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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

ROBERT MARTIN OFFER-WESTORT, an
individual; ELIZABETH ZITRIN, an
individual; and the AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN
CALIFORNIA, INC.,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN
FRANCISCO; GREGORY SUHR, in his
official capacity as Chief of Police of the City
and County of San Francisco; and
DOES 1 through 20, inclusive,

Defendants.

No.

VERIFIED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY
RELIEF FOR VIOLATION OF
ARTICLE 1, SECTIONS 1,2,3 AND 13
OF THE CALIFORNIA
CONSTITUTION, AND THE FIRST
AMENDMENT OF THE UNITED
STATES CONSTITUTION

INTRODUCTION

1
2 1. Mobile devices are an essential, ubiquitous feature of modern life. They
3 function as our connection to the world, our platform for communications both personal and
4 professional, and they are also less and less likely to be used exclusively as a phone and
5 more and more likely to be used like a computer, rolodex, calendar, camera, photo album,
6 video recorder, television, and credit card. In our culture of constant connectivity, the vast
7 majority of the population owns a mobile device and has that device in immediate reach at
8 all times. Many no longer have a landline, and some access the internet only through their
9 cell phone. In light of advances in technology and evolving social norms, mobile devices
10 contain a treasure trove of information both about their users and about all the people with
11 whom their users interact, with the volume of information far exceeding what would be
12 found in a home office, and at least as detailed and intimate as would be contained in a
13 personal diary.

14 2. In 2011, the California Supreme Court held that a warrantless search of an
15 arrestee's cell phone did not violate the Fourth Amendment to the United States
16 Constitution. See *People v. Diaz* (2011) 51 Cal.4th 84.

17 3. The California Constitution provides greater privacy protections than the
18 federal constitution. Cell phones today are essentially compact home offices that can be
19 carried on the person or in a briefcase, and searching them poses special privacy concerns
20 beyond what is typical in the search and seizure context. The California Constitution and
21 First Amendment of the United States Constitution also safeguard the rights of free speech
22 and free association against governmental interference, in particular, against the compelled
23 disclosure of speech and associational information.

24 4. By this Complaint, Plaintiffs Robert Martin Offer-Westort, Elizabeth Zitrin,
25 and the American Civil Liberties Union of Northern California seek to stop the City and
26 County of San Francisco and Gregory Suhr, in his official capacity as Chief of Police of the
27 City and County of San Francisco, from continuing their policy and practice of conducting
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1 warrantless searches of the cellular telephones of arrestees, even in situations where there
2 are no exigent circumstances, because these searches violate (1) arrestees' and their
3 associates' right to privacy under the California Constitution; (2) arrestees' and their
4 associates' right to be free from unreasonable searches and seizures under the California
5 Constitution; (3) arrestees' and their associates' right to liberty of speech and their right to
6 association under the California Constitution; and (4) arrestees' and their associates' right
7 to free speech and associational privacy guaranteed by the First Amendment to the United
8 States Constitution. Plaintiffs also ask this Court to declare that these warrantless searches
9 violate the right to privacy guaranteed by Article I, section 1 of the California Constitution,
10 the right to be free from unreasonable searches and seizures guaranteed by Article I, section
11 13 of the California Constitution, the right to liberty of speech and association under Article
12 I, Sections 2 and 3 of the California Constitution, and the right to free speech and
13 associational privacy guaranteed by the First Amendment to the United States Constitution.

14 PARTIES

15 5. Plaintiff Robert Martin Offer-Westort is an individual and was at the time of
16 the facts alleged in this complaint a resident of San Francisco, California. He is now a
17 resident of Oakland, California. Offer-Westort owns a basic cellular phone, which he uses
18 for personal and work-related communications. He generally carries his phone on his
19 person or has it within reach at most times of day.

20 6. Plaintiff Elizabeth Zitrin is a member of the American Civil Liberties Union
21 of Northern California, Inc. ("ACLU-NC"), and was and is at all times mentioned in this
22 Complaint, a taxpayer and resident of San Francisco, California. Plaintiff Zitrin owns real
23 property situated in San Francisco, California, and has been assessed and has paid property
24 taxes on this property within the past year. Zitrin owns a smart phone, which she uses for
25 personal and work-related communications and to store and access personal and
26 professional data. She generally carries her phone on her person or has it within reach at
27 most times of day.

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7. Plaintiff ACLU-NC is a non-profit corporation dedicated to protecting civil rights and civil liberties, including the right to privacy. Plaintiff ACLU-NC has approximately 36,000 members in Northern California, including over 6,000 members who reside in the City and County of San Francisco, at least some of whom have been assessed and have paid taxes to San Francisco in the last year. Plaintiff ACLU-NC owns real property situated in San Francisco, California, and has been assessed and has paid property taxes on this property within the past year.

8. Defendant Gregory Suhr is the Chief of Police of Defendant the City and County of San Francisco and, in this capacity, is directly responsible for the policies, practices, and actions of which Plaintiffs complain. Defendant Suhr is sued in his official capacity.

9. Defendant the City and County of San Francisco (“San Francisco”) is a charter city and county organized under the constitution and laws of the State of California.

10. Plaintiffs are ignorant of the true names or capacities of the Defendants sued herein under the fictitious names DOES 1 through 20, inclusive, and therefore sue such Defendants by such fictitious names. Plaintiffs are informed and believe, and on that basis allege, that such fictitiously named Defendants are responsible in some way for the damage and legal injury sustained by Plaintiffs as alleged herein.

VENUE AND JURISDICTION

11. This Court has jurisdiction over this case under Article VI, Section 10 of the California Constitution and Code of Civil Procedure Section 410.10.

12. Venue is proper in this Court pursuant to Code of Civil Procedure Section 395 because Defendant the City and County of San Francisco is located in San Francisco County, and because all of the conduct alleged herein occurred in San Francisco County. In addition, Chief Gregory Suhr is employed by the City and County of San Francisco.

1 13. Plaintiff Offer-Westort has standing because Defendants violated his rights
2 and the rights of his associates under the California Constitution.

3 14. Plaintiff Zitrin has standing as a taxpayer under Code of Civil Procedure
4 Section 526a and because she is at risk of having her privacy and the privacy of her
5 associates violated by Defendants in the event of an arrest.

6 15. Plaintiff ACLU-NC has standing because (1) both it and some of its
7 members are taxpayers under Code of Civil Procedure Section 526a, (2) at least some of its
8 members own cellular phones and are at risk of privacy violations by Defendants in the
9 event of an arrest, and (3) ACLU-NC staff use electronic mail to communicate in
10 confidence with other staff, directors, and members, and if any of these individuals were
11 arrested and their cell phones searched these confidential communications could be
12 compromised.

13 **FACTUAL BACKGROUND**

14 **Offer-Westort's Arrest for Peaceful Civil Disobedience**

15 16. Offer-Westort was arrested for an act of peaceful civil disobedience on
16 January 27, 2012.

17 17. Offer-Westort worked at the San Francisco Coalition on Homelessness
18 ("Coalition") from 2006 to 2012. He continues to be politically active on a wide variety of
19 issues, especially those affecting the homeless. He regularly works with and appears before
20 the San Francisco Board of Supervisors to advocate for the rights of the homeless in San
21 Francisco.

22 18. Offer-Westort owns an LG GU 295 cell phone. It is an older model cell
23 phone and not a smart phone. Offer-Westort does not own a smart phone because he
24 cannot afford to purchase one and he cannot afford to pay for a data plan for a smart phone
25 each month. Because he cannot afford a smart phone, Offer-Westort relies heavily on text
26 messaging.

1 19. In early 2012, Scott Wiener of the San Francisco Board of Supervisors
2 proposed passing an ordinance to make it illegal to camp and, during certain hours, sleep in
3 Harvey Milk and Jane Warner Plaza. The San Francisco Coalition on Homelessness
4 opposed the legislation, arguing to the Board of Supervisors that it targeted the homeless
5 and was unnecessary in light of existing law, such as Penal Code Section 647(e), which
6 prohibits lodging in public places without permission. Supervisor Wiener disputed the
7 assertion that his proposed legislation duplicated existing law, contending that it was
8 unclear whether the state anti-lodging law applies to Harvey Milk and Jane Warner Plazas.

9 20. As part of the Coalition's efforts to oppose the proposed legislation, Offer-
10 Westort decided to engage in an act of peaceful civil disobedience. In particular, he
11 decided to camp in Jane Warner Plaza, risking arrest, to prove that the proposed legislation
12 duplicated the existing state anti-lodging law.

13 21. On Friday, January 27, 2012, in the evening, Offer-Westort pitched a tent in
14 Jane Warner Plaza. He placed a sleeping bag inside the tent and sat at the entrance to the
15 tent. As is usually the case, he had his cell phone in the pocket of his pants. Eventually,
16 two officers of the San Francisco Police Department, Officers Chambers and Officer
17 Manrique, arrived in a vehicle. One of the officers told Offer-Westort that Penal Code
18 §647(e) prevented him from camping in the Plaza and the officers asked him to leave.
19 Offer-Westort declined to do so and was then arrested and taken to Mission Station.

20 **The Warrantless Search of Offer-Westort's Personal Information**

21 22. Officer Chambers engaged in an intrusive and warrantless search of private
22 communications contained on Offer-Westort's cell phone.

23 23. The search was conducted at the police station after Offer-Westort's arrest
24 but before his booking. The arresting officer (Officer Chambers) took Offer-Westort's cell
25 phone from out of his pants pocket, slid it open, and examined some of the data on it.

26 24. Offer-Westort was nervous about the police looking through his text
27 messages, because he had recently sent a text message that included negative comments

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1 about a local politician and that he intended to relay exclusively to the message's recipient
2 but otherwise to keep private; if this text message were made public, it could adversely
3 affect his ability to work with this politician and with other politicians.

4 25. Offer-Westort was therefore extremely concerned about the government
5 reading his private text message about a politician. Offer-Westort asked Officer Chambers
6 what he was doing. Officer Chambers stated something to the effect of: "Looking for text
7 messages – how do you feel about that?"

8 26. Offer-Westort objected to the search, stating: "I don't give you consent."

9 27. Officer Chambers did not cease the search upon Offer-Westort's objection,
10 instead responding with a statement to the effect of: "The California Supreme Court gives
11 me the right after I arrest you."

12 28. Officer Chambers continued with his search of Offer-Westort's cell phone,
13 reading many of Offer-Westort's text messages and relaying their contents to him,
14 including three text messages Offer-Westort had not yet read himself as they had been
15 received after he was arrested. Officer Chambers then left Offer-Westort handcuffed in the
16 waiting room and continued his search of Offer-Westort's cell phone. At least twice over
17 the next two hours, Offer-Westort could see Officer Chambers in other parts of the station
18 either scrolling through his cell phone or holding his cell phone.

19 29. In the course of the warrantless search of Offer-Westort's cell phone, Officer
20 Chambers read messages authored by individuals other than Offer-Westort who had not
21 been arrested, and messages that were unrelated to the crime for which Offer-Westort was
22 arrested.

23 30. Officer Chambers's incident report states that "[u]pon returning to Mission
24 Station [he] removed Offer-Westort's [] phone from his pants pocket and searched it
25 incident to arrest." The report quotes several of the text messages that he read, including a
26 draft message relating to discussions with a San Francisco supervisor concerning the
27 proposed camping ordinance that Offer-Westort had not sent to its intended recipient. In
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1 order to access unsent (draft) text messages on Offer-Westort's cell phone, Officer
2 Chambers had to take several extra steps beyond those required to read sent or received text
3 messages.

4 31. The report indicates that it was reviewed by a sergeant and sent to the
5 District Attorney's office; nothing on the report suggests that either the reviewing sergeant
6 or the District Attorney's office believed there was anything improper or unusual about the
7 search of the cell phone. The report number is 120076365, and is attached as Exhibit A to
8 this Complaint. Personal information about Offer-Westort has been redacted. In attaching
9 the police report, Plaintiffs note that they do not agree that every statement in the report is
10 accurate.

11 32. Officer Chambers stated that he believed the text messages were proof of
12 Offer-Westort's intent to violate Penal Code § 647(e).

13 33. Defendants and their agents did not need to search Offer-Westort's cell
14 phone to obtain evidence of the crime of his arrest. Officers Chambers and Manrique had
15 personally witnessed Offer-Westort sitting on top of a sleeping bag in a tent pitched in the
16 Plaza at night and refusing to leave upon their request. Penal Code § 647(e) requires only
17 general intent, and there was no reason to think that searching Mr. Offer-Westort's phone
18 would uncover evidence of intent or any other element of this or any other crime. Nor did
19 the officers have reason to believe or suspect that they would find any other evidence
20 relevant to the crime of arrest on Offer-Westort's cell phone, or that his cell phone could be
21 used as a weapon.

22 34. Even if the officers had reason to believe or suspect that the phone would
23 contain evidence relevant to the crime of arrest, Defendants and their agents had no reason
24 to believe that Offer-Westort would destroy any such evidence. At the time of the search,
25 Offer-Westort was handcuffed and his phone had been reduced to the officers' control. Nor
26 was there any other sort of exigent circumstances that would have made it impracticable to
27 apply for a warrant to search the phone.

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1 35. Offer-Westort was cited for violating the anti-lodging law and released. The
2 police department retained Offer-Westort's tent, sleeping bag, and cell phone as
3 "evidence."

