

FILED**JAN 25 2021****CLERK OF SUPREME COURT
OF WISCONSIN**

IN THE SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN

Plaintiff-Respondent,

Appeal No.

2019-AP-1404-CR

v.

GEORGE STEVEN BURCH,

Defendant-Appellant.

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, ELECTRONIC FRONTIER FOUNDATION, AND ELECTRONIC PRIVACY INFORMATION CENTER FOR LEAVE TO FILE A NON-PARTY BRIEF EXCEEDING WORD LIMIT

The American Civil Liberties Union Foundation, the American Civil Liberties Union of Wisconsin Foundation, the Electronic Frontier Foundation, and the Electronic Privacy Information Center (collectively, “*amici*”), by undersigned counsel, respectfully move this Court pursuant to Wis. Stat. § 809.19(7)(a) for leave to file a non-party brief in support of defendant-appellant George Steven Burch. *Amici* also move for leave to file a brief that exceeds the 3,000-word limitation set forth in Wis. Stat. § 809.19(8)(c)(2).

As grounds for this motion, *amici* state as follows:

1. The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the Federal Constitution and our nation’s civil rights laws. For decades, the ACLU has been at the

forefront of efforts nationwide to protect the full array of civil rights and liberties, including the right to the protections enshrined in the Fourth Amendment to the Federal Constitution.

2. The ACLU of Wisconsin Foundation is the educational and litigation wing of the ACLU of Wisconsin, which has nearly 13,000 members and is dedicated to defending the civil liberties and civil rights of all Wisconsin residents. The ACLU of Wisconsin is the local affiliate of the ACLU.

3. The ACLU and the ACLU of Wisconsin have frequently appeared before courts—including this one—throughout the country in Fourth Amendment cases, both as direct counsel and as *amici curiae*. See *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (warrantless acquisition of cellphone location information); *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (bulk collection of call records); *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014) (warrantless GPS tracking); *Alasaad v. Nielsen*, 419 F. Supp. 3d 142, 147 (D. Mass. 2019), *appeal docketed*, No. 20-1077 (1st Cir. Jan. 5, 2020) (warrantless searches of electronic devices at the border); *Riley v. California*, 573 U.S. 373 (2014) (cellphone searches incident to arrest); *United States v. Jones*, 565 U.S. 400 (2012) (warrantless GPS tracking); *United States v. Ganius*, 824 F.3d 199 (2d Cir. 2016) (en banc) (storing hard drive data not responsive to a warrant for years); *State v. Sveum*, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 369 (warrantless GPS tracking of vehicles); *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016) (GPS bracelets); *United States v. Patrick*, 842 F.3d 540 (7th Cir. 2016) (cell site simulators).

4. The ACLU plans to appear as *amicus* in the appeal of *People v. McCavitt*, 145 N.E.3d 638 (Ill. App. Ct. 2019), *appeal docketed*, No. 12550 (Ill. Dec. 12, 2019), before the Illinois Supreme Court. The appellate court below cited *McCavitt* and its reasoning in its certification of issues. *See* Unpublished Certification at 17, *State v. Burch*, No. 2019AP1404-CR (Wis. Ct. App. Oct. 20, 2020). In addition, the ACLU appeared as *amicus* in the Michigan Supreme Court case *People v. Hughes*, 2020 WL 8022850 (Mich. 2020). *Hughes* involved a similar scenario where the police searched data obtained pursuant to a warrant in a drug investigation for evidence of a different crime. The ACLU's contributions as *amicus* in these cases may also be of assistance to the Court here.

5. The Electronic Frontier Foundation ("EFF") is a member-supported, non-profit civil liberties organization that has worked to protect free speech and privacy rights in the online and digital world for nearly thirty years. With roughly 35,000 active donors, including donors in Wisconsin, EFF represents technology users' interests in court cases and broader policy debates, and actively encourages and challenges the government and courts to support privacy and safeguard individual autonomy as emerging technologies become more prevalent in society.

