No. 14-1481

IN THE

Supreme Court of the United States

KELLY M. RINDFLEISCH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

BRIEF OF ERWIN CHEMERINSKY, ARTHUR F. McEVOY, GLENN HARLAN REYNOLDS, AND STEPHEN A. SALTZBURG, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Copies of petitioner's 16,000 private e-mails were seized, and subsequently searched, by government investigators even though petitioner was not under investigation. The investigators' rationale for seizing *all* her correspondence was that *some* of it was exchanged with a person under investigation, who had deleted e-mails in *his* accounts. The investigators hoped to find copies of his deleted e-mails in the e-mail accounts of several people who had corresponded with him, including petitioner.

Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765), held that even concerning those under government investigation (suspected of seditious libel), their correspondence and other papers could not be seized or searched for evidence of a crime (i.e., if not contraband or the instrumentalities or fruits of a crime). *Entick*, this Court has repeatedly held, is a key reference point for the meaning of the Fourth Amendment. *E.g.*, *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

The question presented is whether the Wisconsin appellate court below, in its 2-to-1 decision upholding the seizure (and subsequent search) of all the correspondence sent and received by a person *not* under government investigation, satisfies the "18th century guarantee against unreasonable searches," by providing "*at a minimum* the degree of protection it afforded" when the Fourth Amendment was adopted. *Id*. at 953.

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors with an interest in the Fourth Amendment issue presented by this case. Their institutional affiliations are in the Appendix.

Amici and their counsel have no prior involvement with petitioner or her counsel, and have no direct interest, financial or otherwise, in the outcome of this case. *Amici*'s sole interest is to ensure that this Court, in deciding whether to grant plenary review, fully appreciates how sharply the decision below departs from fundamental Fourth Amendment principles, and how grave a threat its approach poses to "[t]he right of the people to be secure in their . . . papers" — a right embodied not only in the Fourth Amendment, but in common-law principles underlying it.

BACKGROUND AND SUMMARY OF ARGUMENT

Despite the ubiquity of e-mail (and other electronic text-based communication) during the past two decades, and its practical importance to daily life in America, this Court has never addressed how the special protection of individuals' correspondence and other "papers," established by 18th-century common law, and embedded in the Fourth Amendment, applies to stored e-mails. Absent direction by this Court, government investigators have for years enjoyed considerable latitude to seize and rummage

[1] Rule 37 statement: No party's counsel authored any part of this brief, and no person other than *amici* and their counsel funded its preparation and submission. Both parties were timely notified of the intent to file this brief (at least ten days before the due date), and both parties granted consent.

through the entire contents of individuals' private e-mail accounts, often without seeking a warrant, and typically without ever informing the individuals of the rummaging (unless they were later charged).[2]

The sweeping power to secretly intrude on private communications claimed by the State of Wisconsin in this case may be as egregious a departure from the original constitutional understanding as this Court will ever see in a case involving the seizure (and subsequent search) of e-mails pursuant to a warrant. Consideration of the factual background is a necessary preliminary to consideration of whether there is any historical precedent for upholding these actions.

In 2010, an employee of Milwaukee County, Tim Russell, was under investigation for embezzlement (ultimately he pled guilty). Pet. App. 4-5 & n.4. After obtaining copies of everything in Russell's e-mail accounts, investigators determined that Russell had deleted some e-mails. Hoping to find copies of the deleted e-mails in the e-mail accounts of people with whom Russell had corresponded, investigators exercised the power granted them by Wis. Stat. § 968.375 to secretly seize the entirety of the private e-mail accounts of petitioner (and several others). Pet. App. 5-12.[3]

[2] *See generally* Nicole Friess, *When Rummaging Goes Digital: Fourth Amendment Particularity and Stored E-Mail Surveillance*, 90 Neb. L. Rev. 971 (2012); Patricia L. Bellia & Susan Freiwald, *Fourth Amendment Protection for Stored E-mail*, 2008 U. Chi. L. Forum 121. *But see United States v. Warshak*, 631 F.3d 266, 283-88 (6th Cir. 2010) (Boggs, J.) (holding that indiscriminate search of suspect's e-mails violated Fourth Amendment).

