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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP2319-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL JOSEPH GASPER,

Defendant-Respondent-Petitioner.

ON REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING AN ORDER GRANTING SUPPRESSION, ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE SHELLEY J. GAYLORD, PRESIDING

STATE'S SUPPLEMENTAL, CONSOLIDATED BRIEF RESPONDING TO ALL NON-PARTY BRIEFS

(CONTENT IS IDENTICAL TO SAME ENTITLED BRIEF FILED IN *STATE V. RAUCH SHARAK*, 2024AP469-CR)

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
michael.conway@wisdoj.gov

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INTRODUCTION

This Court has received four briefs from non-parties (collectively "amici"),[1] all arguing that defendants Gasper and Rauch Sharak had a reasonable expectation of privacy in the CSAM files attached to the CyberTips reviewed by law enforcement. Their arguments make three errors.

First, amici read the court of appeals' decision in *State v. Gasper*, 2024 WI App 72, 414 Wis. 2d 532, 16 N.W.3d 279 too broadly. Amici frame *Gasper* in dire terms, warning that it spells the end of privacy in ESP accounts. But neither *Gasper* nor *Rauch Sharak* are about ESP accounts. Both cases concern the constitutionality of an investigator viewing individual CSAM files outside the defendants' accounts. *Gasper* does not disturb the undisputed proposition that individuals generally have a reasonable expectation of privacy in their ESP accounts.

Second, amici argue that an ESP's terms of service (ToS) are irrelevant to deciding whether the Fourth Amendment applies. In so arguing, they erroneously draw a stark line between expectations of privacy against private parties and expectations of privacy against the government. Those considerations overlap because the reasonableness of a claimed expectation of privacy turns on an individual's property interests, such as the right to exclude. Those property interests govern the individual's relationship with *everyone*—not merely the government. Accordingly, an individual's capacity, or lack thereof, to assert property interests against private parties necessarily informs the

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[1] Google LLC, Snap, Inc., and Microsoft Corp. ("Google et al."); Project for Privacy & Surveillance Accountability, Inc. ("PPSA"); the Electronic Frontier Foundation and American Civil Liberties Union ("EFF/ACLU"); and the Wisconsin Association of Criminal Defense Lawyers ("WACDL").

reasonableness of a claimed expectation of privacy against the government.

Third, amici erroneously treat CSAM and electronic communications equivalently. They are not the same. The type of content matters because the alleged Fourth Amendment events are law enforcement review of files, not accounts. Rather than possessing a privacy interest in isolated CSAM files, defendants unreasonably invaded the privacy of the child victims by possessing them. They cannot rely on the historical tradition of privacy for communications to protect their possession of CSAM.

The most telling feature of the non-party briefs is their silence. Only PPSA supports all of defendants' positions and a result in their favor.[2] The other three amici conspicuously decline to address whether the ESPs were government actors or the private-search doctrine. Their silence reveals that the fundamental question raised in these cases is *why*, not *whether*, the State wins.

ARGUMENT

I. *Gasper* does not vitiate an individual's expectation of privacy in an ESP account.

Amici overstate *Gasper*'s consequences by contending that it vitiates a user's expectation of privacy in an ESP account.

The alleged Fourth Amendment event in both cases is an investigator's viewing of individual CSAM files attached to a CyberTip outside an ESP account. *Gasper* could not have been clearer in holding that the detective's "viewing of the *video that accompanied the CyberTip* did not constitute a

[2] The State's previous briefs adequately address these other arguments.

search under the Fourth Amendment." *Gasper*, 414 Wis. 2d 532, ¶ 29 (emphasis added). The State agrees that a user generally has an expectation of privacy in an ESP account because it is a digital container storing digital effects. *See State v. Bowers*, 2023 WI App 4, ¶ 26, 405 Wis. 2d 716, 985 N.W.2d 123.

Some amici, however, argue that *Gasper* allows law enforcement unfettered access to a user's ESP account whenever the user violates the ToS. (Google et al.'s Br. 16; EFF/ACLU's Br. 11–12; WACDL's Br. 10–12.)[3] In so arguing, amici erroneously conflate a single effect with a container.

Gasper addressed the defendant's reasonable expectation of privacy only in a single effect (the reported CSAM file) not the container (the Snapchat account) in which it was detected. In both *Gasper* and *Rauch Sharak*, no law enforcement officer accessed an ESP account without a warrant. The CSAM attached to the CyberTips did not provide access to the defendants' ESP accounts. *Gasper* did not hold that a user forfeits an expectation of privacy in an ESP account by storing CSAM within it.

