

No. S260391

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEREMIAH SMITH,

Petitioner,

v.

LOANME, INC.,

Respondent.

Court of Appeal, Fourth District, Case No. E069752
Riverside County Superior Court Case No. RIC1612501

Honorable Douglas P. Miller
Honorable Michael J. Raphael
Honorable Frank J. Menetrez

**APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND
BRIEF OF *AMICI CURIAE* CONSUMER ACTION, CONSUMER
FEDERATION OF CALIFORNIA, AND THE ELECTRONIC PRIVACY
INFORMATION CENTER SUPPORTING PETITIONER**

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Pursuant to California Rule of Court 8.208, *amici curiae* are 501(c)(3) non-profit entities in which no other person or entity has an ownership interest of 10 percent or more. *Amici* know of no other person or entity that has a financial or other interest in the outcome of the proceedings.

Dated: July 20, 2020

Respectfully submitted,

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

Under California Rules of Court rule 8.520(f), Consumer Action, the Consumer Federation of California, and the Electronic Privacy Information Center request leave to file the attached *amicus curiae* brief in support of appellant Jeremiah Smith.¹ The brief will aid the Court in understanding the unique privacy risks of call recording, the need to require specific consent by all parties to record a call, and the privacy implications of the lower court's rule, particularly in our current society of remote school, work, and life.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education and advocacy for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change. In 2019-2020, the organization participated in more than 80 advocacy coalitions, including two groups specifically focused on privacy rights.

To empower consumers to assert their rights in the marketplace, Consumer Action provides a range of educational resources. The organization's extensive library of free publications offers in-depth information on many topics including

¹ Under Cal. Rule of Court rule 8.520(f)(4), *amici* certify that no party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the brief. *Amici* certify that no other person or entity other than the *amici* and their counsel authored or made any monetary contribution intended to fund the preparation or submission of the brief.

telecommunications and privacy, while its free hotline provides advice and referrals on the same range of issues.

Consumer Action has long worked to protect consumer privacy through advocacy and education. It bases its work on the belief that every person has the right to privacy in their homes, their communications, their commercial and financial dealings, and their personal affairs. Consumer Action works with many coalitions and organizations to address areas of concern regarding consumer privacy, including robocalls, medical privacy, data brokers, social media, security surveillance, internet tracking, geolocation systems, and facial recognition, to name a few. The organization works actively in pursuit of baseline privacy principles for future U.S. legislation that would give individuals significant control over who may access, share or sell their data online; would grant consumers the opportunity to correct data; and would establish strong consumer rights of recourse for privacy violations.

Consumer Action's advocacy efforts include outreach to the Federal Trade Commission and Federal Communications Commission to retain and strengthen regulations and enforcement actions that protect consumers from unwanted robocalls and texts and broadband and telephone privacy violations.

Since 1960, the non-profit Consumer Federation of California ("CFC") has worked to improve state and federal consumer protection laws. CFC has worked on numerous privacy-related matters, including strengthening and protecting medical,

credit card, financial, children’s, motorist and biometric privacy protections, data breach notice laws, and protections against identity theft. CFC has participated in hearings of the California Public Utilities Commission and the California Department of Insurance that led to promulgation of utility ratepayer and insurance policyholder privacy regulations. CFC was a founding member of Californians for Privacy Now, a coalition that helped to win enactment of the nation’s strongest financial privacy law (Senate Bill 1 - Speier; Chapter 791, Statutes of 2003). In 2015, CFC spearheaded the successful opposition to AB 925 (Low), which would have eviscerated the California Invasion of Privacy Act, Penal Code § 632.7. In 2017, CFC worked with Assemblymember Eggman, who amended her AB 413 to establish a very narrow exception to the two-party consent law in cases involving call recording to obtain evidence of domestic violence (Chapter 191, Statutes of 2017).

