Supreme Court No. 93609-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC GRAY,
Petitioner.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, JUVENILE LAW CENTER, COLUMBIA LEGAL SERVICES, AND TEAMCHILD

Steven W. Fogg, WSBA No. 23528
Kelly H. Sheridan, WSBA No. 44746
Corr Cronin Michelson Baumgardner
Fogg & Moore LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
Tel (206) 625-8600

Nancy L. Talner, WSBA No. 11196
Vanessa Hernandez, WSBA
No.42770
ACLU-WA Foundation
901 Fifth Ave. #630
Seattle, WA 98164
Tel (206) 624-2184

Attorneys for Amicus American Civil Liberties Union of Washington

Marsha L. Levick
Juvenile Law Center
1315 Walnut Street
4th Floor
Philadelphia, PA 19107
Tel (215) 625-0551

Attorney for Amicus Juvenile Law Center

Nicholas B. Allen, WSBA No. 42990
Columbia Legal Services
101 Yesler Way Ste 300
Seattle, WA 98104
Tel (206) 464-0838

Attorney for Amicus Columbia Legal Services

Sara Zier, WSBA No. 43075
TeamChild
715 Tacoma Ave S
Tacoma, WA 98402
Tel (253) 507-8435

Bonnie Linville, WSBA No. 49361
TeamChild
32 N 3rd St Ste 410
Yakima, WA 98901
Tel (509) 573-4993

Attorneys for Amicus TeamChild

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I. INTRODUCTION

Petitioner Eric Gray, as a juvenile, took a sexually-explicit image of himself and texted it to an adult. In an extraordinary twist, he was then was convicted of felony dealing in depictions of a minor engaged in sexually explicit conduct in the second degree (RCW 9.68A.050(2)). This strained and erroneous interpretation of the child pornography statute punishes the very children who the statute is intended to protect, is directly adverse to the legislature's intent to protect children from child pornographers, implicates both free-speech concerns under the First Amendment and vagueness concerns under the Fourteenth Amendment, and would jeopardize thousands of minors across the state by criminalizing increasingly common and normative adolescent behavior. For the reasons discussed below and in Petitioner/Appellant's briefs, the Court should reverse the Court of Appeals' decision affirming Eric's conviction.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of *Amici Curiae* are set forth in the accompanying Motion for Leave to File *Amici Curiae* Brief.

III. ISSUES PRESENTED

1. Whether the Court should overturn an interpretation of the "dealing in depictions of a minor" statute that, if permitted to stand, would criminalize a minor taking nude photographs of themselves, thereby rendering the growing teenage practice of "sexting" a felony sex crime?

2. Whether the lower courts' interpretation of the statute raises significant constitutional concerns because it contravenes decades of jurisprudence holding that child pornography laws are constitutional only when they protect

child victims, while the constitutional concerns can be avoided by applying a reasonable interpretation of the statute?

IV. STATEMENT OF THE CASE

As petitioner's supplemental brief and the parties' briefs below explain, Eric Gray was a minor with disabilities who was charged with the felony offense of distribution of child pornography under RCW 9.68A.050 after he sent a text message containing a photograph of his own penis to an adult woman. After the trial court rejected the defense's motion to dismiss for insufficient evidence, Eric was convicted of "dealing in depictions" of child pornography.

The Court of Appeals affirmed the conviction in a published opinion. *State v. E.G.*, 194 Wn. App. 457, 377 P.3d 272 (2016). The lower courts' rulings are based on an interpretation of the statute that is contrary to the intent of the legislature and raises significant constitutional concerns. *Amici* ask the Court to construe the dealing in depictions statute as being inapplicable to minors who take and distribute nude photographs of themselves.

V. ARGUMENT

A. The Conviction is Based on an Interpretation of the "Dealing in Depictions" Statute that Violates Statutory Construction Rules, is Contrary to the Intent of the Legislature, and Would Have Far-Reaching Harmful Effects.

