NO. 86399-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN N. RODEN,

Petitioner.

On Petition for Review from the
Court of Appeals of Washington, Division 2
No. 41037-1-II

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, including 851 dues-paying members in Washington, and more than 3,241 Washington subscribers to EFF's weekly e-mail newsletter, EFFector, 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, such as *United States v. Jones*, 132 S. Ct. 945 (2012), *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) and *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

INTRODUCTION

Text messaging is the 21st Century phone call. But in denying Roden's suppression motion and approving of the warrantless interception of his text messages, the lower court ignored the technological realities of text messaging and threatened to erode privacy protection to a ubiquitous form of communication in the United States.

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)).

Because the lower court's opinion failed to "keep pace," it must be reversed.

STATEMENT OF THE CASE

After arresting Daniel Lee on drug charges, police officers seized and searched his cell phone. *State v. Roden*, 169 Wn. App. 59, 62-63, 279 P.3d 461 (2012). Officers not only looked through the text messages stored on Lee's phone, but also "who he had been calling." *Id.* at 62. Officers found a text message from petitioner Roden and responded to it, pretending to be Lee. *Id.* at 62-63. Through a series of texts, officers ultimately arranged to meet Roden for a drug transaction and at the meeting, arrested Roden for attempting to possess heroin. *Id.* The trial court denied Roden's motion to suppress the text messages he sent to Lee. *Id.*

On appeal, Roden moved to suppress the "fact that text messages were exchanged and the content of those messages" under Washington's Privacy Act, RCW 9.73.030. *Id.* The court rejected this argument, noting "there is no reasonable expectation of privacy in a text message found in a telephone call message left on an answering machine that could be overheard by anyone." *Id.*

The Court of Appeals affirmed, finding Roden "impliedly consented to the recording of his text messages on Lee's iPhone." *Id.*

at 66. Relying on *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002) and analogizing text messages to an answering machine, "the only function of which is to record messages," the court ruled Roden "anticipated that the iPhone would record and store the incoming messages," meaning they were not "private" for purposes of the Privacy Act. *Id.* at 66 (quoting *Townsend*, 147 Wn.2d at 676).

Judge Van Deren dissented, noting that under the majority's "implied consent reasoning, a police officer's simple possession of a smartphone is sufficient to imply or infer consent of the communicating parties" which could "easily and dangerously be extended to allow warrantless State searches of any digital device that police come to possess, all contrary to the [Privacy] Act itself." *Roden*, 169 Wn. App. at 71, 279 P.3d 461 (Van Deren, J., dissenting). She also noted the search of the text messages violated the Fourth Amendment, finding "the public has a reasonable expectation of privacy in cell phone and text message communications." *Id.* at 81.

ARGUMENT

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A "Fourth Amendment search occurs when the government violates a

subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). Searches conducted without a warrant "are presumptively unreasonable." *United States v. Jacobsen*, 466 U.S. 109, 114 (1984).

Although the lower court did not explicitly interpret the search here under the Fourth Amendment, its conclusion that Roden "impliedly consented" to having the text messages recorded on Lee's phone, defeating Roden's reasonable expectation of privacy under the Privacy Act, clearly implicates the Fourth Amendment. *Roden*, 169 Wn. App. at 63. Because by finding implicit consent to the recording, the court below effectively found Roden and all other text message users have no subjective expectation of privacy in text messages. Although the same court ruled in a companion case, *State v. Hinton*, 169 Wn. App. 28, 280 P.3d 476 (2012), that "text messages deserve privacy protection similar to that provided for letters," the lower court's conclusion means this privacy protection is in name alone. A text message conveys far more than a message left on an answering machine; instead it is the equivalent of a phone call, providing for instantaneous communication, as happened here. That means text messages are worthy of privacy protections regardless of the fact they are stored on someone else's cell phone.

Moreover, by focusing on the physical phone rather than the communication itself, the lower court ruled Roden lost his privacy rights in the texts because once the texts were recorded on Lee's phone, they were just like "a telephone call message left on an answering machine that could be overheard by anyone." *Roden*, 169 Wn. App. at 63, 279 P.3d 461. But the idea that texts lose their privacy interest simply because of the hypothetical possibility of exposure to someone else is not only wrong, but also dangerous to the future of privacy in an increasingly digital world.

Therefore, this Court should reverse the lower court's decision.[1]

A. Roden's Expectation of Privacy in the Text Messages Did Not End Once the Texts Were Stored on Lee's Phone.

The lower court analogized text messages to a message left on an answering machine, but this fundamentally misunderstands the technology at issue and the contours of the expectation of privacy in texts.