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy issues.² EPIC routinely participates as *amicus curiae* in cases concerning consumer privacy. *See, e.g.*, Brief for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Barr. v Am. Ass. of Political Consultants*, 140 S. Ct. 812 (2020) (No. 19-631) (arguing that the Telephone Consumer Protection Act (“TCPA”) is constitutional); Brief for EPIC as *Amicus Curiae* Supporting Petitioner, *LinkedIn v. hiQ*

² EPIC Appellate Advocacy Fellow Melodi Dincer and IPIOP clerks Margaret Foster and Serena Wong contributed to this brief.

Labs, (No. 19-1116) (U.S. filed Apr. 13, 2020) (arguing that electronic service providers must be able to limit web scraping to protect user privacy); Brief for EPIC as *Amicus Curiae* Supporting Respondents, *PDR Network v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051 (2019) (No. 17-1705) (arguing that TCPA defendants should not be able to challenge FCC interpretations of the TCPA outside the review process Congress established); Brief for EPIC et al. as *Amici Curiae* Supporting Respondent, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that violation of statutory privacy rights confers Article III standing); Brief of EPIC et al. as *Amici Curiae* Supporting Petitioner, *Maracich v. Spears*, 570 U.S. 48 (2013) (No. 12-25) (arguing that the scope of the litigation exception to the Driver's Privacy Protection Act should be narrow); Brief for EPIC et al. as *Amici Curiae* Supporting Petitioners, *Sorrell v. IMS Health*, 564 U.S. 552 (2011) (No. 10-779) (arguing that a Vermont law restricting use of prescriber-identifying data protected patient privacy).

CONCLUSION

Amici respectfully request that the Court grant the application to file this *amicus curiae* brief.

Dated: July 20, 2020

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INTRODUCTION

The State of California has long been a leader on privacy, and the state's privacy laws are some of the strongest in the nation. California has traditionally protected privacy through statutory, constitutional, and common law rights, and more recently was the first state to enact comprehensive consumer data protection legislation. California was also one of the first states to require that all parties consent to the recording of a call. But the lower court's decision would turn California into a one-party consent state and, if upheld, Californians will lose one of their key privacy rights: the right to control who records—and, thus, has the power to disclose—their telephone conversations.

Modern privacy law recognizes the right of individuals to control their private information. The origins of this right date back to the late nineteenth century, when Samuel Warren and Louis Brandeis first outlined a general right of each individual to control the reproduction of their image and disclosure of their private information. From the beginning, reproduction and disclosure of personal information required the consent of the individual. The subsequent development of the right to privacy distributed rights and obligations based on specific information practices—collection, use, retention, and disclosure—and required, at a minimum, meaningful consent of an individual to authorize those practices. Because recording a call creates a record of the contents of the call, while merely listening to a call does not, California and other states require the meaningful

consent of all parties to a call before it can be recorded or intercepted.

The need to preserve California’s all-party consent law is more urgent now than ever before. With the COVID-19 pandemic, millions of Californians have been forced to conduct their personal and business lives remotely, relying on voice and video calls to complete their work, to pursue their education, to preserve their relationships, and to maintain basic human connections. The increased use of call technology exacerbates the risk that private communications—concerning issues of political involvement, health and other private matters, or sensitive financial data—could be recorded and disclosed against an individual’s will. That is precisely what the California Invasion of Privacy Act (“CIPA”) was enacted to prevent, and this Court should preserve those protections.

ARGUMENT

I. Requiring meaningful consent by all parties to the recording of a call is consistent with fundamental principles of privacy law.

The central purpose of privacy law is to vest individuals with rights to control their personal information and impose corresponding obligations on entities that seek to collect, use, or disclose personal data. To this end, privacy laws distinguish between different data practices—collection, use, retention, and disclosure—and recognizes rights and obligations for each. The act of recording a call poses unique threats to privacy because a permanent record of the private communication can be made surreptitiously without the consent, or even knowledge, of the

caller. The recorder could then retain and disclose the contents of that private communication without the consent of the caller. Indeed, that is the purpose of recording a call. In response to this threat to privacy, California has required that all parties must consent to the recording of a private call. That is because consent to participate in a call is inherent in carrying out a call, but consent to record a call is not. The lower court's ruling turns California into a one-party consent state by inferring consent to record a call from consent to participate in a call.

