No. _____

IN THE
Supreme Court of the United States

JORGE DELGADO-RIVERA, *Petitioner*

v.

COMMONWEALTH OF MASSACHUSETTS, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourth Amendment prevent the government from using a person's sent text messages against them when those messages are obtained through an unconstitutional search of the recipient's cell phone?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jorge Delgado-Rivera, respectfully requests the issuance of a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.

INTRODUCTION

In 2014, this Court observed that cell phones "hold for many Americans 'the privacies of life,'" and unanimously ruled that warrantless searches of cell phones are unconstitutional (absent a proper warrant exception). *Riley v. California*, 573 U.S. 373, 403 (2014) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Despite *Riley*'s clear prohibition, some police officers still unlawfully search cell phones during traffic stops, stop-and-frisks, and arrests. The decision below encourages such conduct by permitting the government to use messages obtained from an unlawful search of one's cell phone against any other participant in the conversation. This narrow reading of the Fourth Amendment incentivizes warrantless searches and

undermines the constitutional rights defended by *Riley*. By holding that the sender of a text message cannot challenge the warrantless search of a recipient's phone, the court below has given state agents carte blanche to unlawfully search private cell phones in hopes of finding evidence against third parties.

The ruling below poses a considerable threat to Fourth Amendment rights. Because the content of a text conversation will be usable against anyone except the owner of the phone searched, investigators who cannot get a warrant for a person's phone will be incentivized to warrantlessly search the phones of their target's friends, family, colleagues, and acquaintances. Allowing such warrantless searches does more than incentivize scattershot privacy violations, though. It effectively guts *Riley* with regard to *any* material that is emailed, texted, or otherwise shared between multiple people and is accessible via a cell phone. For example, because messages are generally duplicated on the phones of everyone in a conversation, an officer could gain access to the entire conversational history between two friends by unlawfully searching each person's phone. After searching the phones of both A and B without a warrant, the government may use A's copy of the conversation against B and B's copy against A, ensuring that neither person can meaningfully object to the dual constitutional violations.

Such strategies would be particularly effective at uncovering the internal communications of any disfavored group. The unlawful search of one person's phone could provide broad intelligence about the group, and the information could be used against anyone except that individual. Information usable against *every* member

could be gathered by briefly detaining a few of them and perusing their phones. Protesters clustered on the sidewalk, members of an unpopular political club meeting for dinner, colleagues sharing a ride, and friends taking a walk could all have their conversations warrantlessly rifled during investigatory stops.

Even if most officers would not undertake such brazen or systematic violations, the ruling below provides state agents with a strong motivation to at least occasionally search the phones of less important suspects and witnesses in hopes of gathering evidence against proverbial "bigger fish." Such impermissible searches are easy to accomplish because everyone carries a cell phone, and they promise a significant yield of information because cell phones often contain years of correspondence, all of which is admissible against its senders under the ruling below. It is hard to imagine that such potential investigatory riches will not tempt some working in law enforcement.

The bulwark against such Fourth Amendment violations is the exclusionary rule. Although it often provides individual recourse, the rule's main purpose is *general* deterrence—to remove any incentive for state agents to engage in unlawful warrantless searches, thus ensuring their observance of the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). The rule aims to prevent unlawful searches, not just remedy their effects, because the constitutional violation is the search itself, regardless of whether evidence is found or subsequently used. *United States v. Calandra*, 414 U.S. 338, 354 (1974). (Indeed, for unlawful searches that find no evidence, the exclusionary rule's *only* role is deterrence.) In short, the rule cannot

make all victims of unlawful searches whole, but it seeks to disincentivize and thus prevent Fourth Amendment violations. The ruling below does the opposite—it fails to uphold the teaching of *Riley* and enforce the Fourth Amendment because it allows unconstitutional cell phone searches to regularly bear admissible fruit, thereby incentivizing them.

This Court can remove that incentive and enforce the constitutional requirement articulated in *Riley* by explicitly finding that one's text conversations, including sent messages, are constitutionally protected from warrantless search, regardless of whether the messages were seized from the sender or the recipient. Such an outcome is supported by two independent frameworks of Fourth Amendment analysis. First, the text and the original meaning of the Fourth Amendment place sent correspondence among one's "papers," which are protected from warrantless search, even after delivery. Second, a sender's text messages are protected from warrantless search because Americans have a reasonable expectation of privacy in their text conversations—an expectation rooted in the Constitution and reinforced by *Riley*.

OPINIONS BELOW

The opinion of the Supreme Judicial Court (App. 2a–18a) is reported at 487 Mass. 551, 168 N.E. 3d 1083 (2021). The Superior Court's ruling on the motion to suppress (App. 21a) is unreported.

JURISDICTION

The Supreme Judicial Court of Massachusetts entered its judgment on June 1, 2021, and denied Petitioner's timely motion for reconsideration on July 2, 2021. App. 20a. On July 19, 2021, this Court ordered that the deadline to file a petition for a writ of certiorari remain extended to 150 days for cases in which the relevant order denying discretionary review was issued prior to July 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United State provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

STATEMENT OF THE CASE

1. *Factual Background.* On September 18, 2016, an officer of the Pharr, Texas, police department stopped a car driven by Leonel Garcia-Castaneda. During the traffic stop, the officer warrantlessly searched Garcia-Castaneda's cell phones and read text messages stored therein. When called to testify about the search, the officer invoked his Fifth Amendment right against self-incrimination. Despite also conducting a canine search of the car and X-raying it at a nearby port of entry, police found no contraband during the traffic stop, and they released Garcia-Castaneda with a warning. App. 8a.

Among the text messages that the officer read were some that had been exchanged with a Massachusetts phone number and appeared to reference the sale of narcotics. Texas officials forwarded that information to police in Massachusetts, who linked the phone number to the Petitioner. An investigation followed and led to indictments in the Massachusetts Superior Court against Garcia-Castaneda, Petitioner, and others. *Id.*

2. *Proceedings Below*. In the Superior Court, Garcia-Castaneda moved to suppress the warrantless search, arguing that it was bereft of both probable cause and consent, and thus violated his constitutional rights under both state and federal law. Petitioner moved to join the suppression motion, which the court allowed. The court held that, given the officer's refusal to testify, the fruits of the traffic stop must be suppressed. App. 21a. The Commonwealth pursued an interlocutory appeal, which was taken up and decided by the Massachusetts Supreme Judicial Court. App. 8a–9a.

