COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-12919

COMMONWEALTH,
APPELLANT,

v.

JORGE DELGADO-RIVERA,
APPELLEE.

ON THE COMMONWEALTH'S INTERLOCUTORY APPEAL FROM AN ORDER OF THE MIDDLESEX SUPERIOR COURT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., COMMITTEE FOR PUBLIC COUNSEL SERVICES, AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") represents that it is a 501(c)(3) organization under the laws of the Commonwealth of Massachusetts. The Massachusetts Association of Criminal Defense Lawyers ("MACDL") represents that it is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. ACLUM and MACDL do not issue any stock or have any parent corporations, and no publicly held corporations own stock in ACLUM or MACDL.

PREPARATION OF AMICUS BRIEF

Pursuant to Mass. R. App. P. 17(c)(5), amici and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money to fund preparing or submitting the brief;

(c) no person or entity, including the amici curiae, contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

INTEREST OF AMICI CURIAE

ACLUM is a membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the

United States. The rights it defends through direct representation and amicus briefs include the right to be free from unreasonable searches and seizures, and the application of that law to developing technologies. See, e.g., *Commonwealth v. Almonor*, 482 Mass. 35 (2019) (amicus); *Commonwealth v. Augustine*, 467 Mass. 230 (2014) (direct representation).

The Committee for Public Counsel Services ("CPCS"), Massachusetts's public defender agency, is statutorily mandated to provide counsel to indigent defendants in criminal proceedings. G.L. c. 211D, § 5. The issue addressed in this case will affect numerous indigent defendants whom CPCS attorneys are appointed to represent.

MACDL is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and devote a substantial part of their practices to criminal defense. MACDL files amicus briefs in cases raising questions important to the criminal justice system. See, e.g., *Augustine*, 467 Mass. 230.

INTRODUCTION

Text messaging is the 21st Century phone call. Like the cellphone itself, text messages have become "such a pervasive and insistent part of daily life" that for most people, sending and receiving them is indispensable to participation in modern society. Cf. *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018). People text

about matters ranging from the mundane to the intimate: they conduct business, donate to political campaigns and charitable causes, discuss marital issues, communicate about or with their children, schedule doctor's appointments, and generally detail their "privacies of life." *Id.* at 2217.

At this point, "[m]ost Americans would rather type it than say it."[1] Americans send over two trillion text messages each year, and five times as many texts as number of calls each day, making text messaging today's primary mode of conversing by phone. But unlike oral communications, each text message not only *conveys* the message but also *creates* a potentially long-lasting record of what was said. And thus, text messaging presents unprecedented risks to the privacy of interpersonal communications.

The law has long recognized that people can reasonably expect their private conversations to remain private. "[E]very man has a right to keep his own sentiments, if he pleases," and "to judge whether he will make them public, or commit them only to the sight of his friends." Samuel E. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 n.2 (1890) (internal citation omitted). For that reason, this Court has held that government attempts to access private conversations breach reasonable expectations of privacy. See

[1] See Corilyn Shropshire, *Americans prefer texting to talking*, *report says*, Chicago Tribune (March 26, 2015), https://www.chicagotribune.com/business/ct-americans-texting-00327-biz-20150326-story.html.

Commonwealth v. Blood, 400 Mass. 61, 68-69 (1987). These expectations do not disappear depending on the technology through which those private conversations take place.

To the contrary, this Court and the United States Supreme Court have taken pains to ensure that technology does not "shrink the realm of guaranteed privacy." *Almonor*, 482 Mass. at 47 (quoting *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001)). "[T]he drafters of the Fourth Amendment and art. 14 … sought to preserve the people's security to forge the private connections and freely exchange the ideas that form the bedrock of a civil society." *Commonwealth v. Mora*, 485 Mass. 360, 390 (2020). To ensure that people retain the "degree of privacy against government that existed when the Fourth Amendment" and art. 14 were adopted, *Carpenter*, 138 S. Ct. at 2214, they must be able to challenge government surveillance of their private conversations.

That includes text messages. Sending a text message creates an expectation of privacy that is virtually identical to, and just as reasonable as, that associated with the more traditional modes of conversation that texting has replaced. In fact, this Court has already said so in *Commonwealth v. Fulgiam*, 477 Mass. 20 (2017), which held that police must get a warrant before obtaining text messages from a cell service provider. This Court concluded that the sender "ha[s] a reasonable expectation of privacy in the content of his text messages," even when the records are obtained

from a cell service provider. *Id.* at 34-35. *Fulgiam*'s underlying logic—that the privacy interest in sent text messages exists regardless of the physical location of the search—applies equally to sent text messages obtained from a recipient's phone.

Were it otherwise, every text message would lose constitutional protection the moment it was sent. And the police would be gifted a power as intrusive as it is unprecedented: the ability to perfectly reconstruct private conversations, "a category of information otherwise unknowable." *Carpenter*, 138 S. Ct. at 2218. Providing warrantless access to such voluminous and private conversations would dangerously chill free association and expression. This Court should therefore affirm the Superior Court's decision and hold that an individual may challenge searches of their sent text messages from the recipient's phone. Such a conclusion would not place text messages entirely out of law enforcement reach; it would just require law enforcement to do what they are already required to do when they search a cellphone: "get a warrant." *Riley v. California*, 573 U.S. 373, 403 (2014).

