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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEREMIAH SMITH, Plaintiff and Appellant, v. LOANME, INC., Defendant and Appellee.	Supreme Court No. _____ Court of Appeal No. E069752 Superior Court No. RIC1612501

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Douglas P. Miller
Honorable Michael J. Raphael
Honorable Frank J. Menetrez

PETITION FOR REVIEW

After the Published Decision of the Fourth Appellate District, Second Division, County of Riverside.

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After the Published Decision of the Fourth Appellate District, Second Division, County of Riverside.

TO THE HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner Jeremiah Smith ("Petitioner") respectfully petitions for review of the published Order of the Court of Appeal Fourth Appellate District, Second Division, filed December 20, 2019. A copy of the ruling is

attached to this petition as Exhibit A in the Appendix pursuant to Cal. R. Ct. 8.504(b)(5).

ISSUES PRESENTED

I. Whether the Court of Appeal erred in determining that California Penal Code § 632.7 authorizes the secret recording of any telephone call that involves one or more cordless or cellular telephones, so long as the recording is made by someone who is a party to the call rather than by a third-party eavesdropper.

II. Whether the Court of Appeal erred in determining that California Penal Code § 632.7 clearly and unambiguously applies to third party eavesdroppers only, and not to parties to a call who receive and record the communications of another party without the knowledge or consent of that party.

WHY REVIEW SHOULD BE GRANTED

This case is about telephone privacy. Since 1967, California has been an all-party consent state, meaning that it is generally illegal to record a telephone call without the consent of everyone who is a party to the call. The prohibition of non-consensual telephone recording, as well as other aspects of electronic privacy, are codified in the California Invasion of Privacy Act, Penal Code § 630 et seq. ("CIPA"). In enacting the CIPA, the California Legislature determined that an all-party consent regime is necessary "to protect the right of privacy of the people of this state." Penal Code § 632. In 1974, voters further enshrined this right through the addition of the right to privacy in the California Constitution, Article 1, Section 1.

This Court has consistently applied the CIPA in a manner that furthers telephone privacy. In *Ribas v. Clark* (1985) 38 Cal.3d 355, this Court held

that the CIPA's prohibition on non-consensual monitoring applies not only to interception while a telephone communication is in transit, but also to monitoring on an extension phone. In *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, this Court explained that § 632 protects from non-consensual recording any telephone call that a participant does not intend to be overheard or recorded (whether or not the content of the call is intended to remain secret) and that § 632.7 protects against intercepting or recording "*any* communication" involving a cellular phone or cordless phone. *Flanagan, supra*, 27 Cal.4th at 776. In *Kearney v. Salomon Smith Barney, Inc*. (2006) 39 Cal.4th 95, this Court affirmed the all-party consent requirement and held that it applies to out-of-state businesses that engage in telephone communications with California customers. Recording a telephone call without the consent of any party has been held to be "an affront to human dignity." *Friddle v. Epstein* (1993) 16 Cal. App. 4th 1649, 1660-61.

Consistent with this, "the Legislature found that 'the advent of widespread use of cellular radio telephone technology means that persons will be conversing over a network which cannot guarantee privacy in the same way that it is guaranteed over landline systems." *Flanagan*, *supra*, 27 Cal.4th at 775. The California Supreme Court addressed application of section 632.7 by holding that it was enacted in response "to the problem of protecting the privacy of parties to calls involving cellular or cordless telephones" and made unlawful "the intentional interception **or recording** of a communication involving a cellular phone or a cordless phone." *Id*. at 776 (emphasis added). Section 632.7 "protect[s] against interception or recording of *any* communication." *Id*. at 776 (italics in original). Thus, while together sections 632 and 632.7, "protect[ ] against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation or the type of telephone involved" (*Id*. at p. 776), for landline communications, section 632 imposes the added requirement

that the plaintiff establish "an objectively reasonable expectation that the conversation is not being overheard or recorded." *Id.* at 777. This statutory background, described by the Supreme Court, is incredibly important because it frames *why* the Legislature enacted § 632.7 – This Court was concerned that cellular phones and cordless phones would be determined by courts to be so insecure (due to eavesdropping) that there could be no reasonable expectation of privacy, and hence, § 632 would not prohibit recording such calls, since the statute required confidentiality, i.e. a reasonable expectation of privacy. Section 632.7 closed this foreseeable loophole. And, as further explained below, many federal district courts in California have held that § 632.7 protects against the non-consensual recording of telephone calls transmitted in whole or in part between cellular and/or cordless telephones.

Despite the statutory language, the legislative history of the CIPA, and judicial precedent, the Court of Appeal below held that § 632.7 applies only to third party eavesdroppers and that it does not apply to anyone who is a party to the call. The practical result of this ruling is to authorize the secret recording of any telephone call in which any party happens to be using a cell phone or a cordless a phone. The ruling effectively turns California into a one-party consent state with respect to the recordation of cell phone and cordless phone calls.

If left to stand, the Court of Appeal's decision will have a devastating impact on the privacy rights of every Californian that have been in place and well understood for decades. As this Court has noted, consumers in California are accustomed to being informed at the outset of a call whenever a business entity intends to record the call. *Kearney*, *supra*, 39 Cal.4th at 118. The questionable ruling marks the first appellate-level Order on this issue and is being cited by defendants in numerous class action cases pending across the state wherein the identical issue is presented as a basis to request

reversals of prior rulings, as well as dismissals of the pending actions. Supreme Court review at this time would preserve judicial resources, in that the same issue is likely to be presented to each of the Appellate Districts in California if this important question of law is not settled now. Indeed, this issue is ripe for Supreme Court review pursuant to Cal. R. Ct. 8.500(b)(1) in order to settle an important question of law and it is relevant to every California resident, as it affects the privacy rights of every person who use cellular or cordless telephones.