Although the Supreme Judicial Court considered both the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights, the court grounded its decision in the reasonable-expectation-of-privacy standard that governs whether a defendant may challenge a search under the Fourth Amendment. App. 9a–12a. The court recognized that technological advances must not be allowed to erode existing privacy rights but nonetheless held that a person has no reasonable expectation of privacy in a sent text message that resides on the recipient's cell phone. App. 13a–16a. The court analogized text messages to letters and emails, holding that such

written communications enjoy no expectation of privacy once delivered because they are beyond the sender's control. App. 13a–15a.

The court reasoned that an individual who sends a written communication to another person assumes the risk that the recipient will share it publicly and noted that this risk is particularly strong with text messages, which are easily forwarded to others. App. 14a–15a. From there, the court concluded that, by accepting the mere possibility that a confidant might disclose a private communication, one gives up any reasonable expectation of privacy in that communication and cannot challenge a warrantless search thereof. App. 14a–16a. In so holding, the court distinguished *State v. Hinton*, 319 P.3d 9 (Wash. 2014), ruling that, although *Hinton* had found a reasonable expectation of privacy in text messages taken from a recipient's phone, the circumstances were distinct because the messages in *Hinton* had not been opened by the phone's owner before being read by police. App. 16a.

REASONS FOR GRANTING THE PETITION

I. This Case Presents an Important and Recurring Question of How the Court's Decisions Deter Unconstitutional Searches in the Digital Age.

This Court has long recognized the danger inherent in the "power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). In the face of that threat, the Court "has sought to 'assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (alteration in original) (quoting *Kyllo*, 533 U.S. at 34). In *Riley*, the Court recognized that cell

phones require particular protection because of the immense volume of private and personal information that they contain, and the Court unanimously held that cell phone searches generally require a warrant. *Riley*, 573 U.S. at 393–95, 403. The question in this case is, at its heart, whether *Riley* means what it says, or whether the Fourth Amendment right that "shall not be violated" actually may be violated, so long as the fruits of the violation are only used against certain people. U.S. Const. amend. IV.

Riley's warrant requirement is straightforward, and if all state agents were well informed about the Court's decisions and unfailingly respected them, this petition would not be before the Court. Unfortunately, in the pursuit of just ends, some officers misinterpret constitutional requirements as mere technical obstructions to their estimable work. Under the decision below, unlawful cell phone searches will not always result in exclusion, so *Riley*'s warrant requirement will go unenforced in many circumstances. Well-intentioned government agents will likely conclude that the courts tacitly endorse the use of unconstitutional searches to collect evidence in those circumstances where the unlawfully obtained information will nonetheless be admissible. (There may also be some small faction of officers who understand the constitutional restrictions but are simply driven to prioritize results over rules.) The ever-increasing role of cell phones in daily life combined with the lower court's shortfall in the enforcement of *Riley* renders this case important and pressing. As cell phones continue to expand their capabilities and reach, the question presented will recur with increasing frequency until addressed by this Court.

The holding below—a holding that relies on precedent from a time when correspondence was written, read, and filed at home at one's desk—creates grievously misaligned incentives in an era when nearly all of one's correspondence resides in one's pocket. Left undisturbed, the holding will not only fail to enforce *Riley* and to preserve the same degree of privacy envisioned and enjoyed by the nation's founders, but it may push some in law enforcement to routinely violate the Constitution. Under the decision below, police are incentivized to make an informal policy of stopping and invasively searching citizens in a manner that reaches far beyond stop-and-frisk. Government agents could unlawfully search the phone of anyone (or everyone) they meet in the street, knowing that any messages they find may be used against nearly anyone, with the solitary exception of the phone's owner. In short, the ruling threatens to render *Riley* toothless and encourages state agents to partake from the forbidden tree because the fruit of any cell phone search is only poisoned with regard to one person.

A. The Question Presented Determines Whether This Court's Decision in *Riley* Provides Meaningful Constitutional Protections.

The holding of *Riley* is simple: police who wish to search one's personal cell phone must "get a warrant." *Riley*, 573 U.S. at 403. This Court was unanimous and unequivocal in *Riley*, even as the Court acknowledged that searches of cell phones can yield information useful to police. *Id.* at 401. Of course, *Riley* does not prevent investigators from accessing cell phones with a warrant (or a proper warrant exception), but that is not this case. Here, police unlawfully searched Garcia-Castaneda's cell phone, and the question presented is whether the government may

reap the benefits of its Fourth Amendment violation by using the search's fruits against Petitioner.

"[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Mapp*, 367 U.S. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). Despite *Riley*'s recognition that the Fourth Amendment protects cell phones, when an officer unconstitutionally searches a phone and finds correspondence, the holding below frustrates the exclusionary rule's deterrent purpose. Under the lower court's decision, an officer whose unlawful search finds text messages or emails may use that evidence against anyone except the phone's owner. Given the volume of communications stored on cell phones and the frequency with which police investigate groups rather than lone suspects, such a limited exclusionary sanction is unlikely to provide adequate deterrence in most cases. Further, this narrow understanding of the Fourth Amendment's ambit incentivizes police to undertake warrantless searches of the phones belonging to people who know a suspect, rather than seeking a warrant for the suspect's own phone, because the suspect will be unable to challenge any evidence gained through those unconstitutional searches.

Moreover, should an officer wish to use messages unlawfully collected from a phone against its owner, all that is required is another source of the same evidence. Enterprising government agents will quickly realize that they may easily obtain all communications between two people without any need for a warrant by simply

unlawfully searching the phones of both individuals. The two unlawful searches will yield a pair of nearly identical records of the two people's communications, yet, under the ruling below, each person could only successfully move to suppress the record taken from their own phone. Thus, because electronic conversations create duplicate records on multiple phones, police may easily obtain months or years of correspondence without a warrant, and the government may use that information without any of the parties to the text conversation having meaningful recourse. For officers and agents who know that cell phones often contain virtually all of a person's communications, the ruling below provides a powerful motivation to ignore *Riley*'s warrant requirement and bypass the guarantees of the Fourth Amendment.

