NO. SU-12-0263

SUPREME COURT OF THE STATE OF RHODE ISLAND

STATE OF RHODE ISLAND,

Petitioner,

v.

MICHAEL PATINO,

Respondent.

On Petition for Review from the
Providence Superior Court
No. P1-10-1155A

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION

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STATEMENT OF INTEREST

The Electronic Frontier Foundation ("EFF") is a member-supported civil liberties organization working to protect free speech and privacy rights in the online world. With more than 21,000 dues-paying members nationwide, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age. As part of its mission, EFF has often served as counsel or amicus in privacy cases, including cases involving the expectations of privacy in text messages and other forms of electronic communications. *See, e.g., City of Ontario v. Quon*, 130 S. Ct. 2619 (2010); *State v. Hinton*, 169 Wash.App. 28, 280 P.3d 476 (2012), *review granted* 175 Wash.2d 1022, 291 P.3d 253 (2012); *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010). Both counsel for the state and the defendant have no objection to the filing of this brief.

INTRODUCTION

Text messaging is the 21st Century phone call. By focusing on the technological realities of text messaging and the serious threat posed by warrantless intrusions into a ubiquitous form of communication in the United States, the lower court correctly held that defendant Michael Patino had standing to challenge the warrantless search of the text messages and correctly suppressed both the texts and other evidence obtained as a fruit of the initial, illegal search under the Fourth Amendment to the U.S. Constitution and Article I, Section 6 of the Rhode Island State Constitution.

This Court should affirm the lower court's decision. The Supreme Court has made clear it is "foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). The "meaning of a Fourth Amendment search must change to keep pace with the

march of science." *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (citing *Katz v. United States*, 389 U.S. 347 (1967)). The lower court's opinion recognized this evolution and its decision should be affirmed.[1]

STATEMENT OF THE CASE

On October 4, 2009, Cranston police and rescue units arrived at an apartment belonging to Trisha Oliver ("Oliver") in response to Oliver's 911 call. *State v. Patino*, 2012 WL 3886269, Slip Opinion ("slip op.") at 4 (R.I. Sup. Ct. Sep. 4, 2012).[2] Her six-year-old son Marco Nieves was not breathing, and the fire and rescue unit took him to the hospital. *Id.* at 4-5. After the rescue unit left, police officer Matthew Kite inspected Oliver's apartment. *Id.* During this inspection, Officer Kite viewed a list of text messages on an LG cell phone, which led him to suspect that defendant Michael Patino may have caused Marco's medical condition. *Id.* at 7-8. The LG phone belonged to Oliver, and the initial message viewed by Officer Kite was apparently an unsent message from Oliver to Patino. *Id.* Marco died later that evening. *Id.* at 17. Later, during an interrogation of Patino, other officers referred to messages apparently sent by Patino, which the lower court found must have been read on the LG phone. *Id.* at 11-13.

The lower court held that Patino had standing to challenge the search of the LG phone in which the police viewed incriminating text messages both to and from Patino, *id.* at 88-89, and that this warrantless search violated the Fourth Amendment, *id.* at 100. As a result, the court suppressed these messages and other evidence tainted by this illegal search. *Id.* at 189.

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[1] Although this brief primarily references the Fourth Amendment, the analysis is the same under Article I, section 6 of the Rhode Island Constitution, especially since it can provide even greater protection than the Fourth Amendment. *See State v. Maloof*, 114 R.I. 380, 390, 333 A.2d 676, 681 (1975).

[2] All further page references to the lower court decision are to the slip opinion, as the Westlaw version does not have page numbers.

ARGUMENT

I. PATINO HAD A REASONABLE EXPECTATION OF PRIVACY IN THE TEXT MESSAGES STORED ON THE LG PHONE

A. Text Messages Are A Ubiquitous Form of Communication.

A "text message" is a short electronic message sent from one electronic device to another device, typically a cell phone. Text messages are quickly sent and received, allowing for instantaneous communication. A text message is stored on both the sender and recipient's electronic device. It is fast becoming a routine form of communication nationwide, and the preferred method of communication for many cell phone users, particularly younger ones. A 2011 Pew Research Center Report found:

- 83% of American adults own cell phones
- 73% of those cell phone owners send and receive text messages
- users who text sent or received an average of 41.5 messages per day
- users between the ages of 18 and 24 exchanged an average of 109 messages a day, or more than 3,200 messages a month
- 31% of cell phone users who text message prefer to be contacted by text message instead of by phone call
- 45% of people send or receive 21-50 texts a day say text messaging is their preferred mode of contact
- 55% of people who send more than 50 texts a day say text messaging is their preferred mode of contact

See Pew Research Center, *Americans and Text Messaging*, September 19, 2011.[3] CTIA, the wireless phone trade association, reported that 2.27 trillion text messages were sent nationwide in the twelve-month period ending June 30, 2012. *See* CTIA, *U.S. Wireless Quick Facts*.[4]

These statistics, combined with the reality that most cell phones are carried on a person's pocket or purse, indicates text messaging is a common form of communication, one worthy of constitutional protection as the lower court correctly ruled. *See Patino*, slip. op. at 44-55. "Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification." *Quon*, 130 S. Ct. at 2630.

