AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

ELECTRONIC FRONTIER FOUNDATION

July 20, 2021

*Submitted via TrueFiling*

Honorable Tani Cantil-Sakauye, Chief Justice

and the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

**Re: Letter of American Civil Liberties Union of Northern California and Electronic Frontier Foundation in Support of Petition for Review: *In re Waer*, Case No. S269188**

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

The American Civil Liberties Union of Northern California and the Electronic Frontier Foundation submit this amici curiae letter in support of the Petition for Review in *In re Waer* (Case No. S269188). Amici urge this Court to grant the petition because it raises important questions of law, which, once settled, will help secure uniformity in the lower courts. (*See* Cal. Rules of Court, rule 8.500(b)(1).)

In particular, the petition presents an opportunity to clarify how *In re York*'s analysis of a pretrial release condition—concerning the warrantless search of an individual's residence, vehicle, and person—applies, decades later, to the warrantless searches of electronic devices. (*See In re York* (1995) 9 Cal.4th 1133.) Given the capacity of electronic devices to hold vast amounts of extremely sensitive and private information, recent Fourth Amendment jurisprudence dictates that a different analysis is now required. Further, as the capacity and ubiquity of electronic devices continue to grow, it is critical that this Court also resolve the split among California's appellate courts regarding how to apply the constitutional overbreadth doctrine to warrantless electronic searches.

The resolution of these questions is not just timely, but also necessary. An individual who is presumed innocent should not be required to forfeit all of his digital privacy rights in order to secure pretrial release. Allowing for the imposition of invasive, unlimited electronic searches absent meaningful due process runs counter to the Fourth Amendment. It also endangers other constitutional protections and the privacy rights of all Californians, potentially chilling activities protected under the First Amendment and impeding an accused person's ability to develop a defense at trial. This Court should not allow such a constitutional infirmity to survive.

## I. IDENTITY AND INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Northern California is a California affiliate of the national American Civil Liberties Union ("ACLU"), a non-profit, non-partisan civil liberties organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in both the United States and California constitutions. The Electronic Frontier Foundation ("EFF") is a San Francisco-based, member-supported, non-profit civil liberties organization that has worked to protect free speech and privacy rights in the online and digital world for more than thirty years. EFF has over 38,000 dues-paying members, over 400,000 subscribers, and represents the interests of everyday users of the Internet.

Both the ACLU of Northern California and EFF have a longstanding interest in ensuring that advances in technology do not erode constitutional protections guaranteed under the First and Fourth Amendments and the California Constitution. Amici have appeared in numerous state and federal cases to protect individuals' fundamental privacy rights in the face of invasive searches by government and private actors.[1] Of particular relevance to the current matter, amici participated in *In re Ricardo P.* (2019) 7 Cal.5th 1113, a case that raised issues related to those presented here and which led to the invalidation of an expansive electronic search condition imposed in the juvenile probation context. Amici also co-sponsored the California Electronic Communications Privacy Act (CalECPA), Penal Code section 1546 et seq., which generally requires state entities to obtain a warrant to search electronic devices, and to either compel access to or production of electronic information.

Given this interest and experience, amici are uniquely positioned to offer perspective regarding the privacy invasions inherent in warrantless electronic device searches and the need for a strong limiting principle when imposing such searches as a condition of pretrial release.

## II. ARGUMENT

### A. Review is necessary to clarify that electronic devices, containing vast amounts of highly personal information, should not be subject to unlimited warrantless searches as a condition of pretrial release.

The petition for review should be granted because, in requiring Petitioner to submit to unfettered electronic device searches and to the copying of those devices as a condition of pretrial release, the trial court failed to heed the U.S. Supreme Court's repeated direction not to "mechanically apply[]" older Fourth Amendment doctrines in the context of new technologies.

[1] Amici, for example, have been involved in *Riley v. California* (2014) 573 U.S. 373; *United States v. Jones* (2012) 565 U.S. 400; *Haskell v. Harris* (9th Cir. 2014) 745 F.3d 1269; *see also Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1.

