place where the item was viewed, and the officer has a "lawful right of access to the object seized." *Id.*

67. *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990) (confirming the broader exigent circumstances standard for warrantless searches and seizures); *Crocker*, 886 F.3d at 1136 (explaining that the "exigent circumstances exception permits warrantless seizure of property" when the officer can "show an 'objectively reasonable basis'" to prevent the "'imminent destruction of evidence'") (citation omitted).

68. United States v. Boozer, 511 F. Supp. 3d 1128, 1135 (D. Or. 2020); *see also Babcock*, 924 F.3d at 1187 ("[T]he Supreme Court has interpreted the Fourth Amendment to allow a warrantless seizure when police can show both (1) probable cause to believe that property contains contraband or evidence of a crime and (2) an applicable warrant exception, such as exigent circumstances.") (citing Kentucky v. King, 563 U.S. 452, 459–60 (2011)).

69. *Boozer*, 511 F. Supp. 3d at 1135 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

police "reasonably feared imminent destruction of the evidence"—that is "whether the facts, as they appeared at the moment" of seizure, would "lead a reasonable, experienced" officer to "believe that evidence might be destroyed before a warrant could be secured."[70] "Proof of exigent circumstances 'should be supported by particularized, case-specific facts, not simply generalized suppositions about the behavior of a particular class of criminal suspects.'"[71]

Without a doubt, cell phones are valuable tools for criminals.[72] Police testify that cell phones are regularly used in connection with drug trafficking, firearm offenses, gang activity, and prostitution (just to name a few commonly connected criminal contexts).[73] As such, cell phones often serve as valuable sources of evidence.[74] To get this evidence, police regularly assert the exigent circumstances exception to seize a suspect's cell phone because of the "ease of destroying or deleting cell phone evidence" and the "fear[]" that the suspect will "severely hamper an investigation" by deleting or destroying "evidence from his phone if they did not secure it pending a search warrant."[75] Courts commonly affirm this

70. United States v. Napue, 834 F.2d 1311, 1326 (7th Cir. 1987) (quoting United States v. Rivera, 825 F.2d 152, 156 (7th Cir. 1987)).

71. United States v. Samboy, 433 F.3d 154, 158 (1st Cir. 2005) *(*citation omitted).

72. *See e.g.*, United States v. Barron-Soto, 820 F.3d 409, 416 (11th Cir. 2016) (noting that a federal agent provided in his affidavit that "drug traffickers often use cell phones to coordinate drug deals and cell phones are often a source of valuable evidence"); United States v. Delima, No. 2:22-cr-00111, 2023 WL 7404054, at *9–10 (D. Vt. Nov. 9, 2023) (describing a federal agent who provided that "people who distribute controlled substances often carry firearms, and their cell phones may have evidence of unlawful firearm possession"); Coleman v. Reynnells, No. 1:19-CV-851, 2019 WL 13521767, at *2 (N.D. Ga. July 30, 2019)) ("Because cell phones often contain evidence of drug trafficking, police are authorized to seize phones in connection with lawful drug arrests.") (citation omitted); United States v. Martinez, No. CR 13-00794, 2014 WL 3956677, at *7 (N.D. Cal. Aug. 12, 2014) (highlighting that detective stated that "gang participants 'often store' photographs of gang activity in their cell phones, 'frequently' record evidence of potential gang crimes in their letters, electronic media storage devices, and video records"); United States v. Warren, No. CR 10-276, 2010 WL 5330566, at *2 (D. Minn. Dec. 1, 2010) (stating "cell phones are often used to promote prostitution").

73. *See Barron-Soto*, 820 F.3d at 416 (noting a federal agent stated "drug traffickers often use cell phones to coordinate drug deals and cell phones are often a source of valuable evidence); *Delima*, 2023 WL 7404054, at *4 (discussing a federal agent who stated "people who distribute controlled substances often carry firearms, and their cell phones may have evidence of unlawful firearm possession"); *Martinez*, 2014 WL 395667, at *7 (noting a detective stated "gang participants 'often store' photographs of gang activity in their cell phones, 'frequently' record evidence of potential gang crimes in their letters, electronic media storage devices, and video records"); *Warren*, 2010 WL 5330566, at *2 (highlighting federal agent who claimed "cell phones are often used to promote prostitution").

74. *See Coleman*, 2019 WL 13521767, at *2; *Martinez*, 2014 WL 395667, at *7; *Warren*, 2010 WL 5330566, at *2.

75. *See* United States v. Beard, No. 3:20-CR-0567, 2022 WL 1321549, at *11 (N.D. Tex. May 3, 2022); *see also, e.g.*, Andersen v. DelCore, 79 F.4th 1153, 1164 (10th Cir. 2023) (finding that "exigent circumstances existed because [the suspect] refused to hand over a cell phone that [the detective] had reason to believe contained probative evidence relating to an ongoing investigation into child abuse"); United States v. Ashley, 647 F. Supp. 3d 526, 535 (E.D. Tex. 2022) (holding that seizure of murder suspect's cell phone was justified because of the "easily destructible nature of digital evidence at issue . . . once [the suspect] became aware he was a murder suspect").

practice.[76] Indeed, courts "have *routinely* denied motions to suppress the seizure of cell phones, in the context of narcotics conspiracies, based on knowledge that the phones may contain contacts and other evidence of a crime."[77]

The problem is that police often apply this "routine" from other criminal contexts to seize cell phones in protest and police recording cases without recognizing the fundamental differences in these situations.[78] "[E]veryday objects such as cell phones" will undoubtedly "take on a different character depending on the context in which they are found."[79] Like many courts, the Eleventh Circuit has "found the exigent-circumstances exception 'particularly compelling' in drug cases 'because contraband and records can be easily and quickly destroyed while a search is progressing.'"[80] Importantly, however, the Court emphasized that this will not be the case in all circumstances, as "it's not that a cell phone *itself* creates an exigent circumstance."[81]

For example, a suspected drug dealer believed to have incriminating text messages, photos, and contacts on his cell phone is substantively different from the individual that has a video recording of a heated protest (even one involving rioting or looting) or police activity (which may show a suspect resisting arrest) in at least two important ways.[82] First, the recorder is usually a bystander to the protest or police activity they are recording and not a criminal suspect.[83] This is true even if the officer eventually *believes* that the recorder breaks the law when they refuse to stop recording or turn over their cell phone because the "evidence" at issue still pertains to the separate event that was filmed.[84] Second, while the drug dealer has an incentive to delete potentially incriminating messages or contacts from his phone, the recorder likely has an incentive to preserve the video.[85] The recorder in the protest context is likely recording for their own recollection (which is a common reason people take pictures and recordings) or to later share a newsworthy event with others, including on social media.[86] Similarly, the recorder in the police recording context is likely recording to preserve evidence of perceived (or at

76. *See Beard*, 2022 WL 1321549, at *11; *Andersen*, 79 F.4th at 1164–65; *Ashley*, 647 F. Supp. 3d at 535.

77. United States v. Delva, 13 F. Supp. 3d 269, 276 (S.D.N.Y. 2014) (emphasis added) (citations omitted).

78. *See infra* Sections I.A.1, 2.

79. *Delva*, 13 F. Supp. 3d at 276.

80. United States v. Babcock, 924 F.3d 1180, 1194 (11th Cir. 2019) (quoting United States v. Young, 909 F.2d 442, 446 (11th Cir. 1990)).

81. *Id.* (emphasis in original).

82. *See infra* Sections I.A.1, 4.

83. *See infra* Section I.A.1.

84. *See infra* Sections I.A.1, 2.

85. *See infra* Sections I.A.1, 3.

86. *See infra* Section I.A.1.

least potential) police misconduct for legal reasons and to share with others, including on social media.[87]

My survey of recent case law provides several examples showing that police often apply common experience and assumptions from exigent circumstances in other criminal contexts to seize cell phones in protest or police recording situations. In such situations, the core justification for the exception is lacking: The recorder is not likely to destroy the "evidence" on his phone before the officer can obtain a warrant for the phone.[88] Worse, case law demonstrates that police in several instances seize the cell phone of the recorder out of retaliation (or agitation) and believe they can use the exigent circumstances exception as a shield to later defend against suit.[89] Ironically, in some instances, it is the police officer who wants to delete the recording.[90]

1. Recorders as Bystanders

James Crocker was driving on the interstate when he saw an overturned SUV lying in the median following a recent accident.[91] Crocker pulled over and approached the SUV to see if he could help.[92] A police officer soon arrived on scene and told the group that "emergency personnel were nearby."[93] Crocker stayed and stood in "the interstate median about fifty feet from the SUV."[94]

Crocker decided to get out his own phone and "take photos and videos of the scene."[95] After Crocker had been recording for thirty seconds, an officer "walked over toward him, reached out from behind him without warning or explanation, and took the iPhone out of his hand."[96] The officer asked Crocker why he remained at the scene.[97] Crocker told the officer that he had stopped to try to help before any first responders arrived.[98] The officer ordered Crocker to leave.[99] Crocker agreed to go, "but said that he needed" the officer to return his cell phone.[100]

The officer refused, saying that Crocker's phone contained evidence and that Crocker would have to drive to a nearby weigh station and "wait for instructions about the return of his phone after the evidence could be

87. *See infra* Sections I.A.1, 3.
88. *See infra* Section I.A.1.
89. *See infra* Section I.A.3.
90. *See infra* Section I.A.3.
91. Crocker v. Beatty, 886 F.3d 1132, 1134 (11th Cir. 2018).
92. *Id.*
93. *Id.* at 1134–35.
94. *Id.* at 1135.
95. *Id.*
96. *Id.*
97. Crocker v. Beatty, 886 F.3d 1132, 1135 (11th Cir. 2018).
98. *Id.*
99. *Id.*
100. *Id.*

obtained from it."[101] Crocker again said he would leave immediately if the officer would return the phone, even offering to "delete the photographs and videos in an attempt to secure its return."[102] The officer refused, and so, Crocker also refused to leave.[103] The officer "arrested Crocker for resisting an officer without violence."[104]

Crocker filed suit against the officer for several constitutional violations, including wrongful seizure of his cell phone under the Fourth Amendment.[105] The officer argued that exigent circumstances justified his warrantless seizure of Crocker's phone, claiming that "he had an objectively reasonable belief that the photographs and videos on Crocker's [phone] were evidence of a crime and the destruction of this evidence was imminent."[106] The Eleventh Circuit disagreed, finding that, even if it was assumed that Crocker's photos and videos of the crash scene "may be evidence of a crime," there were "no facts" that could "support the conclusion that a reasonable, experienced agent would have thought destruction of the evidence was imminent."[107]

The court emphasized that Crocker was only a bystander.[108] While "[e]xigent circumstances sufficient to seize evidence may be found when the evidence is in the possession of a person it could implicate in a crime or someone close to them[,] . . . . finding that exigent circumstances exist in order to seize property from a bystander is a different thing entirely."[109] This is for the "obvious reason[]" that "evidence is more likely to be destroyed when it is in the possession of a person who may be convicted by it."[110] Importantly, there was no indication from the officer's conversation with Crocker that he would have deleted the recordings.[111] As such, "no reasonable law enforcement officer would have believed that the evidence on Crocker's [phone] was at risk of imminent destruction at the time of the seizure."[112]

The officer made the common argument that the "'nature of cell phones' leads to easily-destroyed evidence that disappears quickly," which fact alone should support a finding of exigent circumstances.[113] The court recognized the danger inherent in this broad conclusion, as the officer's "interpretation would permit police officers to seize now-

101. *Id.*
102. *Id.*
103. Crocker v. Beatty, 886 F.3d 1132, 1135 (11th Cir. 2018).
104. *Id.*
105. *Id.*
106. *Id.* at 1136.
107. *Id.*
108. *Id.*
109. Crocker v. Beatty, 886 F.3d 1132, 1136 (11th Cir. 2018) (emphasis removed).
110. *Id.*
111. *Id.*
112. *Id.* at 1137.
113. *Id.*

ubiquitous cell phones from any person, in any place, at any time, so long as the phone contains photographs or videos that could serve as evidence of a crime—simply because the 'nature' of the device used to capture that evidence might result in it being lost."[114] The court concluded that "[t]he Constitution requires [the officer's] argument to fail," as the "Fourth Amendment draws a line well short of this awesome breadth of government power."[115]

The bystander role is particularly important in police recording situations. In *King v. City of Indianapolis*,[116] a commotion broke out in a residential neighborhood when police stopped a vehicle driven by a longtime resident of the neighborhood and thereafter arrested him for driving under the influence.[117] It was undisputed that (1) the suspect resisted arrest, (2) a crowd of neighbors gathered around the scene, and (3) the arresting officer had to call for backup.[118] Willie King lived in this neighborhood for forty-one years and had been a neighbor of the suspect for forty of those years.[119] As the crowd of neighbors gathered, King began recording the scene on his cell phone, eventually moving to a neighbor's porch near the arrest.[120]