STATEMENT OF CASE AND FACTS

I. Procedural Background of Trial Court Proceedings

Smith filed his Class Action Complaint against LoanMe on September 26, 2016, alleging violations of Cal. Penal Code § 632.7 on behalf of himself and a putative class. The Parties jointly stipulated to and the Court ordered a bifurcated bench trial on a legal issue that ultimately is not relevant to this Appeal – whether beep tones constitute a sufficient notice advisory to a reasonable consumer that the call is being recorded. The parties briefed the issue and appeared for a bifurcated bench trial on October 13, 2017. The Court ruled in favor of LoanMe and entered Judgment against Plaintiff on November 21, 2017. On January 2, 2018, Smith timely filed his Notice of Appeal.

II. Statement of Facts

The Parties stipulated and agreed on all facts for the bifurcated trial and appeal. LoanMe is a lender that offers personal and small business loans to qualified customers. Smith's wife is the borrower on a loan made to her by LoanMe. In October 2015, LoanMe called the telephone number provided to it by Smith's wife to discuss her loan. Smith answered the phone and informed LoanMe that his wife was not home, after which the call ended. The call lasted approximately 18 seconds. LoanMe recorded the call.

Approximately 3 seconds into the call, LoanMe caused a "beep tone" to sound. A "beep tone" is played on outbound calls made by LoanMe at regular intervals every 15 seconds. LoanMe did not orally advise Smith that the call was being recorded, and Smith did not sign any contract with LoanMe granting consent to record calls with him. For purposes of the bifurcated bench trial and appeal, LoanMe accepts that the recorded call was placed to a cordless telephone. LoanMe contends that causing beep tones to sound at regular intervals during a phone call puts people on notice that the call is being recorded, and that, as a matter of law, people who continue the conversation after a beep tone (or series of tones) have consented to the call being recorded. Smith alleges that the use of beep tones, in the manner beep tones were used by LoanMe as demonstrated during the recorded phone call at issue, without more, are insufficient notice that the call is being recorded. This was the sole issue on which the parties requested review by the Court of Appeal. There were no other disputes of law or fact raised by the Parties. ***LoanMe did not argue that § 632.7 did not apply to it as a party to the call.***

III. The Court of Appeal Unexpectedly Invokes Government Code § 68081

For reasons that are unclear, after the legal issues surrounding beep tones had been fully briefed before the Court of Appeal, the Court issued a short Order requesting further briefing on a completely unrelated question: "should Penal Code § 632.7 be interpreted as applying only to the recording of a wireless communication that was 'hacked' or 'pirated' by someone who was not a party to the communication?" A copy of this Order is attached hereto as Exhibit B. Appellant was given only five pages of briefing on this issue.

IV. The Court of Appeal Order Unexpectedly Guts the Invasion of Privacy Act

Section 632.7 prohibits the secret recording of telephone calls that occur on a cell phone or cordless landline phone.[1] Or rather, it did until the Court of Appeal unexpectedly issued an unprompted ruling that § 632.7 applied only to eavesdroppers and not to parties to the call. The Court's Order analyzes one single legal question relating generally to the Invasion of Privacy Act: does § 632.7 apply to the surreptitious recording of a telephone call by a participant in the phone call, or instead does it apply *only* to the recording of a communication by an undisclosed third-party eavesdropper? The Court of Appeal ruled that § 632.7 applies only to eavesdroppers, and that parties to a call are free to receive and secretly record communications without the consent of another party to the call without violating the statute. The ruling acknowledges that the majority of federal courts, in more than a dozen cases, have held otherwise.

The Court of Appeal Order is based on a misreading of the plain language of § 632.7 and the broader California Invasion of Privacy Act ("CIPA"). Rather than starting with the language of § 632.7, the Court of Appeal started by looking at CIPA as a whole and concluding that telephone calls that were confidential were already protected from recording under the circumstances by parties to a call under § 632. The Court went on to look at Penal Code § 632.5 and 632.6, which prohibit the *malicious* interception or

[1] Roughly 70% of calls placed to consumers are placed to their cell phones, not landlines. In fact, as of 2017, more than 53% of households in America were wireless only, meaning that they do have landline service. https://www.textrequest.com/blog/how-many-people-still-use-landline-phone/. In the wake of the Court's ruling, consumers are left vulnerable to surreptitious recordation of their telephone conversations by companies that do not disclose that they are recording the call. This is directly contrary to long-settled appellate jurisprudence holding that such conduct is not only a violation of their privacy rights, but an "afront to human dignity" as well.

receipt of cellular phone or cordless phone communications without consent of the parties. Nothing in the plain language of either of these statues specifies that they inherently apply only to third party eavesdroppers. Nevertheless, the Court read such a requirement into these two statutes due solely to their inclusion of the word "malicious," which is not present in § 632.7. Finally, the Court looked at the language of § 632.7: "Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by" a fine, imprisonment, or both. Nonetheless, rather than focusing on the language of the statute, the remainder of the Order attempts to frame § 632.7 in the context of §§ 632.5 and 632.6, with the assumption that neither applies to parties to a call and therefore, that § 632.7 must only apply only to third parties to a call as well. The conclusion appears to rest solely on the observation that *some* of the same language in § 632.7 also appears in §§ 632.5 and 632.6.