4 36. The police eventually returned Offer-Westort's cell phone in May or June of
5 2012. During the time that the police had his cell phone, Offer-Westort simply went
6 without a phone. Offer-Westort's cell phone does not automatically delete text messages;
7 they must be manually deleted. During the time that the phone was in police custody, it
8 continued to receive text messages from Offer-Westort's friends and family. When the
9 police returned his cell phone, these messages were no longer marked unread, meaning they
10 had been opened by someone.

11 37. Offer-Westort's case was subsequently assigned to Neighborhood Court,
12 where it has since been provisionally dismissed.

13 38. Offer-Westort continues to be active in local politics and remains concerned
14 about the impact on his ability to work effectively in this arena if the contents of his text
15 messages, read by Defendants without a warrant after his arrest for civil disobedience, are
16 disseminated.

17 39. Upon information and belief, Defendants have a policy and practice of
18 searching the cell phones of arrestees without a warrant, even in situations where (1) the
19 cell phone poses no threat to officer safety, (2) there is no reasonable basis to believe that
20 the phone contains evidence of the crime of arrest or that the suspect will destroy any such
21 evidence, and (3) there are no exigent circumstances.

22 **Plaintiff Elizabeth Zitrin**

23 40. Plaintiff Zitrin's interest in this case stems from her right not to have her tax
24 dollars spent in ways that violate the state and federal constitutions, and also from her
25 concern about her own privacy and the privacy of organizations of which she is a member.

26 41. Zitrin uses an Apple iPhone that contains an enormous amount of private
27 data and is illustrative of the wide variety of personal, confidential information of both the
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1 user and the user's associates contained on a typical smart phone. She uses her iPhone to
2 access her personal and work email, her text messages, her calendar, her photographs, and
3 her social networking accounts (in particular, Facebook and Twitter).

4 42. She also uses Evernote, which is an application on her phone that
5 synchronizes information with her computer and that allows her to save notes, webpages,
6 files, and images, and to access that information remotely from her iPhone. She uses
7 Evernote to store, among other things, personal information about her son, father, and
8 mother; account information with vendors; her frequent flyer numbers with airlines; and
9 information relating to access to websites that require a user to log-in.

10 43. Her iPhone provides access to Zitrin's confidential legal, financial, and
11 health information.

12 44. Zitrin is an attorney who serves on a legal team in a death penalty matter.
13 She reviews and receives confidential attorney-work product information about that matter
14 via email, which can be accessed on her phone. Zitrin has also retained the services of an
15 attorney to handle matters arising out of her husband's death. She engages in confidential
16 communications with her attorney about her husband's estate via email, which can be
17 accessed on her phone.

18 45. Zitrin has an accountant. She engages in confidential communications with
19 her accountant about her private financial matters via email, which can be accessed on her
20 phone. She also has an application on her phone that allows her to access information
21 about her bank accounts and engage in financial transactions.

22 46. Zitrin obtains her health care through Kaiser Permanente, which has an
23 application that she has installed on her phone that allows her to access her health
24 information, including laboratory results, confidential communications with physicians, and
25 prescriptions.

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1 47. Zitrin's phone also provides access to confidential information about
2 organizations of which Zitrin is a member. Zitrin is a current member of Plaintiff ACLU-
3 NC, and also served as a member of its Board of Directors from 2004 through 2011.

4 48. In her capacity as a member of Plaintiff ACLU-NC's Board, she had
5 electronic access through her phone to the organization's financial information and its
6 internal priorities and strategies. As a Board member she engaged in fundraising and
7 communicated with ACLU-NC staff about donors via email, which was accessible by her
8 phone. Zitrin remains interested in serving on the ACLU-NC Board in the future and, if re-
9 elected to the Board, would again have access through her phone to confidential
10 information pertaining to the organization's finances, priorities, strategies, members, and
11 donors.

12 49. Zitrin worked vigorously on the campaign to pass Proposition 34, which was
13 on the November 2012 ballot. Proposition 34 would have replaced the death penalty in
14 California with permanent imprisonment, and was supported by the ACLU-NC. She
15 engaged in extensive communications with other ACLU-NC members and with ACLU-NC
16 staff about the campaign; these emails were and remain currently accessible on her phone.
17 Zitrin remains active on death penalty issues and continues to communicate electronically
18 with other ACLU-NC members and ACLU-NC staff about the organization's on-going
19 death-penalty work. These electronic communications are accessible on her phone.

20 50. Zitrin is concerned that, in the event she were arrested in San Francisco, the
21 police could have access to all of this private information.

22 51. She is also concerned that if any of the people with whom she works or
23 corresponds were arrested, the police would be able to access Zitrin's confidential
24 communications that are stored on their cell phones.

25 **Plaintiff ACLU-NC**

26 52. Plaintiff ACLU-NC's interests in this case are as a taxpayer, as an
27 organization that advocates for the privacy, free-speech, and associational rights of its
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1 members and others in San Francisco and Northern California, and also as an organization
2 with over 25 full-time employees in San Francisco who use email, text messaging, and
3 voicemail to communicate with one another, with Plaintiff ACLU-NC's members, with
4 Plaintiff ACLU-NC's attorneys, and with others about political and legal advocacy. Much
5 of the ACLU-NC staff use smartphones that send, receive, and store work-related emails on
6 these topics; this means that their phones will often contain material that is related to the
7 organization's advocacy efforts and material that is protected by the attorney-client
8 privilege or as attorney work product. Some of this material relates to litigation against the
9 City and County of San Francisco. The ACLU-NC has an interest in maintaining the
10 confidentiality of this material, an interest that would be seriously undermined if a police
11 officer who arrested any staff or person with whom staff communicate in confidence (such
12 as a cooperating attorney) were able to examine the contents of that person's cell phone.

13 Cell Phones

14 Basic Cell Phones and Smart Phones

15 53. Basic cell phones, such as the type of phone carried by Offer-Westort, allow
16 the user to store the names and numbers of their contacts, make and receive calls, receive
17 voice mail messages, and send and receive text messages, all of which are stored on the cell
18 phone. Basic cell phones can also connect to some social media, such as Twitter,¹ because
19 Twitter allows users to send and receive Tweets via text message.² According to AT&T,
20 400 million text messages generated by social networking sites³ were sent over its network

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22 ¹ Twitter is an online social networking and microblogging service that enables its users to
23 send and read text-based messages of up to 140 characters, known as tweets. Wikipedia:
24 *Twitter*, available at <http://en.wikipedia.org/wiki/Twitter> (last visited March 17, 2013).
25 According to Twitter, its total mobile users increased 62% between April and September
26 of 2010, with 46% of active users participating via a mobile device, and 16% of all new
27 users to Twitter starting on a mobile platform. Twitter Blog, *The Evolving Ecosystem*,
28 Sept. 2, 2010, available at <http://blog.twitter.com/2010/09/evolving-ecosystem.html> (last
visited March 17, 2013).

² <http://support.twitter.com/articles/14014-twitter-via-sms-faq>.

³ Social networking sites such Facebook and Path allow members to create online profiles,
which are individual web pages on which members post photographs, videos, and
(continued...)

1 in October 2009, and by September 2010, the number had more than doubled to one
2 billion.⁴ Many basic cell phones also have cameras, and are able to store and send pictures.
3 As of 2012, 82% of all adult cell phone owners reported using their cell phone to take
4 pictures.⁵

5 54. A basic phone costs anywhere from \$20 to \$80. Purchase prices are often
6 waived or reduced through a subsidy from the wireless carrier if a user enters into a service
7 contract for a specified length of time. Monthly fees to carriers for cell phone service range
8 from \$30 to \$80. Some carriers also offer “pay as you go” or prepaid services.

9 55. Basic cell phones contain information about the user and the user’s
10 associates. For example, even basic phones store the phone numbers of the user’s contacts,
11 historical incoming and outgoing call information, as well as the contents of text messages
12 and photos sent by the user and received from others.

13 56. Smart phones are a type of cellular phone that provide Internet access and
14 that allow users to run “apps” (short for applications). Major categories of apps include
15 web browsing, news and information, e-mail and messaging, games, social networking,
16 location-based services, photo sharing, music and video streaming, and voice
17 communications and video chat services.⁶ In addition, thousands of niche applications have
18 been designed for specific uses, hobbies, interests, and industries by third-party application
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20 (...continued)
21 information about their lives and interests. The idea of online social networking is that
22 members will use their online profiles to become part of an online community of people.
Major social networking sites include Facebook, Twitter, LinkedIn and FourSquare.

23 ⁴ Federal Communications Commission Mobile Annual Report and Analysis of
24 Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial
Mobile Services (adopted June 24, 2011) at 116, *available at*
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A1.pdf (last visited March
17, 2013).

25 ⁵ Maeve Duggan and Lee Rainie, *Cell Phone Activities 2012*, PEW INTERNET AND
26 AMERICAN LIFE PROJECT (November 25, 2012), *available at*
[http://pewinternet.org/Reports/2012/Cell-Activities/Additional-Demographic-
Analysis/Demographics.aspx](http://pewinternet.org/Reports/2012/Cell-Activities/Additional-Demographic-Analysis/Demographics.aspx) (last visited March 17, 2013).

27 ⁶ FCC Mobile Wireless Competition Report, *supra* note 4, at 21, 198.

1 developers.⁷ Apple, for example, maintains a store through which consumers can download
2 free and paid apps that work with Apple brand mobile devices such as the iPhone and iPad.
3 As of September 2010, there were over 250,000 applications available from the Apple App
4 Store.⁸ The total number of applications downloaded from Apple's App Store surpassed
5 6.5 billion by September 2010.⁹

6 57. A smart phone can cost anywhere from \$300 to \$700. As with basic cell
7 phones, purchase prices are usually subsidized if a user enters into a contract with a carrier
8 for a specified length of time.¹⁰ Monthly fees for smart phone service (which means they
9 include a data plan) range from under \$79 to \$199.

10 58. Smart phones are effectively a handheld computer, calendar, television,
11 camera (in many cases with flash), photo album, video recorder, and distribution network
12 combined into a single device. Smart phone owners can use the phones to access and post
13 content to blogs¹¹ and social networking sites, among other things. Most social networking
14 sites, including Facebook, permit the user to limit the content that the general public can
15 access. For example, Facebook users can restrict access to photos and personal information
16 they post to the site to only those they have designated as "Friends." The social networking
17 mobile application Path requires users to limit access to content they post to the site to a
18 maximum of 150 people who are also registered with the application.¹²

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21 _____
22 ⁷ *Id.* at 198.

23 ⁸ *Id.* at 20, 196.

24 ⁹ *Id.* at 20, 196.

25 ¹⁰ See *id.* at 66.

26 ¹¹ The term blog is short for "web log." A blog contains entries that are typically presented
27 in reverse chronological order and are self-edited. Many blogs contain RSS Feeds, which
28 notify users when content is updated.

¹² Wikipedia: *Path (social network)*, available at
[http://en.wikipedia.org/wiki/Path_\(social_network\)](http://en.wikipedia.org/wiki/Path_(social_network)) (last visited March 17, 2013).

Market Penetration of Cell Phones

59. Cell phones are a ubiquitous feature of modern life, and the vast majority of Americans own a cell phone. Market penetration rates have increased dramatically over the past decade.

60. In October of 2004, 66% of American adults owned cell phones.¹³

61. Just five years later that number increased dramatically: in 2009, 82% of American adults owned a cell phone.¹⁴ Seventeen percent of those 13 and older who owned a phone owned a smart phone.¹⁵

62. The number of adults who owned a cell phone remained relatively constant in 2010.¹⁶ But the percentage of those 13 and older who owned a smart phone increased to 27% in 2010.¹⁷ In May of 2011, the number increased slightly, with 83% of American adults owning cell phones (of those, 35% owned smart phones).¹⁸

¹³ Lee Rainie and Scott Keeter, *Americans and their cell phones: Data Memo: Findings*, PEW INTERNET AND AMERICAN LIFE PROJECT (April 3, 2006), available at <http://pewinternet.org/Reports/2006/Americans-and-their-cell-phones/1-Data-Memo-Findings/06-This-survey-and-the-state-of-the-cell-phone-population.aspx> (last visited March 17, 2013).

¹⁴ Amanda Lenhart, *Cell Phones and American adults: Overview*, PEW INTERNET AND AMERICAN LIFE PROJECT (September 2, 2010), available at <http://pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults/Overview.aspx> (last visited March 17, 2013).

¹⁵ comScore, *The 2009 U.S. Digital Year in Review* (February 2010) at 13, available at http://www.comscore.com/Insights/Presentations_and_Whitepapers/2010/The_2009_U.S._Digital_Year_in_Review (last visited March 17, 2013).

¹⁶ Lenhart, *supra* note 14, available at <http://pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults/Part-1-Adults-and-cell-phones-Ownership-and-use/Cell-ownership-in-the-United-States-remains-steady-since-2009.aspx> (last visited March 17, 2013).

¹⁷ comScore, *U.S. Digital Year in Review* (February 2011) at 25, available at http://www.comscore.com/Insights/Presentations_and_Whitepapers/2011/2010_US_Digital_Year_in_Review (last viewed March 17, 2013).