An officer standing nearby noticed that King was recording on his phone.[121] The officer told King that "police could confiscate his phone if the video showed [the suspect] resisting arrest."[122] King responded, "I don't give a fuck what you do," and continued to record.[123] Another officer then approached King, asked if he was recording, and told him "I need your camera."[124] King told the officer, "You ain't taking shit."[125] A third officer also approached King and requested his phone.[126] When King refused, this officer "grabbed" him and "pulled him off the porch onto the ground."[127] King dropped his phone in the process.[128] One of the officers picked up King's phone, shut it down, and took it into custody.[129]

The officers argued "that the potential imminent destruction of evidence—i.e., the video Mr. King was recording—created an exigent cir-

114. *Id.*
115. Crocker v. Beatty, 886 F.3d 1132, 1137 (11th Cir. 2018) (emphasis removed).
116. 969 F. Supp. 2d 1085 (S.D. Ind. 2013).
117. *Id.* at 1088.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. King v. City of Indianapolis, 969 F. Supp. 2d 1085, 1088 (S.D. Ind. 2013).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1089.
127. *Id.*
128. King v. City of Indianapolis, 969 F. Supp. 2d 1085, 1089 (S.D. Ind. 2013).
129. *Id.*

cumstance justifying the seizure of the [cell phone]."[130] The district court explained that King had a "clearly established right to be free from the warrantless seizure of a cell phone."[131] The court emphasized that Mr. King was not engaged in unlawful activity at the time the officer seized his phone.[132] "When reviewing a warrantless search or seizure to determine if exigent circumstances existed, courts ask whether 'a reasonable officer had a reasonable belief that there was a compelling need to act and no time to obtain a warrant.'"[133] The court rejected the officers' argument, finding that it was "not clear that the destruction of evidence was imminent, nor that the seizure was motivated by a need for the evidence."[134] Moreover, the court was "not convinced that a reasonable officer would feel" that there was "no time to obtain a warrant for the evidence."[135]

The recognition of the recorder's status as a bystander is equally important in protest situations. In *Zinter v. Salvaggio*,[136] a group of protestors in Leon Valley, Texas, had several clashes with the Leon Valley Police Department while protesting the department near city hall. Several protestors recorded police officers (and other public employees) in connection with the protest.[137] Over a period of three days, officers "confiscated a small film studio's worth of cell phones and video equipment" that the protestors used to record protests and police reaction.[138] The protestors were not able to get their phones and other devices back from the department until "years after the officers seized them."[139] The protestors sued the officers in part for violating their Fourth Amendment rights by seizing "cell phones, video cameras, hard drives, and the like—without a warrant."[140]

The district court introduced its analysis of these claims by noting that the police chief "apparently believed this practice to be permissible."[141] During the police chief's deposition, the protestors' counsel asked: "And so your understanding is that you have the authority to just walk up to any citizen and take their devices without any . . . warrant if they filmed a crime?"[142] The police chief's answer: "If they filmed a

130. *Id.* at 1093.
131. *Id.* at 1092.
132. *Id.* at 1092–93.
133. *Id.* at 1093.
134. King v. City of Indianapolis, 969 F. Supp. 2d 1085, 1093 (S.D. Ind. 2013).
135. *Id.*
136. 610 F. Supp. 3d 919 (W.D. Tex. 2022).
137. *Id.* at 929–32.
138. *Id.* at 929.
139. *Id.* at 949 (emphasis removed).
140. *Id.* at 947.
141. *Id.*
142. Zinter v. Salvaggio, 610 F. Supp. 3d 919, 947 (W.D. Tex. 2022).

crime, absolutely. That is my understanding, and that is exactly what the best practices say you can do."[143]

The district court explained that this understanding was wrong, as the Fourth Amendment requires an exception to its general warrant requirement for the seizure of personal property—in relevant part here—the exigent circumstances exception.[144] The police chief provided the conclusory argument that "the exigency . . . was that we need to ensure that we got the phone[s]."[145] "By confiscating phones, police avoided 'losing evidence.'"[146] The court responded that while it is "true" that "a suspect who possesses incriminating evidence may try to destroy that evidence," the protestors in this case "were *bystanders* to alleged crimes—many seemed surprised even to be questioned, detained, or arrested."[147] The district court held that the "exigent-circumstance factors seem[ed] largely inapposite to the facts of th[e] case."[148]

Many of the protestors "fully intended to make their videos public by publishing them online."[149] The district court noted that "[s]ome even livestreamed these events as they occurred."[150] As such, the "concerns justifying the exigent circumstances exception—notably, the belief that 'contraband is about to be removed,' the 'possibility of danger' to officers, and the knowledge that those holding the contraband might take 'efforts to dispose of it'—are not present in this case."[151] Beyond the exigency component of the exception, there were problems with probable cause for the seizures because the officer had not "pointed to specific, articulable facts that plaintiffs' recording devices contained evidence of crimes."[152]

2. Relationship Between the Bystander Recorder and the Suspect

D'Marco Craft recorded a heated physical altercation between police officers and his friend at a gas station convenience store.[153] During the initial struggle between the friend and two police officers, one of the officers yelled at Craft to "back away from the area," threatened to mace Craft, and made contact with Craft and his phone.[154] Craft's friend was

143. *Id.*
144. *Id.* at 947–48.
145. *Id.* at 948.
146. *Id.*
147. *Id.*
148. Zinter v. Salvaggio, 610 F. Supp. 3d 919, 948 (W.D. Tex. 2022) (emphasis in original).
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 948–49. Though the district court found a violation of the protestors Fourth Amendment rights related to the cell phone seizures, the court granted the officers' motion for qualified immunity because the court felt that only two out-of-circuit cases "clearly established that warrantless seizures of witnesses' recording devices were unlawful" at the time of the seizures in 2018. *Id.* at 949 (citations omitted).
153. Craft v. Billingslea, 459 F. Supp. 3d 890, 898–99 (E.D. Mich. 2020).
154. *Id.* at 899.

released temporarily after this initial struggle—but apparently determined to buy cigarettes at this particular gas station (and perhaps to agitate the officers)—went back into the convenience store.[155] Craft followed his friend and continued to record.[156] Unsurprisingly, a second physical altercation ensued between Craft's friend and the officers, this time with one officer hitting the friend with punches and knee strikes.[157] Craft continued to record despite orders that he leave the store.[158]

Several other officers arrived at the scene and assisted the first two officers, who continued to struggle with Craft's friend, eventually putting the friend in handcuffs.[159] Some of the reporting officers also took Craft's cell phone and removed Craft from the store.[160] Officers detained Craft in the backseat of a patrol car while the officers determined if Craft had interfered in the arrest of his friend.[161] When Craft was eventually told that he was free to leave, the officers refused to return Craft's phone because it had to be kept as evidence to preserve the video.[162]

When Craft later sued the officers for violating his Fourth Amendment rights related to the cell phone seizure (amongst other claims), the officers argued that the warrantless seizure of Craft's phone was justified under the exigent circumstance exception.[163] Demonstrating the fundamental mistake that the exigent circumstances exception applies the same in every context, the officers cited the Sixth Circuit's decision in *United States v. McClain*,[164] a warrantless entry case involving a potential home burglary, not the seizure of a cell phone recording.[165] Despite Craft's relationship with the friend that was arrested, the *Craft* court rejected the officers' argument and explained that the officers "fail[ed] to identify any actions by Craft that would indicate he was planning to delete the cell phone video" or that "there was imminent danger of evidence destruction by Craft."[166]

3. Seizures Motivated by Agitation or Retaliation

A very limited allowance for seizure of cell phones under the exigent circumstances exception in the protest and police recording contexts not only protects against a blind application of the exception but also strengthens individual claims against officers for a retaliatory seizure.

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155. *See id.*
156. *Id.*
157. *Id.* at 899–900.
158. *Id.* at 900.
159. Craft v. Billingslea, 459 F. Supp. 3d 890, 900 (E.D. Mich. 2020).
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 906–07.
164. 444 F.3d 556 (6th Cir. 2006).
165. *See* Craft v. Billingslea, 459 F. Supp. 3d 890, 907 (E.D. Mich. 2020) (citing *McClain*, 444 F.3d at 562).
166. *See id.*

Robert Gray was driving to pick up his son (Jacob Gray) from work when Robert was stopped by police.[167] Robert's license plate light had burnt out.[168] Robert suffered from a nerve disease that affects his speech and balance.[169] The officers thought Robert was intoxicated because they observed some irregular speech and movement from Robert.[170] In reality, however, the symptoms were related to his condition.[171] Robert tried to explain his condition and present his handicap identification card to the officers, but the officers ignored the explanation and told Robert to get out of his car.[172] When Robert tried to explain that he might fall on the uneven ground because of his condition, the officers threatened to force him out of the car.[173]

Robert called his son Jacob at this point to tell him what was happening.[174] When Jacob arrived at the scene, he saw that several officers had surrounded Robert's vehicle and were removing Robert.[175] Jacob began recording the scene on his cell phone.[176] One of the officers "noticed Jacob recording and attempted to make him stop, first by forcing Jacob to move to the passenger side of his father's car (to block Jacob's view), and then by grabbing Jacob's phone from his hand, tackling him to the ground, and deploying pepper spray in his face."[177] Jacob's phone kept recording while he screamed from the pepper spray.[178] One of the officers later saw that Jacob's phone was still recording.[179] That officer stopped the recording and attempted to delete the recording by hitting the delete button.[180] This however only sent the recording to the "deleted photo/video album" and did not permanently delete the video.[181] Jacob later recovered the video recording from that album and brought suit against the officers.[182]

The officers moved to dismiss Jacob's Fourth Amendment claim for an unlawful seizure of his cell phone.[183] Based upon the pleadings, the district court found that (1) Jacob "was not interfering" with the officers

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167. Gray v. City of Denham Springs, No. 19-00889, 2021 WL 1187076, at *1 (M.D. La. Mar. 29, 2021).
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. Gray v. City of Denham Springs, No. 19-00889, 2021 WL 1187076, at *1 (M.D. La. Mar. 29, 2021).
174. *Id.*
175. *Id.*
176. *Id.* at *2.
177. *Id.*
178. *Id.*
179. Gray v. City of Denham Springs, No. 19-00889, 2021 WL 1187076, at *2 (M.D. La. Mar. 29, 2021).
180. *Id.*
181. *Id.*
182. *See id.*
183. *Id.* at *1, *2, *7–8.

at the time of the seizure, (2) there were no safety concerns to justify such actions, and (3) "no exigencies eliminated the warrant requirement, such as the need to prevent destruction of evidence, locate or pursue a fleeing suspect, or identify or prevent serious injury or death."[184]

In *Williams v. City of Paris*,[185] police reported to a residential address after dispatch had received a 911 call from the location.[186] Officers found Phyllis Williams and her adult son in the house.[187] Williams testified that her first interaction with the police took place when she saw that one of the officers had opened the front door (a screen door) and was about to enter the house.[188] Williams told the officer that he "was not allowed in her house and demanded that he shut the door."[189] The officer told Williams that he could enter the house in response to a 911 distress call.[190] Williams continued to refuse and told him "[t]here's no distress here."[191]

Williams testified that the officer became angry, entered the house, and shoved her son against the wall.[192] Apparently, Williams's son had been carrying a glass of chocolate milk at the time and the shove caused him to spill the milk across the wall and floor.[193] Williams testified that the other officer came from behind her son and grabbed him (pushing Williams backwards in the process).[194] Williams got her cell phone at this point and began recording.[195]

The officer handcuffed Williams's son and walked him towards their patrol cars.[196] Williams walked behind them and continued to record.[197] There was some dispute over whether Williams's son resisted arrest.[198] At some point during the walk toward the patrol cars, one of the officers turned around to Williams and "told her that he would put her in jail if she did not stop the recording."[199] Williams contended that "she was not doing anything except recording the officers as they arrested her son."[200] Williams claimed that the officer then grabbed her by her arms

184. *Id.* at *7–8.
185. No. 5:15-108, 2016 WL 2354230 (E.D. Ky. May 4, 2016).
186. *Id.* at *1.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. Williams v. City of Paris, No. 5:15-108, 2016 WL 2354230, at *1 (E.D. Ky. May 4, 2016).
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. Williams v. City of Paris, No. 15-108, 2016 WL 20837, at *1 (E.D. Ky. May 4, 2016).
198. *See id.*
199. *Id.*
200. *Id.*

and jerked them upwards, causing her to release her phone into the air.[201] According to Williams, the officer seized the phone and threw it in a patrol car, telling Williams that "it's evidence now, b_tch."[202] Officers booked Williams's phone into evidence.[203] The police held Williams's phone for over two months.[204] When Williams picked up her phone, she saw that "several videos had been deleted, including the video of her son's arrest."[205]

The officer argued that the seizure "fell under the exigent circumstances exception" to the warrant requirement.[206] The officer claimed that "he took the phone from Williams because he was concerned that she would delete the video once she realized that it showed her son resisting arrest."[207] However, Williams believed "that her son did not resist arrest and the video was exculpatory evidence."[208] Williams argued "that '[i]t would make no sense' for her to destroy the evidence."[209] Ironically, Williams asserted that the police in fact deleted this video.[210] The district court found that Williams's testimony cast doubt on the claimed exigent circumstances and denied the officer's request for summary judgment.[211]