6. EFF regularly participates both as direct counsel and as *amicus* in the Supreme Court, the Seventh Circuit Court of Appeals, this Court, and other state and federal courts in cases addressing the Fourth Amendment and its application to new technologies. *See, e.g.,* *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley v. California*, 134 S. Ct. 2473 (2014); *City of Ontario v. Quon*, 560 U.S. 746 (2010); *United*

States v. Ganas, 824 F.3d 199, 200 (2d Cir. 2016); *United States v. Patrick*, 842 F.3d 540 (7th Cir. 2016) (where EFF, ACLU, and ACLU of Wisconsin exposed the Milwaukee Police Department's secret use of a cell site simulator to locate the defendant); *State v. Sveum*, 2010 WI 92 (GPS tracking); *Commonwealth v. Snow*, SJC-12938, slip op. (Mass. Jan. 11, 2021) (involving similar issues of scope of and restrictions on cell phone searches).

7. The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues in the information age. EPIC participates as *amicus curiae* before courts across the country in cases involving constitutional rights and emerging technologies. *See, e.g., Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017); *Riley v. California*, 573 U.S. 373 (2014); *United States v. Miller*, 982 F.3d 412 (6th Cir. 2020) (Google's use of a proprietary algorithm to automatically search user data and refer to law enforcement); *Anibowei v. Morgan*, No. 20-10059 (5th Cir. Jan. 17, 2020) (warrantless cell phone search at border); *State v. Andrews*, 243 N.J. 447 (2020) (compelled disclosure of cell phone passcode); *Commonwealth v. Zachery*, SJC-12952 (Mass. argued Nov. 6, 2020) (warrantless access to location data held by a third party).

8. This case presents the following six issues for this Court's consideration and decision in this matter:

- a. Would a reasonable person consider the scope of consent to search a cell phone to be limited by the person's discussion with law enforcement, or would a reasonable person properly consider a subsequent discussion about police extracting "the

information” from the cell phone as showing the person had consented to police searching the phone in its entirety?

- b. May a reasonable person consider the broad scope of the consent form signed by Burch despite the officer’s initial request to review only the text messages on the phone?
- c. After police downloaded information from the cell phone, what portion of Burch’s data could it lawfully retain?
- d. If the police department was permitted to retain some or all of the downloaded material, how long could it do so?
- e. Did the status of the original investigation that produced the download affect the ability of police to lawfully retain the downloaded material?
- f. Did the police have any obligation to return the downloaded material to Burch, and if so, when?¹

9. The six issues involving digital information presented in this case require careful attention and consideration, specifically in establishing what the appropriate warrant standard is and the parameters of permissible digital searches under the Fourth Amendment. Given their expertise in the legal and technological matters relevant to this case, *amici* seek to submit a brief addressing the issues for the Court. In addition, *amici* seek to do so in an efficient and effective manner. It would be very difficult to meaningfully address all six issues within the statutory limit of 3,000 words. Each *amicus* could seek permission to file its own brief, but since the issues interrelate, the result could be disjointed or confusing. Rather than file three separate briefs of about 3,000 words, *amici* seek leave to file a single joint brief of no more than 7,500 words.

¹ Clerk of the Supreme Court, *Wisconsin Supreme Court Pending Cases: Appendix 1*, 13 (Jan. 12, 2021), <https://www.wicourts.gov/sc/sccase/DisplayDocument.pdf?content=pdf&seqNo=324154>.

For the foregoing reasons, *amici* respectfully request that this Court grant their motion for leave to file a single joint non-party brief of 7,500 words or less in this case.

Dated this 19th of January, 2021.

Respectfully submitted,

/s/ Jennifer Granick

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Thursday, January 21, 2021, I caused a true and correct copy of the above document to be served, by certified mail, upon:

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Madison, Wisconsin 53701-1688

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Dated: January 21, 2021

A handwritten signature in black ink, appearing to read 'N. Shemtov', with a long horizontal stroke extending to the right.

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