Despite § 632.7 clearly stating that liability is imposed on any person "who, without the consent of all parties to a communication, intercepts or receives and intentionally records" a communication involving a cellular phone or cordless phone, the Court determined as follows:

> "The statute thus requires that the interception or receipt of the communication be without the parties' consent. But the parties to a phone call always consent to the receipt of their communications by each other-that is what it means to be a party to the call (or at least that is part of what it means)…Consequently, the parties to a phone call are incapable of violating section 632.7, because they do not

> intercept or receive each other's communications without all parties' consent."

The Court of Appeal's error was supported thereafter by a strawman argument, whereby the Court looked at § 632.5 and § 632.6 in its own rewritten context of applying only to eavesdroppers, despite such a restriction being nowhere in § 632.5 or § 632.6, and notwithstanding the only reason the Court of Appeal reached such a conclusion was due to the presence of the word "malicious" in § 632.5 and § 632.6. Yet the word "malicious" does not appear in § 632.7, so the same logic does not apply. The Court went on to conclude that the only way to harmonize the three statutes was to rule also that § 632.7 only applied to third parties. The Court appears to have conducted the analysis backward, looking at the conclusion and determining how best to reach it, rather than starting with the plain language of the statute and looking elsewhere only if necessary to resolve ambiguity. The only justification offered for having taken that backwards method of statutory interpretation was the court's statement: "it is not clear what it would mean for one party to receive the other party's communications with malice." What is particularly bizarre about the ruling is its attempt to square the Order's inconsistency with the Supreme Court's ruling in *Kearney*, which recognizes an approach to consent under § 632 that is similar to that taken by Appellant:

> "Although parties to a phone call always consent to each other's receipt of their communications, they do not always consent to the use of an electronic amplifying or recording device to eavesdrop upon or record the communication. It is consequently unsurprising that section 632 can apply to the parties to a communication. (*Kearney*, supra, 39 Cal.4th at pp. 117-118.)

Appellant used a similar line of reasoning at oral argument – although parties to a telephone call always consent to one another's receipt of their communications, they do not always consent to the recording of the

communication. Thus, it is unsurprising that § 632.7 can apply to parties to the communication. The Court of Appeal was unpersuaded by this logic, but its Order fails to adequately explain why. The Court characterized Appellant's position as "absurd" rather than actually looking at the plain language of § 632.7, which makes it abundantly clear that a consumer's consent is conditional insofar as it requires ***both*** consent to "intercept or receive" ***and*** consent to "record" in order to obtain the requisite consent for the otherwise intrusive and statutorily-prohibited conduct described therein.

The Court goes on to ignore the reasoning of more than a dozen published federal decisions that have analyzed these questions thoroughly and persuasively from multiple angles and have come to a contrary conclusion. Instead, it focuses on a single opinion – *Brinkley v Monterey Financial Services, LLC* (S.D.Cal. 2018) 340 F.Supp.3d 1036. That decision recognized the reading of "consent" advanced by Appellant – that consent was conditional and required both consent to receive and consent to record, in order to amount to consent for the otherwise prohibited conduct. Despite consent being an affirmative defense under Black's Law Dictionary's definition, and being defined as conditional under the statute, the Court summarily dismisses that interpretation by simply concluding that the introductory prepositional phrase "without the consent of all parties to a communication" modified both "intercepts or receives" and "intentionally records" as separate acts and thus required a *lack of consent* for both elements in order for a violation to occur. This Court's reading of the statute distorts what the term "consent" means in everyday use, in the legislative history, and according to legal dictionaries. While the Court went on to discuss the legislative history in its Order, it made clear that because it was ruling that the statute was unambiguous, it placed no weight on the Legislative History. A petition for rehearing was not requested.

The Order decimates important privacy rights of every California resident and turns California into a one-party consent state with respect to recordation of cellular and cordless phone calls. This is contrary to decades of precedent and the clear intent of the Legislature and stands as an affront to human dignity. The Order should be reversed.

V. The California Invasion Of Privacy Act

California's Invasion of Privacy Act, located in California Penal Code § 630 *et seq*., prohibits, among other things, the recording of telephone conversations without consent. "Section 632.7 makes unlawful the intentional, non-consensual recording of a telephone communication, where at least one of the phones is a cordless or cellular telephone." *Kuschner v. Nationwide Credit, Inc.* (E.D. Cal. 2009) 256 F.R.D. 684, 688. § 632.7 "protect[s] against interception or recording of *any* communication." *Flanagan v. Flanagan* (2002) 27 Cal. 4th 766, 776. *See also Brown v. Defender Sec. Co.* (C.D. Cal. Oct. 2, 2012) 2012 WL 5308964, *2 (stating that both § 632 and § 632.7 "prevent a party to a conversation from recording it without the consent of all parties involved," but "***§ 632.7 grants a wider range of protection to conversations where one participant uses a cellular phone or cordless phone***," without the need for a "confidential" communication) (emphasis added).

California is known as a two-party consent state, which means that both parties to the call must consent in order for the conversation to be recorded. *Kearney, supra,* 39 Cal.4th at 129 & fn. 15. Consistent with this, "the Legislature found that 'the advent of widespread use of cellular radio telephone technology means that persons will be conversing over a network which cannot guarantee privacy in the same way that it is guaranteed over landline systems." *Flanagan, supra,* 27 Cal. 4th at 775.

