No. 18-11679

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WALI EBBIN RASHI ROSS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida, Case No. 3:17-cr-00086-MCR-1

EN BANC BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF DEFENDANT-APPELLANT

Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
Ashwin P. Phatak
Clare E. Riva*
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St. NW, Suite 501
Washington, DC 20036
(202) 296-6889
ashwin@theusconstitution.org

Counsel for Amicus Curiae

**Not admitted in D.C.;*
Supervised by principals of the firm

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I also hereby certify that I am aware of no persons or entities, other than those listed in the party and *amicus* briefs filed in this case, that have a financial interest in the outcome of this litigation. Further, I am aware of no persons with any interest in the outcome of this litigation other than the signatory to this brief and its counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: May 5, 2020

/s/ Ashwin P. Phatak
Ashwin P. Phatak
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers adopted the Fourth Amendment to protect people from arbitrary government searches and seizures, and they expected the courts to play a critical role in guarding against encroachments on the rights that Amendment protects. Yet under this Court's precedent in *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015), individuals who have allegedly "abandoned" property that was subject to a potentially unlawful search or seizure may be shut out of court because "abandonment implicates Article III standing—and thus subject matter jurisdiction," *United States v. Ross*, 941 F.3d 1058, 1065 (11th Cir. 2019). As *Sparks* held, "where

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for both parties have consented to the filing of this brief.

abandonment occurs, we lack jurisdiction." 806 F.3d at 1341 n.15.

This Court should overrule *Sparks* because abandonment, like other exceptions to the Fourth Amendment's warrant requirement, *see, e.g.*, *United States v. Mercer*, 541 F.3d 1070, 1074-75 (11th Cir. 2008) (invoking both consent and good-faith mistake to justify warrantless search), is not a jurisdictional prerequisite that a defendant must establish to challenge a search or seizure on the ground that it is unconstitutional. Rather, it is a justification that the government can offer to establish that a search or seizure is constitutionally permissible. In other words, it relates to the merits of the Fourth Amendment challenge, not the court's jurisdiction. Treating the defense of abandonment as a jurisdictional prerequisite is at odds with Supreme Court precedent and improperly shifts the burden of proof from the government.

As the Supreme Court has recognized, a person must have "a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search." *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018). As such, "it is settled law that one has no standing to complain of a search or seizure of property he has voluntarily abandoned." *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973). But unlike Article III standing, this so-called Fourth Amendment "standing" doctrine is not jurisdictional. As the Supreme Court recently explained, "[t]he concept of standing in Fourth Amendment cases . . . should not be confused

with Article III standing, which is jurisdictional and must be assessed before reaching the merits. . . . Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question . . . ." *Byrd*, 138 S. Ct. at 1530. *Sparks* does what Supreme Court precedent strictly forbids.

Treating abandonment as jurisdictional not only flouts binding Supreme Court precedent, it also improperly shifts the burden of justifying a warrantless search from the government to the individual. That shift undermines the longstanding principle that "[t]he burden of proving an exception to the warrant requirement rests with the government." *United States v. McGough*, 412 F.3d 1232, 1237 n.4 (11th Cir. 2005) (citing *United States v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002)). Furthermore, it means that the government is free to raise abandonment at any stage of a case, including—as it did here—for the first time on appeal. Even if the government has deliberately refused to raise abandonment before the district court, *Sparks* requires this Court to give the government a second bite at the apple.

Sparks is likely to produce particularly pernicious consequences in the context of cases involving modern technology. If the abandonment of a phone is a jurisdictional bar to considering the merits of a Fourth Amendment claim, police may be able to search through the data stored on an abandoned cell phone even if that phone was locked. This would seriously compromise fundamental Fourth Amendment values. As the Supreme Court's recent cell phone cases make clear,

digital data implicates Fourth Amendment rights in unique ways. Cell phones and other modern technological devices contain the "privacies of life" that the Framers crafted the Fourth Amendment to protect from unjustified government inquisition. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Courts therefore must not "mechanically apply the rule[s] used in the predigital era to the search of a cell phone." *Riley v. California*, 573 U.S. 373, 406-07 (2014) (Alito, J., concurring). Treating abandonment as a jurisdictional question at the outset of a case forecloses the careful analysis necessary to properly apply the abandonment doctrine in the context of digital data. *See, e.g.*, *Riley*, 573 U.S. at 389-90 (discussing how the activation of a lock on a phone implicates privacy concerns and what law enforcement can appropriately access on a phone pre- and post-warrant).