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[1] This brief is concerned only with whether the warrantless search of the text messages violated the Fourth Amendment. Article I, section 7 of the state constitution "provides greater protection from state action than does the Fourth Amendment." *State v. Eisfeldt*, 163 Wn.2d 628, 636, 185 P.3d 580 (2008). Thus, the search here also violated the state constitution. Additionally, EFF agrees in full with the amicus brief filed by the American Civil Liberties Union of Washington, the Washington Association of Criminal Defense Lawyers and Washington Defender Association, arguing that the search violated the Privacy Act as well.

1. People Have A Reasonable Expectation of Privacy in Text Messages.

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 Messagin*g, September 19, 2011.[2] 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*.[3] These statistics, combined with the reality that most cell phones are carried in a person's pocket or purse, indicates that text messaging is a common form of communication, one worthy of constitutional protection.

The lower court, relying on *Townsend*, analogized text messaging to a voicemail left on an answering machine and found Roden must have "anticipated that the iPhone would record and store the incoming messages to allow Lee to read them." *Roden*, 169 Wn. App. at 67, 279 P.3d 461 (citing *Townsend*, 147 Wn. 2d at 676, 57 P.3d 255). But 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*, 533 U.S. at 33-34.

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[2] Available at http://www.pewinternet.org/Reports/2011/Cell-Phone-Texting-2011.aspx (last visited April 6, 2013).

[3] Available at http://www.ctia.org/advocacy/research/index.cfm/aid/10323 (last visited April 6, 2013).

Townsend itself noted that a person consented to the recording of their voicemails when leaving a "message on an answering machine, *the only function of which is to record messages*." *Roden*, 169 Wn. App. at 66 (citing *Townsend*, 147 Wn.2d at 676) (emphasis added). A cell phone can record text messages, but it also enables real time communication with others. "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." *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (2010). Here, the text messages allowed the police to communicate directly with Roden in real time in a way simply not possible by answering machine. Taking the true nature of text messages into account, it is clear they deserve Fourth Amendment protection.

2. The Text Messages Did Not Lose Their Constitutional Protection When Sent to Lee's Phone.

In its decision in *Hinton*, the lower court recognized the need to provide Fourth Amendment protection to text messages, ruling they deserved the same constitutional protections as letters. *Hinton*, 169 Wn. App. at 43, 280 P.3d 476 (citing *Warshak*, 631 F.3d at 286). But relying on *United States v. King*, 55 F.3d 1193 (6th Cir. 1995), *Hinton* noted that when "a letter is sent to another, the sender's expectation of privacy

ordinarily terminates upon delivery." *Id.* at 43-44 (citing *King*, 55 F.3d at 1196). Declining "to offer communication made using a technological device more privacy protections than have been provided for letters," it found a text message's Fourth Amendment protection ends when the message is sent. *Id.* at 44. But this conclusion is at odds with *King* and the Fourth Amendment law protecting letters.

In *King*, the defendant mailed letters to his wife, who received the letters and kept them with other documents. *King*, 55 F.3d at 1195. Later, King's wife asked someone else to retrieve and destroy the letters, but that person instead turned them over to the FBI. *Id.* 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 a private individual. *Id.* at 1196.

Lee may have "received" the first message stored on the phone, but the subsequent messages and ensuing conversation Roden had with the officers pretending to be Lee were never "received" by Lee the same way King's wife "received" the letters. While it is true Lee's *phone* received these additional messages, this is not the same thing as Lee receiving the messages himself, and then turning them over to the government. 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, but survives until the letters are "received by their intended recipient." *United States v. Tolliver*, 61 F.3d 1189, 1197 (5th Cir. 1995) *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 (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 (1969) (suppressing search of letter under Fourth Amendment when "addressee was unaware apparently of even the existence of the letter at the time it was opened"); *see also 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).

The result would be different if Lee received the text messages and voluntarily turned them over to the government. *See King*, 55 F.3d at 1195. But that is not what happened here. The phone was a high tech mailbox, holding the texts for delivery to Lee. By posing as Lee and retrieving Roden's text messages before Lee saw them or even knew of their existence, the police intercepted the messages. The government essentially rummaged through a mailbox, took a letter, and opened and read it before the addressee was even aware of the message. 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 cell phone is opened and text messages are "opened and examined." It is important to remember text messages enable instant communication 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 the intended recipient means texts will *never* be constitutionally protected.[4] The Fourth Amendment requires searches be reasonable, but of course the "reasonableness determination must account for differences in property." *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013) (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.