¹⁸ Aaron Smith, *Americans and Their Cell Phones: Key Findings*, PEW INTERNET & AMERICAN LIFE PROJECT (Aug. 15, 2011), available at <http://pewinternet.org/Reports/2011/Cell-Phones/Key-Findings.aspx> (last visited March 17, 2013).

63. In 2012, the number of adults who owned a cell phone had increased to 88%.¹⁹ Nearly every major demographic group – men and women, younger and middle-aged adults, urban and rural residents, the wealthy and the less well-off—experienced an increase in smartphone penetration between 2011 and 2012. As of February 2012, nearly half (46%) of Americans adults owned a smart phone.²⁰

64. These numbers are taken from surveys. If one looks only at the number of mobile subscriptions, the numbers similarly reflect explosive growth (but vary somewhat because some people have more than one mobile subscription at a time).²¹ In June 2004, there were 169.5 million mobile subscriptions in the United States.²² In June 2009, there were 276.6 million mobile subscriptions.²³ At the end of 2009 there were 49.8 million smartphones in service, up from 40.7 million in mid-2009.²⁴ As of June 2010, there were 292.8 million mobile subscriptions, which is a 94.9% penetration rate.²⁵ In June 2011, there were 306.3 million total subscriptions.²⁶ As of June 2012 there were 321.7 million

¹⁹ Aaron Smith, *Nearly half of American adults are smartphone owners*, PEW INTERNET & AMERICAN LIFE PROJECT (May 1, 2012), available at <http://pewinternet.org/Reports/2012/Smartphone-Update-2012/Findings.aspx> (last visited March 17, 2013).

²⁰ *Id.*

²¹ mobiThinking, *Global mobile statistics 2013*, available at <http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats/a#uniquesubscribers> (last visited March 17, 2013); see also FCC Mobile Wireless Competition Report, *supra* note 4, at 96.

²² CTIA – The Wireless Association, *Semi-Annual Mid-Year 2012 Top-Line Survey Results* (2012), at 4, available at http://files.ctia.org/pdf/CTIA_Survey_MY_2012_Graphics-final.pdf (last visited March 17, 2013).

²³ *Id.*

²⁴ FCC Mobile Wireless Competition Report, *supra* note 4, at 99.

²⁵ CTIA – The Wireless Association, *supra* note 22, at 4; United States Census 2010, *2010 Census Data*, available at <http://www.census.gov/2010census/data/> (last visited March 17, 2013).

²⁶ CTIA – The Wireless Association, *supra* note 22, at 4.

1 mobile phone subscriptions in the U.S., which is a 101% penetration rate²⁷ (the census
2 bureau estimated the 2012 United States population at just under 314 million people,
3 approximately 24% of whom are adults).²⁸

4 65. A significant percentage of the U.S. population is wireless-only, which
5 means that they do not have a landline telephone and rely exclusively on cell phones. As of
6 2011, 35.8% of U.S. households were wireless-only.²⁹ That is a meaningful increase from
7 the 26.6% of U.S. households that were wireless only in the first half of 2010.³⁰ Among
8 young adults aged 25-29, as of 2010 over half lived in wireless-only households.³¹

9 **Demographics of Cell Phone Users by Race, Age, Education Attainment, Household**
10 **Income and Urbanity**

11 66. As of December 2012, eighty-seven percent of adult whites, 86% of adult
12 African Americans, and 83% of adult Latinos owned a cell phone. Of those, 43% of
13 whites, 48% of African Americans, and 44% of Latinos owned a smart phone.³²

14 67. Of those age 18-49, 93% owed some kind of cell phone as of December
15 2012.³³ For those age 18-29, 65% own a smart phone. For those age 30-49, 59% own a
16 smart phone.

17 _____
18 ²⁷ CTIA – The Wireless Association, *Wireless Quick Facts*, available at
19 http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (last visited March 17,
20 2013).

21 ²⁸ United States Census Bureau, *State & County QuickFacts* (last revised March 14, 2013),
22 available at <http://quickfacts.census.gov/qfd/states/00000.html> (last visited March 17,
23 2013).

24 ²⁹ CTIA – The Wireless Association, *supra* note 27, citing Stephen J. Blumberg, Julian V.
25 Luke, *Wireless Substitution: Early release of estimates from the National Health*
26 *Interview Survey*, July-December 2011, National Center for Health Statistics, 2012,
27 available at <http://www.cdc.gov/nchs/data/nhsr/nhsr061.pdf> (last visited February 12,
28 2013).

³⁰ FCC Mobile Wireless Competition Report, *supra* note 4, at 207.

³¹ *Id.* at 21, 207.

³² Joanna Brenner, *Pew Internet: Mobile*, PEW INTERNET & AMERICAN LIFE PROJECT
(January 31, 2013), available at <http://pewinternet.org/Commentary/2012/February/Pew-Internet-Mobile.aspx> (last visited March 17, 2013).

³³ *Id.*

1 68. Of American adults who have not received a high school diploma, 71% own
2 a cell phone and 22% of those own a smart phone.³⁴ Of Americans who have graduated
3 from high school but never attended college, 86% own a cell phone and 38% of those own a
4 smart phone.³⁵ Eight-nine percent of Americans with some college attendance own a cell
5 phone and for 49% of them that phone is a smart phone.³⁶ Of Americans with a college
6 degree, 92% own a cell phone and for 61% of them that phone is a smart phone.³⁷

7 69. Eighty-two percent of American adults living in households with income of
8 less than \$30,000 per year own a cell phone, and of those, 31% own a smart phone.³⁸ In
9 households with incomes between \$30,000 and \$49,000, 88% of adults own a cell phone
10 and 46% of those phones are smart phones.³⁹ When household income falls between
11 \$50,000 and \$74,999, 91% of adults own a cell phone and, of those, 56% are smart
12 phones.⁴⁰ When household income exceeds \$75,000, 94% of adults own a cell phone and
13 68% of those phones are smart phones.⁴¹

14 Evolution of the Mobile Phone

15 70. The cell phone has miniaturized over time. While early mobile phones used
16 to weigh almost 90 pounds, advances in technology led eventually to mobile phones fitting
17 in (and sometimes being sold in) a briefcase or attaché case. Today's cell phones easily fit
18 in a pants pocket.⁴²

20 ³⁴ *Id.*

21 ³⁵ *Id.*

22 ³⁶ *Id.*

23 ³⁷ *Id.*

24 ³⁸ *Id.*

25 ³⁹ *Id.*

26 ⁴⁰ *Id.*

27 ⁴¹ *Id.*

28 ⁴² See, generally, Barry Wellman and Lee Rainie: *If Romeo and Juliet had mobile phones*,
MOBILE MEDIA AND COMMUNICATION 2013 1:66, at 168, available at
<http://mmc.sagepub.com/content/1/1/166> (last visited February 24, 2013).

1 71. Prior to 1973, mobile phones were limited to phones installed in cars and
2 other vehicles. In 1947, AT&T commercialized mobile telephone service. Calls were set
3 up manually by an operator and the call subscriber equipment weighed about 80 pounds.⁴³
4 The first fully automated mobile phone system for vehicles launched in Sweden in 1956
5 and was called MTA. It allowed calls to be made and received in the car using a rotary
6 dial. MTA phones weighed 88 pounds.⁴⁴

7 72. The first prototype handheld mobile phone was produced in 1973; it
8 weighed 2.5 pounds and measured 9 inches x 5 inches x 1.75 inches.⁴⁵ The first
9 commercially available handheld cellular phone was the Motorola DynaTAC 8000x, which
10 was released in 1983 and measured 13 inches x 1.75 inches x 3.5 inches.⁴⁶ It weighed 2
11 pounds and was nicknamed “The Brick.”⁴⁷

12 73. The Apple iPhone5 weighs just 3.95 ounces – less than one-sixteenth the
13 weight of “The Brick.”⁴⁸

14 74. The mobile phone has evolved in other ways as well. Mobile phones used to
15 function solely as a mode of communication with others. Early cell phones could make and
16 receive calls. Today, the phone is no longer just a means of communication with others but
17 also a medium of production, consumption, and distribution.⁴⁹ For some, the calling
18 capacity of the modern smartphone may be one of the least used functions. Modern cell

19 _____
20 ⁴³ Wikipedia, *History of mobile phones*, available at http://en.wikipedia.org/wiki/History_of_mobile_phones (last visited March 17, 2013).

21 ⁴⁴ *Id.*

22 ⁴⁵ *Id.*

23 ⁴⁶ Tech-FAQ, *The History of Cell Phones*, available at <http://www.tech-faq.com/history-of-cell-phones.html> (last visited March 18, 2013).

24 ⁴⁷ NBCNews.com, *First cell phone a true ‘brick’*, (last updated April 11, 2005), available at <http://www.nbcnews.com/id/7432915/> (last visited March 18, 2013).

25 ⁴⁸ Apple, *iPhone 5 Technical Specifications*, available at <http://www.apple.com/iphone/specs.html> (last visited March 18, 2013).

26 ⁴⁹ See, e.g., Lee Humphreys, *Mobile social media: Future challenges and opportunities*,
27 MOBILE MEDIA AND COMMUNICATION 2013 1:20 at p. 24, available at <http://mmc.sagepub.com/content/1/1/20> (last visited February 24, 2013).

1 phones do the job of a phone, computer, camera, video recorder, television, and distribution
2 network.

3 75. The cell phone is a medium of production because users can take pictures or
4 record video using their cell phones. As such, the modern cell phone functions not just as a
5 phone but as both a camera and a video recorder. Like a printing press, it is a medium
6 through which its user can generate creative content.

7 76. The cell phone is also medium of consumption because users can view
8 photos and videos, watch television and movies on their phones, and read magazines,
9 newspapers, blogs, and books. As such, the modern cell phone functions not just as a
10 phone but as a television and gateway to the library.

11 77. The cell phone is also medium of distribution because users can distribute
12 content, either self-created or created by others, to their contacts using their cell phone. As
13 such, the modern cell phone functions not just as a phone but as a distribution network, with
14 the potential reach of a traditional publishing house.

15 78. The cell phone in short is a movie camera, printing press, library reading list,
16 and powerful distribution network – all in a package weighing less than 4 ounces.

17 **Nature and Volume of Data Stored and Accessed on Cell Phones**

18 79. Cell phones are essentially tiny personal computers and contain as much,
19 and often more information than computers did in the 1990s. If an individual filled a pick-
20 up truck with books, the amount of text in the truck could be stored in a single gigabyte of
21 electronic storage.⁵⁰ According to one estimate, 32 gigabytes can hold more than 64,000
22
23

24
25 ⁵⁰ Brief of Amicus Curiae Electronic Frontier Foundation at 6, *State v. James Tyler Nix*, 349
26 Or. 663 (2011) (No. S058751), *dismissing review as improvidently allowed*, 350 Or. 298
27 (2011), *citing* Peter Lyman and Hal R. Varian, University of California Berkeley School
28 of Information, *How Much Information? 2003*,
<https://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm>
(last visited March 18, 2013).

1 Microsoft Word.doc pages, 19,200 photographs, or 2,048 MP3 audio files.⁵¹ Most
2 smartphones can carry at least 4 gigabytes of data, and the Apple iPhone 5 can store as
3 much as 64 gigabytes,⁵² or the equivalent of 64 pick-up trucks worth of books.

4 **Information about the user**

5 80. Smart phones contain a treasure trove of information about the user. This
6 includes information such as a log of phone calls, “contacts” or address book information,
7 voice mails, text messages, emails, photographs, videos, a record of where the user has
8 been (global positioning system, also known as “GPS,” a satellite-based navigation system),
9 software that allows users to track the location of their children, document editing
10 functions, access to personal or work documents stored remotely on a “cloud” (or remote
11 server), apps that provide access to the user’s social networking accounts or accounts at
12 banks and other financial institutions, and the user’s Internet browsing history, which can
13 reveal everything they were curious about lately, such as birth control information, forums
14 for individuals questioning their sexual orientation, or support groups for recovering
15 alcoholics.

16 81. If the user accesses work documents using a popular application like
17 DropBox,⁵³ every document the user views can be stored locally on the user’s cell phone, as
18 well as remotely on DropBox’s server. Thus, even though a user might expect some
19 measure of security and privacy for documents stored on her DropBox Account (because
20 DropBox requires a password to access documents), once she views a DropBox document
21
22

23 ⁵¹ *Id.*, citing CFGear, *How much data can a USB flash drive hold?*,
24 <http://www.cfgear.com/how-much-data-can-a-usb-flash-drive-hold/> (last visited March
18, 2013).

25 ⁵² Apple, iPhone 5 Technical Specifications, <http://www.apple.com/iphone/specs.html> (last
visited March 18, 2013).

26 ⁵³ Dropbox is a file hosting service that offers cloud storage, file synchronization, and client
27 software. Files placed in DropBox folders are accessible through mobile phone
applications. DropBox is one of the top 10 most popular iPhone applications of all time.

1 on her cell phone, a local copy of each document may be available on her phone and in turn
2 to anyone who gains access to her phone.

3 82. Phones can also contain detailed information about a user's whereabouts
4 over time. Cell phones necessarily transmit information about a user's location to the cell
5 phone provider. Wireless carriers provide coverage through a network of base stations that
6 connect wireless devices on the network to the regular telephone network. A cell phone
7 connects to the nearest base station, thereby transmitting its location to the wireless carrier.
8 Many smart phones are also equipped with GPS devices, which are able to determine the
9 phone's location. Accumulated location information effectively details the person's
10 movements over time. Some smart phones – often unbeknownst to the user – are
11 configured to store information on the user's location.⁵⁴ Anyone who gains access to such a
12 phone in turn gains access to a detailed and cumulative record of the user's location
13 information over time.