The right of individuals to control personal information and the obligation of information collectors to limit collection, absent meaningful consent, have been important elements of the right to privacy ever since future U.S. Supreme Court Justice Louis Brandeis and attorney Samuel Warren published *The Right to Privacy* in 1890. At the close of the nineteenth century, technological advances had made it easier than ever before to record and distribute personal information. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890). The confluence of new technology and newspaper business models that relied on printing gossip led to an explosion in the collection and publication of individuals' private images and other information. *Id.* Warren and Brandeis were particularly concerned about the surreptitious recording of an individual's image without their consent, *Id.* at 211, but the recent invention of audio recording devices was surely on their minds when they proclaimed that "numerous mechanical devices threaten to make

good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’” *Id.* at 195.

According to Warren and Brandeis, the solution to the problem of surreptitious recording, from a legal perspective, was to recognize in “each individual the right of determining . . . to what extent his thoughts, sentiments, and emotions shall be communicated to others.” *Id.* at 198. To that end, personal information could only be distributed as far as an individual had consented. *Id.* at 199, 218. Importantly, this early articulation of the right to privacy recognized a distinction between consent to observe a person in public or receive a communication and consent to create a record or to publicize the contents of a communication; consent to the former did not entail consent to the latter.

Proliferation of computer technology in the 1960s brought a renewed interest in establishing privacy protections. The pioneers of modern privacy law rightly predicted that computers would enable governments and companies to collect and store records on individuals on a scale never before seen. Legal scholars, legislatures, and courts responded by recognizing the right to privacy as a set of rights and corresponding obligations that could only be waived through consent. In 1967, Alan Westin defined privacy in a way that informed the next several decades of privacy scholarship and legislation. According to Westin, privacy was “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.” Alan Westin,

Privacy and Freedom 5 (1967). Westin also wrote that “the first principle for controlling information in a data-stream society” was to recognize that “consent to reveal information to a particular person or agency for a particular purpose is not consent to the circulation of that information to all, nor to its use for other purposes.” Alan Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970s, Part II*, 66 Colum. L. Rev. 1205, 1211 (1966). He warned that failure to recognize this principle of consent would cause “serious problems of privacy [to] arise in the future.” *Id.* The same year that Westin published his groundbreaking book—and the U.S. Supreme Court determined that individuals have a right to privacy in their telephone conversations, *Katz v. United States*, 389 U.S. 347 (1967)—the California Legislature passed the CIPA.

The formulations of privacy developed in the 1960s were codified in the early 1970s in the Fair Information Practices (“FIPs”), which identified individual rights to control personal information and obligations for data collectors. *See* U.S. Dep’t of Health, Education, & Welfare, *Records, Computers and the Rights of Citizens* (1973) (citing Westin’s work throughout). The FIPs distinguish between the collection, use, retention, and disclosure of personal information, and assign rights and obligations for each. *See* Anita L. Allen & Marc Rotenberg, *Privacy Law & Society* 756-57 (3d Ed. 2016). An individual must consent to a data practice to effect a waiver of their privacy right. *Id.* at 757. Many federal and state privacy statutes implement

aspects of the FIPs, including the California Consumer Protection Act, Cal. Civ. Code § 1798.100, *et seq.*

While notice and choice is not a faithful implementation of the FIPs, Allen & Rotenberg, *supra*, at 757—nor is it a sufficient mechanism to protect privacy online, *see* Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 Wash. U. L. Rev. 1461 (2019)—the Federal Trade Commission’s explanation of notice as a *minimum* requirement for consent is useful in the context of call privacy. Fed. Trade Comm’n, *Privacy Online 7* (1998).³ According to the FTC, “[w]ithout notice, a consumer cannot make an informed decision as to whether and to what extent to disclose personal information.” *Id.* The FTC notes that an individual’s consent to a particular data collection practice is “only meaningful when a consumer has notice of an entity’s policies, and his or her rights with respect thereto.” *Id.* Similarly, an individual cannot make an informed decision about what to say on a call, or whether to end the call, if they are not notified that their call will be recorded, retained, and used for other purposes—possibly against their interests.

