No. 09-11897-G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES A. REHBERG,
Plaintiff-Appellee

v.

JAMES P. PAULK et al.,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND INSTRUCTORS SUPPORTING APPELLEE'S PETITION FOR REHEARING OR HEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici are law school professors and instructors who teach, research, write, and have an interest in the theory, law, and practice of information privacy and criminal procedure, particularly as they are impacted by advancing technology. *Amici* have no other stake in the outcome of this case but are interested in ensuring that constitutional privacy protections do not retract in response to advancing technology. A full list of *amici* is appended to the signature page.

Pursuant to FRAP 26.1, *amici curiae,* through their undersigned counsel, hereby certify:

1. No *amicus* is a publicly held corporation or other publicly held entity.

2. *Amici* have no parent corporations.

3. No publicly held corporation or other publicly held entity owns 10% or more of any *amicus*.

4. None of the *amici* has a financial interest in the outcome of the case.

Pursuant to 11 Cir. R. 26.1-1, in addition to the persons and entities listed in Appellee's Petition for Rehearing or Hearing *en banc*, the following parties, acting in their individual capacities, have a non-financial interest in the outcome of this case:

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/s/_____ DATED: April 12, 2010
Ralph Scoccimaro
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STATEMENT OF COUNSEL FOR AMICI CURIAE UNDER CIRCUIT RULE 35-5

I believe, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Berger v. New York, 388 U.S. 41 (1967)

Katz v. United States, 389 U.S. 347 (1967)

United States v. U.S. District Court, 407 U.S. 297 (1972)

Smith v. Maryland, 442 U.S. 735 (1979)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Does the Fourth Amendment of the United States Constitution protect stored e-mail messages?

/s/ _____

Ralph Scoccimaro
ATTORNEY OF RECORD FOR *AMICI CURIAE*

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STATEMENT OF THE ISSUES MERITING EN BANC CONSIDERATION

The panel has ruled that individuals do not possess a reasonable expectation of privacy in the contents of stored e-mail messages. This ruling, a significant departure from the great weight of other rulings on this issue, contradicts Supreme Court precedent extending Fourth Amendment protection to communications and places in jeopardy the privacy of millions of e-mail users in this Circuit. *En banc* consideration is merited for these reasons.

ADOPTION OF STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES

Amici adopt the "Statement of Facts Necessary to Argument of the Issues" offered in Appellee's petition.

ARGUMENT AND AUTHORITIES

A group of law professors and instructors submit this brief *amici curiae* in support of Appellee Charles Rehberg. *Amici* urge this Court to rehear, as a panel or *en banc*, the opinion filed March 11, 2010, *Rehberg v. Paulk*, 2010 WL 816832 (11th Cir. March 11, 2010), and to affirm the District Court's order denying qualified and absolute immunity to Appellants on the basis of the pleadings alone.

By its opinion, the Court has stripped all e-mail messages of protection under the Fourth Amendment to the U.S. Constitution. Because of this ruling, law enforcement officers can now scrutinize the stored, private e-mail communications of any person, unrestricted by the Constitution. For example, this ruling permits the police to manufacture facially invalid process—as the complaint in this case alleges former District Attorney Hodges did here—compelling e-mail providers to turn over the personal, private communications of their customers without running

afoul of the Fourth Amendment.

The impact of this ruling is hard to exaggerate. Millions of Americans use e-mail every day for practically every type of personal activity and for myriad private uses: to send and receive family photos, requests for personal advice, love letters, personal financial documents, trade secrets, and legally privileged communications. People trust this medium for sensitive and private messages because they expect that personal e-mails sent and received over the Internet are like sealed letters, telephone calls, or papers stored in a home. Yet the panel's ruling announces to all e-mail users in this Circuit that, contrary to their settled expectations, they have been sending and storing a twenty-first century version of a postcard, with no constitutional protection from arbitrary government intrusion.