14 83. Cell phones can contain a user's personal financial information. Mobile
15 banking allows consumers to check account balances, pay bills, and transfer funds. For
16 example, banks such as Bank of America, Chase, and Citibank offer consumers text
17 message banking, access to accounts via the mobile web, and mobile banking
18 applications.⁵⁵ The use of cell phones to engage in private financial transactions is rapidly
19 increasing. Using data from March and April of 2012, the Pew Research Center's Internet
20 and American Life Project reported that 24% of all cell phone owners used their phone for
21 online banking.⁵⁶ When Pew surveyed how many cell phone users used their phone for
22 online banking just a few months later (in August and September of 2012), the number
23

24 ⁵⁴ Jennifer Valentino Devries, *iPhone Stored Location in Test Even if Disabled*, THE WALL
25 STREET JOURNAL, April 24, 2011, [available at](http://online.wsj.com/article/SB10001424052748704123204576283580249161342.html)
26 <http://online.wsj.com/article/SB10001424052748704123204576283580249161342.html>
(last viewed March 18, 2013).

27 ⁵⁵ FCC Mobile Wireless Competition Report, *supra* note 4, at 203.

28 ⁵⁶ Brenner, *supra* note 32.

1 increased to 29%.⁵⁷ Forty-four percent of those who own smart phones use their phone for
2 online banking.⁵⁸ Twenty-one percent of smart phone users do so on a typical day.⁵⁹
3 Online banking from a cell phone is especially prevalent among those ages 18-29, those
4 with higher levels of education, and among African-Americans and Hispanics.⁶⁰

5 84. The use of cell phones to manage access to private health information is
6 pervasive. Thirty-one percent of cell phone owners look for health or medical information
7 online using their cell phone;⁶¹ 52% of smart phone owners look for medical information on
8 their phones.⁶² Nineteen percent of smart phone owners have at least one health app on
9 their phone.⁶³ Health apps that survey respondents report using include apps to track
10 exercise, diet, weight, menstrual cycle, pregnancy, and medication management.⁶⁴

11 85. Phones can contain private communications about sexual matters. Fifteen
12 percent of adult cell owners have received a sexually suggestive nude or nearly nude
13 photograph or video of someone that they know on their cell phone.⁶⁵ People also use their
14 cell phones for online dating. Popular dating sites such as Match.com, e-Harmony, and
15

16
17 ⁵⁷ See Maeve Duggan and Lee Rainie, *Cell Phone Activities 2012*, PEW INTERNET &
18 AMERICAN LIFE PROJECT (November 25, 2012), *available at*
<http://pewinternet.org/Reports/2012/Cell-Activities/Main-Findings.aspx> (last visited
19 March 18, 2013).

20 ⁵⁸ Brenner, *supra* note 32.

21 ⁵⁹ *Id.*

22 ⁶⁰ Duggan and Rainie, *supra* note 5.

23 ⁶¹ *Id.*

24 ⁶² Susannah Fox and Maeve Duggan, *Mobile Health 2012*, PEW INTERNET & AMERICAN
25 LIFE PROJECT (November 8, 2012), *available at*
<http://pewinternet.org/Reports/2012/Mobile-Health/Key-Findings.aspx> (last visited
26 March 18, 2013).

27 ⁶³ *Id.*

28 ⁶⁴ *Id.*

⁶⁵ Aaron Smith, *The Best (and Worse) of Mobile Connectivity: Part V: Cell Phone Usage*,
PEW INTERNET & AMERICAN LIFE PROJECT (November 30, 2012), *available at*
<http://pewinternet.org/Reports/2012/Best-Worst-Mobile/Part-V/Activities.aspx> (last
visited March 18, 2013).

1 OKCupid all have apps for smart phones.⁶⁶ With the app, users can search for and
2 communicate with potential dating partners as well as upload photographs. Even users
3 without the app can receive emails from the dating site or from potential dating partners on
4 their smart phones. Some mobile dating applications are location-based. OKCupid added
5 location-based features to its mobile app so that users can be notified when other users are
6 physically close and can choose to communicate with them to suggest a meeting.⁶⁷ Grindr
7 is an all-male location-based social networking mobile app that allows users to locate other
8 men within close proximity. Grindr advertises itself “as anonymous as you want it to be”
9 because how much information other people see is up to each user.⁶⁸

10 86. Cell phones can also be used for shopping. Some vendors have designed
11 mobile websites that allow consumers to purchase products via the mobile web, while
12 others allow consumers to make purchases via text message.⁶⁹ For example, eBay offers
13 applications for cell phones which allow consumers to buy and sell products through its
14 website, and eBay generated \$600 million through mobile commerce in 2009.⁷⁰

15 87. For some adults, their cell phone has replaced their desktop or laptop
16 computer: 17% of all adult cell phone owners use their cell phone for most of their internet
17
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19

20 ⁶⁶Match.com, available at <http://www.match.com/mobile/index.aspx> (last visited March 18,
21 2013); eHarmony.com, *eHarmony Announces a Mobile App*, available at
22 [http://www.eharmony.com/dating-advice/using-eharmony/eharmony-announces-a-](http://www.eharmony.com/dating-advice/using-eharmony/eharmony-announces-a-mobile-app/)
[mobile-app/](http://www.okcupid.com/mobile-apps) (last visited March 18, 2013); okcupid.com, available at
<http://www.okcupid.com/mobile-apps> (last visited March 18, 2013).

23 ⁶⁷ See Google play, Okcupid, available at
24 <https://play.google.com/store/apps/details?id=com.okcupid.okcupid> (last visited March
25 18, 2013); see also Brenna Ehrlich, *Geo-Dating: OKCupid Adds Location to Mobile App*,
MASHABLE.COM (July 11, 2011), available at [http://mashable.com/2011/07/11/okcupid-](http://mashable.com/2011/07/11/okcupid-location-mobile-app/)
[location-mobile-app/](http://mashable.com/2011/07/11/okcupid-location-mobile-app/) (last visited March 18, 2013).

26 ⁶⁸ Grindr.com, available at <http://grindr.com/learn-more> (last visited March 18, 2013).

27 ⁶⁹ FCC Mobile Wireless Competition Report, *supra* note 4, at 203.

28 ⁷⁰ *Id.* at 204.

1 usage, as opposed to using a desktop or laptop computer.⁷¹ Most do so for convenience, but
2 for 10% their phone is their only option for online access.⁷²

3 **Information about the people with whom the user associates**

4 88. Both basic and smart phones also contain a wealth of information about the
5 people with whom the user associates.

6 89. Basic phones contain a user's contact information, historical incoming and
7 outgoing call records, voicemails from third parties, as well as text messages sent to and
8 received from the people with whom the user communicates.

9 90. Smart phones store the voice mails, text messages, emails, and documents
10 composed and sent to the user *by others*. Using stored passwords to access social
11 networking sites, a third party with access to the phone could access the social networking
12 profile pages of the user's associates. Such pages usually contain, at a bare minimum,
13 photos and messages.

14 91. The privacy risks for both users and their associates are particularly acute
15 when the phone's location function is utilized in conjunction with social networking sites.
16 In these circumstances, comprehensive information not just about the user's location, but
17 also of all of the user's associates, is available on the phone, and in turn to anyone who
18 gains access to the phone.

19 92. For example, if the user is on Facebook, Facebook Place is a feature that
20 allows a user to tag herself and, if she chooses, any of her Facebook "Friends" in a
21 particular location at a particular time. The location information about the user's contacts is
22 then available through the phone, even though the user's contacts have taken no affirmative
23 steps to record their location other than being Facebook "Friends" with the user.

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25 _____
26 ⁷¹ Aaron Smith, *Cell Internet Use 2012*, PEW INTERNET & AMERICAN LIFE PROJECT (June
26 26, 2012), *available at* <http://pewinternet.org/Reports/2012/Cell-Internet-Use-2012.aspx>
(last visited March 18, 2013).

27 ⁷² *Id.*

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1 93. As another example, if the user is registered with FourSquare (a social
2 networking site that combines GPS and location features, allowing users to see where their
3 friends are located at any time), a third party with access to the phone could access the past
4 and present locations of the user and her contacts who are also registered with FourSquare.

5 94. As a final example, for those users registered with Path, Path has a health
6 feature that allows users to post specific information about their workouts, such as when
7 they are currently on a run, the specific route they took when they went for a run, and
8 exactly how long it took them to run that route. A third party with access to the phone
9 could learn that the user's contact was currently on a run and would also be able to view the
10 exact route the user or one of their contacts had taken either that same day or perhaps
11 several weeks ago.

12 **Increases in storage and bandwidth**

13 95. Not only has the storage capacity of cell phones increased dramatically, but
14 the bandwidth⁷³ has also increased. 3G networks can typically download data at a rate of
15 around 800 to 950 kilobits per second; realistic download speeds for 4G networks can range
16 anywhere from 3 to 8 megabits per second; and 4G LTE networks can download data at
17 speeds between 5 and 12 megabits per second.⁷⁴ As an example, (1) the fastest 2G phones
18 can download a 3-minute song in approximately 8 minutes, (2) 3G networks have the
19 potential to download a 3-minute song in approximately 15 seconds, (3) a 4G phone can
20 download a 3 minute song in approximately 4 seconds, and (4) a 4G LTE phone can
21 download a 3 minute song in approximately 2 seconds. The increase in bandwidth means
22 that people are more likely to download and view content on their cell phones (because the
23 content will load faster), such as private documents, spreadsheets, and presentations stored

24 _____
25 ⁷³ Bandwidth refers to the rate of data transfer and affects the amount of data that can be
relayed in a given period of time.

26 ⁷⁴ See J.D. Biersdorfer, *Q&A: The Difference Between 4G and 4G LTE*, N.Y.TIMES.COM,
27 March 26, 2012, available at <http://gadgetwise.blogs.nytimes.com/2012/03/26/qa-the-need-for-speed/> (last visited February 21, 2013).

1 on DropBox, emails with large attachments, and streaming video. Available data suggests
2 that people are, in fact, viewing more content on their phones. One analyst estimates that
3 average monthly data traffic per subscriber grew 78% from 2008 to 2009.⁷⁵

4 96. Along with the storage capacity and bandwidth, the processing power of cell
5 phones has also increased. Together, the increase in storage capacity, processing power,
6 and bandwidth available to the average cell phone makes it more likely that people will
7 access and store sensitive information (and a large amount of it) on their cell phone.

8 97. One study, based on 2010 data, found that: (1) 46.7% of U.S. cell phone
9 users over 13-years-old accessed mobile media (browsed, accessed applications,
10 downloaded content or accessed the mobile Internet); (2) 52% took photographs using their
11 cell phone; (3) 24.7% accessed a social media site or blog using their cell phone; and (4)
12 11.4% of U.S. cell phone users accessed their bank accounts via their cell phone.⁷⁶

13 98. In just two years, the numbers increased dramatically. In 2012, according to
14 a survey by the Pew Research Center, (1) 55% of adult cell owners accessed the internet on
15 their mobile phones; (2) 82% of cell phone users took pictures using their phone; (3) 40%
16 of cell phone owners accessed social networking sites on their phone and (4) 24% of all cell
17 phone owners used their phone for online banking.⁷⁷

18 **Future of Cell Phones**

19 99. Cell phones are increasingly capable of sensing and monitoring (and storing
20 information about) an ever-expanding number of features of their environment.

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23 ⁷⁵ FCC Mobile Wireless Competition Report, *supra* note 4, at 11.

24 ⁷⁶ mobiThinking, *Global mobile statistics 2012*, available at
25 <http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats/d#mobilebehavior>
(last visited March 18, 2013); comScore, *The 2010 Mobile Year in Review* (February
26 http://www.comscore.com/Insights/Presentations_and_Whitepapers/2011/2010_Mobile_Year_in_Review (last visited March 18, 2013).

27 ⁷⁷ Brenner, *supra* note 32.

1 100. The iPhone 3GS came equipped with a digital compass (magnetometer),
2 which can sense magnetic direction relative to the Earth's poles. The iPhone 4 introduced a
3 gyroscopic sensor that detects 3-axis angular acceleration around the X, Y and Z axes,
4 enabling precise calculation of yaw, pitch, and roll. The gyroscope complements the
5 accelerometer, a sensor that has been present since the original iPhone, which detects the
6 device's acceleration, shake, vibration, shock, or fall by detecting linear acceleration among
7 one of three axes (X, Y and Z). The combined data from the accelerometer and gyroscope
8 provides detailed and precise information about the device's 6-axis movement in space and
9 enable the device to recognize how far, fast, and in which direction it has moved in space.⁷⁸
10 As such, the phone senses, and records, whether at any particular point in time the user is
11 driving, walking, running, or riding a bicycle. Law enforcement with access to the phone
12 could determine not only where a person went, but how they traveled there.

13 101. Some cell phones can also be used to monitor heart rate, insulin levels, and
14 ambient air quality.