Consent can only exist when an individual has a meaningful choice about whether their personal information is recorded, retained, disclosed, or used for other purposes. When use of a service is contingent on consent to a certain type of data collection, choice is coerced and consent is meaningless. Richards & Hartzog, *supra*, at 1468. Eliminating the all-party consent rule

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<https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf>.

in California would mean that consumers would be forced to choose between using call services and consenting to their recording—a coerced choice that obviates any consent.

Listening to a call and recording the call are fundamentally different from a privacy perspective, and so require separate consent. Without a recording of a call, parties have a limited ability to recall—and reveal—what was said. Whitfield Diffie & Susan Landau, *Privacy on the Line* 3 (2007). But “audio recordings and video tapes have changed the standards of evidence and opened the way for the repetition—sometimes to a very broad audience—of remarks that the utterer did not expect to be repeated.” *Id.* Indeed, recordings are made because they can be replayed in the future. The contents may be played for a new audience, violating the utterer’s right to control to whom their conversation is disclosed. Even if the contents are only replayed to the original party, they may reveal information the party did not catch the first time around, such as sensitive financial information. Both result in a loss of control for the caller who did not consent to the recording. Loss of control over whether and to whom a conversation is repeated implicates precisely the concerns at the center of privacy law; “loss of control is loss of privacy.” *Id.* at 142. For these reasons, the California legislature prohibited the recording of a call absent consent.

Californians rely on video and audio calls now more than ever—and the only way to secure their privacy is by maintaining California’s requirement that all parties consent to the recording of a call.

II. Phone and video calls have become more pervasive, and more personal, during the COVID-19 pandemic and are predicted to remain so in the future.

The privacy of calls has never been more urgent an issue than it is today. COVID-19 has forced millions of California residents to conduct nearly all aspects of their lives remotely. The increased use of call technology has brought to the fore the risks inherent in a legal regime that does not require all parties to consent to the recording of a call.

Since the COVID-19 pandemic began, telephone calls have become a critical tool for family, friends, coworkers, and customers alike. In late March, Verizon reported 800 million wireless calls each weekday—twice as much call volume as the company fielded on a typical Mother’s Day, the highest call volume day of the year. Verizon, *Verizon Delivers Network Reliability During COVID-19 While Accelerating 5G Deployments* (June 11, 2020).⁴ Verizon also reported a 38 percent spike in wireless minute use. Verizon, *Verizon’s COVID-19 Network Reliability Report* (2020).⁵ AT&T, too, reported that cellular calls have risen 35 percent and Wi-Fi-based calls have nearly doubled. Cecilia Kang, *The Humble Phone Call Has Made a Comeback*, N.Y. Times (Apr. 9, 2020).⁶

⁴ <https://www.verizon.com/about/news/how-americans-are-spending-their-time-temporary-new-normal>.

⁵ <https://www.verizon.com/about/sites/default/files/Network-Update-Stats-6112020.pdf>.

⁶ <https://www.nytimes.com/2020/04/09/technology/phone-calls-voice-virus.html>.

Even the length of phone calls has increased. Verizon reports that calls during the pandemic are 33 percent longer than calls before the pandemic. Verizon, *Verizon Delivers Network Reliability During COVID-19 While Accelerating 5G Deployments* (June 11, 2020). One previously phone-averse individual told the *Wall Street Journal* that she spends 45 minutes to 2 ½ hours on the phone with people she is close to, each of whom she has called 5 to 20 times. Katherine Bindley, *Call Me Anytime . . . No, Really, We're All Answering the Phone Again*, Wall St. J. (Mar. 26, 2020).⁷ In a recent Siena College Research Institute poll of New Yorkers about the coronavirus, calls designed to last 10 minutes instead lasted an average of 14 minutes because respondents, who are typically reluctant to both answer and stay on the phone, wanted to keep talking. Giovanni Russonello & Sarah Lyall, *Surprising Poll Results: People Are Now Happy to Pick Up the Phone*, N.Y. Times (Apr. 17, 2020).⁸ Some individuals have created walk-and-talk routines, incorporating long phone calls into daily walks outside. Kang, *supra*.