In 1928 the Supreme Court was faced with a similar choice regarding the Fourth Amendment's application to a new communications technology, took the wrong path, and held that the Fourth Amendment did not protect the privacy of telephone calls. *See Olmstead v. United States,* 277 U.S. 438, 464-65 (1928) (government's wiretapping of telephone lines outside of bootlegging suspect's home and offices was not a search or seizure because there was no entry into the suspect's properties). In 1967, the Supreme Court recognized *Olmstead* to have been an error that had left telephone users unprotected by the Constitution for nearly half a century. *Berger v. New York*, 388 U.S. 41 (1967) (state's electronic eavesdropping statute facially unconstitutional for lack of adequate Fourth Amendment safeguards); *Katz v. United States*, 389 U.S. 347 (1967) (finding a Fourth Amendment expectation of privacy in telephone calls made from a closed

phone booth).

This Court should reconsider its ruling to avoid the mistake of *Olmstead* and instead follow the lessons of *Berger* and *Katz*. *Amici* submit this brief in support of Mr. Rehberg and the millions of other e-mail account holders whose privacy is at stake by explaining why widespread, reasonable expectations of privacy in stored e-mail should be protected by the Fourth Amendment.

I. E-MAIL USERS HAVE A REASONABLE EXPECTATION OF PRIVACY IN THEIR STORED E-MAIL.

Under the reasoning of *Katz*, the touchstone of modern Fourth Amendment doctrine, e-mail users have a constitutionally protected "reasonable expectation of privacy" in their stored e-mail messages. *See id.*, 389 U.S. at 360-61 (Harlan, J., concurring). Fourth Amendment protections apply where "a person [has] exhibited an actual (subjective) expectation of privacy . . . that society is prepared to recognize as [objectively] 'reasonable.'" *Id.* The reasonableness of an expectation of privacy in the contents of stored e-mails is analogous to society's constitutionally-protected expectations of privacy in the contents of phone calls, the contents of sealed postal mail, and private papers and effects.

A. E-mail users possess a reasonable expectation of privacy in the contents of their stored e-mail similar to the expectation of privacy in the contents of telephone calls, sealed letters, and private papers and effects.

1. E-mail, like the telephone, plays a vital role in private communication that reflects users' reasonable expectation of privacy.

The Supreme Court in *Katz* rejected *Olmstead*'s rigid property-based

conception of the Fourth Amendment, holding instead that "the Fourth Amendment protects, people, not places." *Id.* at 351. Even though Mr. Katz's telephone conversations were intangible and not "houses, papers, [or] effects," and even though they were transmitted via the telephone company's property, they were protected by the Fourth Amendment against search or seizure by the government. *Compare id*. *with Olmstead,* 277 U.S. at 465. Mr. Rehberg's stored e-mail messages, and those of the typical e-mail account holder, are no different.

Katz recognized that the Fourth Amendment protects society's shared expectations about what is private, and applied Fourth Amendment protections based on the telephone's vital societal role as a medium for private communication. *Id.* at 352 ("To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."). In 1967, society's reliance on public telephones for private communication established both the subjective expectation that phone calls were private as well as the objective reasonableness of that expectation giving rise to Fourth Amendment protection. *See id*.

Since *Katz*, the Supreme Court has looked regularly to societal expectations in elaborating the Fourth Amendment, particularly when scrutinizing new technologies. *See Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (finding search based on spouse's consent over target's objection unreasonable based on "widely shared social expectations" and "commonly held understanding[s]"); *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (recognizing that technological advances must not be allowed to erode society's expectation in "that degree of privacy

against government that existed when the Fourth Amendment was adopted.").

Based on society's extensive use of e-mail for private, sensitive communications, it is plain that society expects and relies on the privacy of messages sent or received using this medium just as it relies on the privacy of the telephone system. It is equally plain that society expects privacy in *stored* e-mail messages: e-mail users often store many if not all of their personal messages with their providers after they have been sent or received, rather than downloading them onto their own computers.[1] Indeed, the largest e-mail services are popular precisely because they offer users huge amounts of computer disk space to warehouse their e-mails for perpetual storage.[2] In light of these societal patterns, to hold that the hundreds of millions of people who store their e-mail messages with providers such as Google, Microsoft, or Yahoo! lack either a subjective or objective expectation of privacy makes no sense, and would plainly violate *Katz* by failing to defer to society's expectations of privacy.