In *Bacon v. McKeithen*,[212] Derrick Bacon secretly recorded his interaction with officers during a traffic stop.[213] Two months after the stop, Bacon "revealed in open traffic court that he made the recording."[214] The officers involved in the traffic stop responded to this revelation by later handcuffing Bacon despite "his protests that his [recording] actions were constitutionally protected and plac[ing] him in the back of their car."[215] The officers accused Bacon of violating the Florida wiretapping statute by secretly recording the interaction.[216] Though the officers released Bacon, the officers "kept his cell phone as evidence, which they submitted to the State Attorney's office to determine whether they had probable cause to search the phone."[217] Unsurprisingly, that office "later found

201. *See id.*
202. *See id.*
203. Williams v. City of Paris, No. 15-108, 2016 WL 20837, at *1 (E.D. Ky. May 4, 2016).
204. *See id.*
205. *Id.*
206. *Id.* at *5.
207. *Id.*
208. *Id.*
209. Williams v. City of Paris, No. 15-108, 2016 WL 20837, at *5 (E.D. Ky. May 4, 2016).
210. *Id.* at *1.
211. *See id.* at *5.
212. No. 5:14-cv-37, 2014 WL 12479640 (N.D. Fla. Aug. 28, 2014).
213. *Id.* at *1.
214. *See id.*
215. *Id.*
216. *Id.*
217. *Id.*

that there was insufficient evidence and declined to move forward with the prosecution."[218]

In Bacon's subsequent lawsuit against the officer, the district court rejected the notion that an officer performing a traffic stop could have a reasonable expectation of privacy under the Florida wiretapping statute given the public nature of the traffic stop.[219] Moreover, traffic stops are commonly recorded by police body cameras.[220] And perhaps most importantly, the officer's claimed expectation of privacy would conflict with "societal expectations of police accountability."[221] The district court further held that "[r]ecording a police officer is constitutionally protected speech, subject only to reasonable time, place, and manner restrictions."[222] Given such right, the district court found that the officers did not have probable cause to arrest Bacon or seize his cell phone under the guise of a wiretapping violation.[223]

4. Problems with Assumptions About Probable Cause

Though most current problems in this area relate to the exigency component of the exception, there have been recent examples where officers have also made problematic assumptions about probable cause to believe that recorders have evidence of criminal activity on their phones. *Dunn v. Does 1-22*[224] involved consecutive nights of heated protesting in Des Moines, Iowa from May 29, 2020 through May 31, 2020 following the death of George Floyd.[225] Though these evenings included lawful protesting of crowds in the hundreds, they also included rioting and looting by some which resulted in officers shooting tear gas on multiple occasions.[226] Police verbally issued mandatory dispersal orders during the late hours of May 30, 2020 and early hours of May 31, 2020.[227] Police eventually arrested twelve individuals scattered about the relevant areas for their presence after these dispersal orders, though officers did not know if these particular individuals "participated in the riots or unlawful assemblies" or if they were "within hearing distance" of the dispersal orders.[228]

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218. *See* Bacon v. McKeithen, No. 5:14-cv-37, 2014 WL 12479640, at *1 (N.D. Fla. Aug. 28, 2014).
219. *See id.* at *3.
220. *Id.*
221. *See id.*
222. *Id.* at *4 (citing Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000)).
223. *See id.* at *5. The Eastern District of Pennsylvania similarly held that Pennsylvania's wiretapping statute did not provide officers with probable cause to arrest a woman who was recording an aggressive interaction between police and her husband at their home, noting that even covertly recording police officers did not violate that statute. Gaymon v. Borough of Collingdale, 150 F. Supp. 3d 457, 465–66 (E.D. Pa. 2015) (citations omitted).
224. 116 F.4th 737 (8th Cir. 2024).
225. *See id.* at 743–45.
226. *See id.* at 743–44.
227. *See id.* at 744.
228. *See id.* at 744, 746.

One of the officers seized cell phones from six of these individuals because he thought "it was 'logical to believe' that they held evidence of a crime given how people tend to use smart phone cameras and 'the nature of the property destruction, looting, vandalism, and related riotous behavior.'"[229] The officer did "not point to any evidence showing that officers saw the plaintiffs taking videos of the events or participating in violent behavior."[230] The Eighth Circuit rejected this generalized attempt at probable cause, explaining that the officer's argument displayed an "inability to advance more than threadbare claims of 'specific and articulable facts'" to justify the seizure of these cell phones under the Fourth Amendment.[231]

In *Robbins v. City of Des Moines*,[232] a detective leaving a police station at the end of his shift noticed an individual, Daniel Robbins, recording illegally parked vehicles on his cell phone from a public sidewalk adjacent to the police station.[233] The detective also saw Robbins recording officers and other employees entering and leaving the police station.[234] The detective decided to go talk to Robbins because vehicles had been vandalized or stolen in the area recently and "he was aware of a previous incident in which two officers had been murdered by a person with a history of filming the police."[235] Other officers also approached and surrounded Robbins.[236]

Robbins refused to identify himself and said that he was "taking pictures" because it was "perfectly legal" for him "to do so."[237] One officer grabbed Robbins and patted him down.[238] When Robbins "repeatedly asked what about his conduct was illegal," the officers responded that *nothing was illegal*, but that he was being "suspicious."[239] The officers ordered Robbins to leave, but he refused.[240] The officers told Robbins that he was loitering and that he would be arrested if he did not identify himself.[241] The detective "suggested that the officers 'just make a suspicious activity case . . . [and] confiscate the camera until we have a reason for what we're doing.'"[242]

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229. *See id.* at 752.
230. Dunn v. Does 1-22, 116 F.4th 737, 752 (8th Cir. 2024).
231. *See id.* at 753 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).
232. 984 F.3d 673 (8th Cir. 2021).
233. *See id.* at 676.
234. *Id.*
235. *Id.* at 676–77.
236. *Id.* at 677.
237. *Id.*
238. Robbins v. City of Des Moines, 984 F.3d 673, 677 (8th Cir. 2021).
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*

The detective told Robbins that he was under arrest.[243] The officers again patted Robbins down and asked for identification.[244] Robbins said he did not have identification and that his name was "John Doe," though he eventually provided his name "under protest."[245] At this point, the officers seized Robbins's camera and cell phone, took a picture of Robbins for their file, and told Robbins that he was free to leave.[246] The police retained Robbins's cell phone for twelve days, only returning the cell phone after a demand was made by Robbins's attorney.[247] The detective never attempted to obtain a search warrant to search the phone, as he learned that Robbins "had a YouTube page dedicated to illegally-parked vehicles."[248]

Robbins filed suit, asserting in part that the arrest and seizure of his cell phone and camera violated his Fourth Amendment rights.[249] In relevant part, the Eighth Circuit held that the seizure of Robbins's cell phone was "unreasonable in the absence of . . . probable cause."[250] The court had rejected the officers' argument for probable cause in relation to Robbins's arrest for loitering because there was "no evidence Robbins was blocking the sidewalk or disrupting the activity of the police station."[251] The court rejected probable cause for seizure of the cell phone based upon the same lack of connection between Robbins's recording and loitering (or any other criminal activity).[252]

Future courts should use this case law to adopt and advance a rule that generally precludes police from using the exigent circumstances exception to seize the cell phone of a bystander recording protests or police activity.[253] Bystanders in these situations simply do not present the same inherent risk for deletion of claimed "evidence" on their cell phones as suspected criminals do in other contexts.[254] Rather, common sense demands that courts and police assume that such bystanders are in fact recording the event to preserve and share the recording with the public.[255] The exigent circumstances exception can only apply when the bystander recorder provides affirmative, concrete indication that he might

243. *Id.*
244. Robbins v. City of Des Moines, 984 F.3d 673, 677 (8th Cir. 2021).
245. *Id.*
246. *Id.*
247. *Id.* at 676–77.
248. *Id.* at 681.
249. *Id.* at 677.
250. Robbins v. City of Des Moines, 984 F.3d 673, 681 (8th Cir. 2021).
251. *Id.* at 680.
252. *See id.* at 681.
253. *See supra* Sections I.A.1, 2.
254. *See supra* Sections I.A.1, 2.
255. *See supra* Sections I.A, I.A.1.

delete the video.[256] Of course, the bystander's refusal to consent to the seizure of his phone does not establish such an indication.[257]

Courts should otherwise require a specific explanation as to why the recorder's cell phone was likely to contain actual 'evidence' of criminal activity. The Eighth Circuit's opinion in *Dunn* provides an important rule for protest cases in that officers cannot simply assume that everyone at a protest recorded the protests (or related looting/rioting) simply because they were present at the protest with cell phones in their pockets.[258] Moreover, cases like *Robbins* demonstrate the need for courts to test the alleged connection between the recording and the officer's theory of related criminal activity.[259] A strong requirement for both the exigency and probable cause components not only prevents assumptions in other criminal contexts from being carried over to protest and police recording situations but also supports the ability of recorders to bring important Fourth Amendment claims against officers that use the exigent circumstances exception to cloak a retaliatory seizure. These suits are particularly important to prevent future opportunities for officers to delete unwanted recordings after seizure.

B. Searches Incident to Arrest

The second relevant exception in this context is the seizure of personal property from a "search incident to arrest," which allows the officer to search an individual placed under arrest (along with those areas under the individual's immediate control) in order to disarm the individual and preserve potential evidence for trial.[260] Though the rule is commonly referred to as the "search incident to arrest exception,"[261] it operates in many cases as a search *and* seizure incident to arrest exception.[262] Given that most adults carry their cell phones with them at all times, it is

256. *See supra* Sections I.A.1, 2.

257. *See supra* Sections I.A.1, 2.

258. *See* Dunn v. Does 1-22, 116 F.4th 737, 752–53 (8th Cir. 2024).

259. *See* Robbins v. City of Des Moines, 984 F.3d 673, 676–77, 680–81 (8th Cir. 2021).

260. Knowles v. Iowa, 525 U.S. 113, 116 (1998) ("[T]wo historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial.") (citation omitted). The Supreme Court has explained that "the label 'exception' is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." Riley v. California, 573 U.S. 373, 382 (2014).

261. *See, e.g.*, *Riley*, 573 U.S. at 384–85 (referring to the "search incident to arrest trilogy" of Supreme Court cases and the "search incident to arrest exception").

262. *See, e.g.*, United States v. Perry, 504 F.2d 180, 184 (D.C. Cir. 1974) (referring to the Supreme Court's "exception for searches and seizures incident to arrest") (citation omitted); United States v. Wright, 534 F. Supp. 3d 416, 423 (M.D. Pa. 2021) (referring to "circumstances" justifying a "warrantless search or seizure" including "a search or seizure 'incident to arrest,' an exception based on 'the need to disarm the suspect in order to take him into custody, and . . . the need to preserve evidence for later use at trial'") (citation omitted); United States v. O'Dell, 483 F. Supp. 3d 757, 761 (D. Alaska 2020) ("One such exception permits a warrantless search and seizure effectuated incident to a valid arrest.") (citations omitted).

no surprise that cell phones are often seized incident to an individual's arrest.[263]

The problem with the search incident to arrest exception stems from a critical distinction between the search and seizure components of the exception. Whereas the search allowance is automatic upon the arrest, the seizure allowance really should not be in most instances. As for the *search* component, it "may be made of the *person* of the arrestee by virtue of the lawful arrest."[264] Though the underlying justification for the search is to ensure safety and preserve evidence, the search of the individual does not actually "depend on whether" the particular search is "likely to protect officer safety or evidence."[265] The Supreme Court has emphasized in opinions spanning fifty years that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[266] Rather, "the mere 'fact of the lawful arrest' justifies 'a full search of the person.'"[267]

While the officer can search a person incident to their arrest regardless of the likelihood (or unlikelihood) that the person is carrying contraband or weapons, the officer *should* only seize personal property found during such search if the officer has probable cause to believe that the item(s) (1) are evidence of criminal conduct (even if unrelated to that particular arrest) or (2) present a danger to officer safety.[268] However,

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263. *See e.g.*, *Riley*, 573 U.S. at 388 (noting that there was no dispute that "officers could have seized and secured [defendants'] cell phones" incident to their arrest "to prevent destruction of evidence while seeking a warrant"); United States v. Brixen, 908 F.3d 276, 280 (7th Cir. 2018) ("[T]here is no dispute that the seizure of the cell phone incident to [the defendant's] arrest was lawful."); Haskell v. Brown, 317 F. Supp. 3d 1095, 1108 (N.D. Cal. 2018) ("[W]hile law enforcement may seize an individual's cell phone incident to arrest, searching that phone requires a warrant or exigent circumstances.") (citation omitted).