Phone calls have also become more intimate. Though polling calls are intended to be objective, Siena pollsters told the *New York Times* that many of the individuals who answered their calls went beyond answering polling questions and began talking about their personal lives and emotions, revealing private information like a recent job loss, and even crying. Russonello &

⁷ <https://www.wsj.com/articles/call-me-anytimeno-really-were-all-answering-the-phone-again-11585261816>.

⁸ <https://www.nytimes.com/2020/04/17/us/politics/polling-coronavirus.html>.

Lyall, *supra*. When priests and deacons at a church in Louisiana began calling to check in on parishioners they could no longer see in person, the parishioners responded with details about their daily routines. Kang, *supra*. In the absence of face-to-face interactions, phone calls have become therapeutic. Many individuals who might normally tailor the content of their speech to whoever is on the other end of a call, are now treating friends, family, and even strangers as confidantes and likely would never suspect such calls, and their intimate disclosures, to be recorded.

Even more pervasive than telephone calls, and thereby even more susceptible to invasions of privacy, are video calls, or video chats. Such calls have become the default mode of communication in social, business, education, health, employment, religious, and government contexts. Compared to Q4 2019, downloads of Google Hangouts Meet in the U.S. increased 30-fold, Zoom downloads increased 14-fold, Microsoft Teams downloads increased 11-fold, and Houseparty downloads increased 8-fold. Lexi Sydow, *Video Conferencing Apps Surge from Coronavirus Impact*, App Annie (Mar. 30, 2020).⁹ Zoom in particular has seen unprecedented growth, experiencing a 574 percent surge in usage between February 17 and April 6, 2020. Macy Bayern, *Zoom Grew By 574% In Less Than Two Months, But Skype for Business Reigns Supreme*, Tech Repub. (Apr. 29, 2020).¹⁰

⁹ <https://www.appannie.com/en/insights/market-data/video-conferencing-apps-surge-coronavirus/>.

¹⁰ <https://www.techrepublic.com/article/zoom-grew-by-574-in-less-than-two-months-but-skype-for-business-reigns-supreme/>.

Zoom, among other video chat platforms, pervades all aspects of life, so much so that the phrase “Zoom fatigue” has emerged to describe the mental exhaustion of spending hours per day on video calls. Julia Sklar, *‘Zoom Fatigue’ Is Taxing the Brain. Here’s Why That Happens*, Nat’l Geographic (Apr. 24, 2020).¹¹ This transition to virtual communication is exposing intimate conversations and private transactions to new risks of being recorded.

At least 62 percent of Americans have worked from home since the COVID-19 crisis began. Megan Brennan, *U.S. Workers Discovering Affinity for Remote Work*, Gallup (Apr. 3, 2020).¹² But they are not just attending meetings on Zoom; with mass layoffs and furloughs happening across the country, many companies are firing employees over video calls, often on group calls that lack the privacy of a one-on-one meeting behind closed doors. One employee of the travel management company TripActions described seeing coworkers crying and panicking after she and about 100 others were laid off over what they called a painful and messy Zoom call. Biz Carson, *What It Feels Like to Be Laid Off on Zoom During This Crisis*, Protocol (Mar. 25, 2020).¹³ A little over one month later, Uber laid off 3,500 employees—14 percent of its

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<https://www.nationalgeographic.com/science/2020/04/coronavirus-zoom-fatigue-is-taxing-the-brain-here-is-why-that-happens/#close>.

¹² <https://news.gallup.com/poll/306695/workers-discovering-affinity-remote-work.aspx>.

