NO. 26-2028

In the United States Court of Appeals for the Third Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

V.

GRISELLE LACOSTA-FRANCO,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:26-cr-00027-001; Hon. Gail A. Weilheimer

BRIEF OF PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC. AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Project for Privacy and Surveillance Accountability, Inc. states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock. *Amicus* further states that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

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INTRODUCTION, IDENTITY AND INTEREST OF *AMICUS CURIAE*[1] AND SOURCE OF AUTHORITY TO FILE

The Fourth Amendment takes the choice of where to search from the officer in the field and gives it to a neutral magistrate. Probable cause makes that protection real by requiring a factual basis for selecting the particular place to be searched. Appellee LaCosta ably explains why the affidavit in this case failed to show probable cause. *Amicus* writes to trace the animating principle from the Founding to the smartphone: A fact contributes to probable cause only insofar as it meaningfully distinguishes a place likely to contain evidence from places that do not.

Smartphone ownership and ordinary use cannot supply that distinction. Smartphones are nearly universal. And a nearly universal fact cannot distinguish a particular phone as a likely place containing evidence of a particular crime. Training and experience may explain why a given case-specific fact is significant or distinguishing—but they cannot supply a fact the affidavit omits. The dividing line is not direct evidence versus inference; it is a reasonable inference drawn from case-specific

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[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No party's counsel authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel contributed money intended to fund its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

and distinguishing facts versus inference drawn from ubiquitous and non-distinguishing facts and boilerplate alone.

That ordinary rule resolves this case. A magistrate may still infer that evidence will be found on a particular phone—but only when the inference proceeds from a distinguishing fact tying the offense to the specific device, as the Fourth Amendment requires for any place or thing. The affidavit here supplied none.

Project for Privacy and Surveillance Accountability, Inc. ("PPSA") is a nonprofit, nonpartisan organization dedicated to protecting privacy rights against government overreach. Because searches of cell phones expose an encyclopedic record of a person's life, the standards governing when such searches may occur are of central concern to PPSA and its members. PPSA files this brief to explain how ordinary probable-cause doctrine applies when the "place" to be searched is a smartphone, and why ubiquitous smartphone ownership cannot itself supply the distinguishing connection the Fourth Amendment demands.

SUMMARY OF ARGUMENT

The Fourth Amendment's Warrant Clause keeps the choice of where to search out of the field officer's hands. Probable cause performs that function by requiring a neutral magistrate to find a fair probability

that evidence will be found in "a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Probable cause that a person committed a crime is therefore not, without more, probable cause to search a place associated with the person. A search warrant "is directed, not at persons, but at property where there is probable cause to believe that instrumentalities or evidence of crime will be found." *United States v. Whitner*, 219 F.3d 289, 297 (3d Cir. 2000).

Training and experience may illuminate the significance of case-specific facts, but they cannot supply a factual premise the affidavit omits. This Court's residence cases illustrate the rule. A magistrate may infer that a drug dealer keeps evidence at home only on facts showing that (1) the suspect is a dealer, (2) the place is his, and (3) the home is linked to his drug activity. *United States v. Stearn*, 597 F.3d 540, 559 (3d Cir. 2010). The government's phone theory keeps the first two premises and discards the third.

That missing premise matters because more than 90 percent of American adults own a smartphone. *See Chatrie v. United States*, 146 S.Ct. 2193, 2200 (2026). In other words, smartphone possession, standing alone, does virtually nothing to distinguish criminal from non-criminal activity or mark the phone as a place likely to contain evidence of

criminal activity. The question here then is what is "the degree of suspicion that attaches to particular types of noncriminal acts," like possessing a smartphone. *Gates*, 462 U.S. at 243–44 n.13. And for a fact shared by *almost everyone*, the answer is *almost none*.

Possession alone thus does little to distinguish a phone that holds evidence of criminal activity from the hundreds of millions that do not. Nor does that change merely because the phone is owned by a suspected criminal. A suspected criminal's ownership of a phone is no more sufficient than his ownership of a home. Criminals live somewhere, and nearly all use phones. In either case, the affidavit still needs a fact connecting the particular place to the particular crime.

The decisions upholding phone searches confirm the rule rather than displace it. Each rests on a case-specific anchor—an observed use, coordinated communications, a recent controlled buy—beyond crime plus phone. The Supreme Court's digital-search decisions point the same way. *See Chatrie*, 146 S.Ct. 2193; *Carpenter v. United States*, 585 U.S 296 (2018);*, Riley v. California*, 573 U.S. 373 (2014). Each refused to create relaxed rules for new technologies, insisting that the ordinary standards apply and that technological change should not quietly dissolve familiar safeguards, as the government's position would do here.