B. The Question Presented Will Frequently Recur Because of Increased Police Collection of Citizens' Information and the Ubiquity of Text Messaging.

As the digital world expands, police continue to seek new windows into the private lives of citizens. The circumstances of *Riley* demonstrate that officers are highly motivated to use interactions in the physical world to investigate citizen's digital affairs. Police departments have discovered that the stop-and-frisk interactions permitted by *Terry v. Ohio*, 392 U.S. 1, 30 (1968), can be perfect opportunities to gather information about the populace, and, in the era of cell phones and social media, the scope of the information that may be extracted or extrapolated from a brief stop is ever expanding. *See, e.g.*, Sam Levin, *Revealed: LAPD Officers Told to Collect Social Media Data on Every Civilian They Stop*, Guardian (Sept. 8, 2021, 10:06 AM) https://www.theguardian.com/us-news/2021/sep/08/revealed-los-

angeles-police-officers-gathering-social-media (reporting that the Los Angeles Police Department seeks to routinely collect social media identifiers from civilians during field interviews, but the majority of such stops yield neither a citation nor arrest).

In a climate where police and other state agents feel both motivated and licensed to collect information from citizens in the hope that it might later become useful, unlawful searches of cell phones are sure to increase. Officers know that cell phones contain a wealth of information sent by email, text message, Facebook Messenger, and many other means, and the pressure to seek evidence therein—properly or otherwise—will continue to mount as cell phones and text messaging become ever more central to daily life.

It is not hard to foresee how the ruling below could lead to habitual constitutional violations by some officers seeking to build prosecutable cases. To find local drug dealers, for example, officers might naturally seek to avoid the risks associated with undercover operations and instead choose to unlawfully search the cell phones of patients leaving a rehabilitation clinic. The people searched in such a case would be the victims of the constitutional violations, but not the investigative targets. As such, it would be of little consequence to the officers that any information found would be inadmissible against those individuals. In an afternoon of unconstitutional searches, the officers would likely find at least one relapsed patient whose messages could lead them to a dealer. With the dealer unable to challenge the unlawfully obtained evidence, the officers' method would certainly be effective at locating and convicting criminals. The technique's effectiveness and the lack of any

exclusionary sanction would incentivize officers to commit similar violations in the future and could easily lead them to conclude that the courts tacitly approve of such unconstitutional means, provided that the ends are admirable.

The ruling below also gives officers a powerful tool with which they may easily pry into the past and present conversations of any group, be it a group of friends in the park, or—even more darkly—a group of political dissenters. The desire to investigate specific groups of people has, historically, provided a strong motivation to violate the Constitution. Previously, an officer who viewed a group as suspicious could do no more than question and perhaps frisk them. Under the ruling below, however, that same officer may now feel licensed to unlawfully search a member's phone to gain intelligence on the group, or may search multiple members' phones to render any conversation among them admissible against all members. Given the ruling below, *Riley*'s protections would be unavailable to exclude messages exchanged between the group members, because those messages are reproduced in two or more places and each individual may only challenge the search of their own phone. Such an outcome would gift the government with an unprecedented and alarming power to gather the private conversations between an entire group of friends (or dissidents), and those conversations could easily be laid bare by a single officer cornering one or more members of the group in public and rummaging through their phones.

C. Answering the Question Presented Is Necessary to Prevent Confusing and Inconsistent Outcomes.

If the question presented goes unanswered, confusion about how to enforce *Riley* will cause issues reaching far beyond text messages, especially as relates to

conversations and documents stored in the cloud. *See Riley*, 573 U.S. at 397 ("Treating a cell phone as a container . . . is a bit strained as an initial matter. But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen." (citation omitted)). Take the example of Google Docs, which many people now use as a free alternative to word-processing software. Documents within Google Docs are stored entirely in the cloud and are accessible from any device on which a person is signed in to their Google account. Consider a husband who types a document in the living room and shares it with his wife's account so that she can edit it on the computer in her home office. The shared document would also automatically become accessible on her cell phone. Under the holding below, the husband could not challenge the warrantless seizure of that document from his wife's phone. In times past, it would be unimaginable that the government could warrantlessly reach a document written and reviewed by two spouses in the privacy of their home, but the ruling below collides with new technology to cause this expectation-defying result. An answer to the question presented that reinforces *Riley*'s protection of cell phones would prevent such confusing outcomes.

Without the Court's intervention, the decision below is also likely to cause inconsistent results, because the holding determines who may challenge a search based on who physically possessed the messages; however, attributing a physical location to digital information is difficult. Although not the facts of this case, imagine a text messaging application that does not store a copy of a conversation on each party's phone, but maintains a single copy on a central server that is referenced by

each phone. From a user's perspective, such an application would function just like standard text messaging. From a technical perspective, though, an officer reading the conversation on *either* phone would actually be reading the single, central copy of the conversation. "Such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house." *Riley*, 573 U.S. at 397. This analogy suggests, even under the ruling below, that both people with access to the centrally stored conversation should be able to object to the search. By failing to recognize the Fourth Amendment protection of one's sent electronic messages wherever they are found, the ruling below wanders into a quagmire in which courts will need to examine the technical details of each and every messaging application, and those technical minutiae may be determinative of whether users have a reasonable expectation of privacy. Clear guidance from this Court is necessary to avoid the inconsistent results that such exercises will surely produce among the lower courts.[1]

II. The Decision Below Was Incorrect.

The decision below renders Fourth Amendment protections unavailable to a text message's sender. Such a rule fails to guarantee the constitutional rights

[1] A further issue with a rule based on the physical storage location of digital files is that, when viewing a file that is saved elsewhere, a user is generally actually viewing a temporary copy of at least part of the file, but that temporary copy (although saved on the device) was generally created at the request of the user. In such a case, an officer might be viewing a copy saved on the specific phone in the officer's hand, but—knowingly or not—the officer may well have obtained the copy by requesting it from the cloud using the credentials stored on the phone, meaning that, again, the officer would essentially be using a (digital) key found in a arrestee's pocket to warrantlessly search another location. In more complex cases, it may not even be possible to meaningfully characterize where a file saved in the cloud is physically "located" at any given time.

recognized in *Riley* and, especially in the era of cell phones, this defect severely hinders the exclusionary rule's ability to enforce the Fourth Amendment.