(*Carpenter v. United States* (2018) __ U.S. __ [138 S.Ct. 2206, 2219] [hereafter *Carpenter*]; *see also Kyllo v. United States* (2001) 533 U.S. 27, 35.) Instead, the trial court relied on a 26-year-old case—*In re York* (1995) 9 Cal.4th 1133—which upheld as reasonable pretrial release search conditions that imposed random drug testing and warrantless physical object searches.[2]

Recent Fourth Amendment jurisprudence directs, however, that the warrantless search of a person or a physical object is both qualitatively and quantitively different than the warrantless search of an electronic device. (*See Riley v. California* (2014) 573 U.S. 373, 386, 395 [hereafter *Riley*]; *Carpenter*, *supra*, 138 S.Ct. at p. 2214.) Indeed, as this Court recognized in *In re Ricardo P.*, electronic devices have an extraordinary capacity to hold vast amounts of personal information and the requirement that a person submit to the warrantless search of these devices "significantly burdens privacy interests." (*In re Ricardo P.*, *supra*, 7 Cal.5th at p. 1123.) The broad electronic device searches contemplated in the present matter have the capacity to sweep in all of this sensitive and private information—from personal emails and location history to medical records and banking information—without any nexus to the specific conduct charged or to public safety in general. Because *In re York* never considered the constitutional implications and privacy interests at stake in electronic devices, its application here deserves this Court's full consideration.

### 1. Fourth Amendment jurisprudence requires that old doctrines not be applied reflexively to new technologies.

When applying the Fourth Amendment to "innovations in surveillance tools," the U.S. Supreme Court has made clear that two "basic guideposts" should pervade the analysis: First, that the Amendment is intended "to secure the privacies of life against arbitrary power;" and, second, that "a central aim of the Framers was to place obstacles in the way of a too permeating police surveillance." (*Carpenter*, *supra*, 138 S.Ct. at p. 2214 [internal quotations omitted]; *see also Boyd v. United States* (1886) 116 U.S. 616, 630 [emphasizing same]; *United States v. Di Re* (1948) 332 U.S. 581, 595 [same].)

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[2] Specifically, the trial court stated: "I find the conditions sought by the People here are permissible under *York*." (March 2, 2021 Transcript of Proceedings, PE0082, 5:25-26; *see also id.* PE0082-0085.) The Court then ruled that Petitioner is "subject to a search condition, which means **at any time of the day or night, with or without his consent, with or without a warrant, with or without reasonable suspicion or probable cause** he, his vehicle, his residence, his person, and other areas under his direct control and **his electronic devices are subject to search**. The defendant must at the request of law enforcement when it comes to the electronic devices immediately access and log in to those devices, phone, computer, hard drives, USB drives, other storage devices by whatever means necessary, a thumbprint, facial recognition, password, and login credentials. **He must log in to those devices and permit law enforcement to inspect and copy those devices per the search term**." (*Id.* at 7:22-8:8 [emphasis added].)

Accordingly, any extension of an old Fourth Amendment doctrine in the context of a new technology must not rely on "a mechanical application." (*Riley*, *supra*, 573 U.S. at p. 386.) It instead must "rest on its own bottom." (*Id.* at p. 393.) Privacy implications—that is, the "depth, breadth, and comprehensive reach" of information revealed in a search—are especially relevant considerations to this analysis. (*Carpenter*, *supra*, 138 S.Ct. at pp. 2217–18, 2223; *see also People v. Buza* (2018) 4 Cal.5th 658, 705 [acknowledging that "a new Fourth Amendment analysis" can be required in the face of "scientific advances or other developments"]; *Ko v. Maxim Healthcare Services, Inc.* (2021) 58 Cal.App.5th 1144, 1157–59 ["In various areas of the law affecting traditional conceptions of physical presence, the courts have been called upon to interpret longstanding precedent in light of new technologies."].)

**2. Courts treat warrantless searches of electronic devices differently from searches of ordinary objects or other physical intrusions.**

Both the U.S. Supreme Court and this Court have recognized that warrantless searches of electronic devices require a different legal rubric than the traditional, pre-digital framework used to analyze warrantless searches of a person's house, property, vehicle, or person. In *Riley* and *Carpenter*, the U.S. Supreme Court explicitly acknowledged that—even though an electronic search might seem to satisfy an exception to the Fourth Amendment's warrant requirement—such searches deserve additional scrutiny because of the different privacy interests at stake. (*See Riley*, *supra*, 573 U.S. at pp. 375, 393-94; *Carpenter*, *supra*, 138 S.Ct. at pp. 2214, 2216-17.)

The *Riley* Court, in particular, observed that the vast quantities of detailed personal information stored on electronic devices can amount to the "sum of an individual's private life." (*Riley*, *supra*, 573 U.S. at p. 394.) In *Riley*, the Court rebuffed the government's argument that warrantless searches of electronic devices are "materially indistinguishable" from warrantless searches of other physical objects, stating that this assertion was "like saying a ride on horseback is materially indistinguishable from a flight to the moon." (*Id.* at p. 393.) The *Riley* Court further recognized: "A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information ***never*** found in a home in any form—unless [that is also where] the phone is." (*Id.* at pp. 396-97 [emphasis added].)