15 102. An emerging trend is the use of cell phones to replace credit cards and cash
16 by making on-the-spot payments at physical retail locations. There are different
17 technologies used to make these mobile payments. Contactless and NFC technologies use a
18 microchip that can be integrated into a mobile device in a number of different ways. In
19 contrast to the magnetic strip on a typical credit card, embedded contactless and NFC chips
20 could be used to store additional personal information, including a driver's license, an
21 employment badge, and health insurance information, thus turning a mobile device into a
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26 ⁷⁸Daniel Eran Dilger, *Inside iPhone 4: Gyro spins Apple ahead in gaming*, APPLE INSIDER,
27 http://appleinsider.com/articles/10/06/16/inside_iphone_4_gyro_spins_apple_ahead_in_gaming/page/2 (last visited March 18, 2013).

1 fully enabled digital wallet.⁷⁹ In late 2012, Starbucks announced that it would begin
2 accepting mobile payments at approximately 7,000 U.S. stores.⁸⁰

3 103. Smart phones can already start and control automobiles, and in the next five
4 years, they may be able to remotely control home appliances.

5 **Role of Texting in American Society**

6 104. A text message is a brief electronic communication sent and received by a
7 cellular phone. It usually involves typing words, often in shortened form, on the phone's
8 numeric or QWERTY keypad, although it can include image, video, and sound content.

9 105. The practice of using cell phones to send and receive text messages
10 ("texting") has been steadily increasing (at the expense of calling), and is currently most
11 popular with minorities and young people. Texting has become an important way to
12 participate in politics, including a way to contribute to political campaigns, and texting has
13 profoundly changed the lives of the deaf and hard of hearing.

14 106. Texting is nearly universal among adult cell phone owners aged 18-29; 97%
15 of them do so.⁸¹

16 107. In December 2007, 58% of adults who owned a cell phone texted.⁸²

17 108. By 2010, 72% of adults 18 and older who owned a cell phone texted.⁸³
18 Among adults aged 18-24, 18% sent and received more than 200 text messages per day.⁸⁴

19 _____
20 ⁷⁹ FCC Mobile Wireless Competition Report, *supra* note 4, at 204-205.

21 ⁸⁰ Owen Thomas, *Square And Starbucks Just Launched Their Mobile Payment Service in*
22 *7,000 Stores*, BUSINESS INSIDER, November 8, 2012, available at <http://www.businessinsider.com/square-starbucks-launch-payments-2012-11> (last visited
March 18, 2013).

23 ⁸¹ Duggan and Rainie, *supra* note 5.

24 ⁸² Amanda Lenhart, *Cell phones and American adults*, PEW INTERNET & AMERICAN LIFE
25 PROJECT (September 2, 2010), available at <http://pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults/Part-1-Adults-and-cell-phones-Ownership-and-use/Uses-of-the-phone.aspx> (last visited March 18, 2013).

26 ⁸³ Lenhart, *supra* note 82; FCC Mobile Wireless Competition Report, *supra* note 3, at 96,
199.

27 ⁸⁴ Lenhart, *supra* note 82.

1 109. In 2011, the number of adults who owned a cell phone that texted increased
2 slightly to 73%.⁸⁵ Users sent or received an average of 41.5 messages on a typical day, with
3 the median user sending or receiving 10 texts daily.⁸⁶

4 110. In April 2012, the number of adult cell phone users who reported texting
5 jumped to 79%.⁸⁷ Once data from August and September 2012 was added, that number
6 increased to 80%.⁸⁸

7 111. For the six month period ending in June 2005, the average number of text
8 messages per user per month was 29 and the average number of MMS (photo, video, and
9 other multimedia) messages was 0.3.⁸⁹ For the six month period ending December 2009,
10 the average number of text messages per user per month was 488 and the average number
11 of MMS messages was 14.4.⁹⁰

12 112. Forty-five percent of 21 to 50 year-olds polled reported that they preferred
13 texting to voice calling.⁹¹ Eighty percent of respondents in one survey indicated that text
14 messaging was their preferred way to communicate with friends.⁹²

15 113. African American and Hispanic cell phone users their phone's various
16 capabilities (calling, texting, accessing the internet, and the like) more frequently than
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19 ⁸⁵ Aaron Smith, *Americans and Text Messaging*, PEW INTERNET & AMERICAN LIFE PROJECT
20 (September 19, 2011), available at <http://pewinternet.org/Reports/2011/Cell-Phone-Texting-2011.aspx> (last visited March 18, 2013).

21 ⁸⁶ *Id.*

22 ⁸⁷ Brenner, *supra* note 32.

23 ⁸⁸ *Id.*

24 ⁸⁹ FCC Mobile Wireless Competition Report, *supra* note 4, at 12, 116.

25 ⁹⁰ *Id.* at 12, 114.

26 ⁹¹ NetBlueweb, *Text Message Marketing*, available at [http://netblueweb.com/services/text-](http://netblueweb.com/services/text-message-marketing)
27 [message-marketing](http://netblueweb.com/services/text-message-marketing) (last visited March 18, 2013).

28 ⁹² Greg Prescott, *Text Messaging Statistics*, TSG GLOBAL, INC. (April 8, 2012), available at
<http://blog.tsgglobal.com/bid/80894/Text-Messaging-Statistics> (last visited March 18,
2013).

whites. Minorities send more text messages than whites.⁹³ Young adults text more than older adults.⁹⁴

114. Political campaigns use text messages to update supporters (who opt-in to receive texts) on key issues, organize rallies, notify supporters of volunteer opportunities and fundraising events, solicit donations, and to remind people to vote on Election Day. One 2007 study showed that political text message reminders increased a new voter's likelihood of voting by 4.2 percentage points.⁹⁵

115. In June of 2012, the Federal Election Commission allowed political campaigns to accept contributions via text message, and 10% of 2012 presidential campaign donors contributed via text message or cell phone application.⁹⁶

116. Twenty-seven percent of registered voters who own a cell phone used their phone in the 2012 election cycle to keep up with news related to the election or political news generally. Of these, three quarters send and receive text messages generally and within this group 19% sent text messages related to the 2012 campaign to friends, family, and others.⁹⁷ In 2010, 10% of adults sent text messages relating to the election to friends, family, and others.⁹⁸

⁹³ Duggan and Rainie, *supra* note 5.

⁹⁴ Smith, *supra* note 85.

⁹⁵ Allison Dale and Aaron Strauss, *Mobilizing the Mobiles: How Text Messaging Can Boost Youth Voter Turnout* (September 6, 2007), available at <http://graphics.nytimes.com/images/promos/politics/blog/12blog-textstudy.pdf> (last viewed March 18, 2013).

⁹⁶ Aaron Smith and Maeve Duggan, *Presidential Campaign Donations in the Digital Age*, PEW INTERNET & AMERICAN LIFE PROJECT (October 25, 2012), available at <http://pewinternet.org/Reports/2012/Election-2012-Donations.aspx> (last viewed March 18, 2013).

⁹⁷ Aaron Smith and Maeve Duggan, *The State of the 2012 Election – Mobile Politics*, PEW INTERNET & AMERICAN LIFE PROJECT (October 9, 2012), available at <http://pewinternet.org/Reports/2012/Election-2012-Mobile/Overview.aspx> (last visited March 18, 2013).

⁹⁸ Aaron Smith and Lee Rainie, *Politics goes mobile*, PEW INTERNET & AMERICAN LIFE PROJECT (December 23, 2010), available at <http://pewinternet.org/Reports/2010/Mobile-Politics.aspx> (last visited March 18, 2013).

1 117. Political activists often rely heavily on text messaging and social media as an
2 organizing method to coordinate protest activities and connect individuals. One example is
3 the Occupy movement. When New York City evicted Occupy protesters from Zuccotti
4 park on November 15, 2011, more than 4,000 people received the text message:
5 “URGENT: Hundreds of police mobilizing around Zuccotti. Eviction in progress!” because
6 they had signed up for Occupy Wall Street text alerts.⁹⁹ Coordinated through TextOccupy,
7 Occupy groups have created “cells” on a mass-text social network called Celly.¹⁰⁰ Occupy
8 protesters have also created Facebook sites to coordinate protests and share information,
9 utilized Twitter to update the public, and livestreamed General Assembly meetings.¹⁰¹
10 Videos of police brutality, often taken on cell phones, and uploaded to YouTube and
11 Facebook (such as the video of campus police pepper spraying seated and peaceful
12 protesters at the University of California at Davis) build support for the movement.¹⁰²

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15 ⁹⁹ See Jonathan Massey & Brett Snyder, *Mapping Liberty Plaza*, THE DESIGN OBSERVER
16 GROUP (posted September 17, 2012), *available at*
17 <http://places.designobserver.com/feature/mapping-liberty-plaza-zuccotti-park/35948/> (last
18 visited March 18, 2013); see also The Lucie, *Occupy SMS: The Revolution will be texted*,
COOL REVOLUTION (January 9, 2012), *available at*
<http://coolrevolution.net/2012/01/09/occupy-sms-the-revolution-will-be-texted/> (last
visited March 18, 2013).

19 ¹⁰⁰ See Adrienne Jeffries, *Celly: A Mass-Text Social Network for the Occupy Wall Street*
20 *Movement*, BETABEAT.COM (November 18, 2011), *available at*
[http://betabeat.com/2011/11/celly-a-mass-text-social-network-for-the-occupy-wall-street-](http://betabeat.com/2011/11/celly-a-mass-text-social-network-for-the-occupy-wall-street-movement/)
movement/ (last visited March 18, 2013).

21 ¹⁰¹ See Jennifer Preston, *Social Media Gives Wall Street Protests a Global Reach*, N.Y.
22 TIMES, October 15, 2011, *available at*
[http://mediadecoder.blogs.nytimes.com/2011/10/15/social-media-gives-wall-street-](http://mediadecoder.blogs.nytimes.com/2011/10/15/social-media-gives-wall-street-protests-a-global-reach/)
23 *protests-a-global-reach/* (last visited March 18, 2013); see also Chenda Ngak, *Occupy*
24 *Wall Street uses social media to spread nationwide*, CBS NEWS, October 13, 2011,
available at http://www.cbsnews.com/8301-501465_162-20117291-501465.html (last
visited March 18, 2013).

25 ¹⁰² See Jennifer Preston, *Protesters Look for Ways to Feed the Web*, N.Y. TIMES, November
26 24, 2011, *available at* [http://www.nytimes.com/2011/11/25/business/media/occupy-](http://www.nytimes.com/2011/11/25/business/media/occupy-movement-focuses-on-staying-current-on-social-networks.html?_r=2&)
27 *movement-focuses-on-staying-current-on-social-networks.html?_r=2&* (last visited
March 18, 2013); Wikipedia, *UC Davis pepper-spray incident*, *available at*
http://en.wikipedia.org/wiki/UC_Davis_pepper-spray_incident (last visited March 18,
2013).

1 Occupiers are also still in the process of developing their own social media called The
2 Global Square, which resembles Facebook but is restricted to the Occupy network.¹⁰³

3 118. Many individuals with basic phones can send text messages or call but
4 cannot email contacts using their phones. Texting on a basic cell phone is thus a critical
5 mode of communication for those who cannot afford a more expensive smart phone or a
6 data plan. Sixty-eight percent of those living in households earning \$75,000 or more own
7 smart phones (as compared to 45% of Americans overall).¹⁰⁴ For adults who own a cell
8 phone but have not yet upgraded to a smart phone, 37% cite cost as the main barrier.¹⁰⁵
9 Only 39% of those making less than \$30,000 per year use their cell phones to send and
10 receive email, as compared to 70% of those earning more than \$75,000 per year.¹⁰⁶

11 119. Texting has profoundly changed the lives of the deaf and hard of hearing,
12 allowing them to communicate more easily. Texting has become the norm for those who
13 are deaf or hard of hearing. Several U.S. cellular companies, including Verizon Wireless
14 and AT&T, offer plans that cater to the deaf and hard of hearing. Verizon has a text-only
15 plan that includes unlimited messaging, web browsing, data usage, and email.¹⁰⁷

19 ¹⁰³ See Sean Captain, *Occupy Geeks Are Building a Facebook for the 99%*, WIRED.COM,
20 December 27, 2011, available at <http://www.wired.com/threatlevel/2011/12/occupy-facebook/all/1> (last visited March 18, 2013).

21 ¹⁰⁴ Lee Rainie, *Smartphone Ownership Update: September 2012*, PEW INTERNET &
22 AMERICAN LIFE PROJECT (September 11, 2012), available at
<http://pewinternet.org/Reports/2012/Smartphone-Update-Sept-2012.aspx> (last visited
March 18, 2013).

23 ¹⁰⁵ Aaron Smith, *The Best (and Worst) of Mobile Connectivity*, PEW INTERNET & AMERICAN
24 LIFE PROJECT (November 30, 2012), available at
<http://pewinternet.org/Reports/2012/Best-Worst-Mobile/Key-Findings.aspx> (last visited
25 March 18, 2013).

26 ¹⁰⁶ Duggan and Rainie, *supra* note 5.

27 ¹⁰⁷ See Associated Press, *For Deaf, Texting Offers New Portal to World*, CBSNEWS.COM,
28 September 20, 2010, available at http://www.cbsnews.com/2100-205_162-6883857.html
(last visited March 18, 2013).

1 **Constant Connectivity Through Cell Phones**

2 120. Contemporary society is one of constant connectivity. Phones are not
3 merely an electronic device, but a lifeline to the world and work.

