Supreme Court of California
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Jorge E. Navarrete, Clerk and Executive Officer of the Court
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AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

February 3, 2025

Honorable Chief Justice Patricia Guerrero
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Gerald Louis Clymer, Jr.*, No. S288791
Request for Depublication

Dear Hon. Chief Justice Guerrero and Associate Justices of the Court:

The American Civil Liberties Union of Northern California respectfully requests depublication of the First District Court of Appeal's partially published opinion in *People v. Clymer* (2024) 107 Cal.App.5th 131.[1]

In the decision below, the First District reached two broad conclusions about the California Electronic Communication Privacy Act's (CalECPA) enforcement mechanism that would dramatically undermine the statute's privacy protections. But neither conclusion was necessary to resolving this case, because the court also held that the search in question did not violate CalECPA in the first place. Because this dicta could have far-reaching and unintended consequences, this Court should depublish the decision below.

The ACLU of Northern California is a nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the federal and California Constitutions, and our nation's and state's civil rights laws, including the right to privacy. We have engaged in legislative efforts related to CalECPA and the federal Stored Communications Act and have frequently appeared as counsel to the parties and amici before this Court and the United States Supreme Court in cases implicating the right to privacy. (See, e.g., *In re Ricardo P.* (2019) 7 Cal.5th 1113; *Sheehan v. San Francisco 49ers* (2009) 45 Cal.4th 992; *Hill v. Nat'l Collegiate Athletic Assn.* (1994) 7 Cal.4th 1; *White v. Davis* (1975) 13 Cal.3d 757; *Carpenter v. United States* (2018) 138 S.Ct. 2206; *Riley v. California* (2014) 573 U.S. 373; *Herring v. United States* (2009) 555 U.S. 135.)

[1] Petitioner Gerald Louis Clymer, Jr. filed a petition for review of the decision below on January 13, 2025 (No. S288791).

The published portion of the First District's order ends where it should have started: deciding whether the search in question violated CalECPA. When a search is lawful, no analysis of whether suppression would be appropriate in some other case is necessary. Here, the court found that the officers had conducted the search with the consent of the authorized possessor(s) of the device (here, the decedent's parents), and the court found that search authorized pursuant to Penal Code Section 1546.1(c)(4).

Unfortunately, the court also included an analysis of CalECPA's suppression remedy and offered two advisory, incomplete, and incorrect conclusions.

First, the court concluded that CalECPA does not *require* suppression of evidence—even though the statute clearly provides a suppression remedy for "electronic information obtained or retained in violation of the Fourth Amendment or of this chapter." (Pen. Code § 1546.4(c).) Rather, the court reasoned, CalECPA only *authorizes* filing a motion to suppress; the decision to grant the motion is left entirely to the trial court's discretion. (*People v. Clymer* (2024) 107 Cal.App.5th 131 [2024 WL 4983030, *3]). This interpretation cannot be squared with CalECPA's purposes—or even common sense. Indeed, CalECPA was passed by a 2/3 supermajority of both houses of the California legislature specifically in order to have this suppression remedy.[2] The intent and privacy-protective goals of CalECPA are not achieved by the mere filing of a motion. Rather, those goals—ensuring that government entities comply with strict rules for electronic warrants—follow when there are real and consistent consequences for violating people's rights.[3]

The court's conclusion that suppression is never required by CalECPA also flies in the face of basic statutory construction. Contrary to the First District's analysis, each of CalECPA's three remedial provisions create an entitlement to seek relief in court: by a person "mov[ing] to suppress" (Pen. Code § 1546.4(a)); the Attorney General "commencing a civil action" (Pen. Code § 1546.4(b)); or an individual "petitioning the issuing court" (Pen. Code § 1546.4(c)). The decision below

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[2] Cal. Const., art. I, § 28(d). The two-thirds majority was only necessary for CalECPA because the law includes a suppression remedy for information beyond that which is required by the United States Constitution. *In re Lance W.* (1985) 37 Cal.3d 873, 879.

[3] *See Saunders v. Superior Court* (2017) 12 Cal.App.5th Supp. 1, 22–23 (discussing the public policy concerns motivating CalECPA, including protecting private electronic device information and noting that the legislation "provides additional privacy protections to this kind of information—like notice, time limits, and sealing provisions— reflecting the recognized heightened privacy concerns in both cell-phone records and content . . . ."); *see also Elkins v. United States* (1960) 364 U.S. 206, 217 (noting that the purpose of suppression "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

would reduce each of these avenues for relief to a bare procedural right, that the court could simply disregard. Just as a civil action filed by the Attorney General under 1546.4(b) to enforce CalECPA would entitle the Attorney General to an injunction against a government entity violating the law, so too does CalECPA provide people with a right to suppress evidence or modify legal process that does not comply with the law. By the same token, Penal Code section 1546.5(b), added to CalECPA by the legislature in the wake of the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.* (2022) 597 U.S. 215, 237, uses identical language to empower the Attorney General to "commence a civil action" to ensure that California companies are not undermining abortion rights by handing over information about people to out-of-state law enforcement.[4] The Court of Appeal's reasoning would nullify that enforcement action, leaving it entirely under the trial court's discretion. Other important rights under California law would be similarly nullified, from aggrieved people seeking to exclude evidence against them in litigation targeting protected health-care activity (like reproductive and gender-affirming care),[5] to people seeking suppression of unlawfully collected wiretap evidence.[6]

Of course, the question of whether evidence should be suppressed under CalECPA arises only if a court finds that the evidence was obtained in violation of the statute. Here, as noted, the Court of Appeal concluded that the officers' search of the decedent's phone was properly authorized by his parents. So the court should never have weighed in on the viability of CalECPA's suppression remedy.