This distinction between a law enforcement search of a container and law enforcement access to an effect is crucial to *Gasper*'s scope and best illustrated by analogues in the physical world. Imagine a landlord entered a tenant's apartment to repair a leaky kitchen sink, or a cleaning person entered a hotel room to clean it. If these two people discovered baggies of white powder hidden under the kitchen sink or inside the hotel room coffee machine, they could photograph the baggies and report the photos and relevant information to law enforcement—just like CyberTips generated by ESPs. That information and the photograph would likely support a

[3] The State cites exclusively to the *Gasper* non-party briefs. The amici who filed in both *Gasper* and *Rauch Sharak* raise the same arguments in both cases.

search warrant for the apartment or hotel room—just as the CyberTips did in the present two cases. In these two hypotheticals, there would be no question that law enforcement could lawfully view the photographs provided by the private citizens without a warrant. The reasonable expectation of privacy held by the tenant in the apartment and by the occupant in the hotel room would not extend to a photograph viewed outside the room.

The facts in *Gasper* and *Rauch Sharak* are materially the same. Law enforcement viewed evidence of unlawful activity in ESP accounts provided by the ESPs without accessing the accounts. Then, law enforcement obtained search warrants. Rather than allow for warrantless rummaging in an ESP account, *Gasper* recognized the unremarkable proposition that an individual cannot leverage the reasonable expectation of privacy in a protected space to bar law enforcement access to evidence of wrongdoing outside that space.

Amici also argue that *Gasper*'s reasoning effectively vitiates privacy in an ESP account because most ToS allow ESPs to access and report content to law enforcement in certain circumstances. (Google et al.'s Br. 17–18; PPSA's Br. 11–13; EFF/ACLU's Br. 6, 11–15.) This outcome would not come to pass.

Electronic communications are entitled to the same protection as physical communications. An expectation of privacy can arise from "understandings that are recognized and permitted by society." *Byrd v. United States*, 584 U.S. 395, 405 (2018) (citation omitted). As amici note, an individual's expectation of privacy in mail communication has been established for over a century. (PPSA's Br. 11–12; EFF/ACLU's Br. 10–11.) In terms of *State v. Bruski*, 2007 WI 25, 299 Wis. 2d 177, 727 N.W.2d 503, there is a strong "historical notion[ ]of privacy" in communications. *Id.* ¶ 24 (citation omitted). An ESP's ToS would not supersede this

entrenched historical tradition of privacy. No such tradition of privacy exists for CSAM. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) ("[A]ny interest in possessing contraband cannot be deemed 'legitimate.'") (citation omitted).

As for files reported to law enforcement that are neither communications nor CSAM, the expectation of privacy is unclear but not foreclosed by *Gasper*. Courts would have to apply the *Bruski* factors to the specific circumstances, which may include ToS. *Gasper*, however, does not compel the conclusion that an ESP user lacks a reasonable expectation of privacy in any content disclosed by an ESP to law enforcement pursuant to ToS.

II. The terms of service are relevant.

Amici argue that ToS are irrelevant to answering the reasonable expectation of privacy question because there is a distinction between expectations of privacy from private parties and the government. They maintain that ToS apply only to private expectations. (Google et al.'s Br. 9–12; EFF/ACLU's Br. 9–15; WACDL's Br. 7–9, 12–13.) This distinction is artificial and contrary to *Bruski*.

Amici initially misread *Byrd* to hold that private contracts are irrelevant to the scope of the Fourth Amendment. (Google et al.'s Br. 11–12; EFF/ACLU's Br. 12–14; WACDL's Br. 10–11.) *Byrd* did not issue such a categorical holding. *Byrd* deemed the defendant's violation of a rental car's authorized driver's policy immaterial to the driver's expectation of privacy in the vehicle because the rental car agreement "concern[ed] risk allocation between private parties." *Byrd*, 584 U.S. at 408. *Byrd* distinguished this "risk allocation," *id.*, from whether the driver had an "expectation of privacy that comes with the right to exclude," *id.* at 407. The individual's right to exclude, an explicit property law concept, is essential to determining whether the individual has an objectively reasonable expectation of privacy. *See id.*

at 405; *Bruski*, 299 Wis. 2d 177, ¶ 24. The ToS establish that the defendants had no property interest or right to exclude with respect to CSAM. *See Gasper*, 414 Wis. 2d 532, ¶¶ 22–24.