264. Birchfield v. North Dakota, 579 U.S. 438, 460 (2016) (quoting United States v. Robinson, 414 U.S. 218, 224 (1973)); *see also* United States v. Herron, 18 F. Supp. 3d 214, 223 (E.D.N.Y. 2014) ("So long as the initial custodial arrest is based on probable cause, authority to conduct such a search incident to that arrest does not turn on the probability that weapons or evidence will be discovered.") (citing *Robinson*, 414 U.S. at 235).

265. *Birchfield*, 579 U.S. at 460 (citing *Robinson*, 414 U.S. at 235).

266. *Riley*, 573 U.S. at 384 (quoting *Robinson*, 414 U.S. at 235).

267. *Birchfield*, 579 U.S. at 460 (quoting *Robinson*, 414 U.S. at 235); *see also Riley*, 573 U.S. at 384 ("Instead, a 'custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.'" (quoting *Robinson*, 414 U.S. at 235)).

268. *See* Katz v. Morgenthau, 892 F.2d 20, 22–23 (2d Cir. 1989) ("Although police officers may seize items incident to a lawful arrest which pose an immediate threat to their security or constitute evidence in danger of being destroyed, they may not embark upon a general search of the premises beyond the arrestee's body or area of reach."); United States v. Montalvo, No. 1:19-cv-00134, 2023 WL 183662, at *4 (D.R.I. Jan. 13, 2023) (explaining if "a person is lawfully arrested and is carrying . . . items that are reasonably believed to be contraband or evidence of the crime for which he is arrested[,]" then the "police may seize the item 'incident to the arrest") (citing Arizona v. Gant, 556 U.S. 332, 343 (2009)); Smith v. District of Columbia, 387 F. Supp. 3d 8, 25 (D.D.C. 2019) (citations omitted) (explaining that "police can seize weapons found in plain view or following a

courts disagree on whether such independent probable cause is required to seize items found during the search justified by the arrest.[269] That is, at the time of seizure, must the officer have probable cause to believe that the item to be seized is, or has, evidence of criminal activity?[270] Or may the officer seize anything found on the individual being arrested without limitation by virtue of the valid arrest?[271] This debate is particularly important for recorders of protests or police activity. Though police may have arguable probable cause to arrest the recorder, the police in many instances would not also have probable cause to believe that the recorder's cell phone contains evidence of criminal activity—which would allow the police to seize and keep the cell phone (even if the individual is released without charges).[272]

Current disagreement amongst courts may come, in part, from the fact that although there is a wealth of case law on the scope of a valid search incident to the arrest, relatively little focuses on the justification for seizing personal property following such a search.[273] Indeed, the Supreme Court has said that the century-long "debate" surrounding the search incident to arrest exception has largely "focused on the extent to which officers may search property found on or near the arrestee."[274] The problem for courts who maintain that independent probable cause is *not* required for items seized incident to an arrest is that there are several other Supreme Court cases that speak of a universal rule that *all* seizures of personal property require their own probable cause.[275]

The Ninth Circuit provides the leading statement for this view in *United States v. Holzman*[276]: "For an item to be validly seized during a search incident to an arrest, the police need not have probable cause to seize the item, nor do they need to recognize immediately the item's evidentiary nature."[277] Some other federal district courts have also agreed that "[t]he search-incident-to-arrest exception to the Fourth Amendment's warrant requirement allows the police to seize personal items

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lawful search incident to arrest to ensure officer safety and to preserve incriminating evidence"); *Herron*, 18 F. Supp. 3d at 223 (citations omitted) ("A police officer may seize personal effects discovered during a search incident to arrest if the officers find that these are evidence of criminal conduct, even if unrelated to that for which a suspect had been arrested.").

269. *See infra* Section II.B.2.

270. *See infra* Section II.B.2.

271. *See infra* Section II.B.2.

272. *See infra* Section II.A.1.

273. *See* Young v. State, 339 A.2d 723, 724 (Del. 1975) ("Most of the case law centers around a search of doubtful legality (and any seizure derived from an illegal search is, of course, tainted). Cases considering seizure only are relatively few."); *see also* United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984) (citations omitted) (noting that "the concept of a 'seizure' of property is not much discussed in our cases").

274. Riley v. California, 573 U.S. 373, 382 (2014).

275. *See supra* Section I.B.

276. 871 F.2d 1496 (9th Cir. 1989).

277. *Id.* at 1505 (citing United States v. Robinson, 414 U.S. 218, 235 (1973)); United States v. Edwards, No. 1:10-CR-132, 2010 WL 5184784, at *38 (N.D. Ga. Oct. 13, 2010) (quoting *Holzman*, 871 F.2d at 1505).

from an arrestee's person without any further showing of probable cause to seize such items as evidence."[278] The only basis provided by the *Holzman* court for this conclusion is citation to the following passage from the Supreme Court's explanation of the search incident to arrest exception in *United States v. Robinson*[279]:

> But quite apart from these distinctions, our more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. We do not think the long line of authorities of this Court dating back to *Weeks*, or what we can glean from the history of practice in this country and in England, requires such a case-by-case adjudication. A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.[280]

Certainly, the *Robinson* court established the point that a lawful arrest justifies a full search of the individual without any additional probable cause requirements.[281] But the *Robinson* court's discussion of the automatic allowance of a *search* of the individual says nothing about an automatic allowance for the officer to *seize* any item that the officer may find.[282] The Supreme Court recently confirmed *Robinson*'s automatic search allowance in both *Riley v. California*[283] and *Birchfield v. North*

278. United States v. Walters, No. 3:20-cr-89, 2021 WL 869686, at *10 (D. Conn. Mar. 9, 2021) (citing United States v. Diaz, 854 F.3d 197, 205, 208 (2d Cir. 2017)); *see also* United States v. Tillery, 332 F. Supp. 217, 220 (E.D. Pa. 1971) (citations omitted) (holding that agents did not need probable cause to seize a ten-dollar bill from the defendant's person later used as evidence of a bank robbery because the "agents could do so as a part of the administrative process necessary to prepare the defendant for safe incarceration").

279. 414 U.S. 218, 235 (1973).

280. *Compare id.*, *with Holzman*, 871 F.2d at 1505 (citing *Robinson*, 414 U.S. at 235).

281. *See Robinson*, 414 U.S. at 235.

282. *See id.*

283. 573 U.S. 373 (2014).

Dakota[284] as a central fixture for the search incident to arrest exception. Notably, in both opinions, the Supreme Court did not in any way indicate that the automatic nature of the search allowance carries over to the seizure of items found during the search.[285]

The Ninth Circuit's holding in *Holzman* fails to acknowledge that there are two separate pillars of protection built into the Fourth Amendment. The Fourth Amendment "contemplates *distinct* protections against unreasonable searches and unreasonable seizures."[286] While a "search compromises the individual interest in privacy[,] a seizure deprives the individual of dominion over his or her . . . property."[287] The *Robinson* Court's automatic search incident to arrest rule was meant to prevent a multi-tiered search analysis of the individual incident to arrest, not to prevent the separate analysis of any seizure of personal property that might take place[288] as that seizure is a "different" invasion addressed by the Fourth Amendment.[289]

The Supreme Court's explanation of this distinction is made clear in *Soldal v. Cook County*,[290] where the Court reaffirmed that its "cases unmistakably hold that the [Fourth] Amendment protects property as well as privacy."[291] Though *Soldal* did not involve a search incident to arrest, the Supreme Court provided an extensive survey across its Fourth Amendment cases to demonstrate why the Court had not extinguished the Amendment's property interest component (principally protecting against seizures) to focus only on a privacy interest analysis.[292]

The Court used the Fourth Amendment's "plain view" exception to punctuate this point.[293] The plain view exception allows the government to seize contraband observed in plain view without a warrant so long as the officer had a legal right to be in the place where the officer observed the contraband *and* the officer did not trespass *en route* to seizing the

284. 579 U.S. 438 (2016).

285. *See id.* at 460 (quoting *Robinson*, 414 U.S. and 235); *Riley*, 573 U.S. at 384 (quoting *Robinson*, 414 U.S. at 235).

286. United States v. Rumley, 588 F.3d 202, 205 (4th Cir. 2009) (citing Horton v. California, 496 U.S. 128, 133 (1990)); *see also Horton*, 496 U.S. at 133 (emphasis added) (citation omitted) ("The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property."); PPS, Inc. v. Faulkner Cnty., 630 F.3d 1098, 1102 (8th Cir. 2011) ("The Fourth Amendment protects against two distinct governmental actions—unreasonable searches and unreasonable seizures" as "'[a] search compromises the individual interest in privacy; [while] a seizure deprives the individual of dominion over his or her . . . property'" (quoting *Horton*, 496 U.S. at 133)).

287. *Rumley*, 588 F.3d at 205 (citation omitted).

288. *See Robinson*, 414 U.S. at 235.

289. *Horton*, 496 U.S. at 133.

290. 506 U.S. 56 (1992).

291. *Id.* at 62–63 (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

292. *See id.* at 62–66.

293. *Id.* at 65–66.

contraband.[294] The plain view exception is based upon the notion that the suspect does not have a privacy interest in items that can be observed in "plain view."[295] The *Soldal* court explained, "If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, 'plain view' seizures would not implicate that constitutional provision at all."[296] But as the plethora of cases examining the plain view exception make clear, plain view seizures are still "scrupulously subjected to Fourth Amendment inquiry," requiring that "in the absence of consent or a warrant permitting the seizure of the items in question, such seizures can be justified only if they meet the probable-cause standard . . . *and if they are unaccompanied by unlawful trespass*."[297] The Court noted that this must be the case "because, the absence of a privacy interest notwithstanding, '[a] seizure of the article . . . would obviously invade the owner's possessory interest.'"[298] It is important for our purposes (considering independent probable cause needed for seizure of items incident to an arrest) that the *Soldal* court explained that it does not matter which particular exception to the Fourth Amendment's warrant requirement might be at issue for this rule as the "plain-view doctrine 'merely reflects an application of the Fourth Amendment's *central requirement* of reasonableness to the law governing seizures of property.'"[299]

The Supreme Court stated this universal rule more specifically in *Warden v. Hayden*[300]: For any seizure of personal property, "[t]here must, of course, be a nexus . . . between the item to be seized and criminal behavior."[301] Courts have drawn an important observation about the timing that is inherent in this statement from *Warden*: "Th[is] 'nexus' must be . . . known to the officers at the time of the seizure and may not be based upon mere speculation."[302] Though "[t]he nexus between 'criminal activity' and the item to be seized is 'automatic[]' when the object of the search is 'contraband,'"[303] such as a bag of heroin or an illegal automatic weapon, there are numerous items that could be found during a

294. *Horton*, 496 U.S. at 137.
295. *Id.* at 133, 141.
296. Soldal v. Cook Cnty., 506 U.S. 56, 66 (1992).
297. *Id.* (emphasis added) (citing Arizona v. Hicks, 480 U.S. 321, 326–27 (1987); *Horton*, 496 U.S. at 136–37).
298. *Id.* (quoting *Horton*, 496 U.S. at 134).
299. *Id.* (emphasis added) (quoting Texas v. Brown, 460 U.S. 730, 739 (1983)).
300. 387 U.S. 294 (1967).
301. *Id.* at 307; *see also* United States v. White, 660 F.2d 1178, 1184 (7th Cir. 1981) ("A lawful seizure must be based upon a 'nexus' between the item seized and particular criminal behavior." (citing *Warden*, 387 U.S. at 307)).
302. *White*, 660 F.2d at 1184; *see also* United States v. Delva, 13 F. Supp. 3d 269, 276 (S.D.N.Y. 2014) ("[W]hen the object is seized as evidence of a crime, whether or not probable cause existed at the time of its seizure must be examined in terms of whether there was cause to believe that the evidence sought would aid in a particular apprehension or conviction." (citing *Warden*, 387 U.S. 306–07)).
303. United States v. Abernathy, 843 F.3d 243, 249 (6th Cir. 2016) (quoting United States v. Church, 823 F.3d 351, 355 (6th Cir. 2016)).

search incident to arrest that carry no immediately apparent connection to criminal activity. For instance, a cell phone.