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[1] Many e-mail users lack the option of storing e-mail on their own computers. For example, users of Yahoo!'s web-based e-mail service can view e-mail on the service's web site, but cannot download e-mail to their computers. *See* Yahoo!, *Yahoo! Mail Help: Organizing and Accessing E-mail*, *available at* http://help.yahoo.com/l/us/yahoo/mail/original/manage/ (visited Mar. 30, 2010).

[2] For example, Google's "Gmail" service offers more than seven gigabytes of free storage space. Google, *Google Storage*, *available at* http://mail.google.com/support/bin/answer.py?hl=en&answer=39567 (visited Mar. 30, 2010). Google also encourages its users not to throw messages away. Google, *Getting Started with Gmail*, *available at* http://mail.google.com/mail/help/intl/en/start.html (visited Mar. 30, 2010) ("Don't waste time deleting . . . . [T]he typical user can go years without deleting a single message.").

2. Stored e-mail is communications content protected by the Fourth Amendment like the content of telephone calls, sealed letters, and personal papers and effects.

The three-judge panel relied, in part, on the Supreme Court's decisions in *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976), in justifying its conclusion that the *content* of stored e-mail deserves no Fourth Amendment protection. Not only do these cases not support this conclusion, they stand for the opposite conclusion*; Smith* and *Miller* draw a line between constitutionally-unprotected information voluntarily conveyed to third parties for use by the third parties and constitutionally-protected contents of communications.

The *Smith* court distinguished the contents of phone calls, which it reaffirmed are protected by the Fourth Amendment under *Katz*, from the dialed phone numbers acquired by "pen register" surveillance, which it held are not protected. 442 U.S. at 741-42.[3] *Smith* concluded that dialed phone numbers are not protected by the Fourth Amendment because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," as that person has "assumed the risk" that the information "revealed" to the third party will be conveyed to the government. *Id.* at 743-744 (citing *United States v.*

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[3] Some scholars, including several of the *amici,* have written articles criticizing the reasoning in *Smith* and *Miller*, and have urged courts to apply different rules to modern communications. *E.g.,* Susan Freiwald, *First Principles of Communications Privacy*, 2007 Stan. Tech. L. Rev. 3, ¶¶ 46-49; Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. Cal. L. Rev. 1083, 1137-38. For the present brief, however, *amici* do not rely on these arguments and argue instead that even assuming the direct applicability of these cases to modern communications, the contents of stored e-mail messages are fully protected by the Fourth Amendment.

Miller, 425 U.S. 435, 442-44 (1976) (bank customer had no reasonable expectation of privacy in checks, financial statements, and deposit slips held by bank)). Despite the fact that the electrical impulses constituting the contents of a telephone conversation are just as exposed to telephone company equipment as dialed numbers, *Smith* made clear that its holding did not disturb *Katz*'s reasoning because "pen registers do not acquire the *contents* of communications." *Id.* at 741 (emphasis in original); *accord United States v. Thompson*, 936 F.2d 1249, 1252 (11th Cir. 1991) (noting that "a device which *merely* records the numbers dialed from a particular telephone line" does not violate the Fourth Amendment) (emphasis added).

Smith thus confirms that spying on what callers say is more invasive than knowing what phone numbers they dial. 442 U.S. at 741 (pen registers "disclose *only* the telephone numbers that have been dialed . . . [not] the purport of any communication between the caller and the recipient.") (emphasis added) (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 167 (1977)). This Court has embraced this reasoning; a mere two days before the panel issued the *Rehberg* opinion, another, similarly-composed panel, relied on the distinction between the contents of communications and information we voluntarily disclose to providers. *United States v. Beckett*, No. 09-10579, 2010 WL 776049, at *4 (11th Cir. March 9, 2010) ("Beckett could not have had a reasonable expectation of privacy in the information that was obtained from the ISPs and the phone companies. The investigators did not recover any information related to content.") (unpublished *per curiam* opinion by Judges Hull, Wilson, and Anderson).