[3] In the courts below, the State did not dispute that by using legal process to compel petitioner's e-mail providers (Google and Yahoo!)

Even though petitioner was Russell's co-worker, Pet. App. 3, the State concedes that when it seized her e-mails it did not suspect her of involvement in Russell's wrongdoing, or of any other wrongdoing — it was merely seeking copies of any e-mails in her possession that Russell had deleted.[4] Only after an exhaustive search through petitioner's e-mails did investigators find evidence, *unrelated to Russell's misconduct* (Pet. App. 4 n.4), that petitioner had committed a legal violation (by doing some work on a political campaign during County business hours on four days in April and May, 2010). Pet. App. 12. (The State apparently does not dispute that the incriminating e-mails comprise less than 3% of the 16,000 e-mails in petitioner's private e-mail accounts. Pet. App. 33.)

Nonetheless, following petitioner's guilty plea, in which she reserved the right to appeal the denial of her suppression motion, Pet. App. 14, the Wisconsin Court of Appeals rejected petitioner's Fourth Amendment objection. It reasoned: (1) the investigators had probable cause to seize *some* e-mails in petitioner's accounts, as possible evidence of crimes by Russell (those exchanged with

to hand over copies of petitioner's e-mails, without her permission or even knowledge, it effected a "seizure" of her correspondence which is subject to Fourth Amendment scrutiny.

[4] E.g., State's Br. in Ct. App., Apr. 11, 2014, at 7 (investigation "originally had nothing to do with Kelly Rindfleisch"); *id*. at 10 (warrant affidavit seeking Russell's e-mails "did not refer to Rindfleisch"); *id*. at 11 (warrant affidavit sought only copies of Russell e-mails retained by Rindfleisch which "will contain evidence of Tim Russell's misconduct"); *id*. at 38 ("warrants and supporting affidavit make clear" that "investigation had targeted Tim Russell, not Rindfleisch, and the warrants sought Rindfleisch's communications for the purpose of fillings gaps in Russell's e-mail communications.").

Russell); and (2) it was enough to satisfy the Fourth Amendment that, prior to any seizure, the investigators had obtained a warrant which accurately described all the e-mails that ended up being seized (that, is, *all* the e-mails in the accounts). Pet. App. 19-28. The late Judge Ralph Adam Fine dissented. Pet. App. 30-36.

Justice Michael Gableman of the Wisconsin Supreme Court summarized the crux of this case, in a memorandum reportedly circulated to his colleagues in support of his motion for reconsideration of the denial of review, as follows: "Can the government seize all of your communications because it suspects that someone you know has committed a crime, and then look for evidence that you committed a crime simply because it has your communications?"[5]

The answer turns, at least in part, on history — on whether such a search of all the correspondence of someone not suspected of any crime satisfies the "18th century guarantee against unreasonable searches," by providing "*at a minimum* the degree of protection it afforded" when the Fourth Amendment was adopted. *United States v. Jones*, 132 S. Ct. 945, 953 (2012).

As we explain in Part I, plainly the State of Wisconsin has not supplied petitioner with the minimum protection afforded private correspondence and other papers under the 18th-century common law. In *Jones* this Court singled out *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), as

[5] Quoted in M.D. Kittle, *Justice Gableman: Warrants in Rindfleisch case amount to "fishing expedition,"* Wisconsin Watchdog.org, June 29, 2015 (online at http://bit.ly/1RLMdFa). *See also Gableman requests Supreme Court take up Rindfleisch appeal in John Doe case*, WisPolitics.com, June 26. 2015 (online at http://bit.ly/1eV8HqU) (reproducing Justice Gableman's motion to reconsider).

a key reference point for the meaning of the Fourth Amendment. *Entick* held that even those who *are* under government investigation — in that case, for seditious libel — have an absolute right not to have their papers seized, or even searched, for evidence of a crime (i.e., if not contraband or the instrumentalities or fruits of a crime).