There are several courts that properly recognize that, even in the search incident to arrest context, the "justification to search is not justification to seize."[304] These courts also recognize the importance of the rule that the officer must have probable cause to seize the item as evidence of criminal activity "at the time of seizure."[305] The danger of holding otherwise is explained by Judge Orrick of the Northern District of California in *United States v. Barajas*[306]: "If officers were allowed to seize items not reasonably identified as contraband *at the time of seizure*, this bootstrapping approach would vitiate the probable cause standard for seizures of property."[307] This "would allow later-in-time investigation of an item to justify its prior seizure regardless of whether the seizing officers at the time had probable cause to believe it was contraband or linked to criminal activity."[308]

Instead, "[t]he proper inquiry must focus on whether probable cause existed at the time of seizure, not at some time thereafter."[309] In *Barajas*,

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304. United States v. Sanders, No. 19-CR-125, 2021 WL 2843108, at *8 (W.D.N.Y. July 8, 2021) (explaining that "[e]ven if the officers had probable cause to arrest" the defendant and "search him incident to the arrest, justification to search is not justification to seize"); *see also* United States v. Barajas, 517 F. Supp. 3d 1008, 1022–25 (N.D. Cal. 2021) (holding that seizure of gun switch at the time of the defendant's arrest was invalid because law enforcement did not have probable cause to believe it to be contraband "*at the time of seizure*"). *But cf.* United States v. Chhien, 266 F.3d 1, 9 (1st Cir. 2001) ("While an officer may not *seize* an object during a *Terry* frisk unless he has probable cause to believe that it is contraband, . . . he is not prohibited from inquiring, upon reasonable suspicion, into the nature of that object." (citing Minnesota v. Dickerson, 508 U.S. 366, 376 (1993); United States v. Schiavo, 29 F.3d 6, 9 (1st Cir.1994)); State v. Prahin, 455 N.W.2d 554, 561 (Neb. 1990) (citation omitted) ("It is well established that not everything which is uncovered in a lawful search is thereby subject to lawful seizure.").

305. *Barajas*, 517 F. Supp. 3d at 1022–25 (emphasis removed) (holding that seizure of gun piece at the time of the defendant's arrest was invalid because law enforcement did not have probable cause to believe it to be contraband "*at the time of seizure*"); *see also* Young v. State, 339 A.2d 723, 725 (Del. 1975) (citations omitted) ("Thus, the critical question here is whether at the time of seizure the police had probable cause to believe that the television was stolen . . . . Time is critical because an after-the-fact determination that an item was contraband will not cure a seizure made without warrant or other right in law."); State v. Achter, 512 S.W.2d 894, 904 (Mo. Ct. App. 1974) (holding that "it may be assumed that a lawful seizure requires that [the] officer have knowledge of facts which create a reasonable belief that the articles seized offend against the law"); United States v. Watson, No. 22-13652, 2024 WL 3860113, at *3 (11th Cir. Aug. 19, 2024) (per curiam) (explaining that seizure of the defendant's cell phone was valid after a search incident to arrest because the officer had probable cause to believe the defendant would delete evidence of sex trafficking); United States v. Jackson, No. 22-CR-55, 2023 WL 3932853, at *6 (E.D. Wis. June 9, 2023) ("Police are entitled to seize property they lawfully encounter that constitutes or contains evidence of a crime."); Dixon v. State, 327 A.2d 516, 524–25 (Md. App. Ct. 1974) (holding that the seizure of pills observed in plain view was invalid because officer did not have probable cause to believe the pills were illegal narcotics at the time of seizure).

306. 517 F. Supp. 3d 1008 (N.D. Cal. 2021).

307. *Id.* at 1025.

308. *Id.*

309. *Id.* The *Barajas* court explained that "[t]his does not mean that officers are required to know with certainty that something is contraband in order to seize it[,]" however "the government must still offer sufficient facts to establish probable cause of its criminal nature at the time of seizure." *Id.*

the district court found that the officers had illegally seized a gun conversion switch from the defendant at the time of arrest because they "lacked the information and knowledge necessary to even tentatively identify the [gun] switch as contraband."[310] "[E]ven though [the defendant's] arrest was lawful and the search incident to arrest was lawful, the officers lacked probable cause to maintain possession of the items that they discovered during the search."[311]

The Oregon Supreme Court expressed similar concerns in *Oregon v. Elkins*.[312] The *Elkins* court explained that if the Fourth Amendment did not require independent probable cause for seizure of personal property incident to an arrest, "an officer who desired to inculpate an arrested person in another crime, could seize everything in such person's immediate possession and control upon the prospect that on further investigation some of it might prove to have been stolen or to be contraband."[313] That rule "would open the door to complete temporary confiscation of all an arrested person's property which was in his immediate possession and control at the time of his arrest for the purpose of a minute examination of it in an effort to connect him with another crime."[314] This would allow for the same type of "exploratory seizure as one made upon an arrest for which no probable cause existed" and would invite an "[e]x post facto authorization of a seizure made on groundless suspicion."[315]

One principal argument against independent probable cause for a seizure incident to arrest is that a person that has already been "properly arrested and searched" does not suffer any greater harm to privacy when the personal property is seized.[316] Similar to the Supreme Court in *Soldal*, the *Elkins* court responded by emphasizing that the protection provided by the Fourth Amendment prevents invasion of *both* privacy and property rights.[317] "Historically, there is no doubt but that the founding fathers were also concerned with the violations of property rights which were brought about by indiscriminate seizures through the medium of general warrants and writs of assistance."[318] The Founders were not only concerned about "the violation of privacy brought about by the general ransacking of homes and places of business" but also "the carrying away of everything upon which hands could be laid for the purpose

310. *Id.*
311. *Id.*
312. 422 P.2d 250 (Or. 1966) (en banc); *see also* 3 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.2(j) (6th ed. 2024) (describing *Elkins* as the "leading case on this point").
313. *Elkins*, 422 P.2d at 254.
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.* at 254–55.
318. *Id.* at 254.

of leisurely examination in an attempt to find evidence of unlawful conduct."[319] In line with the universal probable cause requirement discussed in *Soldal* and *Warden*, courts should require that police establish independent probable cause to seize the cell phone of an individual that is arrested in connection with protest or police recording activity.

As discussed in the previous Section examining the probable cause component of the exigent circumstances exception, there are often significant doubts about whether there is probable cause to think that a recorder (or potential recorder) of protests or police activity has evidence of criminal activity on their cell phone.[320] Though case law is clear that the Fourth Amendment demands such a showing to protect the important property interest that the recorder has in their cell phone, the independent probable cause requirement is also critical because the property harm suffered by the recorder is compounded by the seizure's interference with the recorder's First Amendment right to immediately share the recording with the public.

II. EXTENDED SEIZURES OF CELL PHONES

A. Circuit Split on Extended Seizures of Personal Property

There is a widespread circuit split on whether the Fourth Amendment separately requires police to justify an *extended* seizure of personal property.[321] Specifically, even if the initial seizure of personal property was valid, does the Fourth Amendment require police to justify the continued seizure of personal property when the legitimate need for the seizure has arguably ended?[322] For many courts, the Fourth Amendment only applies to the initial *taking* of the personal property and provides no further protection regarding the duration of that seizure.[323] Extended seizures of cell phones taken during a protest or other police encounter can have particularly harmful consequences because the individual is deprived for months (or longer) of both the important possessory interest they have in their phone and the ability to engage in core free speech activities. This includes an extended deprivation of the ability to share the recording of the protests or police activity. The D.C. Circuit's recent opinion in *Asinor* examines the substance of this circuit split and its impact on the seizure of cell phones connected with the recording of protests and police activity.[324]

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319. State v. Elkins, 422 P.2d 250, 254 (Or. 1966) (en banc).
320. *See supra* Section I.A.4.
321. *See infra* Sections II.A.1, 2.
322. *See infra* Sections II.A.1, 2.
323. *See infra* Sections II.A.1, 2.
324. Asinor v. District of Columbia, 111 F.4th 1249, 1251–52 (D.C. Cir. 2024).

1. The D.C. Circuit's Decision in *Asinor v. District of Columbia*

The D.C. Circuit reviewed a consolidated appeal of two cases in *Asinor*.[325] The plaintiffs in *Cameron v. District of Columbia*[326] were five individuals that had been arrested by District of Columbia Metropolitan Police Department officers (District Police) during a protest on August 13, 2020.[327] The plaintiffs joined "dozens" of other "people marching 'for police reform and racial justice'" following the death of George Floyd.[328] District Police "surrounded" the group of protesters in a "confined area, using a tactic known as 'kettling'" and "arrested all 40-plus demonstrators for alleged rioting."[329] District Police seized each of the plaintiffs' cell phones during their arrests.[330] Though District Police released the plaintiffs without pressing formal charges, they retained the plaintiffs' cell phones.[331] District Police continued to refuse to return the plaintiffs' cell phones "despite many phone calls and emails to [District Police] and the U.S. Attorney's office"[332] over a period of "many months."[333] District Police did not seek search warrants in support of such extended seizure of the plaintiffs' cell phones.[334]

Two of the plaintiffs eventually secured the return of their cell phones after filing administrative motions pursuant to D.C. Rule of Criminal Procedure 41(g) with the D.C. Superior Court.[335] D.C. Rule of Criminal Procedure 41(g) "allows a person aggrieved by 'the deprivation of property' to 'move for the property's return.'"[336] However, even these two successful plaintiffs waited "285 and 312 days after their arrests" to retrieve their phones.[337]

Five plaintiffs filed a lawsuit against the District in the federal district court on behalf of themselves and as class representatives of other arrestees whose property was not returned in a timely manner.[338] The plaintiffs sought monetary damages and an injunction for the return of the remaining property being held by District Police, including numerous cell phones.[339] One plaintiff feared that District Police used messages and photos to monitor protests.[340] Other plaintiffs worried that District Police

325. *See id.*
326. No. 21-cv-2908, 2022 WL 3715779 (D.D.C. Aug. 29, 2022), *overruled in part by*, *Asinor*, 111 F.4th 1249.
327. *Asinor*, 111 F.4th at 1251.
328. *Cameron*, 2022 WL 3715779, at *1.
329. *Id.*
330. *Asinor*, 111 F.4th at 1251.
331. *Id.*
332. *Id.*
333. *Cameron*, 2022 WL 3715779, at *1.
334. *Asinor*, 111 F.4th at 1251.
335. *Id.*; *see also Cameron*, 2022 WL 3715779, at *2.
336. *Asinor*, 111 F.4th at 1251 (quoting D.C. R. CRIM. P. 41(g)).
337. *Id.*
338. *Id.*
339. *Id.*
340. *Cameron*, 2022 WL 3715779, at *2.

would use their phones to gather information about Black Lives Matter activists.[341] Several plaintiffs "lost their ability to access photos, documents, work material, and various electronic accounts secured by two-factor authentication."[342] The plaintiffs claimed that the District violated their Fourth Amendment right against unreasonable seizures by keeping phones for longer than necessary to serve a legitimate purpose.[343] The plaintiffs also asserted a violation of their Fifth Amendment due process rights and a common law conversion claim.[344]

The district court dismissed the plaintiffs' complaint, holding that the plaintiffs had failed to assert a valid Fourth Amendment claim because the initial seizure of property was reasonable, and otherwise because any challenge to the continued seizure was governed exclusively by the Fifth Amendment.[345] The district court believed that all other courts that have considered the issue have held that the prolonged retention of lawfully seized property does not implicate the Fourth Amendment.[346] The court rejected the plaintiffs' argument that "every one of these decisions is wrong" because of "a trio of nearly forty-year-old Supreme Court cases"[347]: *United States v. Place*,[348] *United States v. Jacobsen*,[349] and *Segura v. United States*.[350] The district court further held that

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341. *Id.*

342. *Id.*

343. *Id.* at *3; *see also* Asinor v. District of Columbia, 111 F.4th 1249, 1251–52 (D.C. Cir. 2024).

344. *Asinor*, 111 F.4th at 1251.

345. *Id.* at 1251–52.

346. Cameron v. District of Columbia, No. 21-cv-2908, 2022 WL 3715779, at *3 (D.C. Cir. 2024) (citing Bennett v. Dutchess Cnty., 832 F. App'x. 58, 60 (2d Cir. 2020)) ("[W]here an initial seizure of property was reasonable, the government's failure to return the items does not state a separate Fourth Amendment claim of unreasonable seizure."); *id.* (quoting Denault v. Ahern, 857 F.3d 76, 84 (1st Cir. 2017)) (holding that challenges to "the government's retention of personal property after a lawful initial seizure . . . sound[ ] in the Fifth Amendment rather than in the Fourth"); *id.* at *4 (quoting Gilmore v. City of Minneapolis, 837 F.3d 827, 838 (8th Cir. 2016) (stating that "if the seizure" of the plaintiff's political sign was valid incident to an arrest, "we doubt [the plaintiff] can assert a Fourth Amendment claim over the sign's destruction"); *id.* (quoting Snider v. Lincoln Cnty. Bd. of Cnty. Comm'rs, 313 F. App'x. 85, 92–93 (10th Cir. 2008)) (holding that it was error for the trial court to have treated plaintiff's challenge regarding year-plus seizure of his firearm and permit as "only rais[ing] rights explicitly protected by the Fourth Amendment" because a Tenth Circuit case had "analyzed the propriety of the initial seizure by police under the Fourth Amendment, but held that the ultimate disposition of the property had to comply with the protections of procedural due process [under the Fifth and Fourteenth Amendments]"); *id.* at *3 (citing Shaul v. Cherry Valley-Springfield Cent. Sch. Dist., 363 F.3d 177, 187 (2d Cir. 2004)) ("Where, as in this case, an initial seizure of property was reasonable, [the government's] failure to return the items does not, by itself, state a separate Fourth Amendment claim of unreasonable seizure . . . . To the extent the Constitution affords [a plaintiff] any right with respect to a government agency's retention of lawfully seized property, it would appear to be procedural due process."); *id.* (citing Lee v. City of Chicago, 330 F.3d 456, 465 (7th Cir. 2003)) ("[A] government's decision regarding how and when to return once lawfully obtained property raises different issues, which the text, history, and judicial interpretations of the Fourth Amendment do not illuminate."); *id.* (citing Fox v. Van Oosterum, 176 F.3d 342, 351 (6th Cir. 1999)) (holding that "[o]nce th[e] act of taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies").