More fundamentally, amici's dichotomy between private and governmental privacy expectations is illusory. It fails to account for the private property interests at the core of the reasonable-expectation-of-privacy analysis. *See Bruski*, 299 Wis. 2d 177, ¶ 24. The reasonableness of an individual's claimed expectation of privacy necessarily turns on how and whether the individual may assert those interests against other private parties. The expectations of privacy with respect to private parties and the government are therefore intertwined, making ToS relevant to the analysis.

Amici largely ignore the case that best illustrates this overlap: *United States v. Thomas*, 65 F.4th 922 (7th Cir. 2023). There, Thomas retained a reasonable expectation of privacy in his leased condo, despite obtaining it with a false name, because his landlord had not completed the eviction process under Georgia law. *Id.* at 924. However, the landlord's means of protecting her "ownership interest in the property" still "b[ore] on the reasonableness of Thomas's expectation of privacy." *Id.* at 923–24. Thus, Thomas's reasonable expectation of privacy with respect to the government turned on how the private lease assigned the right to exclude between him and the landlord, and on whether the private process by which the landlord could repossess the condo had been completed. *Accord State v. Whitrock*, 161 Wis. 2d 960, 981, 468 N.W.2d 696 (1991); *United States v. Cunag*, 386 F.3d 888, 895 (9th Cir. 2004).

Only Google et al. attempt to address these cases (albeit without naming them). They argue that an eviction is distinct from ToS because an eviction completely extinguishes the tenant's right to exclude while ToS provide a private party a limited right of access to an ESP account. (Google et al.'s Br.

15–16.) Google et al. have merely identified another distinction without a difference.

The right to exclude is not an all-or-nothing proposition. An estate owner's right to exclude may be limited by an easement across the property, and the easement's owner's right to exclude may be defined by a written contract. *See Grygiel v. Monches Fish & Game Club, Inc.*, 2010 WI 93, ¶¶ 13–14, 19, 328 Wis. 2d 436, 787 N.W.2d 6. Here, the ToS denied defendants the right to exclude from CSAM reported to law enforcement for viewing outside the account. This limitation is *Gasper*'s virtue. *Gasper* does not apply to content with an established history of privacy like communications or to content not as expressly addressed by the ToS as CSAM.[4]

Amici next argue that it is imprudent to consider ToS in evaluating the reasonable expectation of privacy. Their concerns are misplaced.

Amici claim that *Gasper*'s reasoning creates an expectation of privacy that varies from ESP to ESP. (Google et al.'s Br. 18–19; EFF/ACLU's Br. 14–15.) Factual variance is hardly uncommon in the Fourth Amendment context: "Determining the constitutionality of a warrantless search is a fact-intensive inquiry, and resolution of these questions has always turned on the specific facts of the case." *State v. Denk*, 2008 WI 130, ¶ 52, 315 Wis. 2d 5, 758 N.W.2d 775.

Amici also warn that *Gasper*'s reasoning will force users to choose between security and privacy in ESP accounts.

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[4] Google et al. similarly object to the State's bailment analogy, arguing that the ToS do not apply to the government. (Google et al.'s Br. 18 n.3.) Google et al., however, do not address this Court's decisions in *State v. Wisumierski*, 106 Wis. 2d 722, 736–37, 317 N.W.2d 484 (1982), or *State v. Dixon*, 177 Wis. 2d 461, 470, 501 N.W.2d 442 (1993), in which this Court decided the reasonable expectation of privacy issue by reference to bailments between private parties.

(Google et al.'s Br. 20–24; EFF/ACLU's Br. 13 n.13.) Amici ignore existing laws that protect electronic communications. The federal Stored Communications Act[5] limits how a "governmental entity" may acquire electronic communications stored by an "electronic communication service" and expressly requires a warrant establishing probable cause for communications sent within the preceding 180 days. 18 U.S.C. § 2703(a)–(b). Wisconsin law is even more restrictive, requiring a warrant establishing probable cause in all situations for the government to obtain the contents of electronic communications. Wis. Stat. § 968.375(3). Wisconsinites do not depend on the beneficence of technology companies to secure their digital privacy and security.[6]

PPSA contends that *Gasper* incentivizes the government to require ESPs to make users waive their Fourth Amendment rights in agreeing to ToS. (PPSA's Br. 14–15.) Not so. If the government mandated such terms, then the ESP would become a government actor, and users would have Fourth Amendment protections from the ESP. *See Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 615 (1989) (determining that federal regulation "intended to supersede 'any provision of a collective bargaining agreement or arbitration award construing such an agreement'" rendered private railways government actors) (citation omitted).

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[5] Title II of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 201, 100 Stat. 1848, codified as amended at 18 U.S.C. §§ 2701–2711.