4 121. Users carry their mobile devices with them wherever and whenever they go,
5 including to the bathroom and to bed. Ninety-one percent of all U.S. cell phone users keep
6 their phones within arm's reach at all times.¹⁰⁸

7 122. In 2010, 65% of adults with cell phones reported that they had slept with
8 their cell phone on or right next to their bed.¹⁰⁹ In 2012, 50% of smart phone owners
9 reported that they slept next to their phone specifically so they would not miss calls, alerts,
10 and texts during the night¹¹⁰ while 44% of all cell phone owners did so.¹¹¹

11 123. One study conducted in 2011 inquired whether respondents would be willing
12 to give up their mobile phone for a week. Twenty-one percent of respondents were more
13 willing to give up brushing their teeth for a week than their mobile phone.¹¹²

14 124. Users rely on cell phones for important personal purposes:

15 a. Cell phones provide important socio-emotional support by allowing families
16 and friends to communicate when they would otherwise be isolated from
17 each other.¹¹³

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19 ¹⁰⁸ Prescott, *supra* note 92.

20 ¹⁰⁹ Lenhart, *supra* note 14.

21 ¹¹⁰ Smith, *supra* note 105.

22 ¹¹¹ Aaron Smith, *The Best (and Worst) of Mobile Connectivity*, PEW INTERNET & AMERICAN
23 LIFE PROJECT (November 30, 2012), available at
24 [http://pewinternet.org/Reports/2012/Best-Worst-Mobile/Part-IV/Your-cell-phone-and-](http://pewinternet.org/Reports/2012/Best-Worst-Mobile/Part-IV/Your-cell-phone-and-you.aspx)
25 [you.aspx](http://pewinternet.org/Reports/2012/Best-Worst-Mobile/Part-IV/Your-cell-phone-and-you.aspx) (last visited March 18, 2013).

26 ¹¹² Telenav.com (August 3, 2011), available at [http://www.telenav.com/about/pr/pr-](http://www.telenav.com/about/pr/pr-20110803.html)
27 [20110803.html](http://www.telenav.com/about/pr/pr-20110803.html) and [http://www.telenav.com/about/pr-summer-travel/report-](http://www.telenav.com/about/pr-summer-travel/report-20110803.html)
28 [20110803.html](http://www.telenav.com/about/pr-summer-travel/report-20110803.html) (last visited March 18, 2013).

29 ¹¹³ See JAMES E. KATZ AND MARK AAKHUS, PERPETUAL CONTACT 8 (2002); see also Ran
30 Wei: *Mobile media: Coming of age with a big splash*, MOBILE MEDIA AND
31 COMMUNICATION 2013 1:50 at 53, available at <http://mmc.sagepub.com/content/1/1/50>
32 (last visited February 24, 2013).

1 b. Parents in particular rely on cell phones to stay in contact with their children
2 throughout the day and to schedule their children's activities.¹¹⁴ Parents are
3 more likely to own a cell phone than non-parents, and are more likely to
4 make 5 or more calls per day than non-parents. They are also more likely to
5 have slept with their phone on or near their bed, and to use the phone for
6 talking for all types of purposes.¹¹⁵

7 c. Cell phones are important for safety. Users rely on cell phones for security
8 and in case of emergency, such as if their car breaks down or they are
9 walking on a dark street at night.¹¹⁶ Ninety one percent of cell owners report
10 that their cell phone makes them feel safer.¹¹⁷ As of June 2012, more than
11 396,000 calls to 911 were made each day from cell phones.¹¹⁸

12 125. People also rely on cell phones for important professional purposes.
13 Technology has heightened expectations of an immediate response. As a result, people
14 carry (and are sometimes required to carry) their cell phones for work purposes.

15 126. Lawyers, for example, routinely engage in and have access to confidential
16 attorney-client and attorney work product information on their phones. Many associates at
17 law firms are required to carry a smart phone.

18 127. Communicating with patients using mobile devices is a growing trend
19 among healthcare providers. Doctors frequently access, store and send confidential
20 information about patients on their cell phones (although failing to encrypt such
21

22 ¹¹⁴ Amanda Lenhart, *Cell phones and American adults*, PEW INTERNET & AMERICAN LIFE
23 PROJECT (September 2, 2010), *available at*
24 <http://www.pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults/Overview.aspx> (last visited March 18, 2013); see also KATZ AND AAKHUS, *supra*
 note 113, at 87.

25 ¹¹⁵ Lenhart, *supra* note 114.

26 ¹¹⁶ Lenhart, *supra* note 114; see also KATZ AND AAKHUS, *supra* note 113, at 8, 119.

27 ¹¹⁷ Lenhart, *supra* note 114.

28 ¹¹⁸ CTIA – The Wireless Association, *supra* note 27.

1 information or take other administrative or physical safeguards could violate the Health
2 Insurance Portability and Accountability Act). An estimated 81% of 2,041 physicians
3 surveyed use personal mobile devices to access protected health information, such as
4 patient records.¹¹⁹ Doctors also rely on their cell phones (as well as pagers) to be reachable
5 in the event of an emergency.

6 128. Cell phones and the remote access they provide is especially important for
7 those whose jobs take them outside of an office with a desktop computer. For example,
8 journalists often work away from their office, as do lawyers who have frequent appearances
9 in far-flung courthouses. Moreover, bloggers, who can publish from their cell phones, are
10 increasingly breaking major news stories or offering their blogs to the public as an
11 alternative and independent source of news. Twitter is often the place for breaking news.

12 **Third-party access to cell phone contents**

13 129. All of the information a user can access on her cell phone could also be
14 accessed by a third party who gains access to the phone, such as law enforcement
15 conducting a warrantless search of the phone incident to an arrest of the user.

16 130. Some users configure their phones to require a password before it may be
17 accessed. Such a user must take the inconvenient, affirmative step of inputting the
18 password each time she wishes to use their phone, thus trading a degree of useability for
19 privacy.

20 131. Although such a user may believe that the password provides protection
21 from unauthorized access, in many cases it does not. Commercially available forensics
22 tools can readily crack typical smartphone passwords and PINs, sometimes in a matter of
23 seconds.¹²⁰ Password cracking tools are widely available to government and private

24 ¹¹⁹ Health Research Institute, PWC, *Old data learns new tricks: Managing patient privacy*
25 *and security on a new data-sharing playground*, (September 2011), available at
26 <http://pwchealth.com/cgi-local/hregister.cgi?link=reg/old-data-learns-new-tricks.pdf> (last
visited March 18, 2013).

27 ¹²⁰ Andy Greenberg, *Here's How Law Enforcement Cracks Your iPhone's Security Code*,
FORBES, March 27, 2012, available at

(continued...)

1 entities.¹²¹ Commercial forensics tools can also download and decrypt the phone's data,
2 including but not limited to location information, text messages and emails, call logs, and a
3 log of keystrokes typed into the phone.¹²²

4 132. As illustrated by the search of Offer-Westort's phone, if law enforcement is
5 permitted to engage in an unsupervised search of an arrestee's cell phone, the access it
6 gains will not be limited to information only about a particular topic (because email or text
7 messages on the phone for example will address the entire range of issues about which the
8 user was communicating), or to information only about the user (because the phone
9 contains information about the people with whom the user associates, *see supra* ¶¶ 88-94),
10 or indeed even to information that was on the phone at the time of the arrest (because
11 phones constantly receive updated information as long as they are connected to the cellular
12 network, as reflected by Defendants' review of text messages that were sent after Plaintiff
13 Offer-Westort's arrest).

14 **Weapons and Preservation of Evidence**

15 133. A cell phone is not a weapon or a threat to officer safety.

16 134. Law enforcement does not need to search the cell phones of arrestees
17 immediately after they make the arrest in order to prevent the loss or destruction of
18 potential evidence.

19 135. In many if not most cases, an arrestee's cell phone will not even contain
20 evidence of the crime of arrest, or any other crime.

21 136. Even if an officer does have reason to believe that an arrestee's phone
22 contains relevant evidence, there is no need to conduct a warrantless search of it.

23
24 (...continued)

25 <http://www.forbes.com/sites/andygreenberg/2012/03/27/heres-how-law-enforcement-cracks-your-iphones-security-code-video/> (last visited March 18, 2013).

26 ¹²¹ See <http://www.elcomsoft.com/eppb.html>; see also <http://www.msab.com/sales/buy-xry>.

27 ¹²² Greenberg, *supra* note 120; <http://www.cellebrite.com/mobile-forensic-products/ufed-touch-ultimate.html>

1 137. Remote wiping programs cannot delete data unless the user takes an
2 affirmative action to trigger the deletion, for example, by signing into an online account,
3 which would be difficult to do while in custody.

4 138. If law enforcement is concerned that evidence could be destroyed while they
5 were obtaining a warrant, they can take simple steps to prevent this from happening.
6 Because remote wiping programs operate by sending a signal to the phone to delete
7 information, the phone must be connected to the cellular network or a nearby wifi network
8 for them to work. Remote wiping programs can thus be defeated by placing cell phones
9 seized from arrestees in a “Faraday Bag,” a container that prevents the phone from
10 receiving outside communications and maintains the integrity of the phone for evidentiary
11 purposes.¹²³ Faraday bags are inexpensive and currently in widespread use by law
12 enforcement. Alternatively, remote wiping programs can be defeated by simply turning the
13 phone off and removing its battery.

14 **INJUNCTIVE AND DECLARATORY RELIEF ALLEGATIONS**

15 139. An actual, existing, and substantial controversy exists between Plaintiffs and
16 Defendants as to the legality of warrantless cell phone searches incident to arrest in
17 circumstances where no exigency is present. Plaintiffs contend that such searches violate
18 the California Constitution and that Defendants’ expenditures made in connection with such
19 searches constitute an illegal expenditure and a waste of public funds. Defendants have
20 engaged and continue to engage in such searches. Unless the Court issues an appropriate
21 declaration of the respective rights and responsibilities of the parties with reference to such
22 cell phone searches, the legal status of Defendants’ actions will remain uncertain, and there
23 will continue to be disputes and controversies surrounding the legality of the searches.

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25 ¹²³ Brief of Amicus Curiae Electronic Frontier Foundation at 17, *State v. James Tyler Nix*,
26 349 Or. 663 (2011) (No. S058751), *dismissing review as improvidently allowed*, 350 Or.
27 298 (2011), *citing to* “Faraday cage,” Wikipedia,
https://secure.wikimedia.org/wikipedia/en/wiki/Faraday_cage (last visited March 18,
2013); <http://www.amazon.com/Black-Hole-Faraday-Bag-Isolation/dp/B0091WILY0>;
<http://www.faradaybag.com/>.

1 Declaratory relief is therefore necessary and appropriate under Code of Civil Procedure
2 section 1060.

3 140. By searching the contents of the cell phones of arrestees without a warrant
4 and in situations that lack exigency, Defendants have violated and continue to violate
5 arrestees' and their associates' right to privacy, arrestees' and their associates' right to be
6 free from unreasonable searches and seizures, and arrestees' and their associates' rights to
7 freedom of speech and association as guaranteed by Article I, Sections 1, 2, 3, and 13 of the
8 California Constitution and the First Amendment of the United States Constitution.

9 141. Defendants' willful disregard of arrestees' constitutional rights and the
10 constitutional rights of their associates has resulted in irreparable harm to them, and unless
11 Defendants' conduct is permanently enjoined, Defendants will continue to inflict
12 irreparable harm.

13 142. By searching arrestees' cell phones without first obtaining a warrant,
14 Defendants have illegally and wastefully expended public funds in violation of Article I,
15 Sections 1, 2, 3, and 13 of the California Constitution and the First Amendment of the
16 United States Constitution.

17 143. Plaintiffs are therefore entitled to a permanent injunction under Code of
18 Civil Procedure Section 526a to prevent, restrain, and enjoin said ongoing illegal
19 expenditures of public funds.

20 144. If not enjoined by this Court, Defendants will continue to conduct illegal cell
21 phone searches, in violation of arrestees' rights and the rights of their associates, and if
22 Defendants are not permanently enjoined, arrestees and their associates will continue to
23 suffer irreparable harm because their right to privacy, arrestees' and their associates' right
24 to be free from unreasonable searches and seizures, and arrestees' and their associates'
25 rights to freedom of speech and association under Article I, Sections 1, 2, 3, and 13 of the
26 California Constitution and the First Amendment of the United States Constitution will be
27
28

1 violated. Injunctive relief is therefore appropriate under Civil Code section 3422 and Code
2 of Civil Procedure section 526.

3 145. Plaintiffs have no adequate remedy at law for the injuries suffered, and to be
4 suffered in the future, in part because it is impossible for the Plaintiffs to calculate a sum of
5 money damages that will compensate all those arrested in San Francisco whose cell phones
6 have been subject to a warrantless search, and their associates whose information was
7 contained on said phones, for the loss of their right to privacy, their right to be free from
8 unreasonable searches and seizures, and their right to freedom of speech and association.

9 **FIRST CAUSE OF ACTION**

10 **(California Constitution, Article I, Section 1)**

11 **Violation of the Right to Privacy**

12 (All Plaintiffs against All Defendants)

13 146. Plaintiffs incorporate herein by reference the allegations of the above
14 paragraphs, as if set forth in full.