B. The Constitutional Focus Should Be the Communication, Not the Communication Technology.

As the lower court recognized, the facts of this case are complex and raise numerous "contemporary problems of the relationship between rapidly evolving technology and the law." *Patino*, slip op. at 43. Due to this complexity, it is easy to lose sight of the constitutional principles that guide the Fourth Amendment analysis on whether the warrantless search of the text messages violated Patino's expectations of privacy. But to be clear, the starting point is the Supreme Court's rejection *in Katz v. United States* of the notion that Fourth Amendment protections are limited to "only searches and seizures of tangible property."[5] 389 U.S. 347, 352-

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[3] Available at http://www.pewinternet.org/Reports/2011/Cell-Phone-Texting-2011.aspx (last visited October 18, 2013).
[4] Available at http://www.ctia.org/advocacy/research/index.cfm/aid/10323 (last visited October 18, 2013).
[5] The U.S. Supreme Court has recently revived the pre-*Katz* focus on physically intruding onto private property for the purpose of investigation as another way in which the government can violate the Fourth Amendment. *See Florida v. Jardines*, 133 S. Ct. 1409 (2013); *United States v. Jones*, 132 S. Ct. 945 (2012). But as the Court made clear in *Jones*, these holdings in no way

53 (1967) (citing *Warden v. Hayden,* 387 U.S. 294, 304 (1967)). Instead, *Katz* explained that "the Fourth Amendment protects people, not places." 389 U.S. at 351.

Since *Katz*, the proper focus of a Fourth Amendment inquiry must be on protecting "people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick,* 433 U.S. 1, 7 (1977). Thus, a "Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 33 (citing *Katz*, 389 U.S. at 361 (Harlan J., concurring)).

Here, Patino does not assert an expectation of privacy in the LG phone, but rather in a text message conversation that the police happened to view on the phone. Thus, as the lower court correctly ruled, what "controls" the Fourth Amendment analysis "are the contents of the communications rather than the device used to communicate." *Patino*, slip op at 60. When the lower court viewed the texts through that rubric, it found the messages worthy of constitutional protection and held that Patino had a reasonable expectation of privacy in the messages read by the police on the LG phone. *Id.* at 88.

The State's arguments to the contrary incorrectly attempt to divert attention from the contents of these messages to the "place" of the communication, the phone. *See Katz*, 389 U.S. at 351. But that ignores the fact that the Fourth Amendment protects people and not places. Individuals have an expectation of privacy in the ability to shield their conversations from intrusion. *See United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972) ("[T]he broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment

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displace *Katz's* foundational approach that looks at expectations of privacy. *Jones*, 132 S. Ct. at 952.

safeguards."). The medium by which that conversation takes place does not alter the constitutional focus.

For example, in *Katz*, the Court found a reasonable expectation of privacy in a phone call, not the phone booth or telephone equipment. *Katz*, 389 U.S. at 351. Importantly, Katz could not claim any such privacy interest since he neither owned the phone booth or the equipment used to make the call. *Id.* Yet the Fourth Amendment's privacy protection extended to both parties on the phone call even though neither had "control" over the phone booth nor could physically exclude the government from wiretapping it. That is because what Katz "sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id.* at 352. So, although the defendant had no property interest in the LG phone since it belonged to someone else, he still had an expectation of privacy in the text messages and conversation.

Here, like the phone booth in *Katz*, the LG cell phone was just a medium for the constitutionally protected text message conversation. Regardless of whether Patino had control over the LG phone, he nonetheless maintained an expectation of privacy in the text message conversation contained on the phone.[6]

C. Patino's Reasonable Expectation of Privacy Was Not Defeated Because the Police Read the Messages on a Phone He Did Not Own.

In its opening appellate brief, the State makes two overlapping attempts to reframe the Fourth Amendment analysis as dependent on the LG phone rather than the text messages at issue. First, drawing heavily on an intermediate Washington state court of appeals decision, the

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[6] That does not mean that a cell phone is not worthy of constitutional protection. Obviously, Oliver had an expectation of privacy in both the physical cell phone and its contents. Likewise, Patino would have an expectation of privacy in the contents of his cell phone. *See, e.g., United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) (expectation of privacy in contents of cell phone); *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007) (same).

State argues that text messages are analogous to physical letters, and that in both cases, "the sender's expectation of privacy ordinarily terminates upon delivery." State's Brief ("SB") at 14-16 n. 37 (citing *State v. Hinton*, 169 Wash. App. 28, 43, 280 P.3d 476, 483-84 (2012), *review granted* 175 Wash. 2d 1022, 291 P.3d 253 (2012)).[7] Thus, the argument goes, once the messages were received on the LG phone, Patino's ability to assert an expectation of privacy was defeated. However, even if the analogy to letters is apt, this argument relies on an inaccurate characterization of Fourth Amendment law.

In *United States v. King*, 55 F.3d 1193 (6th Cir. 1995), the primary case relied on by the Washington Court of Appeals in *Hinton*, the defendant mailed letters to his wife, who received the letters and kept them with other documents. *King*, 55 F.3d at 1195; *see also Hinton*, 280 P.3d at 483 (discussing *King*). Later, King's wife asked someone else to retrieve and destroy the letters, but that person instead turned them over to the FBI. *King,* 55 F.3d at 1195. The Sixth Circuit found no constitutional violation because King voluntarily mailed the letters to his wife who received them, and the government did not take the letters themselves, but obtained them from an individual. *Id.* at 1196.

Here, Oliver, the owner of the phone, did not "receive" the messages in the same way that King's wife "received" the letters. While it is true that the LG phone belonging to Oliver received the messages, this is not the same thing as Oliver receiving the messages herself, and then turning them over to the government, as occurred in *King*. This distinction is crucial. As numerous courts have made clear, a person's privacy right in mailed letters is not terminated upon delivery to a mailbox; rather it survives until the letters "are received by their intended

[7] The Washington Supreme Court heard oral argument in *Hinton* on May 7, 2013 but has yet to issue a decision.

recipient." *United States v. Tolliver*, 61 F.3d 1189, 1997 (5th Cir. 1995) (no expectation of privacy in letters "received, opened and presumably read" by recipient) *cert. granted, judgment vacated on other grounds*, *Moore v. United States*, 519 U.S. 802 (1996); *see State v. Martinez*, 221 Ariz. 383, 389, 212 P.3d 75, 81 (2009) (Fourth Amendment expectation of privacy in letter existed until recipient "took possession of the letter"); *State v. Hubka*, 10 Ariz. App. 595, 598, 461 P.2d 103, 598 (1969) (suppressing search of letter under Fourth Amendment where "addressee was unaware apparently of even the existence of the letter at the time it was opened"); *cf United States v. Dunning*, 312 F.3d 528, 530-31 (1st Cir. 2002) (no Fourth Amendment violation when letter received and opened by intended recipient and recipient encouraged to share contents).

As addressed more fully below, the result would be different if Oliver had voluntarily turned the text messages over to the police. *See King*, 55 F.3d at 1195. But that is not what happened here.[8] The phone was a high tech mailbox, holding the texts for delivery to Oliver. In reading the texts on the LG phone, Officer Kite essentially rummaged through a mailbox, took a letter, and opened and read it. Without a search warrant, this snooping violates the Fourth Amendment. *See, e.g., Ex Parte Jackson*, 96 U.S. 727, 733 (1877) ("Whilst in the mail, [letters] can only be opened and examined under like warrant.").

It should be no different when a police officer inspects a cell phone, and text messages are "opened and examined." *Ex Parte Jackson*, 96 U.S. at 733. It is crucial to remember that text messages enable instant communications, so a ruling that texts lose privacy protection once sent to or received by the *electronic device* regardless of whether the messages are received by

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[8] Oliver did later consent to have the police search her phone, but the lower court held this was the fruit of the earlier illegal search. *Patino*, slip op. at 150.

the intended *recipient* means that text will never be constitutionally protected.[9] The Fourth Amendment requires searches be reasonable, but of course the "reasonableness determination must account for differences" in the thing to be searched by examining the totality of the circumstances surrounding the search. *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2012) (en banc) (citing *Samson v. California*, 547 U.S. 843, 848 (2006)). The key difference between physical mail and text messages is the speed of transmission; to adopt privacy protection for text messages without accounting for this difference is to adopt meaningless privacy protection.