In sum, this Court should overrule *Sparks*'s holding that abandonment precludes a court from considering a Fourth Amendment challenge to a search or seizure and should proceed to consider Mr. Ross's Fourth Amendment challenge on the merits.

ARGUMENT

I. *SPARKS* CANNOT BE SQUARED WITH FOURTH AMENDMENT STANDING AND ABANDONMENT DOCTRINES.

The Fourth Amendment guarantees people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

U.S. Const. amend. IV. "With this language, the Fourth Amendment gives '*each* person . . . the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.'" *Byrd*, 138 S. Ct. at 1531 (Thomas, J., concurring) (quoting *Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (Scalia, J., concurring)). When the government intrudes into an individual's person, house, papers, or effects, the Amendment requires courts to hold the government to its burden of establishing that the intrusion was constitutionally reasonable.

Fourth Amendment standing doctrine asks the "substantive question" of whether the individual challenging a search or seizure by the government "has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge." *Rakas v. Illinois*, 439 U.S. 128, 133 (1978). Answering that question turns on whether the individual retains a legitimate expectation of privacy in the place or item searched. *See Byrd*, 138 S. Ct. at 1526-27; *Minnesota v. Olson*, 495 U.S. 91, 95-100 (1990); *Rakas*, 439 U.S. at 143. The Supreme Court has repeatedly instructed lower courts that questions of Fourth Amendment "standing" are "subsumed under substantive Fourth Amendment doctrine." *Byrd*, 138 S. Ct. at 1530 (quoting *Rakas*, 439 U.S. at 139). They are not "jurisdictional question[s] and . . . need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim." *Id.*

Rather than treating abandonment as a jurisdictional question, *Sparks* should

have treated abandonment as part of the substantive Fourth Amendment analysis and asked whether the individual retained a subjective expectation of privacy in the item or object that the government claimed had been abandoned. That is the core question abandonment doctrine asks courts to answer. "Abandonment is primarily a question of intent," *United States v. Pirolli*, 673 F.2d 1200, 1204 (11th Cir. 1982) (quoting *Colbert*, 474 F.2d at 176), that turns on whether the individual demonstrated an expectation that she would retain a legitimate privacy interest in an object, item or place. As this Court has previously held, the "critical issue," *id.*, is "whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Colbert*, 474 F.2d at 176. Numerous cases recite and apply this settled formulation. *See, e.g.*, *Pineda v. Warden, Calhoun State Prison*, 802 F.3d 1198, 1205 (11th Cir. 2015); *United States v. Cofield*, 272 F.3d 1303, 1306 (11th Cir. 2001); *United States v. Ramos*, 12 F.3d 1019, 1022 (11th Cir. 1994); *United States v. Winchester*, 916 F.2d 601, 603-04 (11th Cir. 1990).

As these cases reflect, this Court's abandonment framework demands analysis of whether an individual has relinquished or retained a legitimate privacy interest in an object or item. This aligns with the Supreme Court's repeated instruction that Fourth Amendment "standing" analysis should turn on whether the individual

possesses a legitimate expectation of privacy in the item or place searched or seized—a question that is a part of the merits analysis, not any jurisdictional inquiry. *Byrd*, 138 S. Ct. at 1530. Considering abandonment as part of that merits inquiry also aligns with the proper allocation of burdens in Fourth Amendment cases, as the next Section explains.

II. TREATING ABANDONMENT AS A JURISDICTIONAL HURDLE SHIFTS THE BURDEN FROM THE GOVERNMENT TO INDIVIDUALS AND UNDERMINES THE PROTECTIONS THE FOURTH AMENDMENT WAS ADOPTED TO PROVIDE.