The lower courts, addressing an issue of first impression with far-reaching impacts, interpreted the "dealing in depictions" provision of the child pornography statute, RCW 9.68A.050, as applying to a minor, like Eric, who voluntarily takes and shares a sexually explicit photograph of

himself. 194 Wn. App. at 467-69. This interpretation is contrary to the plain language of the statute and the stated legislative intent, warranting reversal by this Court.

The "fundamental objective" of the Court when tasked with interpreting the meaning and scope of a statute is to determine and give effect to the intent of the legislature, looking not only to the text of the specific statute but also to related provisions and the "statutory scheme as a whole." *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015) (citation omitted). The plain language and expressed statutory intent of the statute at issue here make clear that the statute does not permit prosecution of minors for taking pictures of themselves. The lower courts' contrary interpretation therefore violates both of the well-established statutory construction precepts set forth above.

First, the plain language of the statute distinguishes between a "person" who commits the crime of dealing in depictions of sexually explicit conduct and the "minor" who is the subject of such depictions, providing that:

> *A person* commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the second degree when *he or she*:
>
> (i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts *a minor* engaged in an act of sexually explicit conduct . . .

RCW 9.68A.050(2)(a) (emphasis added). It is a "fundamental rule of statutory construction" that "the legislature is deemed to intend a different meaning when it uses different terms." *State v. Roggenkamp*, 153 Wn.2d

614, 625, 106 P.3d 196 (2005); *see also State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) ("When the legislature uses different words within the same statute, we recognize that a different meaning is intended.").

The lower courts' interpretation of this statutory language as permitting the "minor" who is depicted in the visual or printed matter to be the same "person" who commits the crime of dealing in depictions violates this rule. The Legislature used different terms to refer to the "person" committing the offense and the "minor" victim of that offense. It is contrary to the basic canons of construction to interpret the statute as permitting the same person to qualify as both the perpetrator "person" and the "minor" victim. Nor did the Legislature include qualifying language specifically indicating that the statute creates felony criminal liability when the alleged perpetrator and alleged victim of the crime were the same minor, *i.e.*, taking a picture of himself. Surely, if the statute's intent was to create felony liability for a minor taking or forwarding a depiction of him-or-herself, the statute would be worded differently. For these reasons, the plain language of the statute contravenes the lower courts' interpretation.

Second, the lower courts' interpretation of the dealing in depictions statute as applying to a minor's depiction of himself violates the Legislature's stated intent for the statute: the protection of minors and the punishment of those who pay to engage in the sexual abuse of children. The Legislature stated:

> The legislature further finds that children engaged in sexual conduct for financial compensation are frequently the victims of sexual abuse . . . It is the intent of the legislature . . . to hold *those who pay to engage in the sexual abuse of children* accountable for the trauma *they* inflict on children.
>
> . . .
>
> The state has a compelling interest in *protecting children* from *those who sexually exploit them* . . .

RCW 9.68A.001 (emphasis added).

Again, by separating the children intended to be protected by the statute who are the subjects of child pornography on one hand and "those who pay to engage in the sexual abuse of children" and "those who sexually exploit them" on the other, the Legislature clearly distinguished between the child victims and the perpetrators criminally liable for the offense of distributing such images. By making clear that the State's child pornography statute is intended to protect minor victims of child pornography, the Legislature did not intend to make minors who take sexually explicit photographs of themselves felony sex offenders.[1] *Cf. In re: Megan R.*, 42 Cal. App. 4th 17, 24-26, 49 Cal.Rptr.2d 325 (Cal. Ct. App. 1996) (minor could not be found guilty of burglary based on predicate felony of aiding and abetting her own statutory rape on ground that minor "was the protected victim under [the relevant statute], a

[1] The Court of Appeals did not directly address this argument in its opinion, instead basing its interpretation of the statute on the baffling (and incorrect) justification that Eric's prosecution was not "a sexting case" or a "case of the innocent sharing of sexual images between teenagers." 194 Wn. App. at 468, 468 n.9; *but see id.* at 466 n.5 (citing dictionary definition of "sexting" as "the sending of sexually explicit messages or images by cell phone"). Yet as discussed below, the Court of Appeals' decision recognizes no logical boundary between the circumstances giving rise to Eric's conviction and a case involving typical "sexting" between teenagers.

provision designed to criminalize the exploitation of children rather than to penalize the children themselves" and an opposite finding "would be contrary to express legislative intent"). In light of the legislature's stated intent in enacting the child pornography statute, it is patently unreasonable to read the specific language of RCW 9.68A.050 as criminalizing the behavior of "a minor" like Eric.