Entick was well known in the colonies, and it was adopted as the common-law rule in America more than a decade before ratification of the Fourth Amendment which, like state constitutional predecessors, explicitly singled out "papers" for special protection. Even in cases involving a charge of treason, in which the accused's papers could be vital to proving the charge, the Founding generation refused to make any exception to the apparently absolute ban on seizing and searching someone's papers to find evidence of a crime. For nearly a century after the Founding, *Entick* was uniformly followed. Not until 1863 did Congress, as an emergency war measure, authorize the seizure and search of papers for use in evidence in *any* context — and then, only for the purpose of investigating companies suspected of failing to pay excise taxes imposed to fund the war effort. Yet even this rationale was found insufficient to support an exception to *Entick*. Relying chiefly on the *Entick* rule for its Fourth Amendment holding, this Court struck down an amended version of the statute at the earliest available opportunity, in *Boyd v. United States*, 116 U.S. 616 (1886).

In Part II, we conclude by explaining why this case is an ideal vehicle for revisiting *Entick* and *Boyd* in the Fourth Amendment context. This Court can resolve this case in petitioner's favor through either a very broad holding or a very narrow one, making it an ideal vehicle for review.

ARGUMENT

I. At Common Law in 1765, Private Papers Could Not Be Searched for Evidence of a Crime, a Rule Which Has Persisted For More Than Two Centuries

This Court has repeatedly looked to 18th-century legal history to resolve disputes over the meaning of the Fourth Amendment. As this Court recently explained in *United States v. Jones*, 132 S. Ct. 945, 953 (2012), the Fourth Amendment should be interpreted as embodying the "18th century guarantee against unreasonable searches" — specifically, as providing "*at a minimum* the degree of protection" the common law afforded when the Fourth Amendment was adopted. *See also Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). Examples of eminent jurists emphasizing this point stretch back at least to 1833.[6]

We therefore begin with an examination of English common law in 1765. (Part I-A). We then examine state common law and constitutional law. (Part I-B). We close by noting the persistence of the 1765 common-law rule in

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[6] *E.g.*, *Carroll v. United States*, 267 U.S. 132, 149 (1925) (Taft, C.J.) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted"); *People v. Chiagles*, 142 N.E. 583, 583 (N.Y. 1923) (Cardozo, J.) (New York's analog to the Fourth Amendment provides "immunity . . . not from all search and seizure, but from searches and seizure unreasonable in the light of common-law traditions"); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 748 (1st ed. 1833) (Fourth Amendment is "little more than the affirmance of a great constitutional doctrine of the common law").

the United States over more than two centuries, in a variety of contexts (Parts I-C & I-D).

A. *Entick v. Carrington* (1765)

Any analysis of English common law prohibiting government officials from seizing and searching one's private papers for evidence of a crime necessarily begins with the celebrated decision of Lord Camden (Chief Justice Charles Pratt) in *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765),[7] which this Court has long recognized "as a wellspring of the rights now protected by the Fourth Amendment." *Stanford v. Texas*, 379 U.S. 476, 484 & n.13 (1965) (citing *Boyd v. United States*, 116 U.S. 616, 626-27 (1886)). *See also Jones*, 132 S. Ct. at 949 (emphasizing importance of *Entick* to deciding "the meaning of the Fourth Amendment when it was adopted").

Entick was one of half a dozen cases decided in the 1760s challenging a series of arrests, and searches and seizures of personal papers, launched by the crown in an effort to silence political opposition.[8] The main target of

[7] The most complete report of *Entick* is in *Howell's State Trials*, which reprinted the statement of the case found in Wilson's Reports (2 Wils. 275, 95 Eng. Rep. 807) and then presented "the Judgment itself at length, as delivered by [Lord Camden] from written notes." 19 How. St. Tr. at 1029. *See also* Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 65-67 (2013) (discussing history, content, and relative influence of the two reports).