Moreover, the content of stored e-mail—like the phone call content protected under *Katz* and *Smith*—is in no way analogous to the business records in *Miller*, but is instead like the contents of the home, or one's private papers and effects. As the *Miller* court explained, distinguishing *Katz*, "the documents subpoenaed [were] not respondent's 'private papers'" nor his "confidential communications." *Miller*, 425 U.S. at 440, 442. "Instead, these [were] the business records of the banks," which "pertain[ed] to transactions to which the bank was itself a party," *id.* at 440, and contained only information "exposed to [the bank's] employees in the ordinary course of business." *Id.* at 442.

In contrast, the eavesdropping in *Katz* constituted a search and seizure of Katz's intangible conversations, which were constitutionally akin to his tangible papers and effects. *See Katz*, 389 U.S. at 352-53 (finding that "[t]he Government's activities in electronically listening to and recording the petitioner's *words* violated the privacy upon which he justifiably relied.") (emphasis added). The Supreme Court has reaffirmed many times that, under the Constitution, conversations are like papers and effects, not mere business records. *See Berger*, 388 U.S. at 51 (holding conversations protected by the Fourth Amendment); *id.* at 63 (treating conversations akin to "the innermost secrets of one's home or office"); *Smith*, 442 U.S. at 741-42 (finding no search or seizure because the surveillance devices at issue did not disclose "*the purport of any communication* between the caller and the recipient.") (emphasis added) (quoting *New York Tel. Co.*, 434 U.S. at 167 (1977)); *United States v. U.S. District Court*, 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 safeguards.") (emphasis added). These cases confirm that the Fourth Amendment protects *the content of private conversations*, whether tangible or intangible and regardless of the technology by which those conversations are transmitted.

Many other constitutional analogies apply as well. The Supreme Court has recognized expectations of privacy in the contents of sealed packages and letters. *Ex Parte Jackson*, 96 U.S. 727, 733 (1878). Bank customers expect privacy in the contents of their safe deposit boxes. *United States v. Thomas*, No. 88-6341, 1989 WL 72926, at *2 (6th Cir. July 5, 1989), . Tenants in rented residences and hotel rooms maintain Fourth Amendment privacy in their units while they occupy them. *Stoner v. California*, 376 U.S. 483, 489 (1964). The fact that owners and hotel managers may be entitled to enter the premises does nothing to diminish the tenant's expectations against the government. *Id.* Users expect their stored e-mail messages to be treated as privately as any of the above, as evidenced by the sensitivity of the messages they send and amount of information they store.

In the Internet age, many of our most important private conversations have migrated from the telephone and sealed envelope to the e-mail server, and we see no principled reason to depart from the Supreme Court's repeated holdings about conversational privacy. *Katz* and *Smith* require that this Court afford stored e-mail the same protection as papers and effects stored in a person's home.

3. The panel's ruling contradicts the near-unanimous weight of authority.

Not only did the panel disregard the lessons of *Smith* and *Katz*, but also it

went against the great weight of authority, breaking with a long line of judges and legal scholars who have all concluded that the Fourth Amendment protects the reasonable expectation of privacy users have in stored e-mail messages. Two federal, military appellate have afforded Fourth Amendment protection to e-mails. *See, e.g.*, *United States v. Maxwell*, 45 M.J. 406, 418-19 (C.A.A.F. 1996); *United States v. Long*, 64 M.J. 57, 65 (C.A.A.F. 2006). Many Article III courts have agreed. A judge in the District of Rhode Island has held that users possess Fourth Amendment rights in e-mail accounts operated by private providers. *Wilson v. Moreau*, 440 F.Supp.2d 81, 108 (D.R.I. 2006) (finding "a reasonable expectation of privacy in [a user's] personal Yahoo e-mail account"). Similarly, a judge in the Eastern District of New York has ruled that the numbers dialed on a telephone *after* a call has been initiated—numbers like account numbers sent to a bank or the commands sent to a voice mail system—are protected contents under *Katz* and distinguishable from unprotected numbers dialed to initiate a call under *Smith*. *In re Applic. of U.S. for Orders Authorizing the Use of Pen Registers*, 515 F. Supp. 2d 325, 336 (E.D.N.Y. 2005).