As the Court is well aware, the judiciary's role in interpreting a criminal statute is not to acquiesce in as broad a reading as possible—even if permitted under the statute's strict terms—but to construe the statute in a way that comports with the Legislature's stated intent, the context of the statute as a whole, and a common-sense understanding of what the statute was intended to prohibit and how it will affect the State's civil society. Although prosecutors have broad discretion to charge a particular crime if facts proving the elements of that offense are present, prosecutorial discretion is not a substitute for statutory construction and interpretation. Treating construction of a felony statute as a discretionary matter would invite arbitrary and harmful results. Rather, the Court's proper role is to safeguard the rights of individuals by construing statutes in a manner that gives effect to the Legislature's overarching intent in enacting them and avoids absurd consequences. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("[A] reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results." (internal quotation and citation omitted)).

Applying longstanding rules of statutory construction, this Court should interpret the dealing in depictions statute as inapplicable to minors who take and distribute sexually-explicit photographs of themselves.

B. The Lower Courts' Interpretation of the "Dealing in Depictions" Statute Implicates Significant Concerns under the United States and Washington State Constitutions.

i. The Lower Courts' Interpretation of the Dealing in Depictions Statute Violates the First Amendment and Article I Section 5 of the Washington Constitution.

The conviction in this case is based on an interpretation of the dealing in depictions statute that raises significant concerns under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 5 of the Washington State Constitution.

First, the reading of the statute upon which the conviction rests raises significant free speech concerns under the First Amendment and Article I, Section 5 of the Washington State Constitution. Although content-based restrictions on speech are presumptively unconstitutional, the United States Supreme Court has recognized a narrow exception in upholding child pornography laws based on the overarching policy that "a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (quotation omitted); *see also Osborne v. Ohio*, 495 U.S. 103, 110, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) (upholding ban on possession of child pornography given the "importance of the State's interest in *protecting the victims* of child pornography" (emphasis added)).

The Supreme Court underscored the limits of this exemption in *Ashcroft v. Free Speech Coalition*, when it invalidated a federal law criminalizing artistic depictions of child pornography that were not created using real children on the ground that "[v]irtual child pornography is not intrinsically related to the sexual abuse of children" and "creates no victims by its production." 535 U.S. 234, 250, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) (quotation omitted).

These rulings make clear that state laws criminalizing sexually-explicit depictions of minors are permissible limits on speech only when they are directly tied to *protecting child victims* of child pornography. The lower courts misconstrued this fundamental limit on child pornography laws, instead characterizing the issue as whether to "creat[e] a right" for minors to produce and distribute sexually-explicit images of themselves. 194 Wn. App. at 464.

But the concern raised by Eric's conviction for felony "dealing in depictions" of child pornography is not whether the State's courts should "create" a novel constitutional right to insulate minors who send depictions of themselves from criminal prosecution. Rather, it is whether the Court should uphold a construction of this statute that reaches beyond what the State and Federal Constitutions permit government to criminalize. *Cf. Fed. Commc's Comm'n v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009) (principle of constitutional avoidance counsels that statutes should be "construed to avoid serious constitutional doubts" (citation omitted)). The problem here

is compounded by the fact that it is not the plain language of the statute that creates the constitutional issue, but rather the lower courts' strained interpretation of that language. The Court should reverse the conviction and interpret the statute as inapplicable to minors who distribute sexually-explicit images of themselves in order to avoid the free speech concerns created by the lower courts' overbroad reading of the statute.

ii. The Lower Courts' Interpretation is Void for Vagueness.

Second, the Court should reverse Eric's conviction because the Court of Appeals' interpretation of the distribution of child pornography statute raises significant vagueness concerns under the Fourteenth Amendment. As set forth above, the language of the statute clearly distinguishes between the "minors" it is intended to protect and "a person" who develops, duplicates, etc. the sexually-explicit depictions of that minor. RCW 9.68A.011(4)(f); RCW 9.68A.050(2)(a). An average citizen—let alone a minor—reading the statute would not understand it to criminalize depictions of minors that the minor "develops" themselves, raising significant vagueness concerns. These concerns are amplified in the context of criminal laws imposing content-based restrictions on speech. *See O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988) ("[W]here First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential."). As with the First Amendment concerns cited above, the Court of Appeals' ruling raises significant vagueness concerns under the Fourteenth Amendment, and the Court should interpret the dealing in depictions statute as inapplicable to

minors who distribute sexually-explicit images of themselves in order to avoid the serious vagueness concerns created by the lower courts' overbroad reading of the statute.

C. If Permitted to Stand, the Lower Courts' Interpretation of the "Dealing in Depictions" Statute Would Criminalize the Increasingly-Common Teenage Practice of "Sexting," Causing Harmful Effects that can be Avoided by a Reasonable Interpretation of the Statute.

The lower courts' overbroad interpretation of the statute would enable prosecutors to charge any consenting minor who voluntarily creates and shares a sexually explicit image of themselves with a felony child pornography offense. "Sexting" is an increasingly common phenomenon inextricably linked with 21st century technology, because the transmission of sexually-explicit images is vastly simpler and quicker today than it was in the early 1980s when the dealing in depictions statute was originally enacted. As smartphones become ubiquitous, sexting—along with its potential for significant legal repercussions—is becoming more and more prevalent.

The Court of Appeals attempted to justify its reading of the statute on the flawed justification that this is not "a sexting case" or a "case of the innocent sharing of sexual images between teenagers." 194 Wn. App. at 468, 468 n.9. Yet under the lower courts' interpretation of the statute, *those precise activities* are now criminalized as felonies in the State of Washington; nothing about the lower courts' construction of the statute would preclude its application to images between minors, whether characterized as "consensual," "innocent," "sexting" or otherwise—and

thus rendering the minors who engage in that sharing felony sex offenders. And as has happened elsewhere in the state, the lower courts' reading of the statute would even permit county prosecutors to charge the *unwilling minor recipients* of any such image with possession of child pornography. Indeed, the lower courts' reading of the statute would permit prosecutors to charge teenagers who take sexually explicit "selfies" with their own cell phones with felony child pornography offenses *even if they do not share the photos*.

The risks created by the lower courts' interpretation of the statute are magnified by the fact that "sexting" conduct among teenagers is on the rise. The Court of Appeals used an outlier study to downplay the magnitude of this problem, citing a 2012 study that concluded that between two and 10 percent of teens had been involved in sending sexually-explicit or "sexually suggestive" images. 194 Wn. App. at 465 n.4 (citing Kimberly J. Mitchell, et al., *Prevalence and Characteristics of Youth Sexting: A National Study*, 129 PEDIATRICS 13 (2012)). Yet an earlier study concluded that roughly *20 percent* of youths engaged in sexting.[2] Indeed, the conduct appears to be growing, with a more recent

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[2] National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* (2008) (available at https://thenationalcampaign.org/sites/default/files/resource-primary-download/sex_and_tech _summary.pdf); *see also* Amanda Lenhart, *Teens and Sexting, Pew Internet and American Life Project* (2009) (available at http://www.pewinternet.org/files/old-media//Files/Reports/2009/PIP_Teens_and_Sexting.pdf) (concluding based on nationally-representative survey that fifteen percent of twelve- to seventeen-year-olds who owned cell phones had received nude or nearly-nude images from someone they knew via text messaging).

June 2014 study focused on 18- to 22-year-olds finding that more than half of respondents had sexted as minors, with a staggering *28 percent* of respondents acknowledging that they sent photographic sexts that were "most likely to be considered illegal." Heidi Stohmaier, et al., *Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences*, 11 SEX. RES. SOC. POLICY 245-255 (2014).[3] That same study found that 61 percent of respondents were not aware that sending explicit photographs could be prosecuted under child pornography laws, and noted that many jurisdictions in the United States have created educational and/or diversionary options in an effort to help teenagers who are caught sexting to avoid the harsh legal penalties associated with child pornography convictions. *Id.* at 247, 251.

This is not an abstract risk. Just as the prevalence of sexting is on the rise, so are convictions of minors for engaging in this practice. A 2012 survey of more than 2,000 law enforcement agencies across the country noted that U.S. law enforcement agencies handled an estimated *3,477* cases of youth-produced sexual images between 2008 and 2009 alone, roughly one-third of which were "experimental" cases (defined as not involving an adult, intent to harm, or reckless misuse).[4] A 2013 survey of

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[3] Available at: https://www.researchgate.net/profile/David_Dematteo/publication/272015427_Youth_Sexting_Prevalence_Rates_Driving_Motivations_and_the_Deterrent_Effect_of_Legal_Consequences/links/5609276308ae4d86bb118d9c.pdf?origin=publication_detail. This 2014 study observed that the 2012 Mitchell study "may underestimate the true incidence of sexting due to a methodological approach (i.e., telephone survey) that may discourage honest responding." *Id.* at 246-47.

[4] Janis Wolak, J.D., David Finkelhor, Ph.D, and Kimberly J. Mitchell, Ph.D, *How Often are Teens Arrested for Sexting? Data from a National Sample of Police Cases*,

378 state prosecutors found that a majority of them had handled a sexting case involving juveniles, with 21 percent of the sample having brought felony charges, and 16 percent having brought charges that would have required the minor to register as a sex offender.[5]

And the number has only increased. A recent 2016 study in The Journal of the American Academy of Psychiatry and the Law noted that even cursory legal research indicated the number of minor sexting prosecutions that had resulted in convictions and reached appeal "has been growing rapidly," and concluded based on its review of the literature that "[m]any states agree that there is or should be a difference between statutes enacted to prosecute individuals for the creation and dissemination of child pornography and statutes used to punish or deter minors from sending sexually explicit photographs to other minors."[6]

A number of commentators have suggested various solutions, including naming minors as a "protected class" immune from child pornography prosecutions.[7] However, that is not the issue before this

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PEDIATRICS 129:4-12 (2012) (available at http://pediatrics.aappublications.org/content/129/1/4.full-text.pdf).

[5] Wendy Walsh, Janis Wolak and David Finkelhor, *Sexting: When are State Prosecutors Decided to Prosecute? The Third National Juvenile Online Victimization Study*, CRIMES AGAINST CHILDREN RESEARCH CENTER (2013) (available at http://www.unh.edu/ccrc/pdf/CV294_Walsh_Sexting%20&%20prosecution_2-6-13.pdf).

[6] Melissa R. Lonrang, M.D., Dale E. McNiel, Ph.D, and Renee L. Binder, M.D., *Minors and Sexting: Legal Implications*, J AM. ACAD. PSYCHIATRY LAW 44:73-81 (2016) (available at http://jaapl.org/content/jaapl/44/1/73.full.pdf).

[7] *See, e.g.*, Sarah Thompson, *Sexting Prosecutions: Minors as a Protected Class from Child Pornography Charges*, 48 U. MICH. J. L. REFORM CAVEAT 11 (2014) (available at http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1039&context=mjlr_caveat).

Court. Instead, correction of the lower courts' interpretation of the dealing in depictions statute is the Court's clearest path to avoiding the looming injustices the lower courts' interpretation risks creating.

Even accepting *arguendo* the frequency of teenage sexting rates cited by the Court of Appeals, there is no real dispute that the practice of "sexting" is on the rise and that the rulings below create significant legal risk for thousands of minors within the State. There is no evidence the Legislature intended to criminalize common adolescent behavior,[8] and the problem will only get worse. The Court should reverse the conviction and interpret the dealing in depictions statute as inapplicable to minors who take and distribute sexually-explicit images of themselves. If the lower courts' erroneous and overbroad reading of the statute is permitted to stand, thousands of minors within the state engaging in a common teenage practice plainly abetted by 21st century technology[9] will continue to risk conviction under the statute and suffer the serious consequences stemming from a felony conviction.