[8] *See generally* David Stiles, *Arresting John Entick: The* Monitor *Controversy and the Imagined British Conquests of the Spanish Empire*, 53 J. British Studs. 934 (2014); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 875-94 (1985).

the crown's ire, and the main force resisting the crackdown, was John Wilkes, an attorney and Member of Parliament who was part of a Whig faction (led by William Pitt the Elder) which fell into opposition to the crown following the accession of King George III in 1760, and which vehemently opposed the crown's conciliatory approach to negotiating an end to the Seven Years' War with France and Spain.[9] Wilkes won his own tort judgment against the crown agents who arrested him and seized all his papers, *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763), 98 Eng. Rep. 489, bolstering his already considerable public prominence, both in England and in America.[10]

But *Entick* is the more important decision regarding the search-and-seizure clause of the Fourth Amendment generally, and as a reference point for the petition in this case in particular. In contrast to Wilkes, whose papers were seized pursuant to a general warrant used to arrest dozens of people and confiscate their papers — and which did not

[9] *See generally* ARTHUR R. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 12, 16, 21, 38-43, 49-50, 56-57, 60-62, 65-100 (2006); JOHN SAINSBURY, JOHN WILKES: THE LIVES OF A LIBERTINE xiv-xv, 45-70 (2006); LOUIS KRONENBERGER, THE EXTRAORDINARY MR. WILKES: HIS LIFE AND TIMES 16-35 (1974); CHARLES CHENEVIX TRENCH, PORTRAIT OF A PATRIOT: A BIOGRAPHY OF JOHN WILKES 56-99 (1962).

[10] *SEE* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 29, 194 n.146 (1997); CASH, *supra* note 9, at 100-16, 131-33, 161-62, 371-72.

even name him[11] — the hundreds of papers belonging to Entick (like the 16,000 pieces of correspondence belonging to petitioner in this case) were searched and seized pursuant to a warrant that, although very broad, at least *named* Entick and directed that his papers be seized.[12]

John Entick was a principal writer for *The Monitor, or the British Freeholder*, an anti-government periodical. A week after Britain, France, and Spain signed a preliminary peace treaty to end the Seven Years' War, on the evening of November 11, 1762, crown agents broke into Entick's house, arrested him, and "seized his personal papers."

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[11] Dripps, *supra* note 7, at 62 & n.64 (upon publication of Wilkes's "scurrilous attack" in *North Britain*, No. 45, on the King's speech opening the latest session of Parliament . . . His Majesty was incensed and Lord Halifax, the Secretary of State, wrote out a general warrant to 'seize and arrest' everyone connected with No. 45 'together with their papers,' under which Wilkes and "forty-nine others were arrested"). *See also* Schnapper, *supra* note 8, at 878; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 398-99 (1995).

[12] *See* Schnapper, *supra* note 8, at 881 & n.72 ("the warrant expressly named Entick as the suspect whose possessions were to be seized," and "[n]either the court nor the plaintiff's counsel suggested that the defendant's conduct was illegal because of a procedural defect in the warrant" — Lord Camden "condemned the very nature of the search and seizure, not the underlying warrant"); Stuntz, *supra* note 11, 105 Yale L.J. at 397-98 (noting "stunningly broad" nature of *Entick* decision: Lord Camden "did not rest his decision on any technical defect in the warrant" but instead "held that the search and seizure of the papers was itself impermissible, even with an otherwise valid warrant"); Stiles, *supra* note 8, at 956 (in *Entick* "there were no procedural warrant issues at stake, and the court could focus on the underlying issue of whether it was legal for the crown to make such a bold intrusion into Entick's home and such a comprehensive inquest into his private thoughts").

Stiles, *supra* note 8, at 935. "Elsewhere, the crown took similar actions against his associates, "in a clean sweep against the writers of *The Monitor*." *Id*. They "had been among the most vehement opponents" of the crown's "conciliatory approach" to ending the war, *id*., insisting that "something of unarguable value" must "be extracted from the defeated French and Spanish," and that Britain must "completely defeat its enemies" and "remove their capacity to retaliate against British colonies or commerce." *Id*. at 939-40.