STATEMENT OF THE CASE AND FACTS

Amici adopt defendant Jorge Delgado-Rivera's statement of facts, and add the below to supplement the facts surrounding the motion to suppress and explain the pervasiveness of text messaging in modern society.

I. The Commonwealth presented no evidence at the suppression hearing because the police officer who conducted the challenged search invoked his Fifth Amendment privilege against self-incrimination.

In November 2018, co-defendant Leonel Garcia-Castaneda moved to suppress the fruits of a September 2016 search of his car, cellphone, and person conducted by Officer Jose Tamez of the Pharr, Texas Police Department. See R.A.41. Mr. Garcia-Castaneda's affidavit states that he was ordered out of his car, and his car, cellphone, and person were all searched without his consent and without a warrant. See R.A.42.

The search of Mr. Garcia-Castaneda's phone yielded text messages sent by Mr. Delgado-Rivera. S.A.4. Mr. Delgado-Rivera moved to join the motion to suppress and assert his standing to challenge the search of his text messages. See S.A.3. By affidavit, Mr. Delgado-Rivera asserted that "all messages from [his] phone are private and only intended for one person," and he had not consented to the search of his sent messages. S.A.4. The Commonwealth opposed Mr. Delgado-Rivera's claim of standing to challenge the search. See R.A.43.[2]

After the Superior Court concluded that Mr. Delgado-Rivera had standing to participate in the hearing, see Tr.45; R.A.51, the Commonwealth moved to limit the potential scope of cross-examination of former-Officer Tamez "concerning prior

[2] The Commonwealth conceded that the recipient of the text messages, Mr. Garcia-Castaneda, had standing to challenge the Texas search. See R.A.43. Allowing Mr. Delgado-Rivera to join that motion hearing therefore imposed no additional burden on the Commonwealth.

instances of misconduct." See Tr.46; See also Tr.56. ("[T]he allegation is that somebody was tipped off that a raid was coming and [Tamez] opted to resign."). The court denied the Commonwealth's motion, holding that "credibility is always relevant here." Tr.54; See also R.A.51.

Tamez ultimately invoked his Fifth Amendment privilege against self-incrimination. See Tr.70; R.A.51. The Commonwealth presented no evidence at the motion hearing, and the judge allowed the motion to suppress as to both defendants. See R.A.51.

II. Texting is a pervasive means of conducting digital conversations in the 21st Century.

A decade ago, the Supreme Court recognized that "[c]ell 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*, 560 U.S. 746, 760 (2010). At that point, 73% of cellphone owners used text messaging, sending and receiving an average of 41.5 messages per day.[3] By 2015, 97% of smartphones owners sent and received text messages.[4] And by last year, "text message traffic [had] increased to

[3] See Pew Res. Ctr., *Americans and Text Messaging* (Sept. 19, 2011), https://www.pewresearch.org/internet/2011/09/19/americans-and-text-messaging/.
[4] See Pew Res. Ctr., *U.S. Smartphone Use in 2015* (April 1, 2015), https://www.pewresearch.org/internet/2015/04/01/us-smartphone-use-in-2015/.

2.1 trillion—up 52 billion texts from the year prior."[5] Eighty percent of Americans communicate by text *every day*.[6] Texting is especially convenient because it allows real-time conversations that are asynchronous and private: it takes just ninety seconds for the average person to respond to a text message.[7] Texting thus permits rapid and convenient back-and-forth digital conversation in real time.

Private conversations that once occurred by phone now regularly take place by text. Text messaging is "the most widely-used basic feature or app" on modern cellphones.[8] It is also the one that is used most frequently, even more than voice calling.[9] One need only take a quick stroll through the streets of Boston to observe the hordes of people who pass by, eyes down, furiously tapping away at their cellphone keypads. See *Augustine*, 467 Mass. at 246. The data reflects this experience. A 2015 Pew Research Center study found that during a one-week period, 100% of participants aged 18-29 used their cellphones for sending and receiving text

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[5] CTIA, *Growing Wireless Investment Fuels Rapid 5G Deployment*, *CTIA Annual Survey Finds* (Aug. 25, 2020), https://www.ctia.org/news/release-growing-wireless-investment-fuels-rapid-5g-deployment-ctia-annual-survey-finds/.

[6] Irene Rufferty, *50 Texting Statistics That Can Quench Everyone's Curiosity*, *Even Mine*, Medium (Sept. 20, 2017), https://medium.com/bsg-sms/50-texting-statistics-that-can-quench-everyones-curiosity-even-mine-7591b61031f5.

[7] Patrick Hull, *Why Entrepreneurs Must Have a Mobile Marketing Strategy*, Forbes (Aug. 23, 2013), https://www.forbes.com/sites/patrickhull/2013/08/23/why-entrepreneurs-must-have-a-mobile-marketing-strategy/#b5e0c67e4feb.

[8] See Pew Res. Ctr., *U.S. Smartphone Use in 2015* (April 1, 2015), https://www.pewresearch.org/internet/2015/04/01/us-smartphone-use-in-2015/.

