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November 14, 2024

Samuel A. Christensen
Clerk of Court of Appeals
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RE: State of Wisconsin v. Andreas W. Rauch Sharak
2024AP169-CR

Dear Mr. Christensen,

On November 7, 2024, the Court ordered simultaneous letter briefs addressing the impact of the recent decision in *State v. Gasper*, 2023AP2319-CR, on this appeal, should that opinion be published. As detailed below, *Gasper* is not dispositive of the issues in this case. Additionally, two of the four federal district cases relied on by the *Gasper* court were called into question the same day that *Gasper* was decided, in the Second Circuit Court of Appeals case *United States v. Maher*, ___ F.4th ___ (2024), 2024 U.S. App. Lexis 27542, which reached the opposite conclusion as *Gasper*.

Gasper differs significantly from both the factual and legal issues in this case. While both cases arise from a CyberTipline Report created by an ESP and forwarded to NCMEC and involve an effort to suppress the warrantless search of contents uploaded, transmitted, or stored on an ESP's platform, the similarities end there.

The legal arguments raised by Gasper differ significantly from those raised in this case. *Gasper* was decided on the narrow question of the defendant's reasonable expectation of privacy in the contents of images he sent through Snapchat and the impact of the terms of service on that expectation. There are significant unresolved issues pertaining to the impact of an ESP's terms of service to a user's reasonable

expectation of privacy that were never raised in *Gasper* (though could have and arguably should have been) which were raised by Mr. Ruach Sharak. Gasper relied on a somewhat confusing argument that the heightened privacy interest in one's cell phone creates a privacy expectation in the contents they transmit over an ESP's platform. The Court of Appeals easily rejected that argument as missing the point. Mr. Rauch Sharak makes a very different argument, one that is not resolved by *Gasper*.

Namely, Mr. Rauch Sharak argues that Google's terms of use are a private contract between Google and Mr. Rauch Sharak that has little effect on Mr. Rauch Sharak's reasonable expectations of privacy vis-à-vis the government. The cases that reach an opposite conclusion are a product of a misapplication of Supreme Court precedent dealing with terms of use/workplace policies where the employer was a unit of government, not a private entity. This is best explained by the Sixth Circuit in *United States v. Warshak*, 631 F. 3d at 286-87 (Warshak III). This distinction is important. The *Gasper* court did not have to grapple with this issue as Gasper failed to raise it.

The line of cases holding that an ESP's terms of service can defeat an individual's reasonable expectations of privacy vis-à-vis the government trace back to one case which incorrectly applied the Supreme Court's ruling in *O'Connor v. Ortega*, 480 U.S. 709 (1987), which dealt with government workplace privacy. The plurality reasoning in *Ortega* was that in a government office, the employer was a government actor. A reasonable expectation of privacy against government intrusions therefore depended on the employer's practices and policies, the "operational realities of the workplace," and those expectations could "be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* at 1717 (O'Connor, J., plurality opinion). Under *Ortega*, then, government workplace privacy policies control Fourth Amendment rights in a government workplace.

This rule has been widely applied in government employee rights in workplace computers: in *United States v. Thorn*, 375 F. 3d 679 (8th Cir. 2004), the defendant worked at a state Department of Social Services. The office had a policy which stated that "an employee's use of [Department] information systems and technology indicates that the employee understands and consents to [the Department]'s right to inspect and audit all such use as described in this policy." After the defendant's workplace computer was searched resulting in the discovery of evidence, he challenged the search. The Eighth Circuit held that the policy was binding and waived the defendant's reasonable expectation of privacy in the contents of his office computer.

However, *Ortega*'s rule applies only in the context of government employment, not private workplaces. Private employees have a reasonable expectation of privacy in their office against the government generally, regardless of the employer's policies and practices. *Mancusi v. DeForte*, 392 U.S. 364 (1968). The private vs. government distinction matters: *Ortega* applies to government space, as an employer policy in that context is imposed by the government against a citizen. But it does not apply in private-sector spaces, as a policy imposed by a private employer not regulated by the Fourth Amendment does not have the same effect. Courts have stumbled over this issue: in *United States v. Ziegler*, 456 F. 3d 1138, 1144-46 (9th Cir. 2006), for example, the Ninth Circuit initially ruled that workplace policies eliminated the reasonable expectation of privacy of private sector employees under *Ortega*. On rehearing en banc, that opinion was vacated in an opinion which held that the workplace policy did not eliminate a reasonable expectation of privacy because private-sector workplace policies are governed by *Mancusi*. *United States v. Ziegler*, 474 F. 3d 1184, 1189-90 (9th Cir. 2007).

The cases linking Terms of Service to Fourth Amendment Rights trace back their reasoning to this error. for example, *United States v. Ackerman*, 831 F. 3d 1292, which questioned the defendant's expectation of privacy in the contents of his AOL account in light of the Terms of Service. On remand, the Circuit Court held that the Terms of

Service defeated Ackerman's reasonable expectation of privacy, citing *United States v. Stratton*, 229 F. Supp. 3d 1230 (D. Kan. 2017) which "found the Tenth Circuit's reasoning regarding whether an employee had a legitimate expectation of privacy in images he downloaded on a work computer instructive." That Tenth Circuit opinion was *United States v. Angevine,* 281 F. 3d 1130, 1134 (10th Cir. 2002), which dealt with the reasonable expectation of privacy in the workplace account of a *public university professor*. That case was controlled by *Ortega*, which applies only to expectations of privacy in governmental workplaces. *Ackerman* also cited *United States v. Wilson*, which relied on the same government network cases. *Wilson* was ultimately reversed by the Ninth Circuit (though not prior to *Ackerman's* reliance on it). The Ninth Circuit determined that the Fourth Amendment had indeed been violated and that, crucially, the defendant's expectation of privacy in the images attached to his email was not frustrated by the email provider's use of technology to scan the emails and report those images to NCMEC, and that the warrantless review of the emails and images by law enforcement was an unreasonable search.

The Court of Appeals in *Gasper* relied on several federal district court cases for the proposition that terms of service broadly defeat a reasonable expectation of privacy. However, the same day as the decision in *Gasper* was dated and filed, the Second Circuit Court of Appeals decided *United States v. Maher*, a case which rejects the position reached by the Court of Appeals in *Gasper* and the district court decisions in the four cases relied on by the *Gasper* court, *United States v. Tennant*, No. 23-CR-79, 2023 WL 6987405 (N.D.N.Y. Oct. 10, 2023); *United States v. Brillhart*, No. 22-CR-53, 2023 WL 3304278 (M.D. Fla. May 7, 2023); *United States v. Colbert*, No. 23-CR-40019, 2024 WL 3304278 (D. Kan. May 9, 2024); and *United States v. Lowers*, 715 F. Supp. 3d 741 (E.D.N.C. Feb. 5, 2024).

Both *Tennant* and *Lowers* are district court decisions in the Second Circuit. Both *Lowers* and *Maher* deal with Google's terms of service (as in this case). *Lowers* held that Google's terms of service extinguished the defendant's reasonable expectation of privacy. *Maher* concluded the opposite.

Given *Gasper's* reliance on cases that have been called into question by *Maher* the very date it was published and the extent to which one of the central issues (the impact of terms of service on the defendant's reasonable expectation of privacy) was not fully developed, *Gasper* is not dispositive of Mr. Rauch Sharak's appeal even if published. Candidly, it should not be published given the omitted issues that are at the heart of the national split in authority. To the extent that this issue must be reached by the Court of Appeals with an eye towards publication, Mr. Rauch Sharak's case is the more appropriate choice.

Very truly yours,

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Electronically signed by
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