Following *Riley* and *Carpenter*, this Court, in *In re Ricardo P.*, considered a search condition "expansive in its scope," which required a juvenile on probation to submit to broad and unlimited electronic device searches. The search condition allowed the government free-ranging and unlimited access to the juvenile's "e-mail, text and voicemail messages, photos, and online accounts, . . . at any time" and without "any temporal limitations." (*In re Ricardo P.*, *supra*, 7 Cal.5th at p. 1127.) Although the government construed such a search condition as "standard" and on par with prior conditions permitting "searches of . . . person, property, and residence," this Court disagreed. (*Ibid.*) Embracing *Riley*, it observed that "searches of electronic devices compared to traditional property or residence searches" are of a "potentially greater breadth." (*Ibid.*)

On these cases alone, *In re York*'s applicability to warrantless electronic device searches imposed as a condition of pretrial release should be called into question. But lest there be any doubt, amici next highlight the rapid advances in digital technology that have occurred post-*Riley*, and, to some extent, also post-*In re Ricardo P.* These advancements reveal that even greater privacy interests are at stake today.

### 3. Modern electronic devices have advanced in innovative ways, making them even larger repositories of ever more sensitive information.

Petitioner draws the Court's attention to the rapid developments in digital technology that occurred between 1995, when *In re York* was decided, and 2014, when *Riley* was decided. (Petition for Review at p. 12 [hereafter Pet.].) In particular, Petitioner elaborates that mobile devices in the mid-1990s lacked clocks and calculators and could neither send text messages nor take photographs. (*Ibid.*) By comparison, in 2014, "smartphones" had "immense storage capacity," containing the equivalent of "millions of pages of text, thousands of pictures, or hundreds of videos." (*Riley*, *supra*, 573 U.S. at pp. 393-394.) Electronic devices at the time *Riley* was decided had the capacity to "hold for many Americans 'the privacies of life'" over a lengthy period of time. (*Id.* at p. 394 [quoting *Boyd v. United States*, *supra*, 116 U.S. at p. 630].)

Since *Riley* was decided, however, advancements in digital technology and the prevalence of electronic devices have grown exponentially. The number of Americans who now own smartphones has nearly doubled, the storage capacity of modern cell phones has sextupled, and the average smartphone owner has at least twice as many applications ("apps") on their phone. Specifically, today, 97% of American adults own a cell phone, with 85% owning a smartphone.[3] For younger people that number is even higher: 93% of people between ages 23 to 38 own smartphones in the United States.[4] And globally, there are eight billion cell phone subscriptions, including six billion subscriptions for smartphones.[5]

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[3] *Compare* Pew Research Center, *Mobile Fact Sheet* (Apr. 7, 2021) <https://www.pewresearch.org/internet/fact-sheet/mobile/> (as of July 20, 2021) *with* Smith, *Smartphone Ownership—2013 Update* (June 5, 2013) Pew Research Center <https://www.pewresearch.org/internet/ 2013/06/05/smartphone-ownership-2013/> (as of July 20, 2021) [noting "56% of American adults are now smartphone owners"] (cited favorably in *Riley*, *supra*, 573 U.S. at p. 385).

[4] Vogels, *Millennials Stand Out for Their Technology Use, but Older Generations Also Embrace Digital Life* (Sept. 9, 2019) Pew Research Center <https://pewresearch-org-preprod.go-vip.co/fact-tank/2019/09/09/us-generations-technology-use/> (as of July 20, 2021).

[5] Cerwall et al., *Ericsson Mobility Report* (June 2021) at p. 5, <https://www.ericsson.com/49e50d/assets/local/mobility-report/documents/2021/june-2021-ericsson-mobility-report.pdf> (as of July 20, 2021).

The storage capacity of the average smartphone today—at 100GB[6]—is six times as large as it was when this Court decided *Riley* just seven years ago. Back then, the Court actually noted that the "current top-selling smart phone ha[d] a standard capacity of 16 gigabytes." (*Riley*, *supra*, 573 U.S. at p. 394.) This device storage capacity will only continue to increase as 5G technology becomes more widely available because "high-capacity storage is essential to support high-speed communication, AI technology, AR/VR and high-definition/4K content."[7]

Average smartphone users now also have 60 to 90 different apps on their devices and use 30 different apps over the course of a month.[8] Apps generate vast and varied data, including call logs, emails, text messages, voicemails, browsing history, calendar entries, contact lists, shopping lists, notes, photos, videos, books read, TV shows watched, financial information, health data, purchase history, metadata, location history, and so much more. This information, in turn, can reveal an individual's political affiliations, religious beliefs and practices, financial status, health conditions, family relationships, and professional affiliations.

Beyond the increased ubiquity of smartphones and apps, 77% of Americans now own a laptop or a desktop computer in addition to a cell phone.[9] In fact, most 18- to 49-year-olds live in households with five to six devices.[10] "And nearly one-in-five American households (18%) are 'hyper-connected'—meaning they contain 10 or more of these devices."[11] These statistics are important because today's electronic devices also allow users to more easily move between devices and store personal information in the "cloud"—that is, not on the devices themselves, but

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[6] Walker, *Report: The Average Android Phone Offered Nearly 100GB Storage in 2020* (Mar. 30, 2021) Android Authority <https://www.androidauthority.com/average-smartphone-storage-1213428/> (as of July 20, 2021).

[7] Lim, *Average Storage Capacity in Smartphones to Cross 80GB by End-2019* (Mar. 16, 2019) Counterpoint <https://www.counterpointresearch.com/average-storage-capacity-smartphones-cross-80gb-end-2019> (as of July 20, 2021).

[8] *See Riley*, *supra*, 573 U.S. at p. 396 (describing various apps and noting, at that time, that the average smart phone user "has installed 33 apps, which together can form a revealing montage of the user's life"); *see also* Perez, *Report: Smartphone Owners are Using 9 Apps per Day, 30 Per Month* (May 4, 2017) TechCrunch <https://techcrunch.com/2017/05/04/report-smartphone-owners-are-using-9-apps-per-day-30-per-month> (as of July 20, 2021).

[9] Pew Research Center, *Mobile Fact Sheet* (Apr. 7, 2021) <https://www.pewresearch.org/internet/fact-sheet/mobile/> (as of July 20, 2021).

[10] Pew Research Center, *A third of Americans Live in a Household with Three or More Smartphones* (May 25, 2017) <https://www.pewresearch.org/fact-tank/2017/05/25/a-third-of-americans-live-in-a-household-with-three-or-more-smartphones/> (as of July 20, 2021).

[11] *Ibid*. [noting "[i]n total, the typical (median) 18- to 29-year-old lives in a household with six of these connected devices – a figure that is comparable to the median figure among those ages 30-49 (six) and 50-64 (five)."].

on servers accessible via the Internet.[12] The exponential increase in cloud storage therefore means that much more information is accessible today by searching a person's electronic device than would have been at the time *Riley* was decided.

Finally, the last year spent amidst the global coronavirus pandemic amplifies all of the above statistics. The pandemic has brought into stark relief how much Californians rely on their electronic devices to communicate for personal and professional reasons, as well as to access essential services like education, healthcare, mental health treatment, and other social services. Indeed, if the *Riley* Court viewed cell phones as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy" (*Riley*, *supra*, 573 U.S. at p. 385), one can only wonder what conclusions a Martian visiting today might reach about our electronic devices. Thus, the wide-ranging inspection and copying of electronic devices raise unprecedented invasions into constitutional rights with enormous implications for privacy and free expression.

**4. Given advancements in modern electronic devices, this Court should examine *In re York*'s application to pretrial electronic device searches.**

*In re York* held that pretrial release conditions, which "may implicate a defendant's constitutional rights," are valid under Penal Code section 1318 "provided that imposition of such conditions is reasonable under the circumstances." (*In re York*, *supra*, 9 Cal.4th at pp. 1146-47.) The search conditions proposed in *In re York*—submission to random drug testing and warrantless searches of an individual's residence, vehicle, and person—are not, however, the same as the electronic device search and copying conditions proposed here. As *Riley*, *Carpenter*, and *In re Ricardo P.* each confirm, the constitutional rights and privacy concerns implicated in electronic device searches dwarf those contemplated by the physical incursions in *In re York*. Modern electronic devices hold vastly more sensitive and private information and track vastly more activity. Imposing unlimited electronic searches of these devices at any time, with the ability to copy all the data contained therein, is not reasonable under the circumstances. This Court should grant review to clarify *In re York*'s applicability to electronic device searches imposed as a condition of pretrial release.

[12] *See* Mell & Grance, *The NIST Definition of Cloud Computing* [Special Pub. 800-145] (Sept. 2011) National Institute of Standards and Technology <http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf> (as of July 20, 2021); *see also* Smith, *Americans' experiences with data security* (Jan. 26, 2017) Pew Research Center <https://www.pewresearch.org/internet/2017/01/26/1-americans-experiences-with-data-security> (as of July 20, 2021).

**B. Review is necessary to resolve the interpretation of the constitutional overbreadth doctrine in the context of warrantless electronic device searches.**

Amici also respectfully urge this Court to grant review to clarify that, as a condition of pretrial release, warrantless electronic device searches should be considered in line with the two separate analytical frameworks employed in the probationary context—frameworks which *In re Ricardo P.* recognized as: (1) a "reasonableness test" under state statutory law in accord with *People v. Lent* (1975) 15 Cal.3d 481, 486 and (2) "a constitutional overbreadth analysis." (*In Ricardo P.*, *supra*, 7 Cal.5th at pp. 1127-28.) This latter analysis for overbreadth is "distinct" from *Lent* in that it "applies to the subset of conditions that implicate a probationer's constitutional rights." (*In re Ricardo P.*, *supra*, 7 Cal.5th at p. 1130 (conc. opn. of Cantil-Sakauye, J.).) And yet, clarity is needed because these two analyses can often be collapsed or conflated. (*See, e.g.*, Answer to Petition for Review at p. 8 [hereafter Answer].)

Further, as relevant to the constitutional overbreadth analysis, amici also urge this Court to grant review to resolve the proper interpretation of the "closely tailor[ed]" standard articulated in *In re Sheena K.* (2007) 40 Cal.4th 875, 890. Notwithstanding the government's arguments to the contrary (Answer at pp. 15-18), amici agree with Petitioner that California appellate courts have used various tests to define the closely tailored standard in constitutional overbreadth challenges to electronic search conditions (Reply at p. 13; *see also id.* at pp. 13-19; Pet. at pp. 16-21). Review would therefore be helpful to clarify that, given the extraordinarily high privacy interests in the information stored on electronic devices, warrantless electronic device searches should be the least intrusive as possible to achieve the specific purpose that the government has established for the search.[13]

**C. Review is necessary to articulate safeguards for constitutional activities, including those protected by the First, Fifth, Sixth, and Fourteenth Amendments, but nonetheless impeded by the threat of overly broad electronic device searches.**

In addition to the Fourth Amendment issues discussed above and further related to the Court's constitutional overbreadth analysis, review is also necessary to protect against the infringement of other rights protected by federal and state constitutional law. With respect to the First Amendment and California's free expression rights, for example, the unlimited searches proposed here are likely to chill protected free speech and association rights. As this Court long ago observed, government monitoring may "run afoul of the constitutional guarantee [to free speech] if the effect of such activity is to chill constitutionally protected activity." (*White v.*

[13] Amici note—to the extent this Court might find it persuasive—that, in *United States v. Scott* (9th Cir. 2006) 450 F.3d 863, the Ninth Circuit held that one who has been released on pretrial bail does not unequivocally shed his constitutional rights. The *Scott* Court reasoned: "Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections." (*Id.* at p. 866.)

*Davis* (1975) 13 Cal.3d 757, 767; Cal. Const., art. I, § 1.) The U.S. Supreme Court recently affirmed this principle, articulating that "[a]ctual restrictions on an individual's ability to join with others" are not necessary to invoke a First Amendment analysis; it is the mere "risk of a chilling effect" that can trigger constitutional protections. (*Americans for Prosperity Foundation v. Bonta* (2021) __ U.S. __ [141 S.Ct. 2373, 2389]).

Here, a person on pretrial release who is subject to an unlimited warrantless electronic search of ***any*** device at ***any*** moment and on ***any*** subject will undoubtedly experience some chilling of free expression or association in a manner that has nothing to do with the underlying offense charged or with the specific justification for the search. Both the scope and the invasiveness of this search condition may also chill others from communicating with the individual on pretrial release. Such persons may also be unwilling to offer supportive environments or beneficial services to the individual on pretrial release for fear of exposing their own private information to government scrutiny. (*See, e.g.*, *United States v. Jones*, *supra*, 565 U.S. at p. 416 (conc. opn. of Sotomayor, J.,) ["Awareness that the government may be watching chills associational and expressive freedoms. And the government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse."].)

This chilling effect could also bleed into the ability of an individual on pretrial release to be free from self-incrimination under the Fifth Amendment and to prepare a defense at trial under the Sixth Amendment. In particular, the specter of law enforcement surveilling personal internet research, discussions with healthcare providers, and potentially even private communications with counsel may discourage a criminal defendant—presumed innocent—from accessing drug treatment services and other rehabilitative programs. The looming prospect of a sweeping device search might also prevent an individual on pretrial release from participating in his own defense. The attorney-client privilege is "fundamental to our legal system and furthers the public policy of ensuring every person's right to freely and fully confer with and confide in his or her lawyer in order to receive adequate advice and a proper defense." (*People v. Navarro* (2006) 138 Cal.App.4th 146, 156-57.) Thus, any interference with these privileged communications undercuts a "hallmark[] of our jurisprudence." (*Ibid.*; *see also Geders v. United States* (1976) 425 U.S. 80, 80 [recognizing that effective assistance of counsel requires communication between the accused and counsel].

Additional constitutional issues and privacy violations arise in connection with the trial court's order imposing a complete ban on the use of WhatsApp—as opposed to permitting the government to potentially search some activity on the app. WhatsApp is a telephone and messaging application with two billion users worldwide that helps people connect and

communicate.[14] WhatsApp has particularly widespread use in lower-income communities[15] and was highlighted by the Harvard Medical School Health Letter as a top app to use to stay connected and healthy during the coronavirus pandemic.[16]

With decades of research that family communication helps promote the success of those in the criminal justice system,[17] banning a person on pretrial release from accessing such a popular communications app is counterproductive to a successful pretrial release period. It also risks running afoul of the U.S. Supreme Court's guidance that "the most important place[] (in a spatial sense) for the exchange of views . . . is cyberspace." (*Packingham v. North Carolina* (2017) __ U.S. __ [137 S.Ct. 1730, 1735]). It is no answer to assert that some other alternative exists; different platforms serve different purposes and user bases. (*See ibid.* [ruling unconstitutional a statute that prohibited access to social media sites even though it permitted access to websites which the lower court believed to "perform the 'same or similar' functions as social media, such as the Paula Deen Network and the website for the local NBC affiliate"].)

In sum, an order like the one here threatens to impede conduct prohibited by the United States and California constitutions, as well as threatens to infringe the privacy rights of all Californians. This Court should offer lower courts some guidance on how best to tailor electronic search conditions so that such searches do not violate constitutional rights or result in counterproductive efforts.

## III. CONCLUSION

The lower courts' embrace of expansive electronic device searches at the pretrial stage as a condition for release threatens the privacy and constitutional rights of all Californians. This

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[14] *See, e.g.*, Zhang, *WhatsApp Hits 2 Billion Users* (Feb. 13, 2020) CNN <https://www.cnn.com/2020/02/12/tech/whatsapp-two-billion-users/index.html> (as of July 20, 2021).

[15] *See* Silver et al., *Use of Smartphones and Social Media is Common Across Most Emerging Economies* (March 7, 2019) Pew Research Center <https://www.pewresearch.org/internet/2019/03/07/use-of-smartphones-and-social-media-is-common-across-most-emerging-economies/> (as of July 20, 2021).

[16] *See* Godman, *Apps to Keep us Connected in a Time of Social Distancing* (March 25, 2020) Harvard Health Publishing <https://www.health.harvard.edu/blog/apps-to-keep-us-connected-in-a-time-of-social-distancing-2020032519306> (as of July 20, 2021); *see also* Perez, *Report: WhatsApp has Seen 40% Increase in Usage Due to Covid-19 Pandemic* (March 26, 2020) TechCrunch <https://techcrunch.com/2020/03/26/report-whatsapp-has-seen-a-40-increase-in-usage-due-to-covid-19-pandemic/> (as of July 20, 2021).

[17] *See, e.g.*, Friedman, *Lowering Recidivism Through Family Communication* (April 15, 2014) Prison Legal News <https://www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication/> (as of July 20, 2021).

Court should respectfully grant the petition for review to clarify the limiting principles that apply in this context.

Dated: July 20, 2021

Respectfully Submitted,

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**PROOF OF SERVICE**

I, Sara Cooksey, 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 scooksey@aclunc.org. On July 20, 2021, I served the attached,

**Letter of American Civil Liberties Union of Northern California and Electronic Frontier Foundation in Support of Petition for Review in *In re Waer*, Case No. S269188**

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:

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BY MAIL: I mailed a copy of the document identified above by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid.

**Clerk of the Superior Court**
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*Respondent*

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

Executed on July 20, 2021 in Fresno, CA.

Sara Cooksey
Declarant