¹³ <https://www.protocol.com/coronavirus-tripactions-layoffs-on-zoom>.

workforce—over Zoom, Jack Kelly, *Uber Lays Off 3,500 Employees Over a Zoom Call*, Forbes (May 13, 2020),¹⁴ and Weight Watchers conducted numerous simultaneous Zoom calls across the country to terminate an undisclosed number of employees. Julie Creswell, *Mass Firing on Zoom Is Latest Sign of Weight Watchers Unrest*, N.Y. Times (May 22, 2020).¹⁵

Several dating applications, including The League, Plenty of Fish, and Hinge, have begun offering video chat features. The League, *Say Goodbye to Bad First Dates, Say Hello to League Live* (2020);¹⁶ Carly Johannson, *What Is the Live! Feature on Plenty of Fish? Latest Catch Blog* (Mar. 24, 2020);¹⁷ Hinge Labs, *Video Chat Dating* (2020).¹⁸ Over one third of Hinge users went on a video date during one week in May. *Id.* Over half of those users talked for over an hour. *Id.* And the majority of Hinge users who have gone on video dates have said that they are likely to continue video dating after the pandemic. *Id.* Beyond dating, many couples are also getting married over Zoom, Zoe Schiffer, *Saying 'I Do' Over Zoom*, Verge (Apr. 1, 2020),¹⁹ while other couples are getting divorced by way of teleconference. Stephanie

¹⁴ <https://www.forbes.com/sites/jackkelly/2020/05/13/uber-lays-off-3500-employees-over-a-zoom-call-the-way-in-which-a-company-downsizes-its-staff-says-a-lot-about-the-organization/#7d35a3207251>.

¹⁵ <https://www.nytimes.com/2020/05/22/business/weight-watchers-firings-zoom.html>.

¹⁶ <https://www.theleague.com/league-live/#are-you-in>.

¹⁷ <https://blog.pof.com/2020/03/what-is-the-live-feature-on-plenty-of-fish/>.

¹⁸ <https://www.hingelabs.co/insights/video-chat-may-2020>.

¹⁹ <https://www.theverge.com/2020/4/1/21202466/zoom-wedding-coronavirus-covid-19-social-distance>.

Zimmerman, *Divorce Lawyers Say Technology Changes May Outlive the COVID-19 Pandemic*, ABA J. (June 11, 2020).²⁰

Unlike face-to-face hearings and mediations sessions, virtual divorce proceedings, which could involve asset and child custody negotiations, are at higher risk of surreptitious recording by a party to the call.

Community organizing has moved virtual, too—and recording these calls without all-party consent can reveal individuals’ sensitive political associations and opinions. In March, Amnesty International USA issued a digital activism toolkit, with tips for its 600 local and student chapters about “running effective and engaging online meetings.” See Amnesty International, *Transitioning to Virtual Activism: Tips for Effective and Engaging Online Meetings*, Medium (Mar. 27, 2020).²¹ SwingLeft, a grassroots election strategy organization, has also published a toolkit for virtual organizing through Zoom and Google Meet. SwingLeft, *Virtual Organizing* (2020).²² Since March 10, 2020, the gun control advocacy campaign March for Our Lives has held weekly Zoom meetings, often with “celebrity” guests and sometimes amassing more than 1,000 participants. Talib Visram, *Can You Keep an Activist Campaign Running During a Pandemic? March for Our Lives Is Trying*, Fast

²⁰ <https://www.abajournal.com/web/article/divorce-in-the-time-of-coronavirus-attorneys-say-tech-changes-may-outlive-the-pandemic>.

²¹ <https://medium.com/@amnestyusa/transitioning-to-virtual-activism-tips-for-effective-and-engaging-online-meetings-f363122a8f40>.

²² <https://swingleft.org/p/virtual-organizing>.