The California Supreme Court has held that an appropriate warning the call is being recorded, must be given "at the outset of the conversation" and

that the CIPA prohibits the recording of any conversation "without first informing all parties to the conversation that the conversation is being recorded." *Kearney, supra,* 39 Cal.4th at 118; Dkt. Nos. 86 and 88.[2] As this Court observed:

> "California consumers are accustomed to being informed at the outset of a telephone call whenever a business entity intends to record the call, it appears equally plausible that, in the absence of such an advisement, a California consumer reasonably would anticipate that such a telephone call is not being recorded, particularly in view of the strong privacy interest most persons have with regard to the personal financial information frequently disclosed in such calls."

Id. at fn. 10. "California must be viewed as having a strong and continuing interest in the full and vigorous application of [CIPA] prohibiting the recording of telephone conversations without the knowledge or consent of all parties to the conversation." *Id*. at 125. Citing to *Kearney*, the Court of Appeal has observed:

> But the high court rejected the Court of Appeal's suggestion that under California law there was no need for an **explicit advisement** regarding the secret recording because "clients or customers of financial brokers ... 'know or have reason to know' that their telephone calls with the brokers are being recorded." [ ]

Kight v. Cashcall (2011) 200 Cal. App. 4th 1377, 1399 (emphasis added) (citing *Kearney*, citations omitted). In other words, to put a consumer on "adequate notice" that his or her call is being monitored or recorded, binding law holds that there must be an "explicit advisement."

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[2] *Friddle v. Epstein* (1993) 16 Cal. App. 4th 1649, 1661-1662 (the Privacy Act is violated at the moment the party begins making a secret recording, and "[n]o subsequent action or inaction is of consequence to this conclusion.").

ARGUMENT

I. The Court of Appeal Erred in Finding that § 632.7's Recording Advisory Requirements Apply Only to Interlopers And Not to Parties to a Call

California Penal Code § 632.7 was designed to prevent anyone, party or interloper, from recording a qualifying telephone conversation without the knowledge or consent of all parties. The plain language of the statute, the overwhelming body of case law, and even the Legislative History of CIPA all support this reading. The Court of Appeal's ruling effectively rewrites the language of the statute. The Invasion of Privacy Act codified under Cal. Penal Code §§630 *et seq*. was designed to broadly protect the privacy of California consumers, from having certain types of conversations recorded without their knowledge or consent. This Court, and every court thereafter, have held that California is a two-party consent state. As this Court has held, § 632.7 was enacted in response "to the problem of protecting the privacy of parties to calls involving cellular or cordless telephones" and made unlawful "the intentional interception **or recording** of a communication involving a cellular phone or a cordless phone." *Flanagan, supra,* 27 Cal. 4th at 776 (emphasis added). The Court of Appeal disregarded this precedent by holding that § 632.7 only applies to eavesdroppers, not parties who secretly record a conversation without the consent of another party. The plain language of the statute makes it clear that the Court of Appeal' Order is flawed:

> "Every person who, [(1)] without the consent of all parties to a communication, [(2)] intercepts **or receives and intentionally records**, or assists in the interception or **reception and intentional recordation** of, [(3)] a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular

> radio telephone, shall be punished by a fine ... or by imprisonment...."

Cal. Penal Code § 632.7. (emphasis added).

In its Order, the Court of Appeal made several errors in reading the statute: First, the Order selectively focuses on the "intercepts" portion of this language, and ascribes to the phrase "intercepts or receives" the same meaning as "eavesdrop." Even if "intercepts" means the same thing as "eavesdrop," "receives" does not. In fact, legal dictionaries define intercept as meaning "covert reception…See wiretapping" which is acutely different from "reception," as reception can be known and is not necessarily surreptitious. Black's Law Dictionary Eighth Edition at Pg. 827. The statutory text is written in the disjunctive, meaning that either interception or reception would violate CIPA, when combined with surreptitious recording.

Second, the Order ignores the statute's clear statement that an entity must have "consent" to both a) intercept or receive, and b) record. Consent to receive alone is insufficient, as the statute clearly makes consent conditional upon informed knowledge whereby a party is advised if his or her communication is *either* intercepted *or* received *and* recorded. What use is having a consumer's consent to what they already know - that they are voluntarily communicating to a party - if they have no idea that their conversation is being secretly recorded as well? Section 632.7 is a prohibition on recording. Thus, it follows that a consumer who is communicating with someone who is secretly recording the call does not have knowledge of the full risks of the communication, because he or she has not been given the dignity and protection of a recording advisory, and therefore have *not* in fact consented to that conversation taking place under the full scope of circumstances. Many a consumer no doubt would say "yes I was speaking to you voluntarily, but I would not have done so if I knew you were secretly recording me!" That is the crux of the problem with the

Court of Appeal's ruling – consent to receive is conditional, not unconditional, and the language of § 632.7 makes that clear. Anything less would amount to uninformed consent, a contradiction in terms.