Importantly, none of these judges applied the assumption of risk rationale of *Miller* to e-mail. As one put it,

> The "assumption of risk" . . . is far from absolute. "Otherwise phone conversations would never be protected, merely because the telephone company can access them; letters would never be protected, by virtue of the Postal Service's ability to access them; the contents of shared safe deposit boxes or storage lockers would never be protected, by virtue of the bank or storage company's ability to access them." These consequences of an extension of the assumption of risk doctrine are not acceptable under the Fourth Amendment.

Id. at 338 (citations removed).

Courts of Appeal have concurred. Both the Sixth and Ninth Circuits have extended Fourth Amendment protection to the contents of electronic communications, albeit in opinions both now vacated. First, in *Warshak v. United States*, 490 F.3d 455 (6th Cir. 2007), the Sixth Circuit noted that "like the telephone earlier in our history, e-mail is an ever increasing mode of private communication, and protecting shared communications through this medium is as important to Fourth Amendment principles today as protecting telephone conversations has been in the past." *Id*. at 473. It expressly rejected the assumption-of-risk rationale for stored e-mail, finding that "simply because the phone company or the ISP *could* access the content of e-mail and phone calls, the privacy expectation in the content of either is not diminished, because there is a settled expectation that the ISP or the phone company will not do so as a matter of course." *Id.* at 471 (emphasis in original). Importantly, the court explained that its earlier decision in *Guest v. Leis*, which is the principal opinion relied upon by the three-judge panel in *Rehberg*, should not be read to deny constitutional protection to the contents of e-mail messages. *Id.* at 472 ("*Guest* did not hold that the mere use of an intermediary such as an ISP to send and receive e-mails amounted to a waiver of a legitimate expectation of privacy."). Second, and in similar terms, the Ninth Circuit found that users of a text messaging service possessed a Fourth Amendment reasonable expectation of privacy, because it could find "no meaningful distinction between text messages and letters." *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 506 (9th Cir. 2008). Although both of these opinions

have now been vacated—*Warshak* as not ripe, *Warshak v. United States*, 532 F.3d 521, 523 (6th Cir. 2008), *Quon* by the Supreme Court upon its grant of certiorari, *City of Ontario v. Quon*, 130 S. Ct. 1011 (2009)—we nevertheless commend to this Court each opinion's persuasive discussion of the reasonable expectation of privacy of e-mail. *Warshak* provides a detailed and careful explanation for why e-mail contents are constitutionally protected. *Quon* directly applies the Ninth Circuit's earlier reasoning in *United States v. Forrester*, 495 F.3d 1041 (9th Cir. 2007). In *Forrester*, the Ninth Circuit analogized electronic mail to physical mail:

> E-mail, like physical mail, has an outside address 'visible' to the third-party carriers that transmit it to its intended location, and also a package of content that the sender presumes will be read only by the intended recipient. The privacy interests in these two forms of communication are identical. The contents may deserve Fourth Amendment protection, but the address and size of the package do not.

Id. at 1049

Finally, courts have found expectations of privacy in e-mail outside the Fourth Amendment context. For example, several courts have extended the attorney-client privilege to e-mail messages, finding both subjective and objective expectations of privacy. *See*, *e.g.*, *Stengart v. Loving Care Agency*, 2010 N.J. LEXIS 241, *38-39 (N.J. March 30, 2010) ("Under all of the circumstances, we find that Stengart could reasonably expect that e-mails she exchanged with her attorney on her personal, password-protected, web-based e-mail account, accessed on a company laptop, would remain private."); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548, 565 (S.D.N.Y. 2008) (finding that a user

"had a reasonable subjective and objective belief that his [Hotmail] communications would be kept confidential").