347. *Cameron*, 2022 WL 3715779, at *4.

348. 462 U.S. 696 (1983).

349. 466 U.S. 109 (1984).

the plaintiffs' Fifth Amendment claim failed because the administrative procedure for return of confiscated property (Rule 41(g)) provided adequate process.[351] Having dismissed the only federal claims in the case, the district court declined supplemental jurisdiction over the plaintiffs' conversion claim.[352]

In *Asinor*, freelance photojournalists Oyoma Asinor and Bryan Dozier attended similar protests on consecutive nights in August of 2020 to document the protests.[353] On August 29, 2020, District Police deployed "chemical irritants" and stun grenades that harmed both Asinor and Dozier.[354] Asinor returned to the same site the following evening to attend another protest. Asinor was arrested while photographing the protest.[355] District Police seized Asinor's cell phone and camera during the arrest.[356] Though Asinor was released the same day without charges, the District refused to return Asinor's cell phone and camera.[357] The District continued to hold Asinor's cell phone and camera for nearly a year despite multiple requests for their return.[358]

Asinor and Dozier filed a lawsuit against the District in the federal district court, with both Asinor and Dozier asserting claims against the District (and three officers) based upon the use of chemical irritants and stun grenades.[359] Like the plaintiffs in *Cameron*, Asinor asserted Fourth Amendment, Fifth Amendment, and common law conversion claims against the District based upon the lengthy seizure of his cell phone and camera.[360] The district court designated the *Asinor* case as related to *Cameron* and reassigned the *Asinor* case to the same district court judge hearing *Cameron*.[361] In an order issued the same day as the order dismissing *Cameron*, the district court dismissed Asinor's Fourth and Fifth Amendment claims based upon the same reasoning (incorporated by reference) provided in *Cameron*.[362]

The starting point for the *Asinor* court's analysis demonstrates the importance of this Article's prior analysis on the Fourth Amendment's requirement of independent probable cause for the seizure of cell phones found by police during a search incident to arrest.[363] The *Asinor* court

350. 468 U.S. 796 (1984).
351. Asinor v. District of Columbia, 111 F.4th 1249, 1252 (D.C. Cir. 2024).
352. *Id.*
353. Asinor v. District of Columbia, No. 21-cv-02158, 2022 WL 3715777, at *1 (D.D.C. Aug. 29, 2022), *overruled in part by*, Asinor v. District of Columbia, 111 F.4th 1249 (D.C. Cir. 2024).
354. *Id.*
355. *Id.*; *see also Asinor*, 111 F.4th at 1252.
356. *Asinor*, 111 F.4th at 1252; *Asinor*, 2022 WL 3715777, at *1.
357. *Asinor*, 111 F.4th at 1252; *Asinor*, 2022 WL 3715777, at *1.
358. *Asinor*, 111 F.4th at 1252; *Asinor*, 2022 WL 3715777, at *1.
359. *Asinor*, 111 F.4th at 1252; *Asinor*, 2022 WL 3715777, at *1.
360. *Asinor*, 111 F.4th at 1252; *Asinor*, 2022 WL 3715777, at *1.
361. *Asinor*, 111 F.4th at 1252; *Asinor*, 2022 WL 3715777, at *1.
362. *Asinor*, 2022 WL 3715777, at *1; *Asinor*, 111 F.4th at 1252.
363. *See Asinor*, 111 F.4th at 1252.

noted that "[a]ll agreed that the [District Police's] arrest of the plaintiffs was reasonable under the Fourth Amendment."[364] The court explained, without discussion, that "it is blackletter law that, during an arrest, police may seize personal property held by the arrestee without a warrant."[365] The court then concluded succinctly: "So, the [District Police's] initial seizure of the plaintiffs' effects did not violate the Fourth Amendment."[366] Had the *Asinor* court acknowledged the universal probable cause rule from *Soldal* and *Warden* and required independent probable cause for the initial seizure of the plaintiffs' cell phones found during a search incident to their arrest, an analysis on the Fourth Amendment's application to an extended seizure may have been unnecessary (depending upon whether District Police could somehow show that the cell phones themselves contained evidence of criminal activity).[367] Or to put it another way, if the jurisdiction required police to honor an independent probable cause requirement to *initially* seize the plaintiffs' phones, the District Police may have decided that seizure of the cell phones was inappropriate, and the months-long seizures would have been avoided.[368]

Setting this point aside, the *Asinor* court explained that the "question before us is whether the Fourth Amendment has anything to say about the many months in which the [District Police] allegedly continued to hold the plaintiffs' effects with no legitimate investigatory or protective purpose."[369] The District continued to argue that while the Fourth Amendment applies to the government's initial seizure of personal property, the Fourth Amendment does not restrict the government's continued possession of the property.[370] The court disagreed, holding that "[w]hen the government seizes property incident to a lawful arrest, the Fourth Amendment requires that any continued possession of the property must be reasonable."[371]

This holding was largely based upon a principle recognized by the two Supreme Court cases that had been rejected by the district court: *Place* and *Jacobsen*.[372] At the center of this analysis is an explanation from the Supreme Court in *Jacobsen* that "a seizure [of personal property] lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable

364. *Id.*
365. *Id.*
366. *Id.*
367. *See supra* Section I.B.
368. *Asinor*, 111 F.4th at 1252.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.* at 1255–56 (discussing Segura v. United States, 468 U.S. 796 (1984); United States v. Jacobsen, 466 U.S. 109 (1984); United States v. Place, 462 U.S. 696 (1983)).

seizures.'"[373] The *Jacobsen* court noted that such a seizure can become "unreasonable because its length unduly intruded upon constitutionally protected interests."[374]

The *Asinor* court found that, though the District Police's initial seizure of the cell phones was valid, the continued seizure of the phones for many months became unreasonable under the reasoning from *Jacobsen* "after [the seizure] lacked any legitimate interest in protecting officers or investigating possible criminal behavior."[375] The court believed that the harm caused by the continued seizure of these cell phones demonstrated why applying the Fourth Amendment in this context was necessary:

> And after the government's legitimate interests dissipated, harm to the plaintiffs continued to accrue: It is one thing not to have access to a cell phone while spending a night in jail. It is quite another not to have access to it for the following year. Some plaintiffs allege that they had to replace their phones, a significant financial harm. And some allege that they lost access to important information like passwords, photographs, and contact information for friends and family. So the plaintiffs have alleged that the seizures at issue, though lawful at their inception, later came to unreasonably interfere with their protected possessory interests in their own property.[376]

The D.C. Circuit also overruled the district court's holding that the Fifth Amendment Due Process Clause and the District's administrative process to request return of property taken in connection with a criminal matter somehow canceled out the plaintiffs' Fourth Amendment right to challenge the extended seizure of their phones.[377] "[C]onstitutional provisions do not preempt one another like that."[378] The court explained, "[T]he Supreme Court has already rejected the argument that the Fourth Amendment does not apply to interferences with property rights just because the Fifth Amendment does."[379] In *Soldal*, the Supreme Court "reasoned that '[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands.'"[380] If a plaintiff alleges "multiple violations" of constitutional rights, a court "must 'examine each constitutional provision in turn.'"[381]

Moreover, the court explained that, even if it had to "pick" between the Fourth Amendment seizure rule and Fifth Amendment's due process

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373. *Id.* at 1255 (quoting *Jacobsen*, 466 U.S. at 124)).
374. Asinor v. District of Columbia, 111 F.4th 1249, 1255 (D.C. Cir. 2024) (quoting *Jacobsen*, 466 U.S. at 124 n.25)).
375. *See id.*
376. *See id.*
377. *Id.* at 1259–60.
378. *Id.* at 1259.
379. *Id.* (citing Soldal v. Cook Cnty., 506 U.S. 56, 70–71 (1992)).
380. Asinor v. District of Columbia, 111 F.4th 1249, 1259 (D.C. Cir. 2024) (quoting *Soldal*, 506 U.S. at 70).
381. *Id.* (quoting *Soldal*, 506 U.S. at 70).

guarantee, the court was not confident "that the Fifth Amendment fits the plaintiffs' claims better than the Fourth."[382] Even if an administrative process under D.C. Criminal Rule 41(g) provided the opportunity for a hearing, "the question remains what substantive law would require the District to return property held without justification."[383] Relying upon a local administrative process alone "would eliminate substantive constitutional protection for the property rights at issue" under the Fourth Amendment.[384] This would be an error and a significant loss of protection for citizens in these circumstances because the Fourth Amendment "has always 'been thought to define the "process that is due" for seizures of persons or property in criminal cases.'"[385]

2. *Asinor* Represents the Minority Approach

Importantly, *Jacobsen* did not specifically address a situation where the government could return the property at issue after an extended seizure.[386] *Jacobsen* considered whether an agent's field test of a powder suspected to be cocaine violated the Fourth Amendment because the test destroyed a small portion of the powder.[387] Though the initial seizure of the powder was valid under the Fourth Amendment because the agent had probable cause to believe it was cocaine, the Court determined whether the seizure later became unreasonable through subsequent destruction of a portion of the powder.[388]

So, the question in *Asinor* was whether the Fourth Amendment principle described by *Jacobsen* is universal, applying to extended seizure cases.[389] The *Asinor* court believed that to be the case.[390] However, Judge Henderson, who issued a concurring opinion "join[ing] the majority opinion in full," noted that this conclusion put the D.C. Circuit in a small minority of circuits to consider the question of the Fourth Amendment's applicability to examine the reasonableness of seizures that extend beyond their initial justification.[391] "Five circuits—the First, Second, Sixth, Seventh and Eleventh—have held in precedential opinions that the Fourth Amendment does not support a claim [challenging] the government's *retention* of legally seized property."[392] Before *Asinor*, it was only the Ninth Circuit that disagreed.[393]

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382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.* (quoting Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975)).
386. *See* United States v. Jacobsen, 466 U.S. 109, 125 (1984).
387. *Id.*
388. Asinor v. District of Columbia, 111 F.4th 1249, 1255 (D.C. Cir. 2024) (citing *Jacobsen*, 466 U.S. at 124).
389. *See id.*
390. *Id.* at 1254–55.
391. *Id.* at 1261–62 (Henderson, J., concurring).
392. *Id.* (citing Denault v. Ahern, 857 F.3d 76, 84 (1st Cir. 2017)) (emphasis added); Shaul v. Cherry Valley-Springfield Cent. Sch. Dist., 363 F.3d 177, 187 (2d Cir. 2004); Fox v. Van Oosterum,

Though precedential, three of these circuit decisions considered the Fourth Amendment's application to the extended seizure (or retention) of personal property "only in passing."[394] In *Denault v. Ahern*,[395] the First Circuit rejected the Fourth Amendment's applicability "without independent analysis" because the plaintiffs "made 'no effort' to 'explain'" their Fourth Amendment theory or offer a "'reason to disagree' with the circuits that had already rejected such theory."[396] In *Shaul v. Cherry Valley-Springfield Central School District*,[397] the Second Circuit "simply reasoned that 'a seizure claim based on the unlawful retention [of property] was too "novel" a theory to warrant Fourth Amendment protection.'"[398] The Eleventh Circuit "gave the issue almost equally short shrift" in *Case v. Eslinger*[399] without substantive analysis or consideration of *Jacobsen*.[400]

The Sixth and Seventh Circuits, however, offered substantive rejections of the Fourth Amendment's applicability to challenge extended seizures.[401] In *Fox v. Van Oosterum*,[402] a detective arrested Jason Fox for his suspected role in theft from several cars and impounded Fox's truck incident to the arrest.[403] Fox's driver's license was seized during an inventory search of the truck.[404] After Fox served a short prison sentence and paid outstanding parking tickets (restoring his driving privileges) months later, Fox requested that the detective return the seized license.[405] The detective refused because Fox had failed to pay other outstanding tickets unrelated to traffic offenses (noise ordinance violations).[406] Though Fox did not challenge the initial seizure of the license, he claimed that the detective's refusal to return his driver's license four months later violated the Fourth Amendment.[407]

A split-panel of the Sixth Circuit rejected this argument, holding that the "Supreme Court cases addressing seizure of property all concern state actors' role in *taking possession of property*" and that the "refusal to return the license here neither brought about an additional seizure nor

176 F.3d 342, 351 (6th Cir. 1999); Lee v. City of Chicago, 330 F.3d 456, 466 (7th Cir. 2003); Case v. Eslinger, 555 F.3d 1317, 1330 (11th Cir. 2009).

393. *Asinor*, 111 F.4th at 1262 (Henderson, J., concurring) (citing Brewster v. Beck, 859 F.3d 1194, 1197 (9th Cir. 2017)).