The legislative history and existence of other provisions in CIPA support Appellant's view. Indeed, the Legislature enacted § 632.7, shortly after enacting §§ 632.5 and 632.6, which unquestionably already protected communications on cellular phones from malicious eavesdropping. Why then would § 632.7 relate only to eavesdropping, and not to recording, when other sections of CIPA already made it illegal for eavesdropping to occur? Moreover, why ascribe to §§ 632.5 and 632.6 a requirement that a violation can be asserted only against a third party when the statute does expressly say that? What's more, even if that were a correct reading, such a reading could be supported only by the inclusion of the term "maliciously" in the statutory text of §§ 632.5 and 632.6. But unlike §§ 632.5 and 632.6, § 632.7 contains no requirement of malice, suggesting the statute governs broader conduct, *i.e.* both recording by parties and eavesdroppers.

The Court's interpretation is also contradicted by numerous statements made by the sponsor of the bill that led to the enactment of § 632.7. The majority of courts that have addressed this issue disagree with the Court of Appeal's interpretation. Such an interpretation of § 632.7 is at direct odds with CIPA's broad purpose, the plain language of § 632.7, the legislative history, and the weight of judicial authority. Accordingly, the Order should be overturned.

A. § 632.7 Prohibits Recording Communications Without Consent of the Party Whose Communications are Being Received

Penal Code § 632.7 is not limited to situations in which third parties eavesdrop on a telephone call and record the conversation without the knowledge or consent of the parties to the call. Such a misreading has the

effect of gutting this important privacy statute with respect to calls placed to cellular phones, which is where most phone calls now are made. The effect of the Order is to turn California into a one-party consent state, which is contrary to what this Court has held in other CIPA decisions.

1. The Plain Language of the Statute Refutes The Court of Appeal's Ruling

Canons of statutory construction help give meaning to a statute's words. We begin with the language of the statute. *Wilcox v. Birtwhistle*, (1999) 21 Cal.4th 973, 977 (words of a statute are the starting point in its interpretation and should be given the meaning they bear in ordinary use). "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature." *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735. Canons of construction provide unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Id*. When construing a statute, court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. *DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 387.

The evidence that the Court of Appeal's interpretation is incorrect is abundant, but one need look no further than the language of the statute itself. § 632.7 provides:

> "Every person who, [(1)] without the consent of all parties to a communication, [(2)] intercepts **or receives and intentionally records**, or assists in the interception or **reception and intentional recordation** of, [(3)] a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine ... or by imprisonment...."

Id. (emphasis added). The Court's error comes from a misreading of the disjunctive and non-disjunctive phrases above. The highlighted language is conditional in nature and makes it clear that § 632.7 requires a company to prove that it has consent to two things: 1) either intercept or receive a communication, and 2) to record that call. Consent just to intercept or receive is not enough, you need consent to also record, because the statute is written conditionally through the inclusion of the word "and." One cannot obtain such consent without telling the person at the outset of the recording that the call is being recorded. Absent an advisory, the communication is taking place under false pretenses (i.e. an assumption that the call is not being recorded). According to Black's Law Dictionary, consent is "agreement, approval, or permission as to some act or purpose" and is "an affirmative defense to…torts such as…invasion of privacy". *See* Black's Law Dictionary Eighth Edition Pg. 323. Informed consent is "a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives." *Id*. In the context of CIPA cases, consent can be implied, such as where a consumer remains on the phone after being advised that a call is being recorded. *Hataishi v. First American Home Buyers Protection Corp*. (2014) 223 Cal.App.4th 1454, 1465. But courts have consistently held that absent a recording advisory at the outset of the call, there is no consent to record. *Raffin v. Medicredit, Inc*. (C.D. Cal. Jan. 3, 2017) 2017 WL 131745, at *6-8; *Friddle, supra, at*16 Cal. App. 4th 1661-1662; *Kearney, supra, at* 39 Cal.4th 118.

The conduct that Smith alleged to be unlawful is that LoanMe "received" "communications" from Plaintiff, which it "recorded" "without the consent" of Plaintiff, when it recorded his telephone call without telling him that the call was being recorded. There is no need to consult with legislative history or case law when the statute is so clear on its face. Perhaps no case makes this more clear than *Ades v. Omni Hotels Management Corp*.

(C.D. Cal. 2014) 46 F.Supp.3d 999. There, the defendant argued that § 632.7 applied only to recordings made by eavesdroppers. *Id*. at 1017-18. Defendant argued that differences between § 632 and § 632.7 demonstrated that § 632.7 does not apply to participants to a call, and instead applied only to third parties. Plaintiffs argued that § 632.7 uses the word "receive" and "intercept" separately, which implies that the words have two different meanings. The court agreed with plaintiff that "§ 632.7 prevents a party to a cellular telephone conversation from recording without the consent of all parties to the conversation." *Id*. This reading is supported by the definition of "intercept" in Black's Law Dictionary, which defines it as "to covertly receive or listen to (a communication). The term usually refers to covert reception by a law enforcement agency. See wiretapping." Black's Law Dictionary Eighth Edition at Pg. 827.

The *Ades* court looked at the common usage of the term "receive" and observed that participants in a conversation normally "receive" communications from one another, making it clear that § 632.7 is not limited to situations involving eavesdroppers. The court found that the word "receives" does not implicitly appear to refer to an unknown interloper but rather to someone who was the target of a communication, i.e. its intended recipient. Because the terms "receives" and "intercepts" were used disjunctively, the terms are plainly meant to "apply to distinct kinds of conduct." *Id*. The Court also noted that other district courts investigated the legislative history and found that "[i]nterpreting § 632.7 to only apply to third parties would defeat the Legislature's intent." *Simpson v. Best Western Int'l, Inc.* (N.D.Cal. Nov. 13, 2012) 2012 WL 5499928, at *9. The *Ades* case presents a much more logical straightforward analysis of § 632.7's plain meaning than does the Court of Appeal's Order.