Two distinct analyses demonstrate that a person's sent messages are, indeed, protected against warrantless search by the Fourth Amendment. First, as discussed in Section B, the plain text of the Fourth Amendment protects one's "papers" against warrantless search. This protection applies to sent communications outside of one's possession, even when they are digital rather than physical, and even when they are not located in one's house or on one's person. Second, as discussed in Section C, Americans hold a reasonable expectation of privacy in their text conversations, including their sent messages.

Both of the aforementioned analyses permit Petitioner to bring a constitutional challenge to the warrantless search of private messages that he sent to another person. This is the case under the text of the Fourth Amendment because the sent messages are Petitioner's "papers," which the Amendment explicitly protects. *See* U.S. Const. amend. IV. This is also the case under the reasonable-expectation-of-privacy standard, because one has standing to challenge a warrantless search if one had a reasonable expectation of privacy in that which was searched. *See Georgia v. Randolph*, 547 U.S. 103, 130 (2006) (Roberts, C.J., dissenting) (noting that *Minnesota v. Olson*, 495 U.S. 91, 95–96 (1990), held that one's reasonable expectation of privacy confers standing to object to a search).

A. The Rule Applied Below Is Too Narrow to Provide the Protection Required by the Fourth Amendment.

1. The Fourth Amendment Is Enforced with the Exclusionary Rule.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. Notably, it does not say, "shall not be violated in furtherance of a prosecution." That is to say, an unlawful search always violates the Amendment, regardless of whether the search finds anything or the government subsequently uses any evidence found. *Calandra*, 414 U.S. at 354. Constitutional violations arise as soon as the state violates a person's rights; they do not lie in abeyance, unrealized, until the person suffers some further resulting harm. *Cf. Abney v. United States*, 431 U.S. 651, 661–62 (1977) (holding that the constitutional guarantee against double jeopardy does not merely provide an avenue for appellate review after a second trial for the same offense, but must instead prevent the second trial from occurring). The cure for Fourth Amendment violations is, therefore, necessarily one of prevention.

This Court has long recognized that the most effective way to protect against unconstitutional searches and enforce the Fourth Amendment is through the exclusionary rule. *United States v. Janis*, 428 U.S. 433, 443 (1976). While the rule does not undo the harm of unconstitutional searches, it "compel[s] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

2. The Decision Below Does Not Adequately Enforce the Fourth Amendment.

The Constitution requires that the government shall not engage in unreasonable searches. U.S. Const. amend. IV. *Riley* unanimously recognized that warrantless cell phone searches are generally unreasonable, and that finding is enforced with the exclusionary rule. *See Riley*, 573 U.S. at 403. A conception of the Fourth Amendment so narrow that police can consistently benefit from unlawful cell phone searches without fear of exclusion flies in the face of the principles undergirding *Riley* and is constitutionally defective. The lower court's constrained reading of the Amendment suggests that one cannot challenge the unlawful search of private communications because there is always a risk of disclosure by one's confidant that negates any reasonable expectation of privacy. *See* App. 14a–16a. This holding would be problematic at any point in history, but the issue is raised into even starker relief by cell phone technology.

In the era of cell phones, a rule that prevents a message's sender from challenging the unlawful search of the recipient's phone encourages officers to scroll through the phone of every person they detain, as discussed above. In the past, the holding below—although wrong—might not have created quite such a strong motive for police to engage in indiscriminate searches of individuals. For most of history, all evidence that might be found in a person's pockets was physical. Courts of centuries past could hardly have conceived of the modern reality that nearly all of a person's information can now be stored indefinitely, commonly exists as multiple identical copies in multiple locations, and yet all resides in one's pocket and the pockets of

others. *See Riley*, 573 U.S. at 396 (noting that past distinctions between searching a person's home and a person's pockets are negated by cell phones because "a cell phone search would typically expose to the government far more than the most exhaustive search of a house").

If a question like the one presented here had arisen before cell phones, the problems posed by the ruling below might not have been so glaring, because the exclusionary rule would often still have provided adequate deterrence. In the past, an officer investigating the sale of narcotics, for example, would be compelled to respect the Fourth Amendment because unlawfully searching a suspect to find a bag of illegal drugs would result in the bag's exclusion, thus destroying the officer's case. No officer would be motivated to conduct an unlawful search by some faint hope of incidentally finding a note from an accomplice or other evidence implicating a different person, because the probability of such a finding would be low, but the destruction of the primary case would be guaranteed by the unlawful search.[2] Historically, the risks of indiscriminate unlawful searches would have nearly always outweighed the possibility of any reward.

In the era of cell phones, though, any such calculus is turned on its head. Now, the greatest trove of private communications (and potential evidence) resides in the pockets of the people, and the ruling below tells state agents that almost every shred of information from an unlawful cell phone search may still be freely used against

[2] Even in a case where an officer was specifically looking for a document implicating a different suspect, the officer would still be unlikely to unlawfully search a person, because such documents would probably be stored in the person's home, not their pockets.

anyone except the person searched. Especially because cell phones contain such extensive records of conversations with others, the ruling creates a massive incentive for officers to violate the Fourth Amendment in any case where an officer has a hunch that more than one person might, at some point, have been involved in (or merely aware of) a crime. Although *Riley* bars such warrantless cell phone searches, the exclusionary rule as interpreted below does little to deter them. Unlike in decades past, where an unlawful search would only occasionally yield evidence against others but would almost certainly damage the primary case, the holding below makes unlawful searches more likely than ever to yield admissible evidence against others and less likely than ever to damage the case against the person searched. Given that any evidence found on one phone is likely to be duplicated on other people's phones, officers need not fear exclusion under the ruling below, because warrantless searches of multiple phones containing the same text conversation would give the government several copies of the same information, but each person searched could only challenge the copy seized from their own phone. Additionally, by rendering warrantless text message searches largely immune to meaningful sanction, the holding below encourages indiscriminate unlawful searches of the phones of witnesses, acquaintances, and other uninvolved parties who might have had communications with or about an investigation's target.