The three-judge panel of this Court now stands alone—the sole court at any level that has ruled unequivocally and without limitation that the contents of e-mail messages are completely unprotected by the Fourth Amendment, in stark contrast to all of the cases cited above.

The panel's opinion conflicts as well with the great weight of legal scholarship. Many legal scholars, including many of the *amici*, have argued at length that users have a reasonable expectation of privacy in the contents of e-mail messages. *E.g.,* Patricia L. Bellia & Susan Freiwald, *Fourth Amendment Protection for Stored E-Mail*, 2008 U. Chi. L. F. 121, 135-140; Deidre Mulligan, *Reasonable Expectations of Privacy in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 Geo. Wash. L. Rev. 1557, 1591 (2004); Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348322, at 33 (forthcoming Stan. L. Rev., 2010) (setting out a presumption that the contents of communications are normally protected by the Fourth Amendment); Stephen Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 Mercer L. Rev. 507, 527 (2005) ("[A]s with postal mail and telephone conversations, the sender of e-mail retains no REP in the addressing components, but should retain a REP in the content"). *Amici* know of no scholars who have concluded otherwise.

Because the panel's ruling contradicts the various reasoning and conclusions

presented above and disrupts the settled expectations of millions of e-mail users, this Court should grant Appellee's petition for rehearing or hearing *en banc*.

B. The panel's ruling will justify expansive new police surveillance of private e-mail messages.

If this Court's ruling stands, the privacy of the e-mail users in this Circuit will be placed in sudden jeopardy. Left without the protection of the Fourth Amendment, they will find their privacy protected under the law only by the Stored Communications Act (SCA), 18 U.S.C. § 2701 *et seq.*, which falls far short of ensuring the level of privacy promised by the Fourth Amendment. As only one example, those harmed by SCA violations have no suppression remedy. 18 U.S.C. § 2708 ("Exclusivity of remedies"). Overzealous law enforcement officials will be free to manufacture sham subpoenas to obtain the e-mails of any person without the disincentive of possible suppression. This is no hypothetical: these are the very facts alleged by Mr. Rehberg and weighed by the district court in concluding the defendants did not deserve qualified or absolute immunity. We urge this Court to rehear this case and affirm the decision of the district court.

II. THE PLAINTIFF PLED SUFFICIENT FACTS TO SURVIVE A MOTION TO DISMISS.

According to Appellee's complaint, the Appellants "issued numerous subpoenas . . . which violated . . . Mr. Rehberg's constitutional civil rights." *Verified Complaint* ¶ 36 (Jan. 23, 2007). One such subpoena was "prepared and issued . . . to Exact Advertising, the Internet service provider of one of Mr. Rehberg's e-mail accounts, and obtained Mr. Rehberg's personal e-mails that were

sent and received from his personal computer." *Id.* at ¶ 37. Even if the Court refuses to rule, as we ask, that the contents of stored e-mail messages always fall within the Fourth Amendment, at the very least, its judgment about Mr. Rehberg's expectation of privacy should turn on facts about Exact Advertising—such as the form of its user agreement—that it could not divine solely from the pleadings. *See Warshak*, 490 F.3d at 473 (finding a reasonable expectation of privacy but allowing the possible relevance of user agreements in extreme cases). Therefore, the court should have refrained from ruling on this fact-intensive question on this procedural posture, for the complaint adequately alleges the Fourth Amendment violation.

CONCLUSION

For the foregoing reasons, the petition for a panel rehearing or hearing *en banc* should be granted and the decision of the District Court should be affirmed.

DATED: April 12, 2010

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I certify that I have this day filed the foregoing BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND INSTRUCTORS SUPPORTING APPELLEE'S PETITION FOR REHEARING OR HEARING EN BANC and served all counsel of record as listed below by email and United States Mail:

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