2. Nearly All Reviewing Courts Disagree With the Court's Interpretation

Virtually every court that has reviewed this issue has held that § 632.7 applies to parties to the conversation, and not simply third-party eavesdroppers. In *Montantes v. Inventure Foods* (C.D. Cal. July 2, 2014) 2014 WL 3305578, the defendant argued that the term "receive" in § 632.7 was ambiguous, and should be limited to third party eavesdroppers. *Id*. at *2. The Court looked at § 632.7 and held: that "[t]he text of § 632.7 unambiguously includes a person who 'receives' a protected 'communication,' whether or not the communication is received while in transit or at its destination. The fact that the term encompasses both receipt in transit and receipt at the destination does not render the term ambiguous; rather, it simply means that the term has a broad meaning." *Id*. at * 3. (citing *Simpson v. Vantage Hospitality Grp., Inc*. (N.D. Cal. Dec. 4, 2012) 2012 WL 6025772). "Because § 632.7 unambiguously includes the receiving and recording of communications like those alleged in the Complaint, it is unnecessary to consider Inventure's arguments based on the legislative history of the statute and other extrinsic sources of legislative intent." *Id*. at *4.

Other courts have held the same. *See Kuschner v. Nationwide Credit, Inc*. (E.D. Cal. 2009) 256 F.R.D. 684, 688 (permitting amendment by a debt collection company to add counterclaim under § 632.7, where consumer recorded debt collector without consent, holding that § 632.7 applies to a claim that one party to a telephone conversation had recorded it without the other party's consent); *Brown v. Defender Sec. Co.* (C.D. Cal. Oct. 22, 2012) 2012 WL 5308964 (same); *Lal v. Capital One Financial* (N.D. Cal. April 12, 2017) 2017 WL 1345636 ("[a]fter examining the case law and the legislative history, the court concluded that the law prohibits any party, not just third parties, to a confidential communication from recording that communication without knowledge or consent of the other party."); *Ramos v. Capital One*, (N.D. Cal. July 27, 2017) 2017 WL 3232488 (same); *Foote*

v. Credit One Bank, N.A. (C.D. Cal. Mar. 10, 2014) 2014 WL 12607687; *Rezvanpour v. SGS Auto. Servs.* (C.D. Cal. July 11, 2014) 2014 WL 3436811, at *3 ("The only burden on speech activity imposed by the statute is that parties to a phone call involving a cellphone must be informed that the call is being recorded, after which consent may be given or the phone call ended."); *Lewis v. Costco Wholesale Corporation, et al*. (C.D. Cal. 2012, No. 2:12-cv-04820-JAK-AJW) Dkt. #29 ("on its face, § 632.7 is unambiguous: it precludes the recording of all communications involving a cellular telephone"); and *Lerman v. Swarovski N. Am. Ltd.*, (S.D.Cal. Sept. 10, 2019) 2019 WL 4277408 *1 (convincingly rejecting identical reasoning as that adopted by the Court of Appeal).

Horowitz v. GC Services Ltd. Partnership, (S.D. Cal. April 28, 2015) 2015 WL 1959377, cited to the overwhelming weight of authority holding that there is no eavesdropping requirement under § 632.7. *Id*. at *11. In *Simpson v. Vantage Hospitality Grp., Inc*. (N.D. Cal. Dec.4, 2012) 2012 WL 6025772, the court likewise adopted Appellant's position regarding § 632.7:

> Here, the Court finds that there is no ambiguity in the language of Section 632.7 and that Defendant's proffered interpretation effectively eliminates the words "or" and "receives" in their entirety. While the common understanding of "intercept" (i.e., "to stop, seize, or interrupt in progress or course or before arrival") contemplates the existence of a third party (Webster's Ninth New Collegiate Dictionary ("Webster's") at 630 (1988)), the same is not true of "receives," which very broadly means "to come into possession of." (Webster's at 982.) Because the inclusion of "receives" is presumed to have been purposeful, the Court must apply the statute as written and using the term's plain (and broad) meaning. Further, the use of "or" also has plain meaning-it is disjunctive and expresses that either alternative of "intercepts" or "receives" will suffice. (See Webster's at 829.) Because the Court applies each part of "intercepts or receives" by its plain meaning, it must reject Defendant's argument that the statute can only apply to third parties. No persuasive reason has been presented why

> Defendant did not "receive" Plaintiff's communications in the ordinary sense.

Also interesting is *Simpson v. Best West'n Int'l, Inc*., (N.D. Cal. Nov. 13, 2012) 2012 WL 5499928, in which the court gave some credence to the idea that the word "receives" plausibly had two interpretations. "On the one hand, the word 'receives' could mean a third party who inadvertently 'receives' a cellular communication by happenstance, as opposed to 'intercepting' the cellular communication intentionally.... On the other hand, 'received' could have the meaning ascribed to it by the court in *Brown*, that parties to a conversation 'receive' communications from one another." *Id*. at *7. The *Simpson* court went on to look at the legislative history, and found that § 632.7 was not designed to apply only to third parties:

> In 1992, the California Legislature passed § 632.7 without any opposition. Cal. Dept. of Consumer Affairs, Enrolled Bill Report on Assem. Bill No. 2465 (1992), at 4. The statute was intended to simply extend to persons who use cellular or cordless telephones the same protection from recordation that persons using 'landline' telephones presently enjoy.' Author Lloyd G. Connelly's Statement of Intent, Assem. Bill No. 2465 (1992), at 1. At the time, § 632 prohibited recording confidential communications, but the Legislature assumed that § 632 only applied to communications made on landlines and not to communications made on cellular or cordless phones. See Letter to Governor Pete Wilson from Assembly Member Lloyd G. Connelly (July 2, 1992) ('under existing law, it is not illegal to record the otherwise private conversations of persons using cellular or cordless telephones'). Moreover, at the time, §§ 632.5 and 632.6 protected communications made on cellular or cordless phones from malicious eavesdropping, but those statutes did not protect against recording. See §§ 632.5–632.6. The Legislature sought to fill in this gap by similarly prohibiting the recordation of communications made on cellular or cordless phones. Notably, then-existing law prohibiting the recording of landline communications extended to parties of the conversation. See *Warner v. Kahn*, 99 Cal. App. 3d 805 (1979) (stating the language in § 632 'has uniformly been construed to prohibit one party to a confidential

> communication from recording that communication without the knowledge or consent of the other party'); see also *Flanagan* [v. Flanagan], 27 Cal. 4th [766,] 777 [(2002)] (holding a party to the conversation liable).

Id. at *8. The court held that § 632.7 "may fairly be read to apply to parties to the communication, as well to as third parties." *Id*. Buttressing its holding was its determination that under the "ordinary use of the word, each party to a conversation 'receives' communications as they hear the words spoken to them from the other party." *Id*.

More recently, the court in *Ronquillo-Griffin v. TELUS Communications, Inc*., (S.D. Cal. June 27, 2017) 2017 WL 2779329 cited to this very language, as well as the *Raffin* decisions, and held that "[t]his court agrees with *Simpson's* thorough and well-reasoned conclusion, which is in line with the bulk of authority holding that section 632.7 applies to parties to the call."

Finally, in certifying a class action, the former Chief Judge of the Central District of California relied on California law interpreting similar language in 632 in order to come to the conclusion that the California Supreme Court would interpret § 632.7 to require a party's consent to record a conversation at the very outset of the call. *Raffin v. Medicredit, Inc*. (C.D. Cal. Jan. 3, 2017) 2017 WL 131745, at *6-8; *see also Zaklit v. Nationstar Mortgage LLC* (C.D.Cal. July 24, 2017, No. 5:15-cv-2190-CAS(KKx)) 2017 WL 3174901 *4-5 (holding the same). § 632.7 clearly applies to parties of the call, because they "receive" communications, and because consent to receive is conditioned upon also having consent to record, which can only be obtained through a conspicuous recording advisory made at the outset of a call.

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3. The Broader CIPA Supports Plaintiff's View

As the Supreme Court held, an advisory that the call is being recorded, must be given "at the outset of the conversation" and the CIPA prohibits the recording of any conversation "without first informing all parties to the conversation that the conversation is being recorded." *Kearney, supra,* 39 Cal.4th at 118. Section 632.7 merely took out the requirement that such communications be confidential, instead applying to all communications, and applied it to cell phones and cordless phones. This view is supported by the legislative history and by other provisions in CIPA.

First, the Legislature enacted § 632.7, shortly after enacting §§ 632.5 and 632.6, which unquestionably already protected communications made on cellular or cordless phones against malicious eavesdropping. *See* Department of Finance Bill Analysis July 6, 1992. How then could § 632.7 relate only to eavesdropping, and not to recording, when other sections of CIPA already made it illegal for such eavesdropping to occur? Let us assume for sake of argument that § 632.7 did not exist at all. Let us also imagine that a third-party eavesdropper hacked into a private cell phone conversation and started recording it. Sections 632.5 and 632.6 already prohibit that conduct.

> (a) Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone shall be punished by a fine…

Cal. Penal Code § 632.5 (emphasis added). A hypothetical interloper already would have intercepted a call and would be liable for doing so under § 632.5 and § 632.6. What purpose would be served by § 632.7's prohibition on recording if not for the fact that it applied to *anyone* recording such a call, whether it be a party or interloper? Such a reading, as was advanced by the Court of Appeal, would render § 632.7 superfluous because one cannot

eavesdrop and record, without eavesdropping. Courts must interpret statutes as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole. *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089-90. Reading § 632.7 to govern only eavesdroppers would render it meaningless, thereby reducing the CIPA to a patchwork, rather than a harmonious whole.

4. The Legislative History Supports Plaintiff's View

Finally, the legislative history of § 632.7 further support Appellant's interpretation. A letter from the bill's sponsor states that the § 632.7 bill was "relating to the recordation of cellular or cordless telephone conversations." Letter of Gene Erbin to Steve White re: AB 2465, February 6, 1992. The letter strongly suggests that § 632.7 was meant to be a counterpart to § 632 and ensure its privacy against recordation provided codified protection for cellular and cordless telephone users, as evolving technology and case law made the future of such protection uncertain under the existing § 632 framework. Legislative Counsel's analysis states that "632 only proscribes eavesdropping or recordation that is intentional as opposed to inadvertent." § 632.7 was modeled on the language of § 632, so the same analysis would apply, as is applied in this portion of the legislative history. Legislative Counsel Letter to Lloyd Connelly, December 17, 1991 ("Legislative Counsel Letter"). This makes clear that the interception is not the problem, but rather, the recordation of the conversations was the legislature's target. "The innocent, merely curious, or non-malicious interception of cellular or cordless telephone conversation will remain legal. However, it will be illegal to record the same conversations."