[9] *Id*.

messages; that number dropped only slightly to 98% for participants aged 30-49, and 92% for participants over 50.[10] That same year, Infomate's International Smartphone Mobility Report found that Americans spend on average twenty-six minutes per day texting, as compared to just six minutes a day on voice calls.[11] In fact, according to a 2017 OpenMarket study, 75% of people aged 18-34 would prefer a phone that was enabled exclusively for text than one that was voice-only.[12]

The lesson is clear: text messages have replaced phone calls as the primary means of communicating the intimate and personal details of everyday life.

SUMMARY OF ARGUMENT

If individuals who send text messages cannot challenge law enforcement's illegal access of those messages from the recipient's phone, it would blur *Riley*'s bright-line rule, incentivize warrantless cellphone searches, and stymie free speech and association. Adopting the Commonwealth's argument would therefore risk ending private conversations as we know them. See *infra* pp. 16-18.

But these consequences are readily avoidable because this Court's existing doctrine supports the ability to challenge such searches. First, and most clearly, this Court's case law demonstrates that breach of a defendant's reasonable expectation

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[10] *Id.*

[11] See Shropshire, *supra* note 1.

[12] *Why Millenials Still Love to Text*, OpenMarket (2017), https://www.openmarket.com/resources/millennials-still-love-text/.

of privacy is sufficient, but not necessary, to establish his standing under art. 14. This Court has distinguished art. 14 doctrine from the Fourth Amendment—which entirely collapses standing into its analysis of a reasonable expectation of privacy—by stating that it will separately analyze these two concepts. But this departure from Fourth Amendment doctrine is meant to *provide* standing in certain circumstances where an individual cannot assert a personal expectation of privacy, not *create an additional hurdle* where an individual can make such an assertion. Alternatively, and at the very least, an expectation of privacy combined with a possessory interest in the item searched confers art. 14 standing. See *infra* pp. 18-22.

Under this Court's existing doctrine, Mr. Delgado-Rivera can challenge a search of a cellphone containing his sent text messages. First, he had a reasonable expectation of privacy in the messages contained on the recipient's phone. Art. 14 protects a reasonable expectation of privacy in our conversations regardless of the technology through which, or the physical location in which, those conversations take place. This expectation is not, and cannot, be defeated by the third-party doctrine: because *all* conversations, regardless of medium, involve at least two participants, disclosure to one person is not disclosure to the world. Second, even if this Court were to require an additional demonstration to establish standing—beyond a reasonable expectation of privacy—it is satisfied by Mr. Delgado-Rivera's possessory interest in his cellphone account. See *infra* pp. 22-35.

In the alternative, if this Court does conclude that Mr. Delgado-Rivera cannot challenge the search under this Court's traditional standing doctrine, it should extend "automatic standing" to allow senders of texts to challenge searches of their messages on the recipient's phone to avoid dire consequences and absurd results. See *infra* pp. 36-37.

ARGUMENT

I. Removing the ability to challenge government searches of sent text messages would adversely affect both police and civilian behavior.

A rule that a sender of text messages cannot challenge a search of those messages on the recipient's phone would have significant negative ramifications for both police and civilian behavior.

As to the police, such a holding would gut *Riley*'s core limitation on the government's ability to invade privacy in the digital age. There, the Supreme Court unanimously required the police to get a warrant before they search a cellphone incident to arrest, *Riley*, 573 U.S. at 403, so all cellphone searches should *already* be conducted pursuant to a warrant or a warrant exception. But eliminating a sender's ability to challenge such searches would incentivize officers to circumvent *Riley*, as police could conduct unlawful searches of cellphones and use all of the text messages received on the phone against their sender(s). The Commonwealth would have this Court write a rule that the fruit of an unlawful search can be used against all but one party to the conversation.

The result of such a rule would be predictable. In any incident involving multiple people, officers might illegally search *everyone's* phone, with a promise that *all* of the text messages could be used against their senders. Entire conversations would be reconstructed, even though each search making that possible was illegal. Likewise, police might illegally search the phones of individuals they deem to be "lower level" criminals in the hopes of finding sent text messages from people they consider "higher level" criminals. That runs afoul of this Court's repeated suggestion that "[u]nconstitutional searches of small fish intentionally undertaken in order to catch big ones may have to be discouraged." *Commonwealth v. Santiago*, 470 Mass. 574, 578 (2015); See also *Commonwealth v. Vacher*, 469 Mass. 425, 435 (2014); *Commonwealth v. Manning*, 406 Mass. 425, 429 (1990). The Commonwealth's brief never admits what it seeks: a gaping exception to *Riley*, one of the most important Fourth Amendment cases of the digital age.

In a world where police officers can conduct unconstitutional searches of text conversations and find admissible evidence, individuals' ability to freely speak and associate will plummet. One could no longer trust that any text message would be free from the government's gaze. Indeed, this would create the very "topsy-turvy" world this Court warned against in *Blood*, in which "the paranoid's delusory watchfulness" becomes the "reasonable" norm, and people are forced to tend "toward secretiveness, seclusiveness, and solitary rumination." 400 Mass. at 73 n.13

(citation omitted). When every lover's quarrel, medical query, and request for advice could be exposed to the police, near-silence will ensue. See Charles Fried, *Privacy*, 77 Yale L.J. 475, 483-84 (1968); See also *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) ("Awareness that the government may be watching chills associational and expressive freedoms."); *R. v. Marakah*, 2017 SCC 59, at ¶ 34 ("People may be inclined to discuss personal matters in electronic conversations precisely because they understand that they are private."). Instead, text conversations will be reduced to variations of "we need more milk."