The dividing line is not direct evidence versus inference; it is inference drawn from a case-specific fact versus inference drawn from ubiquity and boilerplate alone. The affidavit here supplied only the latter. The order suppressing the fruits of the search should be affirmed.

ARGUMENT

I. Probable Cause Requires a Factual Basis for Selecting the Particular Place to Be Searched.

Probable cause does more than establish that a crime occurred: It limits where the government may search for its evidence. That limitation preserves the Fourth Amendment's allocation of authority to a neutral magistrate. Neither probable cause as to the suspect nor an officer's generalized experience can supply the required connection between the offense and the particular place to be searched.

A. The Fourth Amendment takes the choice of where to search from the field officer and gives it to a neutral magistrate.

The Fourth Amendment was adopted to abolish the general warrant and its customs-enforcement cousin, the writ of assistance. Those instruments "specified only an offense" and left "to the discretion of the executing officials" the choice of "which persons should be arrested and which places should be searched." *Marron v. United States*, 275 U.S. 192, 196 (1927). James Otis condemned the writ of assistance as "the

worst instrument of arbitrary power," because it "plac[ed] the liberty of every man in the hands of every petty officer." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). The Warrant Clause reversed that allocation of authority. It requires a warrant "particularly describing the place to be searched, and the persons or things to be seized," U.S. Const. amend. IV, and leaves "nothing … to the discretion of the officer executing the warrant." *Marron*, 275 U.S. at 196.

Probable cause performs the same anti-discretion function. The point of the requirement, as the Supreme Court put it, "consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

Modern probable-cause doctrine implements that principle by requiring probable cause as to the place itself. A warrant issues only on "a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. The "critical element" is "reasonable cause to believe that" the things sought are located in the place named. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978); *see also Chatrie v. United States*, 146 S.Ct. 2193, 2215–16 (2026).

Probable cause as to a different place cannot substitute for that showing. Probable cause "must be … particularized" to the place searched and cannot be "undercut or avoided" merely because "probable cause [exists] to search or seize another" person or place. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). The rule thus prevents the very discretion the Warrant Clause was designed to eliminate: An officer cannot establish a crime and then choose for himself where evidence is likely to be found.

B. Probable cause as to a person or offense does not establish probable cause as to a place.

It follows that probable cause of guilt does not automatically establish probable cause to search a place associated with the suspect. This Court has held that "probable cause to arrest does not automatically provide probable cause to search the arrestee's home," because warrants are "directed, not at persons, but at property." *Whitner*, 219 F.3d at 297; *accord United States v. Jones*, 994 F.2d 1051, 1055 (3d Cir. 1993). The Supreme Court draws the same line: an arrest warrant guards against an unreasonable seizure of the person, while a search warrant "safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." *Steagald v. United States*, 451 U.S. 204, 213 (1981). This Court has enforced that distinction when an affidavit tries to carry probable cause from one

proposition to another. In *Zimmerman*, this Court held that an affidavit establishing probable cause of one offense did not establish probable cause to search for evidence of another: it "contained no information that [the defendant] had ever purchased or possessed child pornography" and gave "absolutely no information . . . indicating that child pornography was—or ever had been—located" in his home. *United States v. Zimmerman*, 277 F.3d 426, 432–33 (3d Cir. 2002). Probable cause as to the charged conduct did not carry over to "the wholly separate crime." *Virgin Islands v. John*, 654 F.3d 412, 419 (3d Cir. 2011) (same result where affidavit contained "not a single assertion" linking defendant to offense for which search was authorized).

C. Training and experience may explain case-specific facts, but they cannot supply a factual premise the affidavit omits.

Training and experience do not change the rule; they help a magistrate evaluate the facts the affidavit actually supplies. An officer may explain, for example, why several brief meetings, coded phrases, or a sequence of calls—if an affidavit alleges them—would be probative of criminal activity. But experience cannot manufacture a factual premise the affidavit omits. As this Court held in *Loy*, "experience and expertise, without more, is insufficient to establish probable cause." *United States*

v. Loy, 191 F.3d 360, 366 (3d Cir. 1999). And an "expert opinion must be tailored to the specific facts of the case to have any value." *Zimmerman*, 277 F.3d at 433 n.4.

John explains why. Whether one kind of conduct correlates with another "is a question of fact" that the affiant must "allege" and "support"—not "a legal issue to be entrusted to a magistrate's judgment as a matter of abstract doctrine." 654 F.3d at 420. Of course, the affidavit need not contain direct evidence that the evidence sought is already in the place to be searched. A magistrate may draw reasonable inferences "based on the nature of the evidence and the type of offense." *Whitner*, 219 F.3d at 296. But every inference must begin with a case-specific fact. Without one connecting the crime to the place, the magistrate has nothing to infer.

