Appellate Case No. H045415

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

GARY PHILLIPS KLUGMAN,

Petitioner and Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF MONTEREY,

Respondent.

The PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Real Party in Interest.

Appeal from the Superior Court for the County of Monterey
The Honorable Julie R. Culver, Judge
Case No. SS160207A

AMICI CURIAE BRIEF OF ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONER AND APPELLANT

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I. INTRODUCTION

CalECPA ensures that Californians have twenty-first century digital privacy protections by providing robust and bright-line rules for California government entities seeking electronic information. Those protections are enforced by CalECPA's clear requirement that evidence collected in violation of any of its provisions be suppressed.

CalECPA's expansive suppression remedy is a core component of the law and was passed thoughtfully by the legislature with a heightened requirement of a two-thirds majority of both houses as required by the Truth in Evidence rule.

The Superior Court in this case erred by refusing to suppress evidence gathered in violation of CalECPA's requirements. This Court declined to review the Superior Court's decision by relying on the time limit restrictions in Penal Code § 1510, which limits pre-trial review of motions denied under Penal Code §§ 995 or 1538.5. After reviewing the record, the California Supreme Court remanded to this Court with directions to vacate its order denying petition for writ of mandate, prohibition, or other appropriate relief and to issue an order directing the Superior Court to show cause why the timeliness requirement of Penal Code § 1510 should apply to Petitioner's motions to suppress.

Amici write in support of Petitioner to provide two reasons why § 1510's timeliness requirements do not apply to suppression motions brought under CalECPA.

First, the plain language of CalECPA and Penal Code § 1510 do not support a reading that § 1510's time limits on pre-trial review should apply to CalECPA. The CalECPA statute only incorporates the procedural structure for the filing of suppression motions codified in Penal Code § 1538.5(b)–(q) inclusive and does not include or reference the time limit placed on pre-trial adjudication of suppression motion denials codified in Penal Code § 1510. *See* Cal. Penal Code § 1546.4(a). In fact, CalECPA specifically provides that "any person in a trial, hearing, or proceeding" may move to suppress. *Id.*

Similarly, § 1510's language only includes motions brought under §§ 995 and 1538.5, not CalECPA. Section 1510 thus cannot be read to apply to CalECPA motions to suppress.

Second, CalECPA was enacted to *expand* privacy protections for electronic communications, not to limit them. CalECPA's independent foundation for suppression—unrestrained by § 1510's time limits—fulfills the objective of its passing by a supermajority vote: the expansion of privacy protections for electronic communications and suppression when

those protections are violated. To read § 1510's restrictions into CalECPA would undermine that foundational purpose.

This Court should therefore grant the writ petition and find that § 1510 does not apply to suppression motions brought under CalECPA.

II. BACKGROUND

California has a long tradition of providing more robust privacy protections than federal law. CalECPA continues that tradition. The California Constitution guarantees an inalienable right to privacy for all Californians, articulated in the Privacy Clause to Article 1, Section 1, which protects the privacy rights of "all people." The Privacy Clause was passed in response to the "modern threat to personal privacy" posed by increased surveillance and then-emerging data collection technology. *White v. Davis* (1975) 13 Cal.3d 757, 774.

The California Supreme Court has consistently held that the California Constitution provides more robust privacy protection than the Fourth Amendment.[2] In particular, the Supreme Court has rejected the

[2] *See People v. Mayoff* (1986) 42 Cal.3d 1302, 1312-1314 (rejecting *California v. Ciraolo* (1986) 476 U.S. 207 and *Dow Chemical Co. v. United States* (1986) 476 U.S. 227 to find expectation of privacy in backyard visible via aerial surveillance under California Constitution); *In re Lance W.* (1985) 37 Cal.3d 873, 884 ("Our vicarious exclusionary rule has never been required under the Fourth Amendment but has been a continuing feature of California law under our ability to impose higher standards for searches and seizures than compelled by the federal Constitution.").

"third-party doctrine," holding instead that Californians do not forfeit their reasonable expectation of privacy when they share their information with a third party. *See Burrows v. Superior Court* (1974) 13 Cal.3d 238 (recognizing expectation of privacy in bank records under California Constitution even though *United States v. Miller* (1976) 425 U.S. 435 found none under the Fourth Amendment).[3]

The California Constitution specifically protects information about an individual that amounts to a "virtual current biography." *People v. Chapman* (1984) 36 Cal.3d 98, 110 (finding an expectation of privacy in a person's unlisted name, phone number, and address since such information could "provide an essential link to establish a 'virtual current biography'").

Before CalECPA, however, federal and state statutory law did not properly safeguard modern electronic communication information in a way that was consistent with the California Constitution. The federal Stored Communications Act ("SCA") has not been meaningfully updated in more than thirty years and suffers from numerous antiquated infirmities.[4]

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[3] After CalECPA's passage, the Supreme Court recently limited the third-party doctrine under the Fourth Amendment, holding that the government needs a warrant to access location information records held by a wireless carrier about a person's cellphone location history. *Carpenter v. United States* (2018) 138 S. Ct. 2206, 2221.

[4] "In significant places, however, a large gap has grown between the technological assumptions made in [the federal Electronic Communications Privacy Act] and the reality of how the Internet works today. This leaves us,

California privacy law in the digital context was similarly "stuck in the digital dark ages"[5] and in need of revision.[6]

To remedy these shortcomings, California legislators passed CalECPA to build on the strong privacy foundation of the California Constitution by creating clear rules necessary to: (1) guide service providers and government agencies; (2) protect Californians' privacy rights

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in some circumstances, with complex and baffling rules that are both difficult to explain to users and difficult to apply." *Hearing on "ECPA Part 1: Lawful Access to Stored Content," Before the House Judiciary Subcomm. on Crime, Terrorism, Homeland Sec. & Investigations*, 113th Cong. 113-16 (2013) (written testimony of Richard Salgado, Dir., Law Enf't & Info. Sec., Google Inc).

[5] Nicole Ozer, *California is Winning the Digital Privacy Fight*, Tech Crunch (Nov. 7, 2015) (available at https://techcrunch.com/2015/11/07/california-now-has-the-strongest-digital-privacy-law-in-the-us-heres-why-that-matters/); Kim Zetter, *California Now Has the Nation's Best Digital Privacy Law*, Wired (Oct. 8, 2015) (quoting CA State Senator Mark Leno) (available at https://www.wired.com/2015/10/california-now-nations-best-digital-privacy-law/).

[6] *See* Facebook Letter in Support of SB 178, March 13, 2015 ("[P]eople deserve to connect with friends and loved ones knowing that their personal photos and messages are well-protected.") (available at https://www.eff.org/document/facebook-sb-178-support-letter); Google Letter in Support of SB 178, March 12, 2015 ("law enforcement needs a search warrant to enter your house or seize letters from your filing cabinet — the same sorts of protections should apply to electronic data stored with Internet companies.") (available at https://www.eff.org/document/google-sb-178-support-letter); Internet Association Statement in Support of SB 178, February 9, 2015 ("California's Internet users expect their inbox to have the same kinds of safeguards that exist for their mailbox, and we look forward to working with policymakers in pursuit of this goal. It is time to update these laws for the digital age.") (available at https://internetassociation.org/020915cal-ecpa/).

when the government seeks electronic communications and device information in the digital age; and (3) ensure consistent application and enforcement of the law through a suppression remedy.

First, CalECPA requires a probable-cause warrant for all electronic information and device information, including information sought from third-party service providers or from personal electronic devices.[7] CalECPA's warrant requirement ensures judicial review of law enforcement's proffered justification before intrusion into individual digital privacy, instead of permitting access via subpoenas with no prior judicial oversight.

Second, CalECPA requires a greater degree of particularity than currently articulated in federal and state constitutional jurisprudence. Warrants must "describe with particularity the information to be seized by specifying, as appropriate and reasonable, the time periods covered, the target individuals or accounts, the applications or services covered, and the types of information sought."[8] CalECPA's particularity requirements ensure judges receive more detailed and higher quality facts to facilitate informed judicial oversight.

Third, CalECPA requires that information unrelated to the warrant's objective "shall be sealed and shall not be subject to further review, use, or

[7] Cal. Penal Code § 1546.1(a)(2), (a)(3).
[8] Cal. Penal Code § 1546.1(d)(1).

disclosure." This provision is meant to deter general criminal fishing expeditions. In the words of a federal court interpreting the Fourth Amendment, warrants to search electronic devices should "not become a vehicle for the government to gain access to data which it has no probable cause to collect."[9] CalECPA ensures this.

Finally, a core provision of CalECPA is its clear, intentional, and robust remedy passed by a legislative supermajority—suppression of evidence. It provides that "[a]ny person in a trial, hearing, or proceeding may move to suppress any electronic information obtained or retained in violation of the Fourth Amendment to the United States Constitution or of [CalECPA]." Cal. Penal Code § 1546.4(a).

III. ARGUMENT

The question for the Court is whether § 1510's time limits apply to motions brought under CalECPA.

They do not, for two reasons. First, the plain language of CalECPA and § 1510 refute this interpretation. Second, extending § 1510's time limits to CalECPA would be inconsistent with the legislative history and public-policy objectives of the statute.

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[9] *United States v. Comprehensive Drug Testing, Inc.* (9th Cir. 2010) 621 F.3d 1162, 1177 (en banc).

A. The Plain Language of the Statutes Shows That § 1510 Does Not Limit CalECPA.

The principles of statutory construction dictate that the Court rely on the plain language and meaning of the statutes. Applying those principles, CalECPA does not incorporate the time limits for pre-trial review codified in § 1510. Neither does the plain language of § 1510 include any mention of its application to CalECPA.

Penal Code § 1510 forecloses pre-trial appellate review of a denial of a motion to suppress brought under either California Penal Code §§ 995 or 1538.5, if the motion is not filed by specified deadlines. Suppression motions brought under CalECPA are governed by § 1546.4.

CalECPA's language does not include any reference to or incorporation of § 1510's limit on pre-trial review of suppression denial. CalECPA's language also does not include any mention of § 1510, referencing only §1538.5(b) through (q). CalECPA specifically states that "[a]ny person in a trial, hearing, or proceeding may move to suppress any electronic information obtained or retained" in violation of the statute and that the motion "shall be made, determined, and subject to review in accordance with the *procedures* set forth in sub-sections (b) through (q), inclusive, of Section 1538.5." Cal. Penal Code § 1546.4 (emphasis added). These detailed procedures ensure that motions to suppress under CalECPA will be brought in a timely way without causing undue delay.

CalECPA thus comes with filing deadlines included. The procedures set forth in § 1538.5(b)–(q) describe the timing for filing motions to suppress, when they should be heard, and how they should be adjudicated. *See, e.g.*, §§ 1538.5(b) (directing that suppression motions should first be heard by the judge who issued them); 1538.5(f) and 1538.5(g) (detailing procedural requirements for suppression motions filed in felony and misdemeanor cases, respectively).

In passing CalECPA, the legislature made thoughtful choices about legislative language, such as its specific incorporation by reference of § 1538.5(b)–(q) inclusive for procedural purposes. It chose not to incorporate by reference § 1510. This drafting choice is both clear and controlling to the Court's statutory construction of CalECPA. The Court should not read into the statute words that are not there.[10]

Section 1510 likewise does not reference CalECPA. If the California legislature had intended § 1510's timing requirements to apply to CalECPA, then § 1510 would have either been amended to this effect when

[10] The legislative language of the suppression remedy was a particular point of focus for the legislature because any statute that imposes a suppression remedy beyond the federal Constitution must pass the legislature with a two-thirds majority of both the Senate and Assembly. This high legislative barrier for suppression remedies, which few laws have met, means that lawmakers are keenly aware of the statutory provision as the bill is moving through the legislative process. Discussion of the suppression remedy appears in every substantive legislative analysis.

CalECPA was initially enacted or in the following legislative year when "clean-up" provisions were enacted in SB 1121.[11]

The government argues that applying the restrictions on pre-trial appellate review from § 1510 to § 1546.4 is necessary to prevent "the dilatory use of suppression motions," without support from either statute or case law. Gov. Return 26. Moreover, in the six different times the suppression remedy of CalECPA was referenced in its legislative history,[12] not once did the issue of "dilatory use" of suppression surface as a concern.

In addition, the government contends that § 1510's reference to motions brought under §§ 995 and 1538.5 should be read to apply not only to motions brought under those sections of the Penal Code, but to *all* motions that are *similar* to motions brought under those sections. This argument has no support from either statute or case law and cannot be squared with the standard rules of statutory construction.

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[11] Senate Bill 1121 (2015–2016), amending Cal. Penal Code §§ 1534, 1546, 1546.1, 1546.2.

[12] *See* SB 178 (Leno) Committee Analysis, Senate Committee on Public Safety, March 23, 2015, p. 5; SB 178 (Leno) Committee Analysis, Senate Committee on Appropriations, April 27, 2015, p. 3; SB 178 (Leno) Committee Analysis, Senate Committee on Appropriations, May 28, 2015, p. 6; SB 178 (Leno) Committee Analysis, Senate Rules Committee, June 2, 2015, p. 6; SB 178 (Leno) Committee Analysis, Assembly Committee on Privacy and Consumer Protection, June 19, 2015, p. 3; SB 178 (Leno) Committee Analysis, Assembly Committee on Public Safety, July 13, 2015, p. 3.

According to the government, § 1510's reference to "a motion made pursuant to . . . 1538.5" does not refer to a motion made pursuant to § 1538.5, but to every possible motion to suppress.[13]

If a statute is to have such a sweeping application, it should use sweeping language. Section 1510 does not. It identifies two particular motions (under §§ 995 and 1538.5) subject to the specified time limits.

This Court should construe the statute to mean what it says, and nothing more. Even if the statutes' language was ambiguous—which it is not—the rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos* (2008) 553 U.S. 507, 514 (citing *United States v. Gradwell* (1917), 243 U.S. 476, 485; *McBoyle v. United States* (1931) 283 U.S. 25, 27; and *United States v. Bass* (1971) 404 U.S. 336, 347–349).

Also contrary to the government's suggestion, there is no inconsistency in the law providing for different procedures for different motions. Indeed, most pre-trial motions brought by defendants—including some that have the potential to be case-dispositive—are not subject to the restrictions of § 1510.

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[13] *See* Return to Order to Show Cause at 25 (arguing that § 1510 should be interpreted to apply to "any other kind of suppression motion" brought under the Penal Code).

For example, § 1510 does not apply to *Brady*[14] motions to dismiss for prosecutorial failure to disclose exculpatory evidence to the defense, *Youngblood/Trombetta*[15] motions to dismiss for prosecutorial failure to preserve material exculpatory evidence, *Serna*[16] motions to dismiss for violation of the defendant's right to a speedy trial, and *Kellett*[17] motions to dismiss because defendant can only be punished once for a single act or indivisible course of criminal conduct.

Section 1510's limit on pre-trial adjudication of motions to suppress filed within forty-five or sixty days after an arraignment is thus the exception rather than the rule. Treating different statutes differently is unproblematic, and is, in any event, what the plain language of the statutes instructs. *See* §§ 1546.4, 1510. The Court should therefore conclude that CalECPA suppression motions are not subject to the timeliness restrictions of § 1510.

B. Applying § 1510 to CalECPA Would Undermine the Very Public Policy Purpose it was Enacted to Achieve.

CalECPA was enacted to ensure greater judicial oversight of law enforcement access to data, supported by robust enforcement mechanisms

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[14] *Brady v. Maryland* (1963) 373 U.S. 83.

[15] *Arizona v. Youngblood* (1988) 488 U.S. 51; *California v. Trombetta* (1984) 467 U.S. 479.

[16] *Serna v. Superior Court* (1985) 40 Cal.3d 239.

[17] *Kellett v. Superior Court* (1966) 63 Cal.2d 822.

like statutory suppression. Applying § 1510 to CalECPA suppression motions would undermine the will of the California legislature, which enacted CalECPA by a two-thirds majority of both houses of the legislature to ensure that compliance was supported by a robust suppression remedy—with a motion that can be brought by "any person in a trial, hearing, or proceeding."

The legislative history makes clear that CalECPA contains a robust suppression remedy. The statute's authors highlighted the importance of the suppression remedy as the best way to ensure compliance with the statute's rules.[18] Discussion of the suppression remedy appears in the law's preamble[19] and every substantive legislative analysis.[20] Limiting pre-trial

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[18] Summary of the California Electronic Communications Privacy Act, Senators Leno and Anderson, September 2, 2015 (available at https://www.aclunc.org/sites/default/files/SB%20178%20CalECPA%20Fact%20Sheet_1.pdf). *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.").

[19] SB 178, 2015–16 Session, Legislative Counsel's Digest (Ca. 2015) ("Because this bill would exclude evidence obtained or retained in violation of its provisions in a criminal proceeding, it requires a 2/3 vote of the Legislature.").

[20] *See* SB 178 (Leno) Committee Analysis, Senate Committee on Public Safety, March 23, 2015, p. 5; SB 178 (Leno) Committee Analysis, Senate Committee on Appropriations, April 27, 2015, p. 3; SB 178 (Leno) Committee Analysis, Senate Committee on Appropriations, May 28, 2015, p. 6; SB 178 (Leno) Committee Analysis, Senate Rules Committee, June 2, 2015, p. 6; SB 178 (Leno) Committee Analysis, Assembly Committee on Privacy and Consumer Protection, June 19, 2015, p. 3; SB 178 (Leno) Committee Analysis, Assembly Committee on Public Safety, July 13, 2015,

appellate review of a CalECPA suppression motion would run counter to the statute's clear purpose of increasing privacy protections for Californians and its intent to suppress any evidence gathered in violation of those rules.

IV. CONCLUSION

For the above reasons, the Court should rule that § 1510 does not apply to CalECPA and grant Defendant's writ petition to this Court dated January 11, 2018.

Dated: December 14, 2018

Respectfully submitted,

/s/ *Stephanie Lacambra*

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p. 3. Full committee analyses available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB178.

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this *Amici Curiae* Brief of Electronic Frontier Foundation and American Civil Liberties Union Foundation of Northern California is proportionally spaced, has a typeface of 13 points or more, contains 3,063 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: December 14, 2018

/s/ *Stephanie Lacambra*
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PROOF OF SERVICE

I, Cynthia Domínguez, declare:

I am a resident of the state of California and over the age of eighteen years and not a party to the within action. My business address is 815 Eddy Street, San Francisco, California 94109.

On December 14, 2018, I served the foregoing documents:

APPLICATION OF ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA FOR PERMISSION TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND APPELLANT

AND

***AMICI CURIAE* BRIEF OF ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONER AND APPELLANT**

on the interested parties in this action as stated in the service list below:

X BY TRUEFILING: I caused to be electronically filed the foregoing document with the court using the court's e-filing system. The following parties and/or counsel of record are designated for electronic service in this matter on the TrueFiling website.

X BY FIRST CLASS MAIL: I caused to be placed the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on December 14, 2018 at San Francisco, California.

Cynthia Domínguez

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