ACLU CALIFORNIA ACTION

P.O. Box 630
1017 L Street
Sacramento 95814

Tel: (916) 442-1036

March 21, 2025

The Honorable David A. Alvarez
1021 O Street, Suite 5320
Sacramento, California 95814

Re: AB 358 – as amended 3/17/25
OPPOSE

Dear Assemblymember Alvarez:

The American Civil Liberties Union California Action regrets that we must respectfully oppose your AB 358, which would unnecessarily weaken the "nation's best digital privacy law",[1] the California Electronic Communications Privacy Act (CalECPA), and expose Californians' private electronic information to warrantless searches. Further, the exception contemplated by AB 358 would violate individuals' Fourth Amendment rights.

CalECPA is a common-sense extension of the U.S. Supreme Court's unanimous decision in *Riley v. California*. Recognizing that the information held on smart phones can reveal comprehensive records of a person's familial, political, professional, religious, and sexual associations,[2] the Court in *Riley* held that before police can access information held on a smart phone, they need to comply with the basic constitutional process that applies to other searches – "get a warrant".[3] Among other provisions, CalECPA reflects *Riley* and generally requires police to get a warrant before accessing electronic device information via physical or electronic interaction with the device.[4] And importantly, CalECPA goes even further, giving people strong privacy rights in devices even when the U.S. Constitution does not. At a time when federal constitutional rights are under attack, it is vital to preserve California's statutory safeguards.

Both justifications offered by proponents for warrantless searches do not withstand scrutiny. Notably, the justifications offered for AB 358, the "need" to avoid delays caused by warrants and to avoid having data remotely wiped from devices, were also offered before the Supreme Court in *Riley* – where they were unanimously rejected.[5]

First, nothing in CalECPA prevents police from searching alleged stalking devices in an efficient and timely manner. As stated above, CalECPA simply requires that law enforcement get a warrant before searching any device – a process that can take as little as 15 minutes.[6] Moreover,

[1] Kim Zetter, *California Now Has the Nation's Best Digital Privacy Law*, WIRED (Oct. 8, 2015).
[2] *Riley v. California*, 573 U.S. _, 20 (2014).
[3] *Id.* at 28.
[4] Cal. Penal Code § 1546.1.
[5] *Riley v. California*, 573 U.S. _, 14, 26 (2014).
[6] *Id.* at 26.

CalECPA currently allows *warrantless* searches of devices where the police agency believes an emergency involving danger of death or serious physical injury to *any person* requires accessing the device, so long as the agency files an appropriate warrant application within three days of the search.[7] Therefore, AB 358's broad warrantless search scheme is unneeded because CalECPA already allows police to search electronic devices quickly, including without a warrant during an emergency.

Second, police can already easily, and cheaply, protect devices from remote wiping. In *Riley*, the Court pointed officers to "two simple ways" to avoid remote wiping, that did not disregard Fourth Amendment protections.[8] Namely, police can remove the battery from a device to disconnect it from any networks.[9] Alternatively, police can place the device in a Faraday bag that isolates the device from receiving inputs via radio waves.[10] These bags are cheap and easy to use, with a number of law enforcement agencies already encouraging their use.[11] For example, Faraday bags can be purchased for about $5 a piece.[12] Because remote wiping concerns can be resolved for free or by use of a $5 bag many agencies already utilize, there is no reason to disrupt the balance struck by the Legislature when they passed CalECPA.

In addition to unnecessarily weakening CalECPA, AB 358 is problematic as its authorization for warrantless searches would violate the constitution. Requiring that police justify their search of devices by establishing probable cause of criminal activity is a fundamental aspect of the Fourth Amendment that protects people from government intrusion based solely on a hunch. Given the important fundamental rights at stake, the consent to search a device must be given by the *owner* of the device, not one who merely finds or encounters the device. The Legislature may not ignore this constitutional limit by permitting police to seek consent from third parties instead of from the owner whose Fourth Amendment rights are at stake. In any event, the proper course of action is for police to obtain a warrant to search any device.

It is important to note that the recent amendments to AB 358 do not reduce concerns. Those amendments, understood in the context of the Assembly Public Safety hearing in which they were adopted, were intended to limit the scope of the bill to exclude devices like computers, laptops, mobile phones, tablets, and other computing devices that contain the private records that so concerned the Supreme Court in *Riley*. Yet, trying to cabin the bill to "tracking and surveillance" devices does not meaningfully limit the bill's reach as nearly every modern device tracks and surveils people, including phones, tablets, and laptops. But even if the bill used a different definition of "tracking and surveillance" devices, the question posed by the Assembly

---

[7] Penal Code Section 1546.1(c)(6) and 1546.1(h).
[8] *Riley v. California*, 573 U.S. _, 14 (2014).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Amazon, *4 Pack Faraday Bags for Phones* (listing four bags for $18.99).

Public Safety analysis remains: "it is not clear why the police cannot take the device found, get a warrant, and identify the person who left the device."[13]

While the author's intent may be to enable valid law-enforcement investigations, the solution proposed, allowing warrantless searches, is wholly inappropriate. As the U.S. Supreme Court stated in *Riley*, the Court has "historically recognized that the warrant requirement is 'an important working part of our machinery of government,' not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency."[14] Insofar as police are raising concerns about the efficiency of approving warrants, the answer is not to gut an "important working part of our machinery of government." Indeed, the Fourth Amendment does not allow it. Instead, we encourage the Legislature to invest in expanding judicial capacity to consider, analyze, and make decisions on applications for warrants.

For these reasons, ACLU California Action opposes AB 358.

Sincerely,

Carmen-Nicole Cox
Director of Government Affairs

George Parampathu
Legislative Attorney

cc: Members and Committee Staff, Assembly Privacy and Consumer Protection Committee

[13] Assembly Public Safety Committee, *AB 358 (Alvarez)*, at p. 6. (March 10, 2025).
[14] *Riley v. California*, 573 U.S. _, 25-26 (2014).