D. This Court's residence cases confirm that the government cannot infer the missing nexus from the offense itself.

The residence cases that the government relies on show what a permissible inference looks like. A magistrate may infer that a dealer stores evidence at his residence only on evidence establishing "(1) that the person suspected of drug dealing is actually a drug dealer; (2) that the place to be searched is possessed by, or the domicile of, the dealer;

and (3) that the home contains contraband linking it to the dealer's drug activities." *Stearn*, 597 F.3d at 559 (quoting *United States v. Burton*, 288 F.3d 91, 104 (3d Cir. 2002)). The third premise answered the question *Whitner* had left open: dealer status alone does not permit the inference. *Id.* The government's phone theory reproduces the first two premises—LaCosta-Franco is a suspected dealer, and the phones are hers—while dropping the third. In other words, the government uses the offense itself to supply the very nexus *Burton* requires it to prove.

Whitner itself shows why the nexus cannot come from the offense alone. This Court observed that "a dealer logically could conclude that his residence is the best, and probably the only, location to store" the records, cash, guns, and drug quantities that dealing generates. *Whitner*, 219 F.3d at 298. But the Court did not treat that observation as self-sufficient. It expressly declined to decide whether a suspect's apparent dealer status alone would justify searching his home, and it sustained the warrant only because a further case-specific fact linked the crime to the place: The officers knew where Whitner lived but he lied to them, and that "attempt at concealment . . . logically suggests that [he] was storing some evidence of illegal activity at the apartment." *Id.* at 299. The permissible inference thus rested on a case-specific nexus—not on dealer status alone.

Nor does drug quantity change the analysis. A large quantity of drugs bears on whether a suspect is a dealer, not on where evidence of the dealing will be found; *Burton*'s third premise must be satisfied however substantial the operation, and *Stearn* confirmed that a nexus to the particular place remains necessary even when the evidence could equally be kept elsewhere. *Stearn*, 597 F.3d at 559–60.

The same requirement governs a phone. A phone can be the natural repository for evidence of an offense that turns on communications or records, and where an affidavit ties such an offense to a particular device, a magistrate may infer that evidence will be found there. But the inference must still begin with a case-specific fact. If anything, the point is sharper for digital evidence: A dealer's drugs and cash must be kept somewhere, and yet the data the government seeks need not reside on any particular phone—it may sit on another device, in the cloud, or nowhere at all because coordination may have happened in person. Those possibilities are precisely why the offense cannot supply its own nexus. The affidavit here supplied none.

II. Smartphone Ubiquity Cannot Supply the Missing Factual Premise.

The government cannot avoid that missing nexus by relying on how people generally use smartphones. The characteristics the government invokes describe nearly everyone, so they do little to distinguish a phone likely to contain evidence from one that does not. The cases sustaining phone searches confirm the point: Each depends on a case-specific fact connecting the particular device to the offense.

A. A nearly universal fact has little power to distinguish a place likely to contain evidence.

The government's affidavit supplies no case-specific facts; it connects phones in general to crime in general: traffickers "frequently use cellular telephones . . . to further their illegal activities," store contacts and photographs, and use navigation and the internet. Those propositions are true—and equally true of virtually every member of the general public. The point is not that innocent conduct can never contribute to probable cause. It is that such conduct contributes only the suspicion it reasonably carries. Probable cause therefore turns not on "whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to [it]." *Gates*, 462 U.S. at 243–44 n.13; *accord United States v. Sokolow*, 490 U.S. 1, 10 (1989); *District of Columbia v. Wesby*, 583 U.S. 48, 61 (2018).

A fact that describes almost everyone carries almost no such suspicion. In *Reid v. Georgia*, the factors making up a drug-courier profile could not support even reasonable suspicion because they "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures" if that were enough. 448 U.S. 438, 441 (1980). Smartphone ownership is even less discriminating. More than nine in ten American adults own a smartphone. *Chatrie*, 146 S.Ct. at 2200. As the Supreme Court observed, "the person who is not carrying a cell phone ... [is] the exception." *Riley*, 573 U.S. at 395.