[6] Google et al. also believe *Gasper* will incentivize bad actors to use platforms with less security and monitoring. (Google et al.'s Br. 22.) That incentive already exists. *See G.G. v. Salesforce.com, Inc.*, 76 F.4th 544, 549 (7th Cir. 2023) (recounting news sources revealing that Backpage operated as a "'hub' of human trafficking" for a decade).

III. Amici erroneously equate CSAM to communications.

Finally, amici erroneously assume that CSAM and communications are equivalent. (Google et al.'s Br. 12–18; PPSA's Br. 12–13; EFF/ACLU's Br. 6, 9–11, 15–16; WACDL's Br. 13.) They are not the same.

The type of file matters because *Gasper* and *Rauch Sharak* concern law enforcement review of *files*, not accounts. *See* Section I, *supra*. For that reason, amici's arguments that *Gasper* strips the expectation of privacy from any ESP account that stores CSAM are wrong. (EFF/ACLU's Br. 15–16; WACDL's Br. 10–13.) The present two cases address the reasonableness of an expectation of privacy in a bare CSAM file viewed by law enforcement.

Only the child victims have a privacy interest in an isolated CSAM file. In evaluating the federal restitution statute when applied to CSAM victims, Justice Sotomayor recognized that "[t]here is little doubt that the possession of images of a child being sexually abused would amount to an intentional invasion of privacy tort—and an extreme one at that." *Paroline v. United States*, 572 U.S. 434, 483 (2014) (Sotomayor, J., dissenting). Wisconsin law supports Justice Sotomayor's assessment.

Wisconsin has a statutory right of privacy at Wis. Stat. § 995.50. A person's privacy can be unreasonably invaded by "[c]onduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct." Wis. Stat. § 995.50(2)(am)4.

Section 942.09 addresses criminal conduct with respect to "intimate representations." A "representation" is an image, sound, or video captured by a recording device. Wis. Stat. § 942.09(1)(a). A "representation" is "intimate" if it depicts a "person engaged in sexual intercourse or sexual contact." Wis. Stat. § 942.09(1)(ag)4. Under Section 942.09(2)(am)3., it is a

crime to possess an "intimate representation" with the knowledge that the depicted person did not consent and had a reasonable expectation of privacy when the representation was captured.[7] A minor "is incapable of consent." Wis. Stat. § 942.09(1)(ae). Gasper's and Rauch Sharak's possession of CSAM plainly constituted violations of Wis. Stat. § 942.09(2)(am)3. Therefore, they unreasonably invaded the privacy of the child victims under Wis. Stat. § 995.50(2)(am)4.

The child victims also have a constitutional right to privacy as crime victims under Wis. Const. art. I § 9m(2)(b). That right "vest[ed]" upon their "victimization." *Id.* § 9m(2). Gasper and Rauch Sharak violated the victims' constitutional right to privacy by possessing files that depicted their abuse.

In this light, an individual cannot claim an expectation of privacy in a bare CSAM file. While a person would not forfeit a reasonable expectation of privacy in an ESP account by storing CSAM within it, that person's possession of the CSAM file in isolation unreasonably invades the privacy of the child victims and is not covered by a broader expectation of privacy in a digital container. For that reason, amici err by uncritically equating CSAM to communications. *Cf. State v. Duchow*, 2008 WI 57, ¶ 34, 310 Wis. 2d 1, 749 N.W.2d 913 ("[P]reservation of a privacy interest in threats to harm the person to whom the threat is made is not what 'free people legitimately may expect.'") (citation omitted).

Neither the State's position nor *Gasper*'s holding turns exclusively on the fact that the files at issue were CSAM. Nonetheless, that fact is relevant to the "historical notions of privacy" factor. *Bruski*, 299 Wis. 2d 177, ¶ 24 (citation

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[7] The court of appeals has explained that "reasonable expectation of privacy" in section 942.09 has its "common and ordinary" meaning rather than its Fourth Amendment meaning. *State v. Nelson*, 2006 WI App 124, ¶¶ 2, 24, 294 Wis. 2d 578, 718 N.W.2d 168.

omitted); *see Caballes*, 543 U.S. at 408 ("[A]ny interest in possessing contraband cannot be deemed 'legitimate.'" (citation omitted)). At the very least, this fact undermines a critical assumption of amici.

CONCLUSION

In *Gasper*, this Court should affirm the court of appeals' decision reversing suppression. In *Rauch Sharak*, this Court should affirm the order denying suppression.

Dated this 5th day of August 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
michael.conway@wisdoj.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,991 words.

Dated this 5th day of August 2025.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of August 2025.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY