

SUPREME COURT COPY

No. S230923

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT

FILED

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RICARDO P.

Defendant and Appellant,

OCT 27 2016

Jorge Navarrete Clerk

Deputy

APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF AND PROPOSED BRIEF
OF *AMICI CURIAE* ACLU OF NORTHERN CALIFORNIA, ACLU OF
SOUTHERN CALIFORNIA, ACLU OF SAN DIEGO AND IMPERIAL
COUNTIES, ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF
DEFENDANT AND APPELLANT RICARDO P.

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION ONE, CASE No. A144149

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), the ACLU of Northern California, the ACLU of Southern California, the ACLU of San Diego/Imperial County, and the Electronic Frontier Foundation respectfully request leave to file a brief as amici curiae in support of Defendant-Appellant Ricardo P.¹

The American Civil Liberties Union (ACLU) is a national, nonprofit, nonpartisan civil liberties organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nation's civil rights law. It has three California affiliates: the ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego & Imperial Counties. The California ACLU affiliates have a statewide Technology and Civil Liberties Project, founded in 2004, which works specifically on legal and policy issues at the intersection of new technology and privacy, free speech, and other civil liberties and civil rights.

¹ No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amici ACLU of Northern California, ACLU of Southern California, ACLU of San Diego/Imperial County, and Electronic Frontier Foundation contributed money intended to fund preparing or submitting this brief.

The Electronic Frontier Foundation (EFF) is a San Francisco-based, member-supported, nonprofit civil liberties organization working to protect and promote fundamental liberties in the digital world. With more than 26,000 active donors and dues-paying members, EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age. Through direct advocacy, impact litigation, and technological innovation, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support privacy, civil liberties, free expression, and transparency in the information society.

Potential amici believe in—and have long advocated for—personal privacy and free expression, both of which are expressly protected by our state constitution, in the context of emerging technologies like the electronic devices and digital communications at issue in this case. Amici have advocated for privacy under Article I, Section 1 of the California Constitution in cases including *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal. 4th 992 (2009); *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1 (1994); *Brown v. Shasta Union High Sch. Dist.*, C061972, 2010 WL 3442147 (Cal. Ct. App. Sept. 2, 2010). Amici have also advocated for privacy under the federal constitution in *Riley v. California*, 134 S.Ct. 2473 (2014) and *United States v. Jones*, 132 S.Ct. 945 (2012). Amici have been involved in numerous cases regarding the appropriate scope of government

authority to conduct searches and challenging the validity of searches, including *Haskell v. Harris*, 745 F.3d 1269 (9th Cir. 2014) (en banc) (challenge to California statute requiring all felony arrestees to provide DNA samples) and *Offer Westort v. City and County of San Francisco* (S.F. Sup. Ct. No. CGC 13529730) (challenge to searches of arrestees' cell phones). Amici also co-sponsored the California Electronic Communications Privacy Act (CalECPA), Penal Code § 1564 *et seq.*, which requires California government entities to obtain a warrant before searching electronic devices or compelling access to electronic information.

Because this case concerns important questions regarding the scope of government authority, individuals' rights to be free from unreasonable searches, and the appropriate balance between the two, proper resolution of the matter is of significant concern to amici and their members. Amici believe their experience in these issues will make this brief of service to the Court. Potential amici therefore respectfully request that this Court grant them leave to submit the accompanying brief. *See* Rule of Ct. 8.520(f).

Respectfully submitted,

Dated: October 19, 2016

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I. INTRODUCTION

The price of any youthful transgression cannot be that the government has an all-access, long-term pass to your private life that chills access to the supportive communities and rehabilitative services that will help you build a healthy and productive future. But that is precisely what the government is asking for with the expansive electronic search condition at issue in this case.

This Court should hold that such a condition fails the third prong of the *Lent* test and is therefore invalid. Amici agree with Appellant that the probation condition fails the third prong of *Lent* because no nexus exists between electronics usage and the underlying offense or future criminality. But the purpose of this brief is to focus this Court's attention on two additional reasons why the electronic search condition is not "reasonably" related to future criminality and must fail the *Lent* test.

First, the search condition here is unreasonable because it authorizes overly broad access to deeply personal information, including communications content. By allowing the government access to a young person's electronic devices, remotely stored digital information, and account passwords, the condition effectively gives the government unlimited access to "the sum" of a young person's life, including highly sensitive and constitutionally protected information about topics such as her sexual orientation. The search condition extends far beyond the scope of

traditional physical searches, making it functionally equivalent to a wiretap, which would be unprecedented as a probation condition.

Second, the condition undermines, rather than supports, the rehabilitative purpose of probation by chilling young people's access to digital services and programs to support rehabilitation and by disincentivizing third parties from providing a supportive, rehabilitative environment. Young people, particularly young people from vulnerable communities who are disproportionately represented in the juvenile justice system, rely on electronic devices and communication to access critical information, to build essential connections, and to obtain important support and services, all of which further the rehabilitative purpose of probation. The condition here is unreasonable because it is likely to discourage precisely these beneficial activities.

If the Court of Appeal's misinterpretation of the *Lent* test were left to stand, there would be no meaningful limitation on the government's ability to conduct invasive electronic probation searches. Tens of thousands of California's young people are placed on probation every year. More and more of these young people would likely find themselves subject to a broad electronic search condition, regardless of how minor their transgressions or how attenuated these transgressions are to the use of electronic devices or digital communications. They would be forced to choose between using modern technology to connect and seek needed support for rehabilitation on

one hand, and safeguarding their private lives and free expression on the other. This cannot be right.

Instead, this Court should recognize, as the United States Supreme Court did in *Riley v. California*, that properly safeguarding constitutional rights requires taking into account the quantitative and qualitative impact of modern technology, rather than “mechanical[ly]” applying pre-digital legal rules to electronic searches. 134 S. Ct. 2473, 2484 (2014). Following that guidance, this Court should analyze the condition at issue in the full context of the expansive nature of electronic searches, the robust California constitutional rights to privacy and free expression, and the core rehabilitative goals of juvenile probation. After doing so, this Court should find that the electronic search condition is unreasonable, that it fails the third prong of the *Lent* test, and that the juvenile court erred in imposing it on Appellant.

II. ARGUMENT

Under the *Lent* test established by this Court, a probation condition is valid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.” *People v. Lent*, 15 Cal. 3d 481, 486 (1975) (quoting *People v. Dominguez*, 256 Cal. App. 2d 623, 627 (1967)). In the present case, the question before this Court is whether the electronic search condition is “reasonably related to future criminality” and passes muster under the third prong of *Lent*. It fails this test.

Juvenile courts are only authorized to impose “reasonable” conditions of probation. Cal. Welf. & Inst. Code § 730(b); see *People v. Olguin*, 45 Cal. 4th 375, 383 (2008) (when evaluating a probation condition, “the relevant test is *reasonableness*. . . .”) (citations omitted). This reasonableness should be determined in light of the purpose of juvenile probation, which is rehabilitation. See Cal. Welf. & Inst. Code § 730(b) (probation conditions must be “fitting and proper to the end that . . . the reformation and rehabilitation of the ward [is] enhanced.”); *Olguin*, 45 Cal. 4th at 380 (conditions of probation, including those that promote supervision, should “assure that the probation serves as a period of genuine rehabilitation”) (citation omitted). This requires considering the secondary effects of a sweeping probationary search on these rehabilitative goals. See *People v.*

Robles, 23 Cal. 4th 789, 799 (2000) (allowing police to effectuate warrantless searches on cohabitants of probationers might cause “many law-abiding citizens . . . not to open their homes to probationers,” leading to “higher recidivism rates and a corresponding decrease in public safety.”);

In re Jaime P., 40 Cal. 4th 128, 138 (2006) (lack of restrictions on the search would “invite repeated harassment and arbitrary searches”).