Possession therefore does almost nothing to separate the phone that holds evidence from the one that does not. When the D.C. Circuit confronted a warrant to search a suspected getaway driver's home for any cell phone he might own, it held that the pervasiveness of phones could not supply what the affidavit lacked: Because a cell phone "is not inherently illegal, there must be reason to believe that a phone may contain evidence of the crime," and "[t]he general pervasiveness of cell phones affords an inadequate basis for eroding" Fourth Amendment protection. *United States v. Griffith*, 867 F.3d 1265, 1274, 1276–77 (D.C. Cir. 2017). Otherwise every suspect's phone would be searchable "almost

anytime there is probable cause to suspect [a person] of a crime." *Id.* at 1276.

B. The cases sustaining phone searches confirm that a case-specific fact must connect the crime to the device.

The necessary connection can take several forms. In *Orozco*, officers "saw the defendant use his phone's GPS while moving drug-tainted cash" and close the application when asked his destination. *United States v. Orozco*, 41 F.4th 403, 410–11 (4th Cir. 2022). Observed use connected the phone to the offense.

In *Silva*, the affidavit alleged a racketeering conspiracy whose members coordinated by communication, and the court held that expertise supports a nexus only "when it is combined with . . . specific, factual allegations that tend to link the alleged criminal conduct to the place to be searched." *United States v. Silva*, 146 F.4th 183, 190 (2d Cir. 2025); *see id.* at 190, 192 (relying on affidavit's specific factual allegations rather than treating existence of probable cause for offense as sufficient by itself). Those specific allegations about how the conspiracy operated supplied the connection.

Eggerson likewise involved far more than offense plus phone: a controlled buy and phones found in circumstances tied to drug-trafficking and on a person associated with that activity. *United States v. Eggerson*,

999 F.3d 1121, 1125–27 (8th Cir. 2021). Whatever the precise probable-cause boundary in *Eggerson*, its facts bear no resemblance to a categorical offense-plus-phone rule.

In each case, its respective anchor—observed use, coordinated communications, a recent transaction—did the work that a generic recital cannot.

By contrast, courts reject affidavits that supply only generalized assumptions about phone use. *See Griffith*, 867 F.3d at 1275–79 (generic "gang members communicate by phone" insufficient); *Texas v. Baldwin*, 664 S.W.3d 122, 122–23, 134 (Tex. Crim. App. 2022) (boilerplate "must be coupled with other facts . . . that establish a nexus between the device and the offense," or every suspect's phone would be searchable "merely because they owned cell phones"); *United States v. Banyan*, 791 F.Supp.3d 388, 395 (S.D.N.Y. 2025) (bare boilerplate "makes a total mockery of the requirement of probable cause"); *United States v. Harris*, -- F.3d --, 2026 WL 1945175, at *7–8 (D.D.C. 2026) (training and experience is relevant to evaluating evidence but does not itself supply missing nexus).

Nor does *Morton* support the government's contrary rule. The *en banc* Fifth Circuit resolved the case on good faith and called probable

cause a "close call." *United States v. Morton*, 46 F.4th 331, 338–39 (5th Cir. 2022) (en banc). A good-faith decision involving a close probable-cause question does not establish that every drug suspect's phone may be searched.

The cases thus divide along a simple line: not direct evidence versus inference, but inference from a case-specific fact versus inference from ubiquity and boilerplate alone.

C. *Riley*, *Carpenter*, and *Chatrie* confirm that technological change cannot dissolve ordinary Fourth Amendment safeguards.

The Supreme Court's digital-search cases reinforce the same principle: Technology cannot turn an ordinary safeguard into an empty formality. *Riley* rejected a rule permitting a phone search whenever the device "might contain evidence of the crime of arrest" because that standard "would prove no practical limit at all." 573 U.S. at 399. An officer could always "come up with several reasons to suppose evidence of just about any crime could be found on a cell phone," producing "unbridled discretion to rummage at will." *Id.* at 399. The government's proposed nexus rule creates the same problem at the warrant stage.

Carpenter similarly warns courts not to let technological change "erode Fourth Amendment protections." 585 U.S. at 318, 320. And

Chatrie requires each step of a technology-enabled warrant to be "supported by probable cause." *Chatrie*, 146 S.Ct. at 2199. None creates a more lenient standard for phones. Each requires the ordinary standard to retain practical force.[2]

D. This affidavit contains no fact connecting either phone to the trafficking offense.

The application in this case is straightforward. Officers recovered roughly 1.5 kilograms of heroin from the vehicle and two phones from LaCosta-Franco. *See United States v. LaCosta-Franco*, 828 F.Supp.3d 543, 543 (E.D. Pa. 2026). The affidavit also alleged that she repeatedly slipped her handcuffs and put items, including the phones, in her pockets during the arrest—although the affidavit mischaracterized her actions as *concealment*, a legal inference about intent. Those facts may strengthen probable cause that LaCosta-Franco committed a drug

[2] The United States itself recognized in *Riley* that "[a] warrant requirement would foreclose searches where officers could not show probable cause to believe that a phone contains evidence of crime." Brief for United States as *Amicus Curiae* Supporting Respondent at 24, *Riley v. California*, 573 U.S. 373 (2014) (No. 13-132). And in applying that standard to Riley's phone, the Government relied not on arrest plus ownership, but on case-specific facts linking the phone to the offense—gang paraphernalia, knowledge that gang members photograph themselves with guns, and the firearms offense of arrest. *Id.* at 2, 30–31.

offense. They do not show that evidence of that offense would be found on either phone.