People should not have to opt out of a primary means of communication to retain their right to free expression and association. To preserve a sense of conversational privacy—which is "essential to liberty of thought, speech, and association," *Blood*, 400 Mass. at 73—people must have the ability to challenge searches of their sent text messages.

II. Breach of a defendant's reasonable expectation of privacy is sufficient, but not necessary, to establish standing under art. 14.

This Court's art. 14 cases demonstrate that a defendant can challenge an electronic search by establishing a reasonable expectation of privacy in the subject of the search.

The amicus announcement in this case inquired *both* whether an individual has a reasonable expectation in their sent text messages stored on a recipient's phone *and* whether they have standing to challenge the search of these messages from the

recipient's phone. The two-part question reflects this Court's previous statements that unlike the federal courts, this Court "separately" considers the interrelated concepts of standing and expectation of privacy, and a defendant establishes the former "either if [he] has a possessory interest in the place searched or in the property seized *or* if [he] was present when the search occurred." *Commonwealth v. Williams*, 453 Mass. 203, 207-08 (2009) (alterations in original) (emphasis added); See also *Fulgiam*, 477 Mass. at 35, 36 n.17. But this Court's case law makes clear that this departure from Fourth Amendment law was meant to *expand* rather than *limit* a defendant's ability to challenge unlawful searches, seesee, e.g., *Commonwealth v. Mubdi*, 456 Mass. 385, 391-95 (2010), and, thus, intrusion upon a defendant's reasonable expectation of privacy is not required to, but still does, establish standing under art. 14. See, e.g., *Commonwealth v. Rousseau*, 465 Mass. 372, 374-75 (2013).

The Supreme Court's Fourth Amendment doctrine has "dispens[ed] with the rubric of standing" altogether, holding that standing analysis "is more properly subsumed under substantive Fourth Amendment doctrine." *Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978). Thus, if a defendant has a reasonable expectation of privacy, he has Fourth Amendment standing. See *id*. at 139. But the converse is also true: *without* a personal expectation of privacy, a defendant categorically *cannot* have standing to challenge the search at issue under the Fourth Amendment. See *Mubdi*, 456 Mass. at 391.

By contrast, this Court's art. 14 jurisprudence has retained a distinct concept of standing, which in certain circumstances allows individuals to challenge searches of items in which they *lack* a personal expectation of privacy. See *Commonwealth v. Amendola*, 406 Mass. 592, 599-601 (1990); *Mubdi*, 456 Mass. at 393. For example, in cases involving possessory offenses, this Court has recognized "automatic standing" to challenge a search even absent a breach of the defendant's own reasonable expectations of privacy. See *Mubdi*, 456 Mass. at 391-92; See also *id.* at n.7 (noting this Court adopted automatic standing despite the Supreme Court's rejection of the same doctrine). In addition, this Court has affirmed that a "target" defendant may stand in the shoes of a third party to challenge a search "where the police engage in distinctly egregious conduct that constitutes a significant violation of a third party's art. 14 rights in an effort to obtain evidence against a defendant." *Santiago*, 470 Mass. at 578 (citation and internal quotations omitted).

To the extent that standing and reasonable expectation of privacy remain distinct inquiries under art. 14, then, this Court has made clear that this separation is designed to confer standing even beyond those areas where the defendant could have raised a Fourth Amendment challenge. Cf. Appellant's Br. at 16 (acknowledging that art. 14 standing is "broad[er]" than under the Fourth Amendment). But the broadening of art. 14 standing has not altered the Fourth Amendment floor: if a defendant *can* establish that a government search breaches his own reasonable

expectation of privacy, he has standing to challenge that search under art. 14. This Court has repeatedly said so. For example, this Court held that a passenger in a car that was subject to GPS monitoring "has standing *because* he had a reasonable expectation that his movements would not be subjected to extended electronic surveillance by the government through use of GPS monitoring." *Rousseau*, 465 Mass. at 374-75 (emphasis added); see also *Commonwealth v. Tavares*, 482 Mass. 694, 705 n.8 (2019) (same); *Commonwealth v. Fredericq*, 482 Mass. 70, 77 (2019) (same).

As a result, it is unnecessary to conduct a separate analysis of whether an individual has a "possessory interest in the place searched or in the property seized" to establish standing under art. 14 where the defendant can establish a reasonable expectation of privacy in the searched or seized information itself.[13] A two-pronged approach is particularly ill-suited to digital searches. Digital searches happen in a physical space, but that physical space is itself often irrelevant to the intrusiveness of the search, making any concern about the defendant's "possessory interest" in that

[13] Of course, at the very least where a defendant has both a reasonable expectation of privacy and a possessory interest in the subject of the search, this confers art. 14 standing, as the Commonwealth concedes. See Appellant's Br. at 16. But, as described above, amici believe that this Court's case law demonstrates that the reasonable expectation of privacy alone is sufficient.

space an outmoded way of ensuring that the defendant has a personal stake in the digital information at issue.[14]

III. Mr. Delgado-Rivera has satisfied this Court's traditional requirements to challenge the search of his sent text messages on Mr. Garcia-Castaneda's phone

Mr. Delgado-Rivera can challenge the search of his sent text messages on Mr. Garcia-Castaneda's phone because he has a reasonable expectation of privacy in his sent text messages, or, should this Court require it, because he has *both* that privacy interest in his messages *and* a possessory interest in his cellphone account.

A. Mr. Delgado-Rivera has a reasonable expectation of privacy in his sent text messages.

The inquiry into a reasonable expectation of privacy asks whether an individual "seeks to preserve something as private," and whether this "expectation of privacy is one that society is prepared to recognize as reasonable." *Carpenter*, 138 S. Ct. at 2213; *Commonwealth v. Montanez*, 410 Mass. 290, 301 (1991) (same standard under art. 14). Mr. Delgado-Rivera's objectively reasonable expectation of privacy in his sent text messages falls within the well-established umbrella of

[14] In fact, "physical intrusion is now unnecessary to many forms of surveillance." *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring). In light of cloud computing, text messages found on a cellphone during a search "may not in fact be stored on the device itself." *Riley*, 573 U.S. at 397. For example, the police could hack into a server to obtain the contents of text messages. There can be no genuine dispute that, in that case, the police would have conducted a search that either party to the conversation would have standing to challenge, even though neither had a possessory interest in the servers themselves.

conversational privacy protected under art. 14 and the Fourth Amendment.[15] Therefore, just as in *Fulgiam*, a "warrant with probable cause was required because [the defendant] had a reasonable expectation of privacy in the content of his text messages." 477 Mass. at 33.

i. The Fourth Amendment and art. 14 protect conversational privacy in text messages.

Under this Court's well-established case law, the government's invasive review of Mr. Delgado-Rivera's private conversations violates an objectively reasonable expectation of privacy.

Art. 14 strongly protects conversational privacy. Indeed, the "right of privacy would mean little if it were limited to a person's solitary thoughts, and so fostered secretiveness." *Blood*, 400 Mass. at 74 (citation omitted). As a result, the right to privacy protected by art. 14 "is not just the right to a silent, solitary autonomy …: It is the right to bring thoughts and emotions forth from the self in company with others doing likewise, the right to be known to others and to know them, and thus to be whole as a free member of a free society." *Id*. at 69. Reflecting this understanding, *Blood* held that individuals have an objectively reasonable expectation of

[15] The Commonwealth does not contest his subjective expectation of privacy, and for good reason. This Court has recognized that the subjective prong is satisfied where—as here, see S.A.4—the defendant's affidavit describes a subjective expectation of privacy. See, e.g., *Augustine*, 467 Mass. at 255 & n.38; *Mora*, 485 Mass. at 305.

conversational privacy, the government invasion of which "threaten[s] the privacy of our most cherished possessions, our thoughts and emotions." *Id*. at 70. The Supreme Court has similarly held that an individual who enters a public phone booth "to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world" or intercepted by government agents. *Katz v. United States*, 389 U.S. 347, 352 (1967); see also *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, *S. Div.*, 407 U.S. 297, 313 (1972) ("[T]he broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards.").

That right to conversational privacy exists regardless of the medium through which the conversation takes place. *Fulgiam* appropriately recognized that text messaging simply represents a technological spin on this settled question, holding that "[j]ust as the government may not intercept private telephone calls" without a warrant, "the Commonwealth may not obtain the content of text messages without a warrant." *Id*. at 32-33.[16]

This conclusion makes sense, as text messages are the new phone conversations. See *supra* Part I. These exchanges take place day or night, in a near-

[16] Multiple courts have reached the same conclusion. In *State v. Hinton*, the Washington Supreme Court concluded that people who send texts have standing to challenge a search of the recipient's phone. 319 P.3d 9 (Wash. 2014). The Supreme Court of Canada has reached the same result. See *Marakah*, 2017 SCC 59.

instant, allowing the sort of detailed back-and-forth that previously could occur only over the telephone or in person. People conduct some of their most private conversations by text: a 2012 poll found that one in five Americans sends sexually explicit messages via texts.[17] Texting even allows for the ready conveyance of emotion: people can laugh,[18] love,[19] like,[20] cry,[21] or fight,[22] all via text. See *Commonwealth v. Castano*, 478 Mass. 75, 78, 84 (2017) (citing defendant's sending of an emoji as conveying his intent to kill the victim). It could easily be said that these voluminous conversational transcripts "are like an extension of the individual's mind. They are a substitute for the perfect memory that humans lack. Forcing an individual to give up possession of these intimate writings may be psychologically comparable to prying words from his lips." Samuel A. Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 39 (1986). Congress itself has banned unsolicited texts just as it has banned unsolicited calls, see 47 U.S.C. § 227(a)(4), showing its understanding that texts and calls fulfill a similar

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[17] Sara Gates, *Adult Sexting On The Rise: 1 in 5 Americans Send Explicit Text Messages*, Poll Finds, Huffington Post (June 8, 2012), http://www.huffingtonpost.com/2012/06/08/adult-sexting_n_1581234.html.

[18] 😂

[19] ❤️

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[21] 😢

[22] 😡

function as a medium for personal, real-time conversations between people who know one another, and that unsolicited versions of either invade a user's privacy.

If anything, there is every reason to think that text messages are meant to be *more* private than phone calls—people text more often than they make calls, and when they do they "exclude the communication from the uninvited ear by avoiding speaking into the mouthpiece altogether." Katherine M. O'Connor, *:o Omg They Searched My Txts: Unraveling the Search and Seizure of Text Messages*, 2010 U. Ill. L. Rev. 685, 716 (2010); see also *Marakah*, 2017 SCC 59, ¶¶ 35-36 ("[I]t is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging."). And it is eminently reasonable to expect privacy in a communication from one cellphone to another when the Supreme Court has unambiguously held that cellphones cannot be searched without a warrant. See *Riley*, 573 U.S. at 403.

Finally, the sort of intrusive surveillance of private conversations enabled by the search of text messages was previously impossible. "In the past, attempts to reconstruct a person's [conversations] were limited by a dearth of records and the frailties of recollection." *Carpenter*, 138 S. Ct. at 2218. Person-to-person conversations were evanescent and fleeting; the police simply could not surveil private conversations that had already occurred. With text messages, police can inspect years' worth of dialogue in a single search.

ii. The Commonwealth's contrary arguments are unpersuasive.

The Commonwealth raises three arguments to suggest that Mr. Delgado-Rivera does not have a reasonable expectation of privacy in his sent text messages, none of which is persuasive.

First, the Commonwealth analogizes text messages to letters, which, it says,[23] lose constitutional protection upon delivery. See Appellant's Br. at 19. But that comparison ignores the radical differences between letters and texts. Just try replacing a text conversation with an exchange of letters—the former is nothing like the latter. Unlike text messages, letters allow no instantaneous back-and-forth, interruption, questioning, clarification, or emotion. In other words, letters allow for mere correspondence, whereas texting facilitates conversation. And any ruling that

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[23] While this Court need not address the constitutional protections afforded to sent letters, see *infra*, it is worth noting that the doctrinal case on Fourth Amendment protection for mail, *United States v. Jacobsen*, 466 U.S. 109 (1984), involved a situation in which a private party in possession of a package *voluntarily turned it over to the government*. *Id*. at 111. It was in this specific context that the Court held that the government did not need a warrant, only because the sender's expectation of privacy "had already been frustrated" by the private party's voluntary disclosure. *Id*. at 117. "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information." *Id*.

The cases cited by the Commonwealth to support its argument that the Fourth Amendment does not apply to sent letters, see Appellant's Br. at 19, are the jurisprudential equivalent of a Russian nesting doll: they all cite to, or cite another case that cites to, one decision—*United States v. King*, 55 F.3d 1193 (6th Cir. 1995). There, just as in *Jacobsen*, the Sixth Circuit found no constitutional violation because the sent letters were voluntarily turned over to the government by a private party. See *King*, 55 F.3d at 1195-96.

adopts the Commonwealth's argument that texts lose constitutional protection once received would mean they will *never* be constitutionally protected—or that protection lasts only for the few seconds it takes for the text to go from sent to received.

What is more, texts reside on a phone that is likely carried everywhere by the recipient, protected against intrusion by a numeric or biometric passcode. Letters are written in ink anyone can read. The analogy between letters and text messages further breaks down upon consideration of the intrusiveness of the search. Cellphones typically retain *all* of the person's text conversations unless they are manually deleted. This bears no resemblance to the interception of a single mailed letter. Simply put, "[t]he quantity of information they contain and the speed at which they are transmitted give text messages a conversational quality that differs markedly from letters." *Marakah*, 2017 SCC 59, ¶ 87 (Rowe, J., concurring).[24] Texts are not letters, and government searches of sent text messages must trigger the warrant requirement. "To read the Constitution more narrowly is to ignore the vital role" that text messaging "has come to play in private communication." *Katz*, 389 U.S. at 352.

[24] See also *Hinton*, 319 P.3d at 14 (rejecting analogy between text messages and letters); O'Connor, *supra* at 707 ("[T]he letter analogy is insufficient and logically inconsistent.").

Second, the Commonwealth argues that Mr. Delgado-Rivera does not have a reasonable expectation of privacy in his sent messages because he neither owned the searched phone nor was present in Texas during the search. See Appellant's Br. at 6, 14, 16, 17, 24. But *Fulgiam* correctly recognized that people retain privacy in their texts *regardless* of where they happen to be stored. See *Fulgiam*, 477 Mass. at 33.

The Commonwealth's fundamental error is its focus on the physical location of the search and the physical phone, rather than the digital communications inside of it. "A search does not require governmental manipulation of an individual's property." *Almonor*, 482 Mass. at 53 (Lenk, J., concurring). "Article 14, like the Fourth Amendment, was intended by its drafters not merely to protect the citizen against the breaking of his doors, and the rummaging of his drawers, but also to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Blood*, 400 Mass. at 69 (citations omitted). "Viewing the contents of people's text messages exposes a 'wealth of detail about [a person's] familial, political, professional, religious, and sexual associations.'" *Hinton*, 319 P.3d at 13 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). Under art. 14 and the Fourth Amendment, that privacy interest is what matters.

After all, "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. And to protect people, it necessarily protects "conversational privacy." *U.S. Dist. Ct.*, 407 U.S. at 313. The cellphone is merely the *medium* for the

constitutionally protected text *message*. See *Marakah*, 2017 SCC 59, ¶¶ 13, 16 ("The subject matter of the alleged search was the electronic conversation between [sender] and [recipient]. … Neither the iPhone itself nor its contents generally is what the police were really after."). The search must be defined functionally, rather than in mechanical terms of mere physical space.

That has long been the law. In *Katz*, for example, the Supreme Court found an expectation of privacy in a phone call, not a phone booth. 389 U.S. at 351. Mr. Katz did not own the booth or the phone, but that did not diminish the expectation of privacy he had in his private communications because property interests do not "control the right of the Government to search and seize." *Id*. at 353.[25] Any property interest in the cellphone here is similarly immaterial. The expectation of privacy in the conversation is what matters. In this context, "[w]hether a search took place is a question of privacy rights, not property rights." *Almonor*, 482 Mass. at 58 (Lenk, J., concurring). And the sender of text messages has an expectation of privacy *in the messages*—whether the police view them on the sender's phone, the recipient's phone, or the records of the service provider.

[25] Similarly, in the CSLI context, Messrs. Augustine and Carpenter had a reasonable expectation of privacy in their location information even though they did not own the CSLI records themselves. *Carpenter*, 138 S. Ct. at 2212; *Augustine*, 467 Mass. at 255-56.

Third, the Commonwealth argues that Mr. Delgado-Rivera has no expectation of privacy because he "lacked any ability to limit the further dissemination of that message to others." Appellant's Br. at 17. But this Court has already rejected the application of this third-party doctrine within the context of both digital and analogue conversations. See *Fulgiam*, 447 Mass. at 34; *Blood*, 400 Mass. at 70.

Once sent, text messages are technically conveyed to two distinct third parties: the cell service provider and the intended recipient of the message. Neither disclosure destroys the objectively reasonable expectation of privacy in the texts. As to the former, *Fulgiam* has already expressly held that the third-party doctrine does not apply "to the content of text messages stored on a cellular telephone service provider's servers." 477 Mass. at 34. And just like a phone call or in-person conversation, a text message conversation does not lose privacy simply because it is occurring with another person (as most conversations do).

All conversations have some hypothetical possibility of exposure. Nevertheless, this Court has still held "in circumstances not disclosing any speaker's intent to cast words beyond a narrow compass of known listeners . . . it is objectively reasonable to expect that conversational interchange in a private home will not be invaded surreptitiously by warrantless electronic transmission or recording." *Blood*, 400 Mass. at 70. By the government's logic, it could tap all phones without a warrant because one of the participants on the call might be wearing a wire. That is not the

law. See *id*. The Supreme Court has already rejected the Commonwealth's present argument in the clearest possible terms, holding that "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).

Of course, if the recipient of the text message *actually* chooses to disclose it to the police without government prompting, the government does not violate the Fourth Amendment or art. 14. Had Mr. Garcia-Castaneda voluntarily turned over the text messages to the police—which he did not[26]—the Commonwealth would have prevailed at the motion to suppress hearing because, under the false friends doctrine, the constitution does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

But not all friends are false, and the mere possibility of exposure does not negate privacy interests. "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

[26] The Commonwealth twice claims in its brief that Mr. Garcia-Castaneda consented to the search of his phone. See Appellant's Br. at 11, 14. For this notion, the Commonwealth cites only the memorandum it submitted in the trial court, see Appellant's Br. at 11 (citing R.A.44), which is not evidence. Indeed, there is no record evidence to support the Commonwealth's claim. See R.A.51. To the contrary, Mr. Garcia-Castaneda stated in his affidavit that he did *not* consent to the search. See R.A.42.

reasonable to expect privacy." *United States v. Smith*, 978 F.2d 171, 179 (5th Cir. 1992). As with private, spoken conversations, individuals can reasonably expect that their sent text messages will not be revealed to law enforcement. Although "the risk that one to whom we impart private information will disclose it is a risk we necessarily assume whenever we speak," that "risk should not be automatically transposed into an assumed risk of intrusion by the government." *Hinton*, 319 P.3d at 15 (citation omitted). The police do not stand in the shoes of our conversational confidantes; for Fourth Amendment purposes, they are "stranger[s]." *Florida v. Jardines*, 569 U.S. 1, 8 n.2 (2013).

The Commonwealth's argument would divest all text messages—indeed, all conversations—of constitutional protection because all conversations have been disclosed to another person. A reasonable expectation of privacy that protects only our inner monologue is not privacy. "Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves." Fried, *supra* at 482 (emphasis in original); see also *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989). The notion that "[n]othing [is] your own except the few cubic centimetres inside your skull," should stay in *1984*. George Orwell, *1984* at 27 (1949).[27]

[27] Both this Court and the Supreme Court have recognized that privacy in the digital world is far more complex than blind adherence to the third-party doctrine allows. See *Carpenter*, 138 S. Ct. at 2220; *Fulgiam*, 477 Mass. at 34; *Augustine*, 467 Mass.

B. If this Court requires an additional showing for art. 14 standing, Mr. Delgado-Rivera's possessory interest in his cellphone account satisfies this requirement.

To the extent this Court still requires an additional demonstration of some "possessory" interest to establish standing, but see Statement of the Case and Facts, Section II,[28] *Fulgiam* made clear that—with respect to text messages—the sender retains a possessory interest in the electronic account from which the texts are sent. In *Fulgiam*, the defendant did not have a possessory interest in the item searched, namely the physical server of his service provider. Nor was he present at the time of the search. But that did not matter. Instead, the Court concluded that anyone with a "possessory interest *in the cellular telephone account*" has standing to challenge a

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at 245. This Court (in *Augustine*) and the Supreme Court (in *Carpenter*) both squarely rejected the application of the third-party doctrine to CSLI held by third parties where the government sought access to location information that was "detailed, encyclopedic, and effortlessly compiled." See *Carpenter*, 138 S. Ct. at 2216; see also *Augustine*, 467 Mass. at 245-52. The intrusiveness of this search similarly bears no resemblance to the cases in which the Supreme Court created the third-party doctrine, which involved dialed telephone numbers (*Smith v. Maryland*, 442 U.S. 735, 743-45 (1979)) and check deposit slips (*United States v. Miller*, 425 U.S. 435, 437, 442-44 (1976)). See *Fulgiam*, 477 Mass. at 34. If anything, text message surveillance is even more intrusive than CSLI. Unlike location tracking, this is not the revelation of personal associations by even "easy inference," *Commonwealth v. McCarthy*, 484 Mass. 493, 504 (2020)—it is the direct surveillance of the contents of private conversations.

[28] In addition, because the motion to suppress was challenged under both art. 14 *and* the Fourth Amendment, R.A.41—which collapses standing into the reasonable expectation of privacy analysis—the search at issue here must be considered under both constitutional provisions.

search "of the content of the text messages sent" from it. *Fulgiam*, 477 Mass. at 36 (emphasis added).

This makes sense. This Court's standing inquiry in the context of a search of digital records has never dwelled on ownership or the physical locus of a search, nor should it. What matters is the defendant's interest in the information obtained by the government's search. Thus, a passenger with no possessory interest in a car has standing to challenge the extended GPS surveillance of that car, see *Rousseau*, 465 Mass. at 382, and a defendant who uses (but does not own) a phone has standing to challenge the collection of its CSLI, see *Augustine*, 467 Mass. at 234 n.6; see also *Commonwealth v. Estabrook*, 472 Mass. 852, 858 n.9 (2015).

Here, as the Commonwealth acknowledges, Mr. Delgado-Rivera is the owner of the account from which the searched text messages were sent. See Appellant's Br. at 12. To the extent an additional possessory interest is still required to confer standing on Mr. Delagado-Rivera, this ownership is sufficient. See *Fulgiam*, 477 Mass. at 36.

IV. In the alternative, a sender of text messages should have automatic standing to challenge a government search of his text messages located in the recipient's phone.

If this Court does not hold that Mr. Delgado-Rivera has the ability to challenge the search of sent texts found on the recipient's phone under the traditional doctrine, the Court should, in the alternative, head off the absurd results that would arise from

the Commonwealth's proposed rule, see *supra* Section I, by expanding automatic standing to include a sender of text messages who wishes to challenge the search of those messages on the recipient's phone.

Traditionally, "automatic standing" has been reserved for cases in which a defendant is charged with a possessory offense involving the fruit of the challenged search. See *Mubdi*, 456 Mass. at 392. "Where the defendant has automatic standing, the defendant need not show that *he* has a reasonable expectation of privacy in the place searched. … [Instead, he need only show] that *someone* had a reasonable expectation of privacy in the place searched." *Id*. at 392 (emphasis in original).

Here, this Court could confer automatic standing on defendants who challenge searches of sent text messages, and so ask only whether a constitutional search has occurred—i.e., did the search invade *someone's* expectation of privacy—rather than whether that defendant has a personal expectation of privacy in the sent message. That approach would protect conversational privacy by eliminating any incentive for the government to conduct warrantless searches of cellphones to obtain text messages to use against a different defendant.

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At bottom, the law of privacy is meant to track reasonable social expectations. And no ordinary person of common sense would think their text messages become public information as soon as they click "send." Art. 14 and the Fourth Amendment

exist precisely to protect the privacy interests of people when they are in society, not to require them to opt out of participating in it.

CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's decision, and hold that an individual has standing and a reasonable expectation of privacy in the contents of sent text messages received by a third party and, accordingly, may challenge a warrantless search of the third party's cellphone.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I, Michael A. Hacker, do hereby certify that this brief complies with the rules of court that pertain to the filing of amicus briefs, including but not limited to Rules 16, 17, and 20. This brief complies with the length limit because it is set in 14-point proportionally spaced font and contains 7,251 non-excluded words, as determined through use of the "word count" feature in Microsoft Word 2016.

/s/ Michael A. Hacker
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CERTIFICATE OF SERVICE

I certify under the penalties of perjury that on October 16, 2020, a copy of the foregoing document was filed electronically through the Court's e-filing system for service to the following registered.

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