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[8] Joanna L. Barry, *The Child As Victim and Perpetrator: Laws Punishing Juvenile "Sexting,"* 13 VAND. J. ENT. & TECH. L. 129 (2010) (noting that "legislators never contemplated children sharing images of themselves, even though teenage sexting might squeeze into the literal definition of child pornography" (quotation omitted)).

[9] The ACLU and Juvenile Law Center's *amicus* brief below cited a number of studies concluding that the sending or receiving of sexually-explicit photographs is part of adolescent development in this modern technological age. *See Amicus Curiae* Brief of American Civil Liberties Union of Washington and Juvenile Law Center at 11-13.

VI. CONCLUSION

For the reasons set forth above, the Court should reverse the conviction and interpret the dealing in depictions statute as inapplicable to minors who distribute sexually-explicit images of themselves.

RESPECTFULLY SUBMITTED this 31st day of March, 2017.

CORR CRONIN MICHELSON
BAUMGARDNER FOGG & MOORE LLP

s/ Kelly H. Sheridan
Steven W. Fogg, WSBA No. 23528
Kelly H. Sheridan, WSBA No. 44746
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
Tel (206) 625-8600
sfogg@corrcronin.com
ksheridan@corrrcronin.com

Nancy L. Talner, WSBA No. 11196
Vanessa Hernandez, WSBA No.42770
ACLU-WA Foundation
901 Fifth Ave. #630
Seattle, WA 98164
Tel (206) 624-2184
talner@aclu-wa.org
vhernandez@aclu-wa.org

Attorneys for Amicus American Civil Liberties Union of Washington

Marsha L. Levick
Juvenile Law Center
1315 Walnut Street
4th Floor
Philadelphia, PA 19107
Tel (215) 625-0551
mlevick@jlc.org

Attorney for Amicus Juvenile Law Center

Nicholas B. Allen, WSBA No. 42990
Columbia Legal Services
101 Yesler Way Ste 300
Seattle, WA 98104
Tel (206) 464-0838
Nick.Allen@columbialegal.org

Attorney for Amicus Columbia Legal Services

Sara Zier, WSBA No. 43075
TeamChild
715 Tacoma Ave S
Tacoma, WA 98402
Tel (253) 507-8435
sara.zier@teamchild.org

Bonnie Linville, WSBA No. 49361
TeamChild
32 N 3rd St Ste 410
Yakima, WA 98901
Tel (509) 573-4993
bonnie.linville@teamchild.org

Attorneys for Amicus TeamChild

DECLARATION OF SERVICE

The undersigned declares as follows:

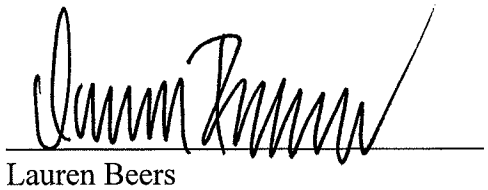
1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys for *Amicus Curiae* American Civil Liberties Union of Washington.

2. On March 31, 2017, I caused the foregoing to be filed with the Supreme Court of the State of Washington and served on the parties to this action as follows:

Kathleen A. Shea Washington Appellate Project 1511 Third Avenue, Suite 701 Seattle, WA 98101 kate@washapp.org wapofficemail@washapp.org *Attorney for Petitioner*	□ Facsimile □ Messenger □ U.S. Mail X E-Mail
Gretchen E. Verhoef Deputy Prosecuting Attorney County-City Public Safety Building West 1100 Mallon Spokane, WA 99260 gverhoef@spokanecounty.org kcornelius@spokanecounty.org scpaappeals@spokanecounty.org *Attorneys for Respondent*	□ Facsimile □ Messenger □ U.S. Mail X E-Mail

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

DATED this 31st day of March, 2017 at Seattle, Washington.



Lauren Beers