15 147. Article I, Section 1 of the California Constitution provides that “[a]ll people
16 are by nature free and independent and have inalienable rights.... [and that] [a]mong these
17 are.... pursuing and obtaining safety, happiness, and privacy.” This provision creates a
18 right to privacy more protective than the implicit privacy protections in the United States
19 Constitution. *In re Carmen M.* (2006) 141 Cal.App.4th 478. People under arrest retain a
20 reasonable expectation of privacy in their person. *People v. Brisendine* (1975) 13 Cal.3d
21 528, 547; see also *Miller v. Superior Court* (1981) 127 Cal.App.3d 494, 511; see also
22 *People v. Pace* (1979) 92 Cal.App.3d 199, 206. The right to privacy protects the right to
23 informational privacy and the right to be free from government intrusion into our private
24 lives. *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1.

25 148. The warrantless search of arrestees’ cell phones violates the fundamental
26 right to privacy of arrestees and the fundamental right to privacy of the associates of
27 arrestees, whose information is contained on the phone. The warrantless search of cell
28

1 phones implicates the legally protected interests of arrestees and their associates' in
2 informational privacy and the right to be free from government intrusion into their private
3 lives. Cell phone searches implicate a host of informational privacy issues beyond what is
4 typical in the search and seizure context, such as freedom of speech, freedom of
5 association, financial privacy, medical privacy, and sexual privacy. People have a
6 reasonable expectation of privacy in the contents of their cell phone, including their text
7 messages, and the kinds of information that could be accessed on a smart phone with
8 wireless internet and saved passwords – such as their medical history, detailed personal
9 communications, and financial records. The warrantless search of cell phones presents a
10 serious invasion of privacy because of the nature and volume of personal information about
11 the phone's user and all the people with whom that person communicates.

12 149. Warrantless searches of arrestees' cell phones do not substantially further
13 any countervailing interests, let alone interests that are compelling. Cell phones do not pose
14 a threat to officer safety and steps can easily be taken to prevent the destruction of potential
15 evidence that the phone might contain. There are less intrusive means to prevent loss of
16 potential evidence on a phone than warrantless searches.

17 150. In addition, warrantless searches of arrestees' cell phones compel the
18 disclosure of personal information unrelated to the crime of arrest and is unconstitutional
19 because the compelled disclosure is not narrowly circumscribed to serve a compelling
20 interest.

21 151. Defendants' warrantless search of Offer-Westort's cell phone and its policy
22 and practice of searching arrestees' cell phones without first obtaining a warrant violates
23 the constitutional right to privacy.

24 152. By searching the cell phones of arrestees, including Plaintiff Offer-Westort,
25 incident to their arrest without first obtaining a warrant, Defendants have interfered with
26 and will continue to interfere with the exercise and enjoyment of their privacy rights of
27

1 arrestees and their associates, as guaranteed by Article I, Section 1 of the California
2 Constitution.

3 153. As a direct and proximate consequence of Defendants' warrantless cell
4 phone searches in derogation of their rights, Offer-Westort, other arrestees, and their
5 associates who have not even been arrested, have suffered, and will continue to suffer,
6 irreparable injury, for which they are entitled to declaratory and injunctive relief, as
7 previously alleged herein.

8 **SECOND CAUSE OF ACTION**

9 **(California Constitution, Article I, Section 13)**

10 **Violation of the Right to be Free from Unreasonable Searches and Seizures**

11 (All Plaintiffs against All Defendants)

12 154. Plaintiffs incorporate herein by reference the allegations of the above
13 paragraphs, as if set forth in full.

14 155. Article I, Section 13 of the California Constitution provides that "[t]he right
15 of the people to be secure in their persons, houses, papers, and effects against unreasonable
16 seizures and searches may not be violated; and a warrant may not issue except on probable
17 cause, supported by oath or affirmation, particularly describing the place to be searched and
18 the persons and things to be seized." Article I, Section 13 is more protective of arrestee's
19 rights than the Fourth Amendment. *People v. Mayoff* (1986) 42 Cal.3d 1302, 1312; *People*
20 *v. Blair* (1979) 25 Cal.3d 640, 653-655; *People v. Brisendine* (1975) 13 Cal.3d 528, 545,
21 551.

22 156. An item not immediately associated with an arrestee, which is seized and in
23 the exclusive control of the police, cannot be searched without a warrant except in exigent
24 circumstances. *Miller*, 127 Cal.App.3d at 511; see also *Pace*,
25 92 Cal.App.3d at 200-201.

26 157. Cell phones are not ordinary items immediately associated with the person
27 because they contain quantities of personal data unrivaled by any conventional item
28

1 traditionally considered to be immediately associated with the person such as an article of
2 clothing or a wallet.

3 158. Plaintiff Offer-Westort was arrested for violating the state anti-lodging law.
4 He was arrested with a sleeping bag and erected tent. There was no reasonable basis to
5 believe that instrumentalities used to violate the state anti-lodging law would be found on
6 his phone. There was no reasonable basis to believe his phone was stolen. Possessing a
7 cell phone is not unlawful. Plaintiff Offer-Westort's phone could not be used to assault the
8 arresting officers.

9 159. Plaintiff Offer-Westort was arrested for an offense for which he should have.
10 been and was cited and released on bail.

11 160. By searching arrestees' cell phones incident to their arrest without first
12 obtaining a warrant, Defendants have interfered with and continue to interfere with the
13 exercise and enjoyment of the arrestees' right to be free from unreasonable searches and
14 seizures as guaranteed by Article I, Section 13 of the California Constitution. Because
15 these searches also reveal the contents of emails, texts, and other communications from
16 other individuals that are stored on an arrestees' phone, they also violate those other
17 individuals' rights under this same provision.

18 161. As a direct and proximate consequence of Defendants' warrantless cell
19 phone searches in derogation of their rights, Offer-Westort, other arrestees, and their
20 associates who have not even been arrested, have suffered, and will continue to suffer,
21 irreparable injury, for which they are entitled to declaratory and injunctive relief, as
22 previously alleged herein.

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1 166. As a direct and proximate consequence of Defendants' warrantless cell
2 phone searches in derogation of their rights, Offer-Westort, other arrestees, and their
3 associates who have not even been arrested, have suffered, and will continue to suffer,
4 irreparable injury, for which they are entitled to declaratory and injunctive relief, as
5 previously alleged herein.

6 **FOURTH CAUSE OF ACTION**

7 **(California Constitution, Article I, Section 2)**

8 **Violation of the Liberty of Speech**

9 (All Plaintiffs against All Defendants)

10 167. Plaintiffs incorporate herein by reference the allegations of the above
11 paragraphs, as if set forth in full.

12 168. Article I, Section 2 of the California Constitution protects the liberty of
13 speech. The compelled disclosure of information about individuals' communications risks
14 chilling the exercise of this right, and is unconstitutional unless the compelled disclosure is
15 narrowly circumscribed to serve a compelling interest. Mere relevance is not sufficient.

16 169. Plaintiff Offer-Westort was arrested for violating the state anti-lodging law,
17 and there was no reasonable basis to believe evidence relating to this or any other offense
18 would be found on his phone. Plaintiff Offer-Westort's phone contained private text
19 messages about political subjects with other individuals with whom Plaintiff Offer-Westort
20 associates. The search of his phone resulted in the compelled disclosure to Defendants of
21 personal communications unrelated to the crime for which Plaintiff Offer-Westort was
22 arrested and the personal communications of people other than Plaintiff Offer-Westort who
23 were not arrested at all. It was therefore overbroad and did not in any event serve a
24 compelling interest.

25 170. By searching arrestees' cell phones incident to their arrest without first
26 obtaining a warrant, including when there is no reasonable basis to believe evidence of the
27 crime of arrest would be found on the arrestees' phone, Defendants have interfered with
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1 and continue to interfere with the exercise and enjoyment of the arrestees' right to speech
2 and associational privacy guaranteed by the California Constitution.

3 171. As a direct and proximate consequence of Defendants' warrantless cell
4 phone searches in derogation of their rights, Offer-Westort, other arrestees, and their
5 associates who have not even been arrested, have suffered, and will continue to suffer,
6 irreparable injury, for which they are entitled to declaratory and injunctive relief, as
7 previously alleged herein.

8 **FIFTH CAUSE OF ACTION**

9 **(California Constitution, Article I, Section 3)**

10 **Violation of the Right of Association**

11 (All Plaintiffs against All Defendants)

12 172. Plaintiffs incorporate herein by reference the allegations of the above
13 paragraphs, as if set forth in full.

14 173. Article I, Section 3 of the California Constitution protects the right of
15 association. The compelled disclosure of information about individuals' communications
16 risks chilling the exercise of this right, and is unconstitutional unless the compelled
17 disclosure is narrowly circumscribed to serve a compelling interest. Mere relevance is not
18 sufficient.

19 174. Plaintiff Offer-Westort was arrested for violating the state anti-lodging law,
20 and there was no reasonable basis to believe evidence relating to this or any other offense
21 would be found on his phone.. Plaintiff Offer-Westort's phone contained private text
22 messages about political subjects with other individuals with whom Plaintiff Offer-Westort
23 associates. The search of his phone resulted in the compelled disclosure to Defendants of
24 personal communications unrelated to the crime for which Plaintiff Offer-Westort was
25 arrested and the personal communications of people other than Plaintiff Offer-Westort who
26 were not arrested at all. It was therefore overbroad and did not in any event serve a
27 compelling interest.

1 175. By searching arrestees' cell phones incident to their arrest without first
2 obtaining a warrant, including when there is no reasonable basis to believe evidence of the
3 crime of arrest would be found on the arrestees' phone, Defendants have interfered with
4 and continue to interfere with the exercise and enjoyment of the arrestees' right to speech
5 and associational privacy guaranteed by the California Constitution.

6 176. As a direct and proximate consequence of Defendants' warrantless cell
7 phone searches in derogation of their rights, Offer-Westort, other arrestees, and their
8 associates who have not even been arrested, have suffered, and will continue to suffer,
9 irreparable injury, for which they are entitled to declaratory and injunctive relief, as
10 previously alleged herein.

11 **SIXTH CAUSE OF ACTION**

12 **(Code of Civil Procedure section 526a)**

13 **The Illegal and Wasteful Expenditure of Public Funds in Violation of Article I,**
14 **Sections 1-3 and 13 of the California Constitution and First Amendment to United**
15 **States Constitution**

16 (Elizabeth Zitrin and the ACLU of Northern California against All Defendants)

17 177. Plaintiffs incorporate herein by reference the allegations of the above
18 paragraphs, as if set forth in full.

19 178. Code of Civil Procedure section 526a provides that a taxpayer has standing
20 to sue to prevent a public official from the waste or illegal expenditure of public funds.

21 179. In his representative capacity, Gregory Suhr has wasted and unlawfully used
22 public funds, and injured the public fisc, and threatens to continue wasting and unlawfully
23 using public funds and injuring the public fisc, by searching the cell phones of arrestees
24 without a warrant or exigent circumstances in violation of Sections 1, 2, 3 and 13 of Article
25 I of the California Constitution, and the First Amendment of the United States Constitution.

26 180. As a direct and proximate consequence of Gregory Suhr expending public
27 funds to search the cell phones of arrestees without a warrant in violation of the California
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1 and United States Constitutions, Plaintiff taxpayer is entitled to permanent injunctive and
2 declaratory relief, as previously alleged herein.

3
4 W h e r e f o r e, Plaintiffs pray for entry of judgment in their favor and
5 against Defendants as follows:

6 a. For an injunction enjoining Defendants, each of their agents,
7 employees, assigns, and all other persons acting in concert or participating
8 with any of them from (1) searching the contents of the cell phones of
9 arrestees without a warrant unless exigent circumstances are present; (2)
10 expending public funds to search or store the contents of the cell phones of
11 arrestees without first obtaining a warrant unless there are exigent
12 circumstances; or (3) otherwise searching cell phones of arrestees without
13 complying Sections 1, 2, 3, and 13 of Article I of the California Constitution,
14 and the First Amendment;

15 b. For a declaration of the rights of the parties, including but not
16 limited to a declaration that the search of Plaintiff Offer-Westort's cell phone
17 was unlawful and that searching the contents of the cell phones of arrestees
18 without a warrant in situations that lack exigency is unconstitutional under
19 Sections 1, 2, 3 and 13 of Article I of the California Constitution and the First
20 Amendment of the United States Constitution.

21 d. For Plaintiffs' costs of suit incurred herein, including
22 attorneys' fees pursuant to Code of Civil Procedure Section 1021.5 and 42
23 U.S.C. § 1988;
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1 e. For such other and further relief as this Court may deem just
2 and proper.

3 Dated: March 19, 2013

4 MICHAEL T. RISHER
5 LINDA LYE
6 American Civil Liberties Union Foundation
7 of Northern California
8 39 Drumm Street
9 San Francisco, California 94111

10 PILLSBURY WINTHROP SHAW PITTMAN LLP
11 THOMAS V. LORAN III
12 MARLEY DEGNER
13 Four Embarcadero Center, Suite 2200
14 San Francisco, CA 94111

15 By: 

16 Marley Degner

17 Attorneys for Plaintiffs
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1 VERIFICATION

2 I, Robert Martin Offer-Westort, declare as follows:

3 I am a Plaintiff in this action. I have read the foregoing Verified Complaint for
4 Permanent Injunctive Relief and for Declaratory Relief for Violation of Article I, Sections
5 1, 2, 3 and 13 of the Constitution of the State of California and the First Amendment of the
6 United States Constitution and know its contents. I declare that Paragraphs 5 and 16
7 through 38 are true and correct to the best of my knowledge, except as to those matters
8 alleged therein on information and belief or that concern other of the Plaintiffs, which
9 matters I believe to be true.