Start with the quantity. Roughly 1.5 kilograms of heroin is no personal-use amount, and it fairly supports an inference that LaCosta-Franco had suppliers and customers—that the offense involved dealing with other people. But the inference the warrant requires lies two steps beyond. That the offense involved others does not establish that she coordinated with them by phone rather than in person or through intermediaries; and even if she used a phone, it does not establish that a record of those dealings resides on either of the two seized devices rather than a discarded phone, a counterpart's phone, or no phone at all. Quantity makes trafficking more likely; it does not make either of the two phones seized a likely place to find its record.

The remaining facts fare no better. Carrying two phones does not itself connect either one to trafficking. Nor does the affidavit's mischaracterization of LaCosta-Franco's conduct as an "attempt[] to conceal" the phones supply the missing nexus. The affidavit alleges that LaCosta-Franco repeatedly slipped her handcuffs and put items—including the phones—in her pockets. Calling that conduct "concealment" does not add a fact; it adds an inference about her intent. And the

circumstances make that inference particularly implausible. LaCosta-Franco did not discard the phones, hide them somewhere officers would not find them, or otherwise separate herself from them. She kept them on her person while under arrest—knowing that she, her pockets, and their contents were going with the officers to the police station.

Those circumstances bear no resemblance to *Whitner*. There, the defendant affirmatively lied about where he lived even when confronted with contrary information about his address. The lie concealed his connection to the very place officers sought to search and thus "logically suggest[ed] that [he] was storing some evidence of illegal activity at the apartment." 219 F.3d at 299. Here, putting phones in one's own pockets neither concealed their location from officers nor concealed LaCosta-Franco's connection to them. At most, it confirmed that the phones were hers—*Burton*'s second premise. It supplied nothing resembling the third *Burton* premise, a nexus between those specific phones and drug trafficking. The affidavit alleged no conspiracy, controlled buy, co-conspirator communication, or observed use of either phone—nothing tying the heroin recovered from the vehicle to the data on the phones. Unlike the affidavits in *Orozco*, *Silva*, and *Eggerson*, this affidavit contains no fact linking the offense to the devices.

Good faith cannot supply the nexus the affidavit lacks. *United States v. Leon*, 468 U.S. 897 (1984), does not apply when an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," and this Court has applied that rule where an affidavit failed to connect the evidence sought to the place searched. *See Zimmerman*, 277 F.3d at 436–37; *John*, 654 F.3d at 421. Reusable boilerplate applicable to virtually any suspect with a phone cannot give the magistrate facts to evaluate—or give the officer an objectively reasonable basis for believing that it did.

CONCLUSION

Riley's answer was "get a warrant." But a warrant is not a rubber-stamp for an officer's conclusions; it is a neutral finding of probable cause to believe that evidence will be found in the place the government proposes to search. Neither a suspect's possession of a ubiquitous device nor an officer's mischaracterization of ordinary physical conduct as "concealment" can substitute for facts connecting that device to the crime. If the observation that criminals use smartphones the way everyone uses smartphones can supply that missing premise, the warrant requirement becomes form devoid of substance—and every suspect's phone becomes

searchable. The Fourth Amendment does not permit that result. The judgment should be affirmed.

September 3, 2026

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. This brief complies with Local Rule 46.1(e) because Gene C. Schaerr, Erik S. Jaffe, and Justin A. Miller are members of the bar of this Court.

2. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,261 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

3. The text of the electronic version of this brief is identical to the text of the hard copies that will be filed.

4. This brief was scanned for viruses using Microsoft Defender, and no virus was detected.

/s/ Gene C. Schaerr
Gene C. Schaerr

Dated: September 3, 2026

CERTIFICATE OF SERVICE

I certify that on September 3, 2026, I caused the foregoing Brief of *Amicus Curiae* to be filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Fed. R. App. P. 25(d). I certify that all parties in the case are registered CM/ECF users and thus will be served through the Court's electronic filing system.

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