394. *See id.*

395. 857 F.3d 76 (1st Cir. 2017).

396. *Asinor*, 111 F.4th at 1262 (Henderson, J., concurring) (quoting *Denault*, 857 F.3d at 83–84).

397. 363 F.3d 177 (2d Cir. 2004).

398. *Asinor*, 111 F.4th at 1262 (Henderson, J., concurring) (quoting *Shaul*, 363 F.3d at 187).

399. 555 F.3d 1317 (11th Cir. 2009).

400. *Asinor*, 111 F.4th at 1262 (Henderson, J., concurring) (citing *Case*, 555 F.3d at 1330–31).

401. *See id.*

402. 176 F.3d 342 (6th Cir. 1999).

403. *Id.* at 345.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.* at 349.

changed the character of [the initial seizure of the license] from a reasonable one to an unreasonable one because the seizure was already complete when the defendants refused to return the license."[408] According to the *Fox* court, "[T]he Fourth Amendment protects an individual's interest in retaining possession of property but not the interest in regaining possession of property."[409] Though the court made passing references to *Jacobsen*, it did not delve into a substantive analysis of *Jacobsen*'s discussion about a seizure becoming unreasonable because of its length.[410]

In *Lee v. City of Chicago*,[411] police impounded Mark Lee's car after the car was hit by stray gunfire.[412] The police wanted to retrieve any bullets still lodged in the vehicle to help identify the shooter.[413] The city made Lee's vehicle available for pick up after ten days but refused to release the vehicle unless Lee paid all applicable towing and storage fees (also threatening to dispose of the vehicle if such fees were not paid in thirty days).[414] Lee eventually paid a negotiated price and retrieved his vehicle.[415] Though Lee did not challenge the initial seizure of his vehicle (for police to retrieve the bullets for evidentiary purposes), he brought suit against the city, arguing that the city's refusal to return the vehicle (unless the towing and storage fees were paid) violated his Fourth Amendment rights.[416]

The Seventh Circuit agreed with the *Fox* court "that when police hold onto evidence longer than is needed for investigatory purposes, the owner has no recourse under the Fourth Amendment."[417] The *Lee* court similarly held that an individual's Fourth Amendment right is limited to an "interest in *retaining* his property."[418] "Once an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable."[419] As such, the Fourth Amendment "cannot be invoked by the dispossessed owner to regain his property."[420] Like the Sixth Circuit's analysis in *Fox*, the Seventh Circuit did not provide a substantive analysis of the language from

408. Fox v. Van Oosterum, 176 F.3d 342, 350 (6th Cir. 1999) (emphasis added) (citations omitted).
409. *Id.* at 351 (citations omitted).
410. *See id.* at 349–52; *see also* Asinor v. District of Columbia, 111 F.4th 1249, 1262 (D.C. Cir. 2024) (Henderson, J., concurring) (discussing the *Fox* court's focus on a seizure under the Fourth Amendment being limited to the moment of taking).
411. 330 F.3d 456 (7th Cir. 2003).
412. *Id.* at 458.
413. *Id.* at 458–59.
414. *Id.* at 459.
415. *Id.*
416. Id. at 460.
417. Lee v. City of Chicago, 330 F.3d 456, 461 (7th Cir. 2003) (citations omitted).
418. *Id.* at 466.
419. *Id.*
420. *Id.*

Jacobsen on how a seizure may become unreasonable because of its length.[421]

B. Courts Should Follow Asinor to Evaluate Reasonableness of Extended Seizures

1. *Asinor* is Consistent with the Supreme Court's Holdings in *Place* and *Jacobsen*

In *Place*, two undercover narcotics detectives at the Miami International Airport became suspicious of Raymond Place while he waited in line to purchase a ticket to New York.[422] Place was not doing a great job of playing it cool. He carried two black suitcases (and a brown handbag) and scanned the lobby as he waited in line, "looking very closely at each person that was seated or standing."[423] Each time one of the undercover detectives moved around the lobby during this time, Place watched the detective carefully, only looking away if the detective looked immediately back at him.[424] Place eventually checked the two suitcases with the airline and purchased his ticket.[425]

The two detectives approached Place and asked for consent to search the two suitcases he checked with the airline.[426] Unknown to these detectives, one of the suitcases contained 1,125 grams of cocaine.[427] Place apparently played a very dangerous bluff well.[428] He consented to the requested search, saying that he "didn't have anything" in the suitcases.[429] With only five minutes left before the flight was scheduled to depart, the detectives let it be and allowed Place to depart without conducting a search.[430] By all accounts, this would have been the end of this story.[431] But Place did not have the right stuff for this narcotics game. As he walked away, he bragged that "he had recognized that they were police" when he first spotted them in the lobby.[432]

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421. *See* id. at 459–66; *see also* Asinor v. District of Columbia, 111 F.4th 1249, 1262 (Henderson, J., concurring) (discussing the *Lee* court's focus on a seizure under the Fourth Amendment being limited to the moment of taking).

422. United States v. Place, 462 U.S. 696, 698 (1983); *see also* United States v. Place, 498 F. Supp. 1217, 1218 (E.D.N.Y. 1980), *rev'd*, 462 U.S. 696 (1983).

423. *Place*, 498 F. Supp. at 1218.

424. *Id.* at 1219.

425. *Place*, 462 U.S. at 698; *Place*, 498 F. Supp. at 1219–20.

426. *Place*, 462 U.S. at 698; *Place*, 498 F. Supp. at 1219.

427. *Place*, 462 U.S. at 699.

428. *See Place*, 498 F. Supp. at 1219–21; *see also Place*, 462 U.S. at 698–700.

429. *Place*, 498 F. Supp. at 1219; *see also Place*, 462 U.S. at 698 (summarizing Place's interactions with the detectives).

430. *Place*, 498 F. Supp. at 1219–20; *Place*, 462 U.S. at 698.

431. *See Place*, 498 F. Supp. at 1220; *see also Place*, 462 U.S. at 698 (describing the detectives' decision making).

432. *Place*, 462 U.S. at 698; *Place*, 498 F. Supp. at 1220.

This did not sit right with the detectives.[433] They went back and checked the addresses that Place had assigned to the pieces of luggage and found that the addresses did not match, and perhaps more suspiciously, that neither address actually existed.[434] The Miami detectives contacted the Drug Enforcement Agency (DEA) office in New York to "relay their information about Place."[435] Two undercover DEA agents were waiting for Place when he arrived at the LaGuardia airport.[436]

Place continued his conspicuous scanning of everyone around him as he walked through the airport, looking behind him several times to see if he was being followed.[437] Place picked up his two suitcases at the baggage claim area and walked to a pay phone to do what one does when trying to keep a low profile: call a limousine for a ride.[438] One of the DEA agents approached Place at this point and identified himself.[439] True to form, Place started this conversation off on the right foot, "immediately" saying "I knew you guys were cops. I spotted [the other agent] as soon as I got out of the plane."[440]

One agent told Place that he suspected Place was carrying narcotics.[441] Place explained that the police surrounded him at the Miami airport and had already searched his suitcases.[442] The agents said they had heard differently and asked to search Place's suitcases.[443] This time, however, Place refused consent for the search.[444] The agents told Place "that they were going to take the luggage to a federal judge to try to obtain a search warrant."[445]

The agents took Place's suitcases to Kennedy Airport to have a drug dog perform a sniff test.[446] The dog alerted to one of the suitcases.[447] This process took ninety minutes.[448] It was late Friday afternoon at this point, and so the agents had to wait until Monday morning to obtain the search warrant for this suitcase.[449] Upon receiving the warrant, the agents opened the suitcase and found 1,125 grams of cocaine.[450]

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433. *See Place*, 462 U.S. at 698.
434. *Id.*
435. *Id.*
436. *Id.*
437. *Place*, 498 F. Supp. at 1220; *see also Place*, 462 U.S. at 698 (explaining that "[t]here again, [Place's] behavior aroused the suspicion of the agents").
438. *Place*, 498 F. Supp. at 1220; *Place*, 462 U.S. at 698.
439. *Place*, 498 F. Supp. at 1220–21; *Place*, 462 U.S. at 698.
440. *Place*, 498 F. Supp. at 1221; *Place*, 462 U.S. at 698.
441. *Place*, 462 U.S. at 699.
442. *Id.*
443. *Id.*
444. *Id.*
445. *Id.*
446. *Id.*
447. United States v. Place, 462 U.S. 696, 699 (1983).
448. *Id.*
449. *Id.*
450. *Id.*

Place was indicted for possession of cocaine with intent to distribute.[451] He moved to suppress the cocaine from evidence, arguing that the warrantless seizure of his suitcases violated the Fourth Amendment.[452] The district court denied this motion, finding that *Terry v. Ohio*[453] allowed for the temporary investigative seizure of the suitcases based upon the agents' reasonable suspicion that they contained narcotics.[454] The Second Circuit agreed that *Terry* could (at least in the abstract) permit a warrantless seizure of luggage with less than probable cause.[455] The Second Circuit, however, ultimately reversed the district court (and Place's conviction), finding that "the prolonged seizure of Place's baggage exceeded the permissible limits of a *Terry*-type investigative stop and consequently amounted to a seizure without probable cause in violation of the Fourth Amendment."[456]

The Supreme Court agreed, explaining that while the Fourth Amendment allows for authorities to "temporarily" seize "personal luggage" without a warrant to allow for a drug dog sniff based on "reasonable suspicion," the warrantless seizure of Place's luggage simply lasted too long.[457] The Court agreed that "where the authorities possess specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics, the governmental interest in seizing the luggage briefly to pursue further investigation is substantial."[458] Place challenged the idea that the reasonableness of a seizure of personal property should be evaluated by duration, as Place challenged the initial seizure of his luggage, which would make the subsequent duration of the seizure irrelevant.[459] Specifically, Place argued that a *Terry*-stop framework should be inapplicable to seizures of personal property because, whereas a brief investigatory stop of a person is "substantially less intrusive of a person's liberty interests than a formal arrest," there can be "no degrees of intrusion" in the property context.[460] "Once the owner's property is seized, the dispossession is absolute."[461]

The Court's response is important for *Place*'s relevance to the circuit split at issue in *Asinor*. The Court disagreed with Place, explaining in *general terms* that the "intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature *and ex-*

451. *Id.*
452. *Id.* at 699–700 (citing Terry v. Ohio, 392 U.S. 1 (1968)).
453. 392 U.S. 1 (1968).
454. United States v. Place, 462 U.S. 696, 699–700 (1983) (citing *Terry*, 392 U.S. at 8–9, 17–20).
455. *Id.* at 700.
456. *Id.*
457. *See id.* at 697–98.
458. *Id.* at 703.
459. *See id.* at 705.
460. United States v. Place, 462 U.S. 696, 705 (1983).
461. *Id.*

tent."[462] "[S]eizures of property can vary in intrusiveness" based upon duration in that "police may confine their investigation to an on-the-spot inquiry" (such as the "immediate exposure of the luggage to a trained narcotics detection dog") or "transport the property to another location."[463] The Court concluded that "some *brief* detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime."[464]

"The length of the detention" of Place's luggage "alone" required a showing of probable cause.[465] The Court had "never approved" of a ninety-minute *Terry*-stop seizure (of a person) before and did not find a reason to do so with respect to personal property in this case.[466] Because the duration of the seizure of Place's luggage was "unreasonable under the Fourth Amendment," the cocaine found during "the subsequent search of his luggage was inadmissible" and Place's conviction was reversed.[467]

The importance of this duration component within the Fourth Amendment analysis was further confirmed by the Supreme Court in *Jacobsen*. In an unfortunate turn of events for Bradley and Donna Jacobsen, a Federal Express forklift damaged a package addressed to them while the package was being transported through the Minneapolis–St. Paul airport office.[468] This caused Federal Express supervisors to open the package and "examine its contents pursuant to a written company policy regarding insurance claims."[469] The package was "an ordinary cardboard box wrapped in brown paper."[470] Inside the box, however, was a ten-inch tube made of the kind of "silver tape used on basement ducts."[471]

The Federal Express supervisors cut the tube open and "found a series of four zip-lock plastic bags," each contained within one another, with the "innermost" bag "containing about six and a half ounces of white powder."[472] Probably setting aside their insurance forms at this point, the Federal Express supervisors "replaced the plastic bags in the

462. *Id.* (emphasis added).
463. *Id.* at 705–06.
464. *Id.* at 706 (emphasis added).
465. *Id.* at 709.
466. United States v. Place, 462 U.S. 696, 709–10 (1983) (citing Dunaway v. New York, 442 U.S. 200, 207–10 (1979)).
467. *Id.* at 710.
468. United States v. Jacobsen, 466 U.S. 109, 111 (1984).
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.*

tube," put the tube back in the box, and notified the DEA of their finding.[473]