This Court should find a reasonable expectation of privacy in text messages, including texts that have not yet reached the addressee.

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[4] 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.

B. Roden's Lack of Control Over the Phone and the Risk of Exposure to Others Does Not Defeat His Expectation of Privacy in Texts.

Surprisingly, although Lee was in custody and had no control over the phone at the time Roden sent the text messages, the lower court believed Roden surrendered his privacy rights once he sent the messages to Lee's phone, which he could not control, and assumed the risk someone else would "overhear" or read the messages. *Roden*, 169 Wn. App. at 63, 279 P.3d 461. Implicit in this analysis is two incorrect assumptions; first that the legal focus had to be on the physical phone; and second, that a text message loses all privacy protection merely because of the risk of exposure to a third party.

1. <u>The Constitutional Focus Must Be On The Conversation, Not The Physical Phone.</u>

The lower court found Roden had no expectation of privacy when he sent the messages to Lee's phone, where he "must have understood" the messages would be recoded. *Id.* at 68. But this places too much focus on the phone instead of the text messages. Lee's phone was not the final destination of the text message: Roden wanted to and thought he was communicating with Lee, not his phone. As one court noted in finding a reasonable expectation of privacy in text messages stored on someone else's phone, "[w]hat should control are the contents of the

communications rather than the device used to communicate." *State v. Patino*, 2012 R.I. Super. LEXIS 139, ¶ 100 (2012).

Hinging the expectation of privacy on transmission to the phone rather than transmission to Lee himself places undue constitutional focus[5] on control over a piece of property – Lee's phone – rather than on Roden's attempted communications with Lee. After all "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. And most importantly, it protects "conversational privacy." *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972) ("the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards.").[6] The cell phone was just a medium for the constitutionally protected text message conversation.

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[5] That does not mean that a cell phone is not worthy of constitutional protection. Obviously, Lee had an expectation of privacy in both his physical cell phone and its contents. *See, e.g., United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008); *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007). Courts have issued conflicting opinions about whether the search incident to arrest exception allows a search of the contents of a cell phone. *Compare State v. Smith*, 124 Ohio St. 3d 163, 920 N.E.2d 949 (Ohio 2009) (warrantless search of a cell phone not permitted incident to arrest) *with People v. Diaz*, 51 Cal.4th 84, 244 P.3d 501 (Cal. 2011) (warrantless search of a cell phone permitted incident to arrest). Amicus obviously agrees that a warrantless search of a cell phone's contents, including text messages, incident to arrest violates the Fourth Amendment. *See generally* Orin Kerr, *Foreward: Accounting for Technological Change*; 36 Harv. J.L. & Pub. Pol'y 403, forthcoming 2013. This means the police had no lawful right to be searching through Lee's phone to begin with.

[6] The 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

This has long been the law. *Katz* found a reasonable expectation of privacy in a phone call, not the phone booth or telephone equipment. 389 U.S. at 351. Nor could Katz 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.

By focusing on the phone conversation rather than possession or control over the phone booth or telephone equipment, the Supreme Court specifically rejected the "premise that property interests control the right of the Government to search and seize." *Id.* at 353. So although Roden had no property interest in the phone since it belonged to someone else, he still had an expectation of privacy in the text messages and conversation.

2. <u>The Risk of Exposure to a Third Party Does Not Defeat the Expectation of Privacy in a Text Message.</u>

The Court also rejected Roden's suppression motion because he ran the risk someone could see or "overhear" the text messages. *Roden*,

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can violate the Fourth Amendment. *See Florida v. Jardines*, --- S. Ct. ----, 2013 WL 1196577 (2013), *United States v. Jones*, 132 S. Ct. 945 (2012). But that is not at issue here, where the phone did not belong to Hinton.

169 Wn. App. at 63, 279 P.3d 461. But this slippery slope argument only means that no one has any privacy protection ever.

Again, *Katz* explained what a person "seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." *Katz*, 389 U.S. at 351 (emphasis added). Justice Sotomayor quoted *Katz* in her concurring opinion in *United States v. Jones* when she noted 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 and *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts . . . for a limited business purpose need not assume that this information will be released to other persons for other purposes")).

As a result, mere risk of exposure to others has not defeated Fourth Amendment protection in luggage. *See Bond v. United States*, 529 U.S. 334, 338 (2000). Or a hotel room even though management has a right to enter. *United States v. Allen*, 106 F.3d 695, 699 (6th Cir. 1997). Or a letter even though it is handled by numerous people, from the person who

sorts incoming mail at the post office, to the letter carrier who delivers mail to a mailbox, to the office worker who sorts mail. *See Jacobsen*, 466 U.S. at 115 (quoting *Ex Parte Jackson*, 96 U.S. at 733).