Because of the volume of information stored on cell phones, and because so much of that information is communications with others, the Fourth Amendment protections against warrantless searches of cell phones articulated in *Riley* cannot be

defended by an exclusionary rule that does not encompass both participants in a text conversation. *See Riley*, 573 U.S. at 393–94. The exclusionary rule is designed to defend the rights of all, but, if the interpretation adopted below is allowed to stand, the rule will frequently fall gravely short when applied to modern technology. Although Fourth Amendment rights are individual, the judicially guaranteed remedy—exclusion—is one of general deterrence, not specific recompense. To accomplish that deterrence where cell phones are concerned, the Constitution requires an application of the exclusionary rule that effectively discourages unconstitutional searches by protecting a message's sender as well as its recipient. Without such intervention by the Court, the ruling below allows "technology to shrink the realm of guaranteed privacy"—a result this Court has warned against. *Kyllo*, 533 U.S. at 34.

B. The Fourth Amendment Protects a Person's Papers, Including Sent Text Messages, Against Unreasonable Searches.

1. The Fourth Amendment Protects a Person's Papers, Independent of Where They Are Located and Who Holds Them.

The Fourth Amendment provides for the security of the people "in their persons, houses, papers, and effects." U.S. Const. amend. IV. This Court has long held that, in interpreting the law, every word must hold meaning, and "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)). Each of the four protected categories in the Fourth Amendment must, therefore, protect something that is not covered by the other three. For example, it is hornbook law that

people have the right to be free from unreasonable searches and seizures in their persons, regardless of whether they are at home or in public, and they have a separate and equally important right for their houses to be similarly protected. They also have a right for their effects, such as their cars, to be secure against unreasonable government intrusion. *United States v. Jones*, 565 U.S. 400, 404 (2012) ("It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment.") In short, the security guaranteed by the Fourth Amendment attaches independently to all four categories. One need not be inside one's house to be secure in one's person, one's house is secure regardless of whether it contains one's person or one's effects, one's effects need not be on one's person or in one's house to be secure, and one's papers are likewise entitled to a security that is not dependent on being on one's person or in one's house.

Based on these principles, it must be the case that one's papers, as referenced by the Fourth Amendment, remain one's papers regardless of where they are or who holds them, because, if possession and control were the only criteria that defined a specific person's papers, then the word "papers" would be superfluous within the Amendment because "papers" would be entirely subsumed within "effects." That is to say, because the Amendment also protects one's "effects," meaning one's personal property, if a person's protected "papers" were limited to only those papers that the person possessed, then those papers would merely be a subset of the person's effects. In order for the word "papers" to not be redundant, it must add some meaning to the Amendment that does not merely restate a subcategory of "effects." This is

necessitated by the Court's canons of statutory construction. Thus, the "papers" protected by the Fourth Amendment *must* include papers that are not one's effects—to wit, one's private writings, including communications, that are outside of one's possession.

The Court has not often considered the protection afforded to papers seized outside of constitutionally protected locations, likely because, in the days before Internet-connected cell phones, most or all of a person's papers resided in the home, which enjoys its own strong constitutional protection. *See* Michael W. Price, *Rethinking Privacy: Fourth Amendment "Papers" and the Third-Party Doctrine*, 8 J. Nat'l Security L. & Pol'y 247, 295 (2016). The Court has, though, addressed Fourth Amendment protections for papers outside a person's possession when those papers are in the mail. In *Ex parte Jackson*, the Court considered papers in the mail and held that the Fourth Amendment protects sealed documents, regardless of location. *Ex parte Jackson*, 96 U.S. 727, 733 (1877) ("The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."). In sum, the "papers" protected by the Fourth Amendment are not merely those writings that are in a person's desk drawer or breast pocket, but also one's personal writings that have been sent to another and are thus no longer among one's "effects." The fact that nearly all of one's personal writings now reside in one's pockets and in the pockets of others (contained within a cell phone and thus "closed against inspection"),

magnifies the urgency of reaffirming the constitutional protections against unlawful search afforded to those papers, wherever they may be. *See id.*

2. Sent Messages Are Part of the Sender's Papers.

The framers of the Constitution placed great importance on the privacy of a person's papers, and, for nearly two centuries after the Constitution's adoption, the government could not reach private papers for use as mere evidence of a crime, even with a warrant. Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. Ann. Surv. Am. L. 553, 568 (2017); *see Boyd v. United States*, 116 U.S. 616, 623 (1886) ("The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not."); *see also Gouled v. United States*, 255 U.S. 298, 264–65 (1921) (explaining the "mere evidence" rule).

Although papers may now be obtained with a warrant, the critical interests in free speech, free association, and privacy that informed the drafting of the Fourth Amendment remain at the forefront in determining what government conduct violates the Amendment. *See Stanford v. Texas*, 379 U.S. 476, 485 (1965) ("[The First, Fourth, and Fifth] amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" (quoting *Frank v. Maryland*, 359 U.S. 360, 376

(1959) (Douglas, J., dissenting))); *Marcus v. Search Warrants*, 367 U.S. 717, 729 (1961) ("The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."). As the Court moved away from the "mere evidence" rule in *Warden v. Hayden*, 387 U.S. 294 (1967), and implicitly held that a person's papers can be reached with a warrant, the Fourth Amendment's role in privacy came to the fore. The Court explained that the Amendment gives protection rooted in privacy even when a person has no ownership of the items seized. *Hayden*, 387 U.S. at 305–06 ("[W]e have given recognition to the interest in privacy despite the complete absence of a property claim by suppressing the very items which at common law could be seized with impunity: stolen goods."). Combined with the understanding that one's protected "papers" must encompass documents outside of one's possession (because documents in one's possession are already protected as one's "effects"), *Hayden*'s recognition that the Fourth Amendment protects privacy even without ownership promotes the conclusion that personal writings which one has sent to someone else remain one's "papers" for Fourth Amendment purposes, even though they may also become the possessions (or "effects") of another.