Finally, focusing on the LG phone rather than the text messages themselves risks an overly rigid adherence to analogy—phones as mailboxes—that increasingly loses sight of how messaging technology operates. For example, Apple's iMessage service may operate indistinguishably from traditional text messages, allowing users to exchange short electronic messages between users' iPhones.[10] But iMessage users can also choose to receive messages on numerous devices at once, including an iPhone, iPad tablet and a laptop computer.[11] Other messaging services operate similarly.[12]

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[9] Or that the Fourth Amendment protection only lasts for the mere seconds it takes for the text message to be received by the phone rather than the addressee.

[10] The iMessage service uses different messaging protocols and networks to send and receive messages than traditional text messages, but these differences are largely hidden from the end user. *See iMessage*, Wikipedia, https://en.wikipedia.org/wiki/IMessage (last visited October 18, 2013).

[11] *See Christina Warrnen, Hands on with Messages for OS X Mountain Lion*, Masahble (Feb. 17, 2012), http://mashable.com/2012/02/17/messages-os-x-beta ("If you are signed into the same account on an iPhone/iPod/iPad as in Messages for Mac, you'll see your conversation everywhere. That means that when you get a message in OS X, it will also show up on your phone (and vice versa).") (last visited October 18, 2013).

[12] *See* Dan Graziano, *Verizon announces iMessaging clone for Android, iOS and Web*, BGR (Mar. 22, 2013, 10:10 PM), http://bgr.com/2013/03/22/imessage-clone-verizon-messages-app-391793/ (last visited October 18, 2013).

If, as the State contends, a sender's expectation of privacy is defeated once the message is "received" by a device, which of these multiple devices is determinative of when the expectation of privacy terminates? The more logical approach, and the one adopted by the Supreme Court, is to focus on the person – in this case the sender – and not the place, or device. *Katz*, 389 U.S. at 351

D. The Risk of Exposure to a Third Party Does Not Defeat the Reasonable Expectation of Privacy in a Text Message.

In a second, related attempt to divert the proper focus of the Fourth Amendment inquiry, the State argues that Patino's expectation of privacy should be defeated because of the risk that Oliver, as the owner of the LG phone, could have shown the messages to the police. SB at 14. But the Supreme Court has rejected the contention that communications lose all privacy protection merely because of the hypothetical risk of exposure of their contents by a party to the communication.

In *Katz*, the Court explained that what a person "seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." 389 U.S. at 351 (emphasis added). And in turn, the Supreme Court has repeatedly found expectations of privacy in items that come into contact with third parties, including physical mail. *See, e.g., United States v. Jacobsen,* 466 U.S. 109, 114 (1984) (reasonable expectation of privacy in "[l]etters and other sealed packages") (quoting *Ex Parte Jackson*, 96 U.S. at 733). In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) the Supreme Court found an expectation of privacy that a urine sample provided to hospital would not be shared with nonmedical personnel without the patient's consent. 532 U.S. at 78. Similarly, in *Bond v. United States*, 529 U.S. 334 (2000) the Supreme Court ruled although a bus passenger exposed his luggage to other passengers by placing it in an

overhead passenger compartment, that was not enough to defeat his expectation of privacy from having his luggage physically manipulated by police. 529 U.S. at 338.

More recently, in her concurring opinion in *Jones*, Justice Sotomayor elaborated that the Fourth Amendment need not treat "secrecy as a prerequisite for privacy" or "assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." 132 S. Ct. at 957 (Sotomayor J., concurring) (citing *Katz*, 389 U.S. at 351-52)).

As a result, the mere possibility that Oliver *might* disclose the contents of the text messages on the LG phone to the police does not defeat Patino's expectation of privacy in the texts. That Oliver could have done so and that such action would not violate the Fourth Amendment is irrelevant for the actual course of events here. *See Hoffa v. United States*, 385 U.S. 293, 303 (1966). In this case, the police did not initially view the messages via Oliver's consent but through their own warrantless search of her unattended phone. Courts "should bear in mind that the issue is not whether it is conceivable that someone could eavesdrop on a conversation but whether it is reasonable to expect privacy." *United States v. Smith*, 978 F.2d 171, 179 (5th Cir. 1992) (citing *Florida v. Riley*, 488 U.S. 445, 453-43 (1989)).

Similarly, it is irrelevant that the messages on the LG phone were potentially stored and therefore accessible by other third parties. *Cf. Patino*, slip op. at 71-78 (discussing the third-party doctrine and finding it inapplicable in this case). When it comes to phone calls, although telephone service providers have a legal obligation to ensure their technologies are configured so law enforcement can monitor and wiretap phone calls with appropriate legal authorization, callers still maintain an expectation of privacy in their conversations. *See* 47 U.S.C. § 1002.