It should be no different with electronic communications. *Katz* recognized this when it found an expectation of privacy in a phone call, although a call is transmitted through a service provider who has the capacity to monitor and record the call. *Katz*, 389 U.S. at 353. A person who enters a phone booth, "occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world" notwithstanding the fact the call was routed to the phone company, or that someone standing on the street could see the person making a phone call or potentially overhear the conversation if close enough to the phone booth. *Id.* at 352. That expectation of privacy has not changed in a world where people use cell phones to communicate.

With the rapid explosion in technology, courts are quickly concluding that electronic forms of communication like emails and text messages are worthy of Fourth Amendment protection despite the fact they are "recorded" and exposed to third parties, the service provider that routes and stores messages. *See e.g., Warshak*, 631 F.3d at 288

(reasonable expectation of privacy in email);[7] *State v. Clampitt*, 364 S.W.3d 605, 611 (Mo. Ct. App. 2012) (reasonable expectation of privacy in text messages); *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, --- F.Supp.2d ---, 2012 WL 3870868, *11-12 (D. Minn. Sept. 6, 2012) (reasonable expectation of privacy in private Facebook "information and messages"). This means that a text message does not lose its expectation of privacy just because they were recorded on an electronic device where someone else could potentially view the message.

This privacy expectation does not change simply because the phone was controlled by the police at the time Roden sent the messages to Lee. The Vermont Supreme Court recently noted that Fourth Amendment

> privacy concerns not only our interest in determining whether personal information is revealed to another person but also our interest in determining to whom such information is revealed. A more complex understanding of

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[7] *Hinton* believed *Warshak* "was primarily concerned with the legality of the government's request that a service provider *intercept* a customer's e-mails before the e-mails reached the intended recipient's computer" and claims that there was no interception here. *Hinton*, 169 Wn. App. at 43, 280 P.3d 476 (emphasis in original). But as explained above, the government intercepted the text messages before Lee received them. *Warshak* noted that the email service provider "was an *intermediary*, not the intended recipient of the emails." *Warshak*, 631 F.3d at 288 (emphasis in original). Similarly, the text message had two intermediaries: the service provider *and* the phone itself. The intended recipient of Hinton's text message was Lee, not the phone or the police officers. Taken to its logical extreme, the lower court's analysis would make a phone call unworthy of constitutional protection the moment the conversation was broadcast over the physical phone. But of course, the Fourth Amendment is intended to protect the privacy of the ensuing conversation, not the physical items used to facilitate that conversation. *See Berger v. New York*, 388 U.S. 41, 51 (1967) (noting a "'conversation' was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment").

> privacy – one not limited to mere concern with avoiding exposure altogether – will inevitably acknowledge that our interest in privacy is, at least in part, an interest in to whom information concerning us is exposed.

In re Appeal of Application for Search Warrant, 2012 VT 102, ¶ 50, --- A.3d ----, 2012 WL 6217042 (2012). Thus the court believed "it is natural to view exposure to a third party – insofar as exposure is required at all – as less of a setback to one's privacy interests than exposure to an investigating officer" and noted "the protections of the Fourth Amendment are built around the recognition that one's relationship with a detached third party will be different than with an investigating officer." *Id.* at ¶ 54 (citing *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)).[8]

Ultimately, 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, 453–54 (1989) (O'Connor, J., concurring) (in determining reasonable expectation of privacy from aerial observation, "relevant inquiry. . . is not whether the helicopter was where it had a right to be" but "whether the

[8] Even in the context of informants, in which there is a stronger argument that some information is voluntarily shared with another, the Supreme Court has noted "[t]here would be nothing left of the Fourth Amendment right to privacy if anything that a hypothetical government informant might reveal is stripped of constitutional protection." *United States v. Karo*, 468 U.S. 705, 716 n. 4 (1984).

helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity") (quotations omitted)). When it comes to phone calls, although 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. There is "no reason why the same information communicated textually from that same device should receive any less protection under the Fourth Amendment." *Clampitt*, 364 S.W.3d at 611.

If this Court adopts the lower court's view of privacy expectations, than all text messages sent by anyone anywhere are no longer private the moment the "send" button is pressed. The Fourth Amendment demands more than that.

CONCLUSION

For these reasons, this Court should find that Roden had a reasonable expectation of privacy in the text messages he sent to Lee's phone, meaning the warrantless search of those messages violated the Fourth Amendment.

Respectfully submitted, and dated April 8, 2013.

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