A DEA agent reported to the Federal Express office.[474] He repeated the process described by the Federal Express supervisors—removing the tube from the box and the zip-lock bags from the tube—and observed the white powder in the innermost bag.[475] With this small pile of white powder behind four perfectly clear layers of plastic, it does not seem that the agent considered that he might need a search warrant to proceed.[476] The agent "opened each of the four bags" and removed a "trace" of the white powder "with a knife blade."[477] He then conducted a "field test," which "identified the substance as cocaine."[478] More DEA agents arrived on site and performed a second field test, which also confirmed that the powder was cocaine.[479]

Using this information, the DEA obtained a warrant to search the "place" addressed on the package, which happened to be the Jacobsens' home.[480] A DEA agent dressed in plain clothes (apparently posing as an off-duty Federal Express delivery person) delivered the package to the Jacobsens' home, with Donna Jacobsen accepting the package at the front door.[481] A group of DEA agents returned to the home an hour later.[482] Bradley Jacobsen answered the door this time.[483] When one of the agents identified himself, Mr. Jacobsen conspicuously "slammed the door," knocking one DEA agent to the ground, and "yelled, 'It's the police-flush it.'"[484] The DEA agents searched the home and found "[c]ocaine traces, cocaine paraphernalia, and burned remnants of the package."[485] The Jacobsens were prosecuted for possessing an illegal substance with the intent to distribute.[486]

The Jacobsens moved to suppress the cocaine, and other evidence gathered at their home, as fruit of an invalid search warrant.[487] They argued that the initial DEA agent's field test of the cocaine was "an illegal search and seizure" because the agent did not first obtain a warrant to go beyond the private investigation of the package performed by the Federal

473. *Id.*
474. United States v. Jacobsen, 466 U.S. 109, 111 (1984).
475. *Id.*
476. *See id.* at 111–12.
477. *Id.*
478. *Id.* at 112.
479. *Id.*
480. United States v. Jacobsen, 466 U.S. 109, 112 (1984).
481. United States v. Jacobsen, 683 F.2d 296, 298 (8th Cir. 1982), *rev'd*, 466 U.S. 109 (1984).
482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.*
486. United States v. Jacobsen, 466 U.S. 109, 112 (1984).
487. *Id.*

Express supervisors.[488] The Supreme Court accepted review of the case to clarify Fourth Amendment search and seizure rules related to a government search that followed from information provided from a private party's own search of the defendant's property.[489]

The Court confirmed that "[w]hen the wrapped parcel involved in this case was delivered to the private freight carrier, it was unquestionably an 'effect' within the meaning of the Fourth Amendment."[490] The Court explained that there were two separate Fourth Amendment seizures involved in *Jacobsen*.[491] The first seizure was the DEA agents' initial possession and control of the package.[492] The Court explained that the DEA agent's "assertion of dominion and control over the package and its contents" clearly constituted a seizure under the Fourth Amendment.[493] However, this first seizure, performed without a warrant, "was not unreasonable."[494] The Court qualified its Fourth Amendment seizure analysis in the context of the Federal Express employees' report of the plastic bags and powder.[495] The DEA agent took control of the package only after (1) Federal Express had made the report of the powder and its suspicious packaging, (2) Federal Express had invited the DEA to come and inspect the package, and (3) the agent confirmed Federal Express's report about the powder and its suspicious packaging through his own observation.[496] At that point, "it was apparent that the tube and plastic bags contained contraband and little else," especially to the "trained eye of the officer."[497] In other words, the DEA agent had probable cause to believe the plastic bags contained cocaine.[498]

Importantly, the Court distinguished the second type of seizure in *Jacobsen*: the DEA agent's field test of the powder (cocaine) that destroyed a trace amount of the substance.[499] The Court relied upon its recent seizure analysis in *Place*.[500] The Court summarized *Place* by explaining in general terms "that while the *initial* seizure of luggage for the purpose of subjecting it to a 'dog sniff' test was reasonable, the seizure *became* unreasonable because its *length* unduly intruded upon constitu-

488. *Id.*
489. *Id.* at 112–13.
490. *Id.* at 114. The Court explained that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy" such that "warrantless searches of such effects are presumptively unreasonable." *Id.* (citations omitted).
491. *See* United States v. Jacobsen, 466 U.S. 109, 120–22, 124–25 (1984).
492. *Id.* at 120–22.
493. *Id.* at 120.
494. *Id.* at 120–21.
495. *Id.* at 121.
496. *Id.*
497. United States v. Jacobsen, 466 U.S. 109, 121 (1984) (quoting Texas v. Brown, 460 U.S. 730, 743 (1983)).
498. *Id.* at 121–22.
499. *See id.* at 124–25.
500. *See id.* at 124 (citing United States v. Place, 462 U.S. 696, 707, 710 (1983)).

tionally protected interests."[501] The Court explained that *Place* extends beyond the justification for the initial confiscation: "[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interest protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'"[502]

The Court held that the "field test did affect respondents' possessory interests protected by the Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one."[503] The Court applied the same reasonableness test from *Place* to determine the seizure's validity: "[W]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[504] The Court found that the agent's "destruction of the powder during the course of the field test was reasonable" because the "law enforcement interests justifying the procedure were substantial."[505] On the other hand, the "intrusion" on the Jacobsens' ownership interest in the powder was "*de minimis*" since "only a trace amount of material was involved."[506]

This fuller reading of *Place* and *Jacobsen* confirms *Asinor*'s application of the Fourth Amendment to test the extended duration of a seizure. This much is unavoidable from *Place* and *Jacobsen*: The length of a seizure is a dimension that can—and must—be evaluated under the Fourth Amendment because the seizure's duration itself can render the seizure unreasonable.[507] The *Place* Court flatly rejected Place's argument that the only possessory interest at issue in a Fourth Amendment seizure of personal property is the initial taking.[508] Again, the *Place* Court explained in general terms that the "intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature *and extent*."[509]

The *Jacobsen* Court then solidified this observation as a universal principle for seizures generally: "[A] seizure *lawful at its inception* can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'"[510]

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501. *Id.* at 124 n.25 (emphasis added).
502. *Id.* at 124.
503. United States v. Jacobsen, 466 U.S. 109, 124–25 (1984).
504. *Id.* at 125 (quoting *Place*, 462 U.S. at 703).
505. *Id.*
506. *Id.*
507. *Place*, 462 U.S. at 705; *Jacobsen*, 466 U.S. at 124–25.
508. *Place*, 462 U.S. at 705.
509. *Id.* (emphasis added).
510. *Jacobsen*, 466 U.S. at 124 (emphasis added).

The potential objection to the origin of this principle in *Place* is that the *Place* Court was specifically evaluating the duration of a temporary *Terry* (investigatory) stop of Place's luggage based upon reasonable suspicion, not the duration of a seizure more fully justified by one of the warrantless seizure exceptions (like exigent circumstances or search incident to arrest).[511] Judge Henderson, however, rightly observed in *Asinor* that the leading cases in the majority of this circuit split "have failed to recognize that *Jacobsen* broadened *Place*."[512] "*Jacobsen* applied *Place* in a new context, extending it from its investigatory detention origin to circumstances in which a full and lawful 'initial seizure' had already occurred."[513] Again, *Jacobsen* applied *Place* to evaluate a second (separate) seizure by virtue of the DEA's field test that destroyed part of the powder (that had already been fully seized).[514] As such, "when *Jacobsen* refers to 'seizure[s] lawful at [their] inception,' it refers not just to the narrow class of seizures at issue in *Place* but to all lawful seizures of property."[515] "[T]he bottom line is that the Supreme Court unequivocally held that what the government does with seized property can sometimes violate the Fourth Amendment even though 'the property ha[s] already been lawfully detained.'"[516]

2. *Asinor* Relies on a Broader View of the Property Rights Implicated at the Founding

In addition to recognizing these principles from *Place* and *Jacobsen*, the *Asinor* court explained that the Fourth Amendment's history required its application to the continued seizure of the plaintiffs' cell phones.[517] The *Asinor* court recognized that "[b]ecause the Fourth Amendment codified a 'pre-existing right,' . . . it 'must be read in light of' its history."[518] The "Fourth Amendment protects possessory interests against government infringement in the same way that Founding-era common law protected possessory interests against private infringement," which necessarily included "actions for damages and recovery of property that was lawfully taken, but then unlawfully possessed."[519] Indeed, the "Fourth Amendment grew out of Antifederalist criticism of the original Constitution" to protect against the federal government's ability to take property "without any evidence or reason."[520] Many "considered

511. *Place*, 462 U.S. at 705–06.
512. Asinor v. District of Columbia, 111 F.4th 1249, 1263 (D.C. Cir. 2024) (Henderson, J., concurring).
513. *Id.* (quoting *Jacobsen*, 466 U.S. at 124).
514. *Jacobsen*, 466 U.S. at 124–25.
515. *Asinor*, 111 F.4th at 1263 (Henderson, J., concurring) (quoting *Jacobsen*, 466 U.S. at 124).
516. *Id.* at 1264 (quoting *Jacobsen*, 466 U.S. at 125).
517. *Id.* at 1252–53 (majority opinion).
518. *Id.* at 1253 (quoting District of Columbia v. Heller, 554 U.S. 570, 592 (2008); Chimel v. California, 395 U.S. 752, 760–61 (1969)).
519. *Id.*
520. *Id.*

the Crown's seizure of personal property to be among the grievances justifying the Revolutionary War—with some colonists comparing British Officers to 'thieves' or lamenting that they would 'take and carry away' their property without cause."[521]

Moreover, the common law in the founding era held that the "prolonged, unauthorized possession of a person's property would have been actionable at common law even if the initial taking had been lawful."[522] "William Blackstone, 'whose works constituted the preeminent authority on English law for the founding generation,'"[523] explained that the common law "deprivation" of personal property was "'divisible into two branches; the unjust and unlawful taking them away; and the unjust detaining them, though the original taking might be lawful.'"[524] The *Asinor* court took hold of an example of a "person who refused to return a borrowed horse," explaining that Blackstone held that the plaintiff "shall recover damages only for the detention and not for the [taking], because the original taking was lawful."[525] The founding era "common law recognized that property interest are impaired not only at the instant when an owner loses possession, but also for as long as the owner cannot get the property back."[526] As such, "history indicates that the Fourth Amendment" applies both to the government's "taking possession" of a personal effect and the "continued retention" of the personal effect.[527]

Future courts faced with this question should follow the holding and reasoning from *Asinor* to find that the Fourth Amendment applies to the extended seizure of personal property beyond the point when there is a legitimate need to retain the property.[528] Universal principles established by the Supreme Court in *Place* and *Jacobsen*—along with recognition of the property rights protected by the Fourth Amendment at the founding—demonstrate that the Fourth Amendment not only protects against an unreasonable initial taking of personal property, it also protects against an unreasonable continuation (duration) of such seizure.[529] Courts facing this question in the context of an extended seizure of cell phones related to recording of protests or police activity should be particularly cognizant of the ongoing harm to both possessory interests and an ability to engage in core free speech activities.

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521. Asinor v. District of Columbia, 111 F.4th 1249, 1253 (D.C. Cir. 2024).
522. *Id.* at 1254.
523. *Id.* (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).
524. *Id.*
525. *Id.*
526. *Id.*
527. Asinor v. District of Columbia, 111 F.4th 1249, 1254 (D.C. Cir. 2024).
528. *See supra* Section II.B.1.
529. *See supra* Section II.B.2.

CONCLUSION

In summary, the cases analyzed throughout this Article establish three approaches for future courts. First, courts should significantly limit application of the exigent circumstances exception for seizures of cell phones related to the recording of protests or police activity because recorders are typically bystanders who intend to preserve and share recordings.[530] A limited application of the exigent circumstances exception also allows for recorders to adequately pursue claims against police that seize cell phones out of retaliation in these sometimes-heated circumstances.[531]

Second, courts must require that police establish independent probable cause to seize the cell phone of an individual who is arrested in connection with protest or police recording activity.[532] A strict rule in this context acknowledges the Supreme Court's universal principle that specific probable cause is required for *all* seizures of personal property.[533] This rule also prevents the situation where police seize the phone of a recorder based upon the arrest and keep the phone for months (or sometimes more than a year) even though the recorder was released without charges.[534]

Third, future courts should follow the holding and reasoning of the D.C. Circuit in *Asinor* that the Fourth Amendment applies to test the *extended* seizure of personal property.[535] Universal principles used to evaluate unreasonable seizures—as well as historic recognition of property rights protected by the Fourth Amendment at its founding—demonstrate that the Fourth Amendment not only protects against an unreasonable *taking* of personal property but also protects against an unreasonable duration of such seizure.[536] Courts facing this question in the context of an extended seizure of cell phones related to recording of protests or police activity should be particularly cognizant of the ongoing harm to both possessory interests and an ability to engage in core free speech activities.[537]

530. *See supra* Section I.A.1.
531. *See supra* Sections I.A.3, 4.
532. *See supra* Section I.A.4.
533. *See supra* Section I.A.4.
534. *See supra* Section I.A.1.
535. *See supra* Section II.B.1.
536. *See supra* Section II.B.
537. *See supra* Sections II.A, B.