Particular scrutiny is appropriate for “[a] probation condition that imposes limitations on a person’s constitutional rights.” *In re Sheena K.*, 40 Cal. 4th 875, 890 (Cal. 2007); *cf. Olguin*, 45 Cal. 4th at 384 (“We do not apply such close scrutiny in the absence of a showing that the probation condition infringes upon a constitutional right.”).

Evaluating the reasonableness of the electronic search condition at issue in this case requires recognizing the vast quantity of personal information that the condition could impact or expose. For this reason, courts, including the U.S. Supreme Court, have recognized the need for particular diligence to protect the significant privacy and speech interests in electronic devices and the communications and information stored on or accessible through these devices, even in contexts like probation where an individual’s general expectation of privacy may be reduced.

In the present case, the lack of a nexus between the electronic search condition and the offense or future criminality is sufficient to invalidate the condition under *Lent*. However, there are two additional reasons that the

condition at issue is unreasonable. First, the condition's scope is unreasonably broad, allowing access to deeply personal information, including communications content.² In fact, the searches it authorizes have much more in common with wiretaps than traditional physical searches. And second, the condition does not merely fail to reasonably advance the rehabilitative purpose of juvenile probation, it actually undermines that purpose: it both deters the young person from forming relationships and seeking rehabilitative support or services through his electronic devices and discourages others from connecting with the young person and providing a supportive rehabilitative environment.

A. Young people, especially those from vulnerable populations, rely on electronic devices to access essential services and rehabilitative support.

Electronic devices and information are indispensable to modern life. As the U.S. Supreme Court recognized, “[n]ow it is the person who is not carrying a cell phone, with all that it contains, who is the exception.” *Riley*, 134 S. Ct. at 2490. The proliferation of electronic devices has gone hand in hand with an increase in the use of digital communication and online

² The condition imposed by the juvenile court allows the government to search electronic devices, access data stored remotely, and demand device and account passwords. *In re Ricardo P.*, 241 Cal.App.4th 676, 681 & n. 6. The appeals court suggested the juvenile court formulate a slightly narrower condition, but that suggestion still contemplated access to “text and voicemail messages, photographs, e-mails, and social media accounts.” *Id.* at 692–93.

accounts. These devices and services allow young people, especially those in vulnerable communities, to access information and find the resources they need to build supportive environments and transition out of the juvenile justice system.

Young people are particularly likely to use mobile devices and online services to connect and seek information. Over 88% of American teenagers have access to a cell phone, 73% of teenagers have access to a “smartphone,” and 58% of teenagers have access to a tablet.³ Texting has become the dominant daily mode of communication for young people.⁴ Ninety percent of young adults in the United States use social media websites to connect with others and communicate online.⁵ Cell phones and other mobile devices have become a primary driver of teen Internet use: 91% of teenagers go online from mobile devices, and 94% of these “mobile teens” go online daily or more often.⁶

³ Amanda Lenhart, *A Majority of American Teens Report Access to a Computer, Game Console, Smartphone and a Tablet*, Pew Research Center (Apr. 9, 2015), <http://www.pewinternet.org/2015/04/09/a-majority-of-american-teens-report-access-to-a-computer-game-console-smartphone-and-a-tablet>.

⁴ Monica Anderson, *How Having Smartphones (or not) Shapes the Way Teens Communicate*, Pew Research Center (Aug. 20, 2016), <http://www.pewresearch.org/fact-tank/2015/08/20/how-having-smartphones-or-not-shapes-the-way-teens-communicate/>.

⁵ Andrew Perrin, *Social Media Usage: 2005-2015*, Pew Research Center, 2–3 (2015), http://www.pewinternet.org/files/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf.