"The security of one's privacy against arbitrary intrusion by the police" is "at the core of the Fourth Amendment" and "basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961). Given the importance of the warrant requirement to guarding the people's rights against such government overreach, that "general requirement" "is not lightly to be dispensed with." *Chimel v. California*, 395 U.S. 752, 762 (1969). It is therefore the government's responsibility to justify a warrantless search by proving that the challenged search or seizure falls into one of the exceptions that allow law enforcement officers to act without a warrant. *See McGough*, 412 F.3d at 1237 n.4 ("The burden of proving an exception to the warrant requirement rests with the government." (citing *Holloway*, 290 F.3d at 1337)). This requirement ensures that police officers do not enjoy "'unbridled discretion to rummage at will among a person's private effects.'" *Byrd*, 138 S. Ct. at 1526 (quoting *Arizona v. Gant*, 556

U.S. 332, 345 (2009)).

Treating abandonment as jurisdictional upends this well-established framework. Well before *Sparks*, this Court had recognized that the government must prove an individual's intent to abandon property to justify a warrantless search of that property. *See United States v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983) (noting that it is the government's burden to prove abandonment and therefore rejecting the government's argument that a defendant had not established his expectation of privacy in a searched briefcase). As *Freire* makes clear, when the government fails to demonstrate that the individual "abandoned" his possessions "either purposely or through neglect or . . . otherwise abrogated his expectation of privacy," the individual's "privacy interest remain[s] intact." *Id.* But if abandonment is treated as a jurisdictional question, then the burden shifts from the government to the individual, forcing her to shoulder the burden of proving her right to challenge a potential Fourth Amendment violation in the first place.

To make matters worse, because jurisdictional issues cannot be waived, treating abandonment as jurisdictional enables the government to raise abandonment on appeal even if it did not argue abandonment in the trial court. Indeed, that is precisely what happened here. The government did not raise an abandonment argument in the district court. Despite that, the government insists that it can still make an abandonment argument on appeal because *Sparks* classifies abandonment

as a jurisdictional issue that cannot be waived.

Reallocating the burden of proof in favor of the government on Fourth Amendment claims, as *Sparks* does, is at odds with the purpose of the Fourth Amendment. The Founding generation was well aware of the oppression that results from unchecked government overreach. Indeed, the Fourth Amendment "grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England." *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). Protecting "the privacy and security of individuals against arbitrary invasions by government officials," *United States v. Parr*, 716 F.2d 796, 811 (11th Cir. 1983) (quoting *Camara v. Municipal Ct. of City & Cty. of S.F.*, 387 U.S. 523, 528 (1967)), was in fact one of the fundamental principles that led to the formation of the new Republic.

The Framers expected that courts would serve as an "impenetrable bulwark against every assumption of power in the legislative or executive" and would "resist every encroachment upon" constitutionally protected rights, including those guaranteed by the Fourth Amendment. 1 Annals of Cong. 457 (1789) (Madison). In addition to recognizing the primary importance of jury trials in the criminal context, *see* U.S. Const. amend. VI, the Founding generation "enthusiastically embraced the role of the civil jury in government search and seizure cases." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 776 (1994);

see United States v. Gecas, 120 F.3d 1419, 1454 (11th Cir. 1997) ("As Parliament cracked down on dissent in the colonies, the colonists rallied around the jury trial as a bulwark of liberty.").

Making the abandonment inquiry a jurisdictional prerequisite, rather than part of the merits analysis of a Fourth Amendment claim, prevents courts from serving that protective function. It eliminates the government's obligation to prove abandonment and shifts the burden of proof to the individual. It gives the government an extra bite at the apple, allowing the government to raise abandonment even when it waived the argument in the district court. In all these ways, *Sparks* allows those "stealthy encroachments" on a person's rights that the Framers intended the Fourth Amendment to guard against. *Boyd*, 116 U.S. at 635. Not only does that decision affect criminal defendants seeking to challenge allegedly unconstitutionally obtained evidence sought to be used against them, it could also affect plaintiffs seeking to vindicate their Fourth Amendment rights in civil suits. In either case, it undermines the protections the Fourth Amendment was adopted to provide and is at odds with the Amendment's history.

III. TREATING ABANDONMENT AS JURISDICTIONAL UNDERMINES COURTS' ABILITY TO PROPERLY ANALYZE HOW THE FOURTH AMENDMENT APPLIES TO MODERN TECHNOLOGIES.

If abandonment is a jurisdictional question, courts may be hard-pressed to protect digital data from unwarranted police snooping. After all, under *Sparks*, a

court might conclude that a person forfeits all constitutional protection by abandoning a cell phone, which would mean that courts may not even consider a Fourth Amendment challenge to a search of that phone. Under this scenario, police would potentially be able to unlock a cell phone and gain a treasure trove of data without complying with the Fourth Amendment's requirements.

Such a result would trench deeply on fundamental Fourth Amendment protections. The Fourth Amendment has always been understood to prohibit unreasonable government "search[es] for and seizure[s] of a man's private books and papers for the purpose of obtaining information therein contained." *Boyd*, 116 U.S. at 623. Indeed, the Framers crafted the Amendment to prohibit intrusive searches, the likes of which had caused controversy in England: "the central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345.

Today's papers and effects often take a different form than those with which the Framers were familiar, but the privacy concerns they implicate are no different. Almost forty years ago, this Court observed that "[f]ew places outside one's home justify a greater expectation of privacy than does the briefcase," which often contains "such items as wallets and credit cards, address books, personal calendar/diaries, correspondence," and the like. *Freire*, 710 F.2d at 1519. Today's modern

technologies raise even greater privacy concerns. After all, cell phones, like the one at issue in *Sparks*, "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Riley*, 573 U.S. at 393. In other words, the types of "papers and effects" the Framers sought to protect are now accessible through the technological devices people carry on their persons everywhere, every day.

This Court's approach in *Sparks* leaves little room for the careful analysis in which courts must engage when they apply the abandonment doctrine to cell phones and other modern technologies. *Sparks* itself rejected the argument that the data on the phone at issue should be subject to its own abandonment analysis and instead concluded that abandonment of the physical cell phone was dispositive of the abandonment question. *Sparks*, 806 F.3d at 1340-42. It failed to engage with the paramount role cell phones have come to play in everyday life—repeatedly recognized by the Supreme Court—and how that might cast light on whether an individual retains legitimate privacy interests in a discarded phone. When the Court held that a person who discarded her cell phone could not even be heard on her Fourth Amendment challenge, it precluded an investigation into the kinds of "case-specific facts," *Ramos*, 12 F.3d at 1025, of a person's phone use, including whether the phone was locked or whether there was a separate folder to store certain apps, that might demonstrate that the individual retained a legitimate expectation of

privacy in at least some aspects of the phone, including the data stored thereon. The unique position of items that store digital data, considered in conjunction with the purpose of the Fourth Amendment, requires courts to engage in that analysis.

*Spark*s cannot be squared with the Supreme Court's recognition that, in order to fulfill the Framers' promise of a robust Fourth Amendment, established doctrinal rules must be applied carefully, and sometimes differently, in cases involving new technology. As devices like cell phones develop greater capacity to access and store vast amounts of personal information, courts must ensure that doctrinal rules, such as the abandonment doctrine, are applied in a manner that realizes one of the Framers' "central aim[s]" for the Fourth Amendment, *Carpenter*, 138 S. Ct. at 2214: "to place obstacles in the way of a too permeating police surveillance," *United States v. Di Re*, 332 U.S. 581, 595 (1948).

For example, in *Riley v. California*, the Supreme Court held that police could not conduct a warrantless search of a cell phone under the long-established doctrine that gives the police leeway to conduct a warrantless search incident to arrest. 573 U.S. at 403. The Court's analysis recognized that a search of a cell phone's contents intrudes deeply on Fourth Amendment values. Unlike other items that are often found on people when they are arrested, the Court explained, modern cell phones are "in fact minicomputers that also happen to have the capacity to be used as a telephone." *Id.* at 393. Because cell phones contain much more information than

would typically be found on a person when he is arrested, the Fourth Amendment requires law enforcement to get a warrant before searching cell phones even incident to arrest. *Id.* at 403. Likewise, in *Carpenter v. United States*, the Court recognized that police must obtain a warrant to access cell site phone records that chronicle a cell phone user's past movements. 138 S. Ct. at 2223. Once again, the Court stressed that Fourth Amendment doctrine had to take account of the fact that a search for cell site records could uncover vast quantities of private information about a person. *Id.* at 2218. "[W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Id.* The Supreme Court refused to permit the government to engage in "tireless and absolute surveillance" without a warrant simply by accessing cell site records held by third parties. *Id.*

These recent cases illustrate that although the Founding era does not provide "precise guidance" regarding how the Fourth Amendment should govern modern technology, *Riley*, 573 U.S. at 374, the fundamental principles remain the same. Allowing police unfettered access to the equivalent of "millions of pages of text, thousands of pictures, or hundreds of videos" simply because an arrest occurred would undermine the protections the Fourth Amendment was adopted to provide. *Id.* at 394; *id.* at 403 (recognizing that "[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any

less worthy of the protection for which the Founders fought"). In short, the Supreme Court's recent treatment of cell-phone data as distinct from the physical phone teaches that some Fourth Amendment questions have become more complex after recent "seismic shifts in digital technology." *Carpenter*, 138 S. Ct. at 2219. That is no less true of questions regarding abandonment than it was of the questions at issue in *Riley* and *Carpenter*.

To be sure, this Court in *Sparks* noted that its analysis did not consider whether a person abandoned data stored on the cloud simply by abandoning the physical phone, but that false dichotomy illustrates the fallacy of treating a data-storage device just like any other physical device: "Cell phone users often may not know whether particular information is stored on the device or in the cloud," *Riley*, 573 U.S. at 397, and "the same type of data may be stored locally on the device for one user and in the cloud for another." *Id.* The separation of data stored on a phone—which itself would "typically expose to the government far *more* than the most exhaustive search of a house," *id.* at 396—from the broader technological and cloud-accessing capacities of the device is becoming increasingly artificial. Treating potentially abandoned cell phones like other abandoned items—commonly, suspects "discard[] some incriminating item, such as narcotics," John P. Ludington, *Search and Seizure: What Constitutes Abandonment of Personal Property Within Rule That Search and Seizure of Abandoned Property Is Not Unreasonable—Modern Cases*,

40 A.L.R. 4th 381, § 2(a) (1985)—becomes like equating "a ride on horseback" with "a flight to the moon[;] [b]oth are ways of getting from point A to point B, but little else justifies lumping them together." *Riley*, 573 U.S. at 393.

In sum, because of the unprecedented opportunities for intrusion modern technology provides, established doctrines cannot facilely be applied in the context of new technologies. Treating abandonment as a jurisdictional inquiry, rather than as a merits one, pretermits the careful analysis that should occur in the context of cases involving digital devices. This point further underscores why this Court should hold that, consistent with constitutional text and history as well as Supreme Court precedent, abandonment is a merits question, not a jurisdictional one.

CONCLUSION

For the foregoing reasons, this Court should overrule *Sparks* and hold that abandonment is a defense that is part of the substantive Fourth Amendment analysis, not a jurisdictional prerequisite.

Respectfully submitted,

/s/ Ashwin P. Phatak
Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
Ashwin P. Phatak
Clare E. Riva*
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Ste. 501
Washington, DC 20036
(202) 296-6889
ashwin@theusconstitution.org

Dated: May 5, 2020

**Not admitted in D.C.;*
Supervised by principals of the firm

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 3,816 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief of *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 5th day of May, 2020.

/s/ Ashwin P. Phatak
Ashwin P. Phatak
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on May 5, 2020.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 5th day of May, 2020.

/s/ Ashwin P. Phatak
Ashwin P. Phatak
Counsel for Amicus Curiae