With the rapid explosion in technology, courts are quickly concluding that electronic forms of communications like emails and text messages are worthy of Fourth Amendment protection despite the fact that they are "recorded" and exposed to third parties, including the service provider that routes and stores messages. *See, e.g, United States v. Warshak,* 631 F.3d 266, 288 (6th Cir. 2010) (reasonable expectation of privacy in email); *State v. Clampitt*, 364 S.W.3d 605, 611 (Mo. Ct. App. 2012) (reasonable expectation of privacy in text messages). In short, this means that senders do not lose their expectation of privacy in text messages just because they are recorded on an electronic device where someone else could potentially view the message, or sent via a network where a third party could read a copy. To hold otherwise would be to once again mistakenly place the constitutional focus on the device rather than the communications.

II. THE LOWER COURT'S RULING DOES NOT CREATE AN INFEASIBLE RULE FOR LAW ENFORCEMENT

Because the viewing of the text messages on the LG phone violated Patino's reasonable expectation of privacy, a Fourth Amendment search occurred. *Kyllo*, 533 U.S. at 33. The consequences of this warrantless search are simple. "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (quoting *Katz*, 389 U.S. at 357)). The lower court determined that none of the exceptions to the warrant requirement applied here, and thus properly excluded the tainted fruits of this tree. *Patino*, slip op. at 189.

In order to avoid this "basic" conclusion, the State describes a parade of "absurdities" that will flow from the lower court's decision. SB at 20-21. The state argues that to avoid having

a sender of a text message challenge a search of a phone on which his messages were read, the police would have to "ascertain the[] perhaps[] numerous text-message senders on a subject cell phone, and before the issuance of a warrant for such cell phone, seek consent from each and every one of those text-message senders." *Id.* at 20. This is clearly incorrect, since a holding that a sender has a legitimate expectation of privacy in messages found on another's phone only means that in lieu of obtaining consent to search the phone, police could obtain a search warrant to search or seize the phone, assuming they have probable cause to search the phone or messages stored within. *See, e.g., United States v. Harris*, 403 U.S. 573, 577 (1971). Similarly, the State's argument that this holding would defeat the ability of the owner of the phone to voluntarily reveal the contents of the messages ignores long-standing Supreme Court precedent. *See, e.g., Hoffa,* 385 U.S. at 303 (informant's testimony about defendant's incriminating statements does not violate defendant's expectation of privacy). Moreover, it is clear that there is a qualitative difference between assuming the risk someone would voluntarily expose details of a conversation to the government and the government intruding into the conversation through no voluntary action of one of the parties to the conversation. Thus, while Patino ran the risk Oliver could have told the police about text messages Patino sent, what happened here – the government snooping into the conversation through no action of Oliver – is an entirely different thing.

Finally, the State contends that Patino is in fact asserting standing in a text message composed by Oliver and never received by Patino. SB at 21-22. This argument fails for two reasons. First, it ignores the conversational nature of text messages, meaning that Patino's expectation of privacy was in his conversation with Oliver. *See Patino*, slip op. at 88; *Katz*, 389 U.S. at 351; *see also Hubka*, 10 Ariz. App. at 598, 461 P.2d at 598 (Fourth Amendment violation where *recipient* was unaware letter was searched). Second, it does not account for the facts of

the situation, in which Officer Kite was privy to sent, unsent, and received messages on the phone. Even if this Court believed Patino could not assert a reasonable expectation of privacy in an unsent message composed by Oliver, he clearly had an expectation of privacy in the messages he did send. The lower court found that police had viewed these messages without a warrant, either on the LG phone or the defendant's phone. *Patino*, slip op. at 189.

Thus, far from creating an infeasible rule that interferes with police investigations, a holding that Patino has a reasonable expectation of privacy in text messages to which he was a party is supported by the weight of precedent. In this situation, the Fourth Amendment requires that police first obtain a warrant based on probable cause, and a warrantless search subject to no exceptions to the warrant requirement is therefore illegal. *Coolidge*, 403 U.S. at 454-55.

CONCLUSION

For these reasons, this Court should find that Patino had a reasonable expectation of privacy in the text messages on the LG phone and that the lower court was correct to find this was an illegal search.

Dated October 21, 2013

Respectfully submitted,

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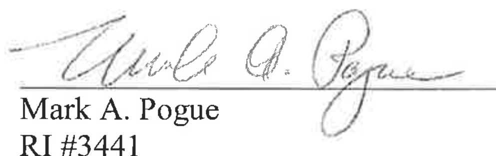

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2013, I caused a copy of the within Brief of *Amicus Curiae* Electronic Frontier Foundation to be mailed to the following:

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