⁶ Amanda Lenhart, *Teens, Social Media, & Technology Overview 2015*,

Young people from vulnerable communities, who are overrepresented in the juvenile justice system,⁷ are often particularly reliant on electronic devices and online information. For example, mobile phones are the only means of Internet access for many poor youth.⁸ African American youth, who comprise 13% of California's youth population but 32% of juveniles on probation,⁹ use smartphones to seek help with homework more often than white students.¹⁰ Over 80% of LGBTQ youth, who comprise between 13 and 15% of young people in the juvenile justice system,¹¹ search the

Pew Research Center, 2 (2015), http://www.pewinternet.org/files/2015/04/PI_TeensandTech_Update2015_0409151.pdf.

⁷ See generally Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 Wash. U.J.L. & Policy, 53 (2012); *Disproportionate Minority Contact*, Nat'l Conf. of St. Leg., 1, 3 (2010), <http://www.ncsl.org/documents/cj/jjguidebook-dmc.pdf> (Sixty-nine percent of youth detained by law enforcement are minority youth, who comprise only 41% of the overall youth population).

⁸ See Victoria Rideout & Vikki Katz, *Opportunity for All? Technology and Learning in Lower-Income Families*, The Joan Ganz Cooney Center at Sesame Workshop, 1, 5 (2016), http://digitalequityforlearning.org/wp-content/uploads/2015/12/jgcc_opportunityforall.pdf. (“One quarter (23%) of families below the median income level and one third (33%) of those below the poverty level rely on mobile-only Internet access.”).

⁹ *Disproportionate Minority Contact*, *supra* note 7, at 3.

¹⁰ *Young Teens in U.S. Use Mobile Devices for Homework*, Reuters (Nov. 28, 2012), <http://www.reuters.com/article/us-technology-tweens-mobiles-homework-idUSBRE8AR1DC20121128> (“Smartphones were used by . . . 42 percent of African-Americans and 36 percent of whites. . .”).

¹¹ *LGBTQ Youths in the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Literature Review, 1, 2 (2014), <http://www.ojjdp.gov/mpg/litreviews/LGBTQYouthsintheJuvenileJusticeSystem.pdf>.

Internet for health-related information and support services.¹² And many survivors of sexual assault, who make up 56% of all girls in the California juvenile justice system,¹³ find support in online communities.¹⁴

The rehabilitative and support services that young people access through electronic devices are an important part of helping them to lead healthy and productive lives. Text messaging programs have successfully encouraged low-income young people to stay in school¹⁵ and access needed health information and clinical and social services.¹⁶ Other online services help young people cope with mental health issues, including suicide and

¹² *Out Online: The Experiences of Lesbian, Gay, Bisexual, and Transgender Youth*, GLSEN (July 10, 2013), <http://www.glsen.org/press/study-finds-lgbt-youth-face-greater-harassment-online>.

¹³ Malika Saada Saar et al., *The Sexual Abuse to Prison Pipeline: The Girls' Story*, Rights4Girls, 1, 5 (2015), http://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf.

¹⁴ See, e.g., *After Silence Home Page*, <http://www.aftersilence.org/> (last visited Oct. 16, 2016) (“Our mission is to support, empower, validate, and educate survivors [of sexual assault] as well as their families and supporters. The core of our organization is a support group . . . where victims and survivors come together online in a mutually supportive and safe environment.”).

¹⁵ See e.g., Benjamin L. Castleman & Lindsay C. Page, *Summer Nudging: Can Personalized Text Messages and Peer Mentor Outreach Increase College Going Among Low-Income High School Graduates?*, Ctr. on Educ. Policy and Workforce Competitiveness, 1, 2 (2013), http://curry.virginia.edu/uploads/resourceLibrary/9_Castleman_SummerTextMessages.pdf.

¹⁶ See e.g., Deb Levine, *Using New Media to Promote Adolescent Sexual Health: Examples from the Field*, ACT for Youth Center of Excellence (2009), http://www.actforyouth.net/resources/pm/pm_media_1009.pdf.