Company (Apr. 29, 2020).²³ Black Lives Matter is planning to hold a virtual convention in August. Aaron Morrison, *Black Lives Matter Movement Plans Virtual National Convention*, Time (July 1, 2020).²⁴

Online organizing meetings are particularly vulnerable to surreptitious recording by parties to a call because regulating attendance and identifying participants can be difficult in a virtual setting, especially in large meetings and for organizations lacking experience in digital activism. The risks to privacy and free speech in the online organizing context are especially relevant in light of law enforcement's history of infiltrating protests and spying on reporters and activists. *See, e.g.*, Ryan Grim & Jon Schwarz, *A Short History of U.S. Law Enforcement Infiltrating Protests*, Intercept (June 2, 2020);²⁵ Wendi C. Thomas, *The Police Have Been Spying On Black Reporters and Activists for Years. I Know Because I'm One of Them*, ProPublica (June 9, 2020);²⁶ Sam Levin, *Los Angeles Police Spied On Anti-Trump Protesters*, Guardian (July 19, 2019).²⁷ The possibility of

²³ <https://www.fastcompany.com/90496668/can-you-keep-an-activist-campaign-running-during-a-pandemic-march-for-our-lives-is-trying>.

²⁴ <https://time.com/5862462/black-lives-matter-national-convention/>.

²⁵ <https://theintercept.com/2020/06/02/history-united-states-government-infiltration-protests/>.

²⁶ <https://www.propublica.org/article/the-police-have-been-spying-on-black-reporters-and-activists-for-years-i-know-because-im-one-of-them>.

²⁷ <https://www.theguardian.com/us-news/2019/jul/19/los-angeles-police-informant-anti-trump-activist-protest>.

being recorded may chill the free speech of meeting participants, or lead them to forego associating altogether.

Privacy is also at risk in the health context. While surreptitious recording would be difficult in a face-to-face setting, tens of thousands of appointments are now happening through virtual calls. McKinsey reports that providers are seeing 50 to 175 times more patients through telehealth than they were prior to the pandemic. Oleg Bestsenny, et al., *Telehealth: A Quarter-Trillion-Dollar Post-COVID-19 Reality?* McKinsey & Co. (May 29, 2020).²⁸ And this growth in virtual services includes therapy, which may involve especially intimate disclosures. Furthermore, while the Health Insurance Portability and Accountability Act of 1996 (HIPAA) normally protects the privacy of medical visits, the U.S. Department of Health & Human Services released a notification on March 30, 2020, that states in relevant part:

A covered health care provider that wants to use audio or video communication technology to provide telehealth to patients during the COVID-19 nationwide public health emergency can use any non-public facing remote communication product that is available to communicate with patients. [The Office for Civil Rights] is exercising its enforcement discretion to not impose penalties for noncompliance with the HIPAA Rule in connection with the good faith provision of telehealth using such non-public facing audio or video communication products.

U.S. Dep't of Health & Human Servs., *Notification of Enforcement Discretion for Telehealth Remote Communications*

²⁸ <https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/telehealth-a-quarter-trillion-dollar-post-covid-19-reality#>.

During the COVID-19 Nationwide Public Health Emergency (Mar. 30, 2020).²⁹ This means that health services can now be delivered via platforms like Zoom, which facilitate recording but might not ensure meaningful consent of other call participants.

Surreptitious recording of medical visits can also target physicians. Though patients may want to record visits to help remember recommended medications or treatment instructions, others may record with malpractice in mind. The risk of such surreptitious recording could undermine physician-patient trust and the free flow of important information.

Students are also particularly vulnerable to the privacy risks associated with call recording. In addition to attending class on videoconferencing platforms, many college students are now subject to virtual exam proctoring. As of April 2020, 54 percent of institutions were using remote proctoring and another 23 percent were planning on or considering using such technology in the future. Susan Grajek, *EDUCAUSE COVID-19 QuickPoll Results: Grading and Proctoring*, Educause Rev. (Apr. 10, 2020).³⁰ Over 60% of institutions that used remote proctoring engaged in some form of video surveillance. *Id.* While proctors are tasked with using videoconferencing platforms to monitor students' surroundings and behavior to detect cheating, they often see more than what is necessary to their job. For instance, a student

²⁹ <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>.