At trial three years later on Entick's trespass action, the jury returned a verdict in his favor. 19 How. St. Tr. at 1032-36. The parties then argued the legal issue of "whether the warrant to seize and carry away the plaintiff's papers is lawful." *Id*. at 1045. Addressing the point that similar warrants had apparently issued routinely during the prior eighty years (since the Revolution), Entick's counsel argued: "If they have, it is high time to put an end to them; for if they are held to be legal, the liberty of this country is at an end." *Id*. at 1038. He continued:

> [N]o power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish inquisition; for ransacking a man's secret drawers and boxes, to come at evidence against him, is like racking his body to come at his secret thoughts. . . . Has a secretary of state a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed! [A]nd if it were lawful, no man could endure to live in this country.

Id. (footnote omitted). "However frequently these warrants have been granted since the Revolution," he argued, "that

will not make them lawful" — noting that it was "most amazing" that such warrants "have never before this time been opposed or controverted, considering the great men that have presided in the King's-bench since that time." He concluded that the honor had been reserved for the Court, ever "the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of Star-chamber tyranny." *Id*. at 1039.

Lord Camden proceeded to do just that, in a "stunningly broad" decision, Stuntz, *supra* note 11, at 397-98, which stands "as one of the landmarks of English liberty," and which was "applauded by the lovers of liberty in the colonies as well as in the mother country." *Boyd v. United States*, 116 U.S. 616, 626 (1886). "Revolutionary-era Americans adored" Lord Camden in no small part because of *Entick*: for a 20th-century analog, one "might think of *Wilkes* and *Entick* as the *Brown v. Board of Education* of their day; and Lord Chief Justice Camden as the Earl Warren of his era." Akhil Reed Amar, *Foreword: Lord Camden Meets Federalism — Using State Constitutions to Counter Federal Abuses*, 27 Rutgers L.J. 845, 845-46 (1996).

[W]hether the warrant to seize and carry away the plaintiff's papers is lawful," *id*. at 1045, Lord Camden began, was "the most interesting question in the cause," but "not the most difficult." *Id*. at 1063. If the Court were to rule this seizure lawful, he explained,

> the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

> * * *
>
> This power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession . . . .
>
> This power, so claimed by the secretary of state, is not supported by one single citation from any law book extant.

Id. at 1063-64.

Lord Camden brushed aside observations that in the prior eighty years such warrants had "been executed without resistance upon many printers, booksellers, and authors, who have quietly submitted to the authority," so that "no court of justice has ever declared them illegal." *Id*. at 1064. "If it is law," he declared, "it will be found in our books. If it is not to be found there, it is not law" — so that it is "incumbent upon the defendants to shew the law, by which this seizure is warranted," *id*. at 1066, which they could not do:

> Papers are an owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear inspection . . . .
>
> * * *
>
> Where is the written law that gives any magistrate such power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.
>
> * * *

> As therefore no authority in our books can be produced to support such a doctrine . . ., I cannot be persuaded, that such a power can be justified by the common law.

Id. at 1066, 1072.

Finally, Lord Camden considered "an argument of utility, that such a search is a means of detecting offenders by discovering evidence." *Id*. at 1073. He noted that in the criminal law, this approach is "never heard of," even though "there are some crimes, . . . murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper-search in these cases to help forward the conviction." *Id*. The reason, he suggested, lay not in any "gentleness of the law towards criminals," but in "a consideration that such a power would be more pernicious to the innocent than useful to the public . . . ." *Id*.

After an extensive pamphlet war over the use of warrants to seize private papers, in 1766 the House of Commons passed a resolution condemning the seizure of papers in libel cases.[13] "The lawful secrets of business and friendship were rendered inviolable, by *the resolution for condemning the seizure of papers*," Edmund Burke reported approvingly.[14]

Entick, holding that government may not search, much less seize, private papers for evidence of a crime, automatically became the law in the American colonies

[13] *See* Schnapper, *supra* note 8, at 896-910; Dripps, *supra* note 7, at 69-72.

[14] Edmund Burke, *A Short Account of a Late Short Administration* (1766), *in* THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 265, 265 (5th ed. 1877).

when it was announced in 1765. We will now show that the *Entick* rule has remained in effect in America, both as common law and as constitutional law, for over two centuries — and remains in effect today, binding on lower courts, unless and until overruled by this Court.