The conclusion that correspondence sent to another remains part of one's Fourth Amendment papers is heavily supported by the Amendment's original stringent protection of personal papers (which placed them wholly beyond the government's reach), the Amendment's role in protecting the exchange of dissenting ideas, and its role in ensuring the privacy of the citizenry. Furthermore, the idea that

one's protected papers include both sides of one's private correspondence with others comports with the common definition of a person's "papers." For example, when one refers to the papers of Thomas Jefferson, it would be absurd to think that one means only those letters that Jefferson received. The letters that he sent to others are a much more central part of his papers, and his sent letters are almost certainly more illuminating about his private thoughts than the letters that he received. Indeed, the way that the National Archives writes about Jefferson's papers, the inclusion of the letters that he sent is assumed, and the inclusion of those that he received is considered slightly unusual. *See About the Papers of Thomas Jefferson*, Nat'l Archives, https://founders.archives.gov/about/Jefferson (last visited Nov. 10, 2021) (noting that *The Papers of Thomas Jefferson* "includes not only the letters and other documents that Jefferson wrote, but also those he received").

Given the common understanding of a person's "papers," and given the interests that the Fourth Amendment was written to defend, it is difficult to imagine that a person's "papers" encompass only one side of any written correspondence (and the side written by the other party, at that). Thus, just as the letters that Jefferson wrote and mailed to others remained his papers, sent text messages, received by others and residing on their phones, remain the sender's papers, necessarily protected by the text of the Fourth Amendment.

3. This Court's Rulings Show That a Paper's Sender May Challenge Its Unlawful Search.

The Fourth Amendment protects papers outside of one's control, as shown by this Court's holding that one's sent mail is protected as "papers" under the

Amendment and cannot be searched without a warrant. *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970) (citing *Ex parte Jackson*, 96 U.S. at 733). This Court has never held, or even implied, that a person's papers lose their Fourth Amendment protections against unreasonable search and seizure once delivered to a recipient. Given that a person's papers maintain the protection of the Fourth Amendment, even once held by another, Petitioner must be permitted to challenge the unlawful search of his sent text messages stored on another person's phone.

There are some decisions that would seem to contradict this understanding, but they are universally inapposite here, typically because they consider cases in which (a) the papers seized were taken from the recipient's home or person during a *lawful* search, (b) the recipient *voluntarily* provided the papers to the government, (c) a third party came into possession of the papers and *voluntarily* provided them to the government, (d) the item at issue was a parcel or some other object that would be regarded as part of a person's effects (which, unlike papers, are defined by possession and ownership), or (e) some combination of the foregoing circumstances. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (finding no Fourth Amendment violation where a parcel service investigated a damaged package and provided it, already torn open, to the government). There is also a small chain of circuit court decisions that all cite back to a 1995 Sixth Circuit case, which held that "if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery." *United States v. King*, 55 F.3d 1193, 1196 (6th Cir. 1995); *see, e.g.*, *United States v. Dunning*, 312 F.3d 528, 531 (1st Cir. 2002) (citing to *King* to find no

expectation of privacy in a delivered letter found in the recipient's house during a *lawful* search). This Court has never reached a similar conclusion, however, and the Sixth Circuit's extremely broad pronouncement in *King* is unsupported by the lone decision that it cites, *United States v. Knoll*, 16 F.3d 1313, 1321 (2d Cir. 1994), which considered the expectation of privacy in *stolen* file boxes, not sent correspondence. *King*, itself, was also not about letters unlawfully seized from their recipient, but instead considered a circumstance in which the recipient of letters entrusted them to a third party, who proceeded to *voluntarily* give them to the police. *King*, 55 F.3d at 1195. Such cases are wholly unlike the present case, in which the writings searched were not willingly provided to the government, nor obtained pursuant to a warrant or warrant exception, nor placed into the hands of another party who willingly gave them to the government. Here, the officer unlawfully accessed Petitioner's digital papers during a warrantless search that indisputably violated the Fourth Amendment.

In short, although a number of circuit courts have adopted the idea that written correspondence somehow loses its Fourth Amendment protection against unlawful search upon delivery, this Court has never endorsed that view, and the Amendment's protection of papers precludes such a finding. The text and the original intent of the Fourth Amendment protect the people's sent correspondence. To provide the constitutionally required protection, the exclusionary rule must give a paper's sender standing to challenge the government's *unlawful* seizure of that paper from its recipient.

C. One Has a Reasonable Expectation of Privacy in One's Sent Text Messages.

Based on the foregoing explanation of how the text and original meaning of the Fourth Amendment require the protection of sent messages, the very words of the Constitution render Petitioner's expectation of privacy in his sent messages reasonable. Furthermore, *Riley* held that cell phones cannot be searched absent a warrant, so it is only reasonable for the people to expect and rely on the privacy of information stored on cell phones. *Riley*, 573 U.S. at 403. If Americans cannot reasonably expect privacy in a place that a unanimous Court has unambiguously told them is constitutionally protected, then it is difficult to know where—if anywhere—they might still have a reasonable expectation of privacy.

The people's expectation of privacy in their text conversations is reasonable based on the text and the history of the Fourth Amendment and the rulings of this Court, but, as explained below, the reasonableness of their expectation is equally supported by the assumptions and social conventions that have developed around text messaging in modern society. Most people regard texting as a private conversation, and many see it as more private than speaking in person or by phone. Just as those mediums carry a reasonable expectation of privacy that prevents government eavesdropping, the people's expectation of privacy in their text messages gives standing to challenge a warrantless search to all participants in a text conversation.