Second, the Court of Appeal offered an analysis of whether the good-faith exception to suppression under Fourth Amendment law applies to CalECPA. Here, the court implied, but did not state clearly, that the good-faith exception applied when CalECPA is violated. Again, there was no reason for the court to address this issue. Indeed, the court *itself* acknowledged that "we need not weigh in . . . as to the applicability of the good faith exception." (*People v. Clymer* (2024) 107 Cal.App.5th 131 [2024 WL 4983030, *4]). That acknowledgment only further highlights why depublication is warranted here.

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[4] *See* Veronica Stracqualarsi, *California Gov. Gavin Newsom signs legislative package protecting and expanding abortion access into law* (September 27, 2022), CNN, https://www.cnn.com/2022/09/27/politics/california-abortion-protection-package-signed-law-newsom/index.html (as of January 31, 2025).

[5] Civ. Code, section 1978.304 ("An aggrieved person, provider, or other entity, including a defendant in abusive litigation, may move to modify or quash a subpoena issued in connection with abusive litigation on the grounds that the subpoena is unreasonable, oppressive, or inconsistent with the public policy of California.").

[6] Pen. Code, section 631 ("Any person in a trial, hearing, or proceeding may move to suppress wire or electronic information obtained or retained in violation of the Fourth Amendment to the United States Constitution or of this chapter.").

In any event, the First District's analysis of the applicability of the good-faith exception misunderstands CalECPA, and its suggestion that the exception "remains operative" should not guide lower courts. CalECPA updated and strengthened electronic privacy law for the modern digital age and specifically rejected outdated distinctions and jurisprudential limitations from federal law.[7] CalECPA includes a statutory suppression remedy, independent of the Fourth Amendment, for "electronic information obtained or retained in violation of . . . this chapter." Pen. Code § 1546.4(c).

The good-faith exception to the exclusionary rule under the Fourth Amendment does not apply to CalECPA. The interaction between the exclusionary rule and statutory bases for suppression is instructive here. In reviewing whether the good-faith exception under the Fourth Amendment applied to California wiretap law, the Second District Court of Appeal wrote that "the first and most obvious reason why [the good-faith exception] does not apply to unlawful wiretap procedures is because [the good-faith exception] is 'a judicially crafted exception to an exclusionary rule that is itself a judicial creation.' (*People v. Jackson* (2005) 129 Cal.App.4th 129, 152–160). If suppression of evidence, the court wrote, "does not turn on the judicially fashioned exclusionary rule, we fail to see how it can turn on a judicially fashioned exception to the judicially fashioned rule." (*Ibid.*) This precise reasoning applies here.

The decision below, if left in place, would reinforce two legal conclusions that undermine statutory privacy remedies for anyone accused of a crime in California. And it would do so in a case where the issues are improperly presented and analyzed only in passing. Accordingly, we respectfully ask this Court to depublish the Court of Appeal's opinion. Alternatively, if the Court grants plenary review, we encourage the Court to correct these errors in the Court of Appeal's analysis and reaffirm CalECPA's vital protections.

Respectfully submitted,

Jacob A. Snow (SBN 270988)

[7] *See* Sen. Com. on Pub. Safety, Rep. on Sen. Bill No. 178 (2015–2016 Reg. Sess.) Mar. 23, 2015, p. 8 ("[CalECPA] updates existing federal and California statutory law for the digital age and codifies federal and state constitutional rights to privacy and free speech by instituting a clear, uniform warrant rule for California law enforcement access to electronic information, including data from personal electronic devices, emails, digital documents, text messages, metadata, and location information."), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB178#.

Neil K. Sawhney (SBN 300130)
Nicole A. Ozer (SBN 228643)
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street,
San Francisco, CA 94111
(415) 621-2493
jsnow@aclunc.org

PROOF OF SERVICE

I, Samantha May, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is smay@aclunc.org. On February 3, 2025, I served the attached:

Request for Depublication, Case No. S288791

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system or via electronic mail:

Law Offices of Marsanne Weese
Marsanne Weese
Rose Mishaan
255 Kansas Street, Suite 340
San Francisco, CA 94103
Marsanne@marsannelaw.com
Rose@marsannelaw.com

Counsel for Gerald Louis Clymer, Jr.

Office of the Attorney General
Rob Bonta, Attorney General of California
Lance Winters, Chief Assistant Attorney General
Jeffrey Laurence, Senior Assistant Attorney General
Donna Provenzano, Supervising Deputy Attorney General
Kelly Styger, Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Kelly.Styger@doj.ca.gov
sfagdocketing@doj.ca.gov

Counsel for The People of the State of California

Court of Appeal – First Appellate District, Division One
350 McAllister Street
San Francisco, CA 94102
1DC-Div1-Clerks@jud.ca.gov

Appellate Court, Case No. A166279

(continued on next page)

Clerk of the Superior Court – San Mateo County
For: Hon. Sean Dabel
400 County Center
Redwood City, CA 94063
dept26@sanmateocourt.org

Trial Court, Case No. 19SF003118A

District Attorney's Office – San Mateo County
Redwood City Branch
500 County Center, 3rd Floor
Redwood City, CA 94063
da_info@smcgov.org

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

Executed on February 3, 2025, in Kensington, CA.

Samantha May, Declarant