B. State Common Law and Constitutional Law

After independence, *Entick* continued as part of American common law due to the states' reception of British common law. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 4 (1977) ("[T]he first Continental Congress in 1774 . . . maintain[ed] that Americans were 'entitled to the common law'") (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 69 (1904)). "Between 1776 and 1784, eleven of the thirteen original states adopted, directly or indirectly, some provision for the reception of the common law," with the final two states following in 1798 and 1818. *Id*. at 4, 270 n.18. *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 66-70, 112 (3d ed. 2005). Reception of British common law extended beyond the thirteen original states, of course, to new territories and eventually new states. *E.g.*, Northwest Ordinance of 1787, art. II, 1 Stat. 50, 51-52 (1789) ("The inhabitants of the said territory shall always be entitled to the benefits of . . . judicial proceedings according to the course of the common law").

During the Founding era, an American jurist who "looked up the law would learn that, under *Entick*, such a warrant was unknown to the common law," and there was no "common law authority to issue warrants for papers." Dripps, *supra* note 7, at 75-76. But then, the law regarding the seizure of papers was hardly something that needed to

be researched. The historical record shows that it, and the *Entick* case in particular, were "the stuff of everyday political conversation in the colonies." *Id*. at 73-75 & n.127. Unsurprisingly, a review of citations to *Entick* in the United States prior to 1860, *id*. at 84-85, reveals no negative reference to *Entick*; "[n]or does any reported antebellum decision permit the seizure of private papers under warrant." *Id*. at 85.

The influence of *Entick* on the states extended beyond the common law, to constitutional law. Long ago this Court concluded that the *Entick* rule was incorporated into the Fourth Amendment. *Boyd*, 116 U.S. at 626-27 ("As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom [*Entick*], and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions . . . were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures."). Similarly, most of the new state constitutions adopted following independence, and all those adopted after 1776, included language which can be read as incorporating the *Entick* rule (four of them anticipate the Fourth Amendment's explicit protection of "papers"). Dripps, *supra* note 7, at 79-80; *see also* Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 Hastings L.J. 713, 741-42 (2014) (Massachusetts clause authored by John Adams was model for Fourth Amendment).

C. Treason

The settled status of the *Entick* rule in the American legal community may explain why there was no deviation from the rule even in a context as serious as alleged

treason. For example, in 1780, shortly after the former military commander of Philadelphia, Benedict Arnold, was exposed as a traitor, a bill was proposed in the Philadelphia legislature to facilitate the punishment of "persons corresponding or trading with the enemies of the [U]nited [S]tates" by authorizing the issuance of warrants to seize papers in such cases. Dripps, *supra* note 7, at 77 (citing bill). An opinion piece in the *Pennsylvania Gazette* condemned the proposal as "contrary to common law," and "an invasion of the natural rights of men," and observed: "this I believe is the only state, where a law of this kind has been thought necessary to be established. Even those states invaded by the enemy have not thought it necessary." *Id*. at 77-78. Those opposing "this heretical idea" prevailed, and the bill failed. *Id*. at 78-79 & n.152.

Even during the 1807 treason prosecution of Aaron Burr there was no suggestion that private papers should be seized, despite the stakes involved and the obvious relevance of the correspondence exchanged between the notorious Burr and others involved in his machinations, particularly General James Wilkinson, the army's top officer who had schemed with Burr beginning in 1804, and who ultimately betrayed Burr. DAVID O. STEWART, AMERICAN EMPEROR: AARON BURR'S CHALLENGE TO JEFFERSON'S AMERICA 52-54, 71, 96, 102-03, 109-11, 126, 132, 147, 163-65, 175, 209 (2011). Even though Burr and an ally had each spoken of plans to stage a coup (using armed men to kidnap the president and vice president), and then split off the west from the rest of the United States, *id*. at 119, 124-25, 127, and even though Burr had personally warned the president he could do him much harm, *id*. at 130-31, and even though convicting Burr was the president's top priority, *id*. at 206-07, 231, 233, no attempt was made to seize Burr's papers, or Wilkinson's, or to force

surrender of the papers through legal process, 241-42 — even though *Burr* had been allowed to subpoena a letter in the president's possession. *Id*. at 237. "The prosecutors never demanded the letters so diligently concealed by both Burr and Wilkinson. They have never come to light." *Id*. at 242.

D. *Boyd v. United States* (1886)

Entick remained unchallenged in America for 98 years — until 1863, when Congress enacted a statute attempting to displace it in a narrow context, during "a period of great national excitement, when the powers of the government were subjected to a severe strain to protect the national existence." *Boyd*, 116 U.S. at 621. As an emergency war measure (taken on the same day it first imposed conscription), Congress authorized the seizure and search of papers in proceedings against companies suspected of failing to pay excise taxes imposed to fund the war effort. Dripps, *supra* note 7, at 86-88 (citing statute and legislative history). Still needed after the war to help pay the massive war debt, the statute was amended in 1867, and again in 1868. *Id*. at 88-89. In 1872 and 1874, it came under constitutional attack on the basis of *Entick*. *Id*. at 90-92. In 1874 Congress amended the statute again: no longer could company books and papers be physically seized pursuant to a warrant; now, all the government could do is subpoena the papers and put the defendant to a choice between producing the papers or confessing the case. *Id.* at 92-93 (citing amendment).

Nonetheless, the Court struck down the statute at the earliest possible opportunity, invoking the Fourth Amendment and relying heavily on *Entick*. The 1886 *Boyd* case was a civil *in rem* action seeking forfeiture of 35 cases

of glass due to defendant's alleged evasion of excise taxes. 116 U.S. at 617-18. The Court first held that by essentially compelling defendant to produce an invoice, the government had brought about the functional equivalent of a search and seizure which must satisfy the Fourth Amendment. *Id*. at 621-22. Analyzing *Entick* in detail, the Court then concluded that the Fourth Amendment had been violated. *Id*. at 622-30. Without "a doubt," the Framers "never would have approved of" such a measure, it added. *Id*. at 630.

The Court also invalidated the compelled production of documents required by the statute, as a violation of the company's Fifth Amendment right against self-incrimination. *Id*. at 633-38. That ruling has been largely displaced by subsequent precedent, particularly in the area of business regulation.[15]

But *Boyd*'s Fourth Amendment holding, at least in cases involving individuals — that government may not search for and seize private papers to find evidence of a crime (i.e., unless they are contraband, or instrumentalities or fruits of a crime) — has been repeatedly applied by this Court, and has never been overruled.[16]

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[15] *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 61-65 (1997); Stuntz, *supra* note 11, at 423-33; Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 39-53 (1986); Robert S. Gerstein, *The Demise of* Boyd*: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. Rev. 343, 373-89 (1979); Note, *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 Mich. L. Rev. 184, 190-212 (1977).

[16] *E.g. Abel v. United States*, 362 U.S. 217, 695 (1960) (reaffirming that "private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them"). *See also United States v. Lefkowitz*, 295 U.S. 452,

Some commentators view *Andresen v. Maryland*, 427 U.S. 463 (1976), as overruling *Entick* and *Boyd* "[b]y clear implication,"[17] but it is difficult to conceive of this Court having discarded the *Entick* rule by *implication* a mere decade after lauding it "as a wellspring of the rights now protected by the Fourth Amendment." *Stanford v. Texas*, 379 U.S. 476, 484 (1965). The status of *Entick* and *Boyd* under the Fourth Amendment was not even put at issue in *Andresen*, in which the petitioner-defendant, in objecting to a seizure of business records, focused mainly on the Fifth Amendment and made only fact-bound arguments under the Fourth Amendment (none relying on *Entick* or *Boyd*). The section of *Andresen* rejecting defendant's Fourth Amendment claim does not even mention *Boyd* or *Entick*. 427 U.S. at 478-84. And reading *Andresen* as overruling the *Entick* rule is implausible in light of this Court's recent decision in *United States v. Jones*, 132 S. Ct. 945, 949 (2012), which cited with approval both *Boyd* and *Entick*.

II. Even if Private Papers Receive Only Heightened (Not Absolute) Protection Against Search or Seizure, It Was Not Supplied in This Case

This case is an ideal vehicle through which to revisit *Entick* and *Boyd* in the Fourth Amendment context, regardless of how broadly this Court might be inclined to

458-59, 464, 466 (1932); *Stanford v. Texas*, 379 U.S. 476, 480, 482-86 (1965); *Warden v. Hayden*, 387 U.S. 294, 303 (1967).

[17] James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 Ind. L.J. 55, 82 (1977).

rule. Petitioner would obviously benefit from a broad holding reaffirming *Boyd*'s absolute ban on seizing and searching the papers of a private individual for evidence of a crime (or at least for evidence of a crime committed by another). But a much narrower holding, relying on *Entick* and *Boyd* to require at least *heightened* protection of stored e-mail communications and other functional modern-day equivalents of Founding-era "papers" (at least in a non-business context), *see* Dripps, *supra* note 7, at 107-09, would be equally dispositive of this case, given the State's utter failure to do *anything* to limit its seizure and search to the reason it sought a warrant in the first place.

Even *Andresen*, invoked by some to suggest that *Boyd*'s absolutism is no longer good law, renders unacceptable the State's seizure of *all* of petitioner's e-mails, and its subsequent rummaging through them. *Andresen* recognized the "grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers" and insisted that officials "must take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy." 427 U.S. at 482 n.11. Therefore the State was obliged to limit its seizure to *only* the e-mails exchanged between petitioner and Tim Russell, as its sole objective was to recover e-mails deleted by Russell. See pp. 2-3 & n.4. Further minimization of unwarranted intrusions on privacy could have been achieved, for example, through having the e-mails screened by an independent "filter agent," or through the State's waiver of the "plain view" doctrine. *See generally* James Saylor, Note, *Computers as Castles: Preventing the Plain View Doctrine From Becoming a*

Vehicle for Overbroad Digital Searches, 79 Fordham L. Rev. 2809, 2836-58 (2011).[18]

Because the State ignored its obligations under *Andresen*, petitioner, who was not suspected of any criminal wrongdoing, nonetheless had her most intimate correspondence seized and searched through, and then used as evidence against her. She has been treated far worse than Aaron Burr who, even after plotting to decapitate the United States government and split off most of its territory to create his own empire, was permitted to keep his conspiratorial correspondence forever secret, enjoying the full benefit of the *Entick* rule which this Court has rightly termed "one of the landmarks of English liberty . . . ." *Boyd*, 116 U.S. at 626. For government investigators to continue to be afforded latitude to rummage at will through private digital archives, see pp. 1-2 & note 2, *supra*, would reduce that landmark of liberty to rubble.

[18] To fail to give private papers at least heightened (if not absolute) protection against search or seizure would effect a profound transformation of the law. Thirty years ago Professor Schnapper noted that the rule "that an individual's private papers were absolutely exempt from seizure" had come under question in the prior decade, although this Court had "stopped short of completely disavowing the century of precedents granting special fourth amendment protection to papers." Schnapper, *supra* note 8, at 869-71. Still, he warned that this Court had "come precariously close to a construction of the fourth amendment that, with only a minor change in the paperwork, would have permitted Lord Halifax and the King's messengers to seize the papers of John Entick and John Wilkes." *Id*. at 930.

CONCLUSION

November 2, 2015, will be the 250th anniversary of the monumental decision in *Entick v. Carrington*. The longevity of the *Entick* rule is a testament to its correctness. This "wellspring of the rights now protected by the Fourth Amendment," *Stanford*, 379 U.S. at 484, should not now be shunted aside. This Court should grant the petition in order to reaffirm the Fourth Amendment holding of *Boyd* which recognized the constitutional status of the common-law *Entick* rule. By granting review it can also supply the lower courts with much-needed guidance on the law governing searches and seizures of electronic text-based communication.

Respectfully submitted.

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APPENDIX
Institutional Affiliations of *Amici Curiae*

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