³⁰ <https://er.educause.edu/blogs/2020/4/educause-covid-19-quickpoll-results-grading-and-proctoring>.

at the University of Arizona who had a proctor watching him over Zoom at the end of the semester accidentally exposed his financial information to his proctor when a security question auto-filled with his credit card number. Monic Chin, *Exam Anxiety: How Remote Test-Proctoring Is Creeping Students Out*, *Verge* (Apr. 29, 2020).³¹ During a University of Florida student's statistics exam, her proctor witnessed her throw up into a wicker basket. Drew Harwell, *Mass School Closures in the Wake of the Coronavirus are Driving a New Wave of Student Surveillance*, *Wash. Post* (Apr. 1, 2020).³² Of particular concern in the context of surreptitious recording, many proctors are working from home, rather than in a supervised office. *Id.*

Given the almost overnight societal transition to videoconferencing, many people are not yet familiar with the technology, and “the applicability of [call recording] laws to videoconferencing may not be intuitive to all participants.” Daniel Rozansky & Crystal Jones, *Consider Legal Ramifications Before Recording Video Calls*, *Law 360* (Apr. 20, 2020).³³ Indeed, “the ease with which a videoconference can be recorded without the use of third-party applications may lull one into recording the communication without even considering the legal ramifications.” *Id.* Participants on a Zoom call, for instance, are only notified of recording by the appearance of a small red dot and the word

³¹ <https://www.theverge.com/2020/4/29/21232777/examity-remote-test-proctoring-online-class-education>.

³² <https://www.washingtonpost.com/technology/2020/04/01/online-proctoring-college-exams-coronavirus/>.

³³ <https://www.law360.com/articles/1264341/consider-legal-ramifications-before-recording-video-calls>.

“Recording . . .” at the top of their screens. Zoom Help Ctr., *Recording Notifications* (2020).³⁴ Numerous third-party recording apps for phones and computers are available that will not notify other users that the call is being recorded. *See, e.g.*, Callnote, *Video Call Recorder* (2020);³⁵ TechSmith Corp., *Screen Capture and Recording Software* (2020);³⁶ Apowersoft Ltd., *Free Online Screen Recorder* (2020).³⁷

The risks to privacy from call recording are not likely to disappear after the pandemic. Though the COVID-19 crisis has caused a surge in both telephone and video calls, experts predict that walk-and-talk routines, telework, telehealth, online learning, and remote proctoring will continue long after it becomes safe to interact face-to-face. *See, e.g.*, Ronald Orol, *After the Pandemic, Teleconferencing and E-learning Could Be the New Normal*, Ctr. Int’l Governance Innovation (Apr. 2, 2020);³⁸ Mohana Ravindranath, *Why Virtual Care Will Outlast the Pandemic*, Politico (June 12, 2020).³⁹

The California legislature sought to protect the privacy of private communications in CIPA, but the lower court’s decision fatally undermines those protections. In order to ensure callers’

³⁴ <https://support.zoom.us/hc/en-us/articles/360000486746-Recording-Notifications>.

³⁵ <https://callnote.net/>.

³⁶ <https://www.techsmith.com/screen-capture.html>.

³⁷ <https://www.apowersoft.com/free-online-screen-recorder>.

³⁸ <https://www.cigionline.org/articles/after-pandemic-teleconferencing-and-e-learning-could-be-new-normal>.

³⁹ <https://www.politico.com/news/2020/06/12/telemedicine-coronavirus-pandemic-315919>.

privacy and uninhibited free speech, the lower court's decision should be reversed.

CONCLUSION

Amici respectfully requests that this Court reverse the lower court's decision.

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Pursuant to California Rule of Court 8.520(c)(1), counsel for *amici* certify that this application and brief contain 5,008 words, excluding the sections enumerated at Rule 8.520(c)(3). The application and brief were prepared in 13-point Century Schoolbook font with 1.5 line spacing, 1-inch top and bottom margins, and 1.5-inch left and right margins.

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