10 I declare under penalty of perjury under the laws of the State of California that the
11 foregoing is true and correct.

12 Dated: March 19, 2013.

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15 Robert Martin Offer-Westort
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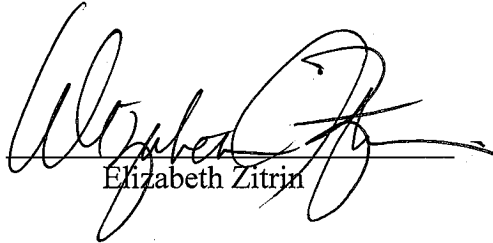
VERIFICATION

I, Elizabeth Zitrin, declare as follows:

I am a Plaintiff in this action. I have read the foregoing Verified Complaint for Permanent Injunctive Relief and for Declaratory Relief for Violation of Article I, Sections 1, 2, 3 and 13 of the Constitution of the State of California and the First Amendment of the United States Constitution and know its contents. I declare that Paragraphs 6 and 40 through 51 are true and correct to the best of my knowledge, except as to those matters alleged therein on information and belief or that concern other of the Plaintiffs, which matters I believe to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 18, 2013.



Elizabeth Zitrin

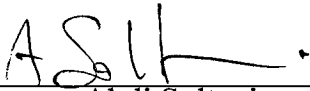
VERIFICATION

I, Abdi Soltani, do hereby declare:

I am the Executive Director of the American Civil Liberties Union of Northern California, Plaintiff in this action. I have read the foregoing Verified Complaint for Permanent Injunctive Relief and for Declaratory Relief for Violation of Article I, Sections 1, 2, 3, and 13 of the Constitution of the State of California and the First Amendment to the United States Constitution and know its contents and am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 19 day of March 2013, in San Francisco, California.



Abdi Soltani

EXHIBIT A

Report Type: Initial

San Francisco Police Department
INCIDENT REPORT

120076365

| | | | | | | | | | |
|--------------------------------------|---|--|---|---|--|---|--|--|---|
| I N C I D E N T | Incident Number 120-076-365 | Occurrence from Date/Time 1/27/12 21:09 | Occurrence to Date/Time | Reported Date/Time 1/27/12 21:53 | CAD Number 120273207 | | | | |
| | Type of Incident Lodging Without Permission -27199 | | | | | | | | |
| | Location of Occurrence 2399 Market Street | | | At Intersection with/Premise type Street, (Not Sidewalk) | | District MISS | | | |
| | Confidential Report? <input type="checkbox"/> | Arrest Made? <input checked="" type="checkbox"/> | Suspect Known? <input type="checkbox"/> | Suspect Unknown? <input type="checkbox"/> | Non-Suspect Incident? <input type="checkbox"/> | Domestic Violence? <input type="checkbox"/> (Type of Weapon Used) | Reporting Unit 3D76 | | |
| | Location Sent Castro and Market | | | | | District MISS | | | |
| How Cleared? 7 | | Reported to Bureau | Name | Star | Date/Time | Elder Victim <input type="checkbox"/> | Gang Related? <input type="checkbox"/> | Juvenile Subject? <input type="checkbox"/> | Prejudice Based? <input type="checkbox"/> |

120076365

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|--|--|--------------|--------------------------------------|----------------------------|------------------------------------|---------------------------------|--|--|--|
| O F F I C I A L C R E A T I O N | I declare under penalty of perjury, this report of (3) pages is true and correct, based on my personal knowledge, or is based on information and belief following an investigation of the events and parties involved. | | | | | | | | |
| | PROP 115 CERTIFIED | | POST TRAINING | | Signature: <i>[Signature]</i> #972 | | | | |
| | Reporting Officer Chambers, Angus M | | Star 972 | Station Mission Station | Watch 2100-0700 | Date 1/28/12 00:06:20 | | | |
| | Reviewing Officer Sgt. M. Rodgers #1914 | | STAR [Signature] | Station Mission Station | Watch [Signature] | Date 1/28/12 | | | |
| | OIC Sgt. R. K. [Signature] 1209 | | STAR | Station Mission Station | Watch 3 | Date 1/27/12 | | | |
| Related Case | | Related Case | Re-Assigned to Copies to District | Assigned to District | Assigned by AC 972 | Add'l Copies 1-DA MIB INTAKE | | | |

| | | | | | | | | | | | | |
|--------------------------------------|--|---|--|------|---|--|-------------------------|--------------------|-----------|---------|---------|--------|
| R E P O R T E E | Code R 1 | Name (Last, First Middle) SFPD #972 / #1219, | | | | Alias | | | | | | |
| | Day Phone Type | | Home Address SFPD Co. D | | City | | State | Zip Code | | | | |
| | Night Phone (415) 558-5400 | | Work Address 630 Valencia Street | | City San Francisco | | State CA | Zip Code 94110- | | | | |
| | DOB / Age Unk. <input type="checkbox"/> | DOB | or age between: and | Race | Sex | Height | Weight | Hair Color | Eye Color | ID Type | Jurisd. | ID No. |
| | Confidential Person <input type="checkbox"/> | Violent Crime Notification <input type="checkbox"/> | 293 PC Notification <input type="checkbox"/> | Star | Follow-up Form YES <input type="checkbox"/> | Statement YES <input type="checkbox"/> | Relationship to Subject | | | | | |
| School (if Juvenile) | | Injury/Treatment | | | | Other Information/If Interpreter Needed Specify Language | | | | | | |

| | | | | | | | | | | |
|---|------------------------------------|---|-----------------------------|-----------------------------------|-----------------------------|-------------------------------------|-----------------------------|---|------------|-----------|
| C I T E D | Code C 1 | Name (Last, First Middle) Offer-Westort, Robert Martin | | | | ALIAS | | | | |
| | Day Phone Type | | Home Address | | City | | State | Zip Code | | |
| | Night Phone Type | | Work Address | | City | | State | Zip Code | | |
| | DOB | Date of Birth | Age | or age between and | Race | Sex | Height | Weight | Hair Color | Eye Color |
| | SFNO | J/D# (if Juvi.) | ID Type/Jurisdiction/Number | | ID Type/Jurisdiction/Number | | ID Type/Jurisdiction/Number | | | |
| | Book Section #1 | | Book Section #2 | Book Section #3 | Book Section #4 | Book Section #5 | Booking Location | | | |
| | Warrant # | Court # | Action # | Dept | Enroute to | CWB Check Veronica | | Star 239 | Statement | |
| | Warrant Violation(s) | | | | Bail | Mirandized <input type="checkbox"/> | Star | Date | Time | |
| | Citation # 012976003 | Violation(s) 647(e) PC - Illegal Lodging | | | | Appear Date/Time 3/19/12 09:00 | | Location of Appearance 850 Bryant St. #475 | | |
| | Book/Cite Approval Sgt. Rodgers | Star 1914 | Mass Arrest Code | M X-Rays <input type="checkbox"/> | School (if Juvenile) | CA Form Booked Copy Attached | | | | |
| Other Information: Citation/Warrant/Booking Charge(s)/Missing Person-Subject Description: Scars, Marks, Tattoos | | | | | | | | | | |

120076365

San Francisco Police Department
PROPERTY LISTINGS

| | | | | | | | | |
|---|---|--------------------------------------|---------|------------------|-------------------|------------------|------------------|--|
| E | Code/No EVD 1 | Item Description Tent | | | | Brand Unknown | Model Unknown | |
| 1 | Serial No. | Gun Make | Caliber | Color MUL/COL | Narcotics Lab No. | Quantity 1 | Value N/A | |
| | Seized by (Star) 972 | From Where (B1) Offer-Westort | | | | | | |
| | Additional Description/Identifying Numbers Blue and Grey | | | | | | | |
| E | Code/No EVD 2 | Item Description Sleeping Bag | | | | Brand LL Bean | Model Unknown | |
| 2 | Serial No. | Gun Make | Caliber | Color BLU | Narcotics Lab No. | Quantity 1 | Value N/A | |
| | Seized by (Star) 972 | From Where (B1) Offer-Westort | | | | | | |
| | Additional Description/Identifying Numbers | | | | | | | |
| E | Code/No EVD 3 | Item Description Cell Phone | | | | Brand LG | Model Unknown | |
| 3 | Serial No. | Gun Make | Caliber | Color BLU | Narcotics Lab No. | Quantity 1 | Value N/A | |
| | Seized by (Star) 972 | From Where (B1) Offer-Westort | | | | | | |
| | Additional Description/Identifying Numbers | | | | | | | |
| E | Code/No EVD 4 | Item Description Photo CD | | | | Brand | Model | |
| 4 | Serial No. | Gun Make | Caliber | Color SIL | Narcotics Lab No. | Quantity 1 | Value N/A | |
| | Seized by (Star) | From Where | | | | | | |
| | Additional Description/Identifying Numbers | | | | | | | |
| E | Code/No EVD 5 | Item Description Property Receipt | | | | Brand | Model | |
| 5 | Serial No. | Gun Make | Caliber | Color WHI | Narcotics Lab No. | Quantity 1 | Value N/A | |
| | Seized by (Star) 972 | From Where (B1) Offer-Westort | | | | | | |
| | Additional Description/Identifying Numbers | | | | | | | |
| | Code/No | Item Description | | | | Brand | Model | |
| | Serial No. | Gun Make | Caliber | Color | Narcotics Lab No. | Quantity | Value | |
| | Seized by (Star) | From Where | | | | | | |
| | Additional Description/Identifying Numbers | | | | | | | |
| | Code/No | Item Description | | | | Brand | Model | |
| | Serial No. | Gun Make | Caliber | Color | Narcotics Lab No. | Quantity | Value | |
| | Seized by (Star) | From Where | | | | | | |
| | Additional Description/Identifying Numbers | | | | | | | |

On 1/27/2012 at approximately 2152 hours Officer Manrique #1219 and I were on patrol in uniform, in a marked police vehicle, working a "Quality of Life" assignment at Mission Station. The Mission District is often plagued with quality of life issues that result in numerous complaints from residents, including people lodging without permission, which often coincide with other violations, including but not limited to public intoxication, public urination/defecation, noise complaints, littering, and obstructing free passage on the sidewalk.

On today's date, I was dispatched to Castro and Market Street regarding a possible homeless subject setting up a tent. Upon arrival, Off. Manrique and I located a male subject, (C1) Offer-Westort, sitting in a (E1) tent with a (E2) sleeping bag inside. Offer-Westort's tent was on the Muni tracks at the intersection of 17th Street and Market Street, inside a city plaza. I spoke to Offer-Westort, who I identified via his CA license [REDACTED]. Offer-Westort told me he had been kicked out of Golden Gate Park for camping, and had decided to set up his tent in the Castro. I determined that Offer-Westort had erected a structure and was lodging illegally in violation of 647(e) PC.

I informed Offer-Westort that he was lodging illegally, and I asked him to remove his tent. Offer-Westort refused, and told me I would have to arrest him. I gave Offer-Westort numerous opportunities to leave on his own, and he repeatedly refused. I asked him if he had anywhere else he could stay, and he told me that he was homeless. I offered to provide him with information on local shelters, which he refused. Off. Manrique took photographs of Offer-Westort and his (E1) tent and (E2) sleeping bag. With approval from Sgt. Rodgers #1914 I placed Offer-Westort under arrest and transported him to Mission Station for further investigation.

Upon returning to Mission Station I removed Offer-Westort's (E3) cell phone from his pants pocket and searched it incident to arrest. I found a text message sent from Offer-Westort's phone to a contact named "Wendy Vinaigrette" that said, "I'm headed to the Castro to try to get a lodging citation to prove that they apply in Milk and Warner Plazas. Inshallah, I just get cited, & not arrested." The text message was dated Friday 1-27-2012 at 8:32 PM. Offer-Westort also had a text message from a contacted named "Lorraine DeGuzman" that stated, "How's it going? Arrested yet?" Offer-Westort had replied, "Not yet. But camped out." There was a third text message in Offer-Westort's "Drafts" folder that said, "Hey, Vin. We're trying to get David Chiu to vote against Wiener's plaza legislation. He's feeling like this is a thing that D3 people & Chinese people don't really casewho."

Based on the text messages on Offer-Westort's phone, it appeared that he had the intent to erect illegal lodging, he possessed the knowledge that it was illegal, and he wanted to be arrested.

Off. Manrique photographed the text messages and the cell phone, and seized the phone as evidence. The images were saved onto a (E4) photo CD. Off. Manrique and I provided Offer-Westort with a (E5) property receipt for his cell phone, tent, and sleeping bag. Off. Manrique contacted Veronica #299 at CWB, who confirmed that Offer-Westort was not currently wanted. With approval from Sgt. Rodgers #1914 I issued Offer-Westort a citation for 647(e) PC, which he signed and thumb-printed in my presence. Off. Manrique booked the evidence at Mission Station, and I prepared a misdemeanor rebooking packet which I forwarded accordingly.