1. Text Messaging Equals or Exceeds the Expected Privacy of Oral Conversation.

Text messaging, with its ability to reach others wherever they may be and elicit responses in real time, is a medium so close to oral conversation that it has largely supplanted phone calls. Nearly a decade ago, the U.K.'s communications regulator reported that text messaging had overtaken both phone conversations and face-to-face interaction as the most common daily means by which Britons communicate with family and friends. Sherna Noah, *Texting Overtakes Talking as Most Popular Form of Communication in UK*, Independent (July 18, 2012, 9:39 AM), https://www.independent.co.uk/news/uk/home-news/texting-overtakes-talking-most-popular-form-communication-uk-7956016.html. In the United States, texting is the single most widely and frequently used function of cell phones (including voice calling), and Americans spend over four times as much time texting each day as they do talking on the phone. Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Rsch. Ctr. (Apr. 1, 2015), https://www.pewresearch.org/internet/2015/04/01/us-smartphone-use-in-2015; Corilyn Shropshire, *Americans Prefer Texting to Talking, Report Says*, Chi. Trib. (Mar. 26, 2015, 1:40 PM), https://www.chicagotribune.com/business/ct-americans-texting-00327-biz-20150326-story.html. These preferences are hardly surprising: texting gets a person's attention faster and more reliably than any other method and allows private, real-time conversation regardless of whether the parties are in private, in public, or in a meeting. *See* David Gargaro, *MMS vs. SMS: Which Is Best for Text Message Marketing?*, Business.com (Jan. 22, 2021), https://www.business.com/articles/mms-vs-sms-text-message-marketing (reporting

that 98% of text messages are opened, as opposed to 20% of emails, and that the average text message response time is just 90 seconds).

To most, texting is a private conversation that happens to be typed, not a correspondence that is intended to be saved for posterity or reread in the future. This is made obvious by their storage format: emails and documents are generally archived and searchable, whereas text messages are often lost each time one purchases a new cell phone or reinstalls a messenger application. Americans naturally expect that their texts will have at least the same degree of privacy as their oral conversations (which are constitutionally protected from warrantless eavesdropping). If such privacy were not a normal and reasonable expectation, it is highly doubtful that texting would be so pervasive or that so many would prefer it to speaking. Many now prefer to send and receive their most private information by text. Doctors communicate with patients by text, some mental health hotlines are now only available by text much of the time, and the Federal Communications Commission is requiring phone carriers to allow text conversations with the new "988" number for the National Suicide Prevention Lifeline. *See* Talya Meyers, *Text Messaging in Healthcare: Key to Better Patient-Provider Communication*, Well Health (Apr. 20, 2021), https://wellapp.com/blog/text-messaging-in-healthcare; *NAMI HelpLine*, Nat'l All. on Mental Health, https://nami.org/help (last visited Nov. 12, 2021) (providing weekday hours for the organization's telephonic helpline but offering 24/7 support via text message); Veronica Stracqualursi, *FCC Approves Texting '988' to Reach National Suicide Prevention Lifeline by Next Year*, CNN (Nov. 18, 2021, 12:53 PM), https://

www.cnn.com/2021/11/18/politics/fcc-approves-texting-national-suicide-prevention-lifeline/index.html.

The behavior of Americans demonstrates an expectation of privacy in their texts, and this is supported by the security that text messages enjoy. Although text messages are digitally stored and thus are not as ephemeral as speech, Americans rightly see that storage as quite secure. Text messages generally exist only on the phones of the sender and the recipient, and cell phones are typically both secured with a password and carefully guarded by their owners. Absent the compulsion of a government agent's order or the threat of a mugger's knife, most people's unlocked cell phones are probably the possession they are least likely to surrender to a stranger. Americans know this, and they reasonably trust that their texts will be secure with their friends, just as their whispered secrets are.

In times when secrets cannot even be spoken, people often use texting because it is *more* private than an oral conversation. One can text one's most intimate thoughts on a crowded train without being overheard, or converse privately with a friend across the room while others present are none the wiser. The Supreme Court of Canada recently acknowledged as much when it held that a defendant had a reasonable expectation of privacy in his sent text messages and was entitled to challenge their seizure from the recipient's cell phone. *R. v. Marakah*, [2017] 2 S.C.R. 608, ¶ 13 (Can.). In so holding, the court noted that "it is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging." *Id.* ¶ 35.

2. The Mere Possibility of Disclosure Does Not Defeat a Reasonable Expectation of Privacy.

The court below noted that text messages are capable of being copied or forwarded by their recipient and concluded that this possibility precludes any reasonable expectation of privacy in a text message conversation. *See* App. 14a–15a. The court based this conclusion on this Court's holding, originating in *Katz v. United States*, that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *United States v. Miller*, 425 U.S. 435, 443 (1976) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). It is a significant misunderstanding, though, to think that the holding from *Katz* somehow means that any information revealed to another person cannot be subject to a reasonable expectation of privacy. *Katz* does not suggest that a communication is "knowingly expose[d] to the public" when shared privately with another person—quite the opposite, in fact. *See Katz*, 389 U.S. at 351. The quoted phrase appears in the midst of the Court's explanation that Katz *did* have a reasonable expectation of privacy in his phone conversation, despite being in a public telephone booth (and that, correspondingly, he could give up an expectation of privacy in a traditionally private location, such as his home, by inviting the public in). The full context is as follows:

> [T]his effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. (footnote omitted) (citations omitted).

In short, this Court's holdings contradict the idea advanced below that communicating with another person divests one's correspondence of a reasonable expectation of privacy. As this Court has held, "there 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). Whether an expectation of privacy is reasonable does not turn on whether the private material could, in theory, be provided to the police or more broadly revealed to the world. Were that the case, no person could have a reasonable expectation of privacy in a home shared with a spouse or in any conversation. To say that one cannot reasonably expect privacy in communications merely because one's confidants *could* reveal them to the world endorses both an untenably mistrustful society and an unprecedented expansion of government power to warrantlessly surveil the populace. In such a world, one could never expect privacy in a phone call with a friend, because the friend *could* easily record the call using one of the dozens of cell phone apps designed for that purpose and post the recording online. By the same token, one could have no faith in the privacy of one's own diary sitting on the bedstand, because a spouse or visitor *could* photograph and disseminate the entries.

These examples, are, of course, absurd. Americans have a reasonable expectation of privacy in the diaries stored in their bedrooms and, as taught by *Katz*, in their phone calls. *Katz*, 389 U.S. at 353. Those calls are protected from warrantless

search, even though one's conversational partner could record and disseminate the call. One does not give up a reasonable expectation of privacy in a place merely because a trusted person has access to it, nor does one give up a reasonable expectation of privacy in a communication merely because one's confidant could share it. Were that the case, all phones could be tapped without a warrant, and anything communicated to another person would be fair game for warrantless search, because one's conversational partners *could* be recording the conversation. It is not hyperbole to call such a hypothetical world Orwellian. *See* George Orwell, *1984* at 27 (1949) ("Nothing was your own except the few cubic centimetres inside your skull.").

The same reasoning applies to text message conversations, which, as discussed above, are every bit as private as phone calls or sealed letters, if not more so. Just as a phone conversation cannot be warrantlessly tapped merely because a participant *could* record it, a text conversation cannot be unlawfully seized merely because a participant *could* forward it. The expectation of privacy in text messages held by the Petitioner—and held by most other Americans—is eminently reasonable.

3. Cases Considering Actual, Voluntary Disclosure to the Police by Another Person Are Inapposite.

A distinction must be noted between violations of the Fourth Amendment by state agents and invasions of privacy by other parties. The latter does not trigger constitutional protections, but cases in which private parties chose to supply evidence to the government are sometimes erroneously cited as support for warrantless searches. The fact that privacy can be reasonably expected in private communications (thus protecting those communications from warrantless searches) is not diminished

by the doctrine that a confidant can *voluntarily* share a private communication with the government without violating the Fourth Amendment. *See Miller*, 425 U.S. at 443 ("the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities"); *Hoffa v. United States*, 385 U.S. 293, 296–98, 302 (1966) (holding, in a case where a government informant voluntarily reported the defendant's statements to federal investigators, that the Fourth Amendment does not protect "a wrongdoer's *misplaced* belief that a person to whom he voluntarily confides his wrongdoing will not reveal it" (emphasis added)); *see also Jacobsen*, 466 U.S. at 117 ("Once frustration of the original expectation of privacy occurs [without government action], the Fourth Amendment does not prohibit governmental use of the now-nonprivate information . . . .").

But this is not a case of voluntary third-party disclosure. This petition argues only for the exclusion of communications *unlawfully* taken from their recipient by government agents acting without a warrant. If, unlike the instant case, a recipient willingly provides communications to the government, or even if the communications are stolen by some third party who gives them to the government, there would likely be no Fourth Amendment violation, and exclusion would be unnecessary.

The foregoing distinction between warrantless searches by the government and disclosure of communications by a private party aligns with the purpose of the exclusionary rule. The Fourth Amendment protects against government action only—a private citizen cannot violate the Fourth Amendment unless acting as an agent of the government. *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 614 (1989). Thus,

there is no constitutional need to discourage the government from accepting evidence independently obtained by a private citizen, because the citizen's actions will not have violated the Fourth Amendment. The government cannot, however, excuse its own Fourth Amendment violations and avoid the sanction of the exclusionary rule by arguing that the fruits of an unlawful search *could* have been provided by a private citizen. Where the government eavesdrops on a communication, for example, even if a nosy neighbor *could* just as easily have done the eavesdropping or the recipient of the communication *could* have disclosed it to the government, the actual fact of the government's misdeed will control, and the evidence obtained must be excluded to discourage the government from engaging in such constitutional violations.

Under this well-established principle, if Garcia-Castaneda had voluntarily forwarded the Petitioner's text messages to the police instead of the police unlawfully seizing them, Petitioner could not have challenged the use of the text messages against him. The same would be true if the police had obtained a valid warrant prior to searching Garcia-Castaneda's phone. Because, however, the officer in this case chose to flout *Riley* and violate the Fourth Amendment, the exclusionary rule must apply to deter such wrongdoing.

In sum, the protections of the Fourth Amendment do not evaporate merely because disclosure by another party is possible—*Miller*, *Hoffa*, and related cases only foreclose Fourth Amendment protections when a disclosure by a "false friend" is the *actual* source of the challenged evidence (i.e., when the evidence reached the government without a government agent violating the Fourth Amendment). *See*

Donald L. Doernberg, *"Can You Hear Me Now?": Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court's Fourth Amendment Jurisprudence*, 39 Ind. L. Rev. 253, 275–306 (2006) (discussing the Court's cases considering disclosures by "false friends"). The question of Fourth Amendment protection does not turn on "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). Here, it is reasonable—and societally necessary—to expect privacy in one's private conversations, both spoken and texted. The alternative would be to allow the hypothetical possibility of disclosure to render all expectations of privacy unreasonable, shrinking the protection of the Fourth Amendment so greatly that no conversation with another person, spoken or written, could ever be protected from warrantless search.

III. Petitioner's Case Presents an Ideal Vehicle to Resolve a Question Not Previously Considered by the Court.

Despite the ubiquity of cell phones and text messaging, this Court has never considered whether the sender of an electronic message can challenge its unlawful seizure from the recipient's cell phone. This case raises that question without complication: the only arguments raised on appeal directly concern whether Petitioner may challenge the government's use of the text messages found on Garcia-Castaneda's cell phone. Because of the officer's refusal to testify, the Commonwealth did not argue below that the warrantless search was constitutional, and it is undisputed that the government gained access to the text messages exclusively as a result of the search. The Commonwealth did not challenge suppression as to Garcia-

Castaneda, the owner of the cell phone, so the published decision below directly and exclusively decided the question presented by this petition. Further, although the decision below also considered the Massachusetts Declaration of Rights, it rested its holding entirely on a Fourth Amendment reasonable-expectation-of-privacy analysis. Thus, this petition comes to the Court as a pure constitutional question. It is also devoid of the overlapping statutory elements (e.g., communications privacy laws) that can sometimes complicate cases involving the interception of electronic communications.

Finally, Petitioner's case is an ideal vehicle because the relevant facts (undisputed on appeal) are simple, and archetypical of how the legal issue presented generally arises. There are no extraneous facts of the sort that might muddy other, similar cases (e.g., if the contested messages had been obtained from multiple sources, if a phone service provider had provided some portion of the information, if a disputed warrant exception or possibly defective warrant were involved, or if the police had obtained additional information using other technologies, such as a cell site simulator). Given the simple facts and posture of this petition, a cleaner and more straightforward vehicle through which to resolve the question presented could hardly be designed.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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