The Author's Statements of Intent in the legislative history strongly indicates that § 632.7 was primarily concerned with the recording of calls on cellular phones and was attempting to expand on existing statutory provisions of CIPA that governed recording of landline calls, or interception

of calls, but not necessarily situations where a cell phone conversation was recorded. AB 2465: Author's Statement of Intent. "The primary intent of this measure is to provide a greater degree of privacy and security to persons who use cellular or cordless telephones. Specifically, AB 2465 prohibits persons from recording conversations transmitted between cellular or cordless telephones." (emphasis added). It further acknowledges that at the time § 632.7 was passed, "[t]here [was] no prohibition against recording a conversation transmitted between cellular or cordless telephones." (citing § 632 and 632.5). *Id*. It went on to acknowledge that it was illegal to "intercept or record a conversation transmitted between landline or traditional, telephones." *Id*. (citing § 632). From there, the letter suggests that cordless and cellular calls should be afforded the same level of protection. It is clear from this history that both interception and recordation of calls were separate and distinct concerns of the Legislature, which was trying to close a policy gap in the face of evolving technology. "AB 2465 prohibits persons from recording conversations transmitted between cellular or cordless telephones. In this matter, AB 2465 simply extends to persons who use cellular or cordless telephones the same protection from recordation that persons using "landline" telephones presently enjoy." *Id.*

The legislative history also contains Legislative Counsel's Analysis of § 632.5 and 632.6, which it acknowledges explicitly chose not to take the measures prescribed in § 632.7, *i.e.* by prohibiting recording. Notably, the analysis recognizes the failure of the Legislature to prohibit the recording of a communication between two telephones where one is a landline and one is a cellular or cordless phone. Legislative Counsel Letter at p, 4 (citing *Lambert v Conrad* (1960) 185 Cal. App. 2d 85, 95). The analysis goes on to state that a person who unlawfully or maliciously intercepts such a communication would already be violating these sections. Ergo, if § 632.7 required third party interception, and not merely recordation, it would be a

useless provision, since interception was already unlawful under § 632.5 and 632.6, per the legislative history. *Id*. Section 632.7 was enacted to fill this gap and prohibit both, with the emphasis being on recordation of calls involving cordless or cellular phones, which the Legislature was concerned would lose privacy protection under § 632 due to a lessening expectation of privacy that was developing with such forms of telephonic communication, as technology and jurisprudence continued to evolve. Accordingly, the Legislative History addresses the very arguments made in § V(A)(3) of this Brief and emphasizes that this is the correct interpretation of CIPA.

In sum, the legislative history confirms that § 632.7 was intended to expand the prohibitions against intentionally recording calls, no matter whether the recording individual or entity was a party or an interloper. The Legislature was concerned with both evolving technology and closing loopholes. It was concerned with expanding privacy rights to ensure that cordless and cellular technologies were not ignored. They acknowledged the limitations of §§ 632.5 and 632.6, which covered eavesdropping on such evolving technologies but did not address recordation. This is clear from the history of the statute, from the plain language, and from the harmonious reading of § 630 *et. seq*. described herein and adopted by the majority of courts. Any alternative reading would reduce the privacy rights of Californians, which is contrary to the express intent of the Legislature.

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CONCLUSION

For the foregoing reasons, Plaintiff and Appellant Jeremiah Smith respectfully requests this Court to review the Court of Appeal's decision in this case.

Dated: January 28, 2020

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I, Todd M. Friedman, hereby certify in accordance with California Rules of Court, rule 8.360(b)(1), that this brief contains 8,185 words as calculated by the Microsoft Word software in which it was written.

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

Dated: January 28, 2020

Respectfully submitted,

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EXHIBIT A
Ruling on Appeal of the Superior Court, County of Riverside
Fourth District Second Division

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JEREMIAH SMITH, Plaintiff and Appellant, v. LOANME, INC., Defendant and Respondent.	E069752 (Super.Ct.No. RIC1612501) OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed.

Law Offices of Todd M. Friedman, Todd M. Friedman and Adrian R. Bacon for Plaintiff and Appellant.

Finlayson Toffer Roosevelt & Lilly, Michael R. Williams and Jared M. Toffer for Defendant and Respondent.

Jeremiah Smith filed a class action complaint against LoanMe, Inc. (LoanMe), alleging that LoanMe violated the California Invasion of Privacy Act (Privacy Act) (Pen. Code, § 630, et seq.).[1] Smith alleged that LoanMe violated section 632.7 by

[1] All further statutory references are to the Penal Code unless otherwise indicated.

recording a phone call with Smith without his consent while he was using a cordless telephone, and he claimed that a "beep tone" at the beginning of the call did not constitute sufficient notice that LoanMe was recording the call. In a bifurcated trial about the beep tone issue, the trial court concluded that (1) the beep tone provided sufficient notice to Smith that the call was being recorded, and (2) Smith implicitly consented to being recorded by remaining on the call.

We requested supplemental briefing on the issue of whether section 632.7 applies to the recording of a phone call by a participant in the phone call or instead applies only to recording by third party eavesdroppers. We asked that the briefs address the question in light of the plain language of section 632.7, its legislative history, and its relationship with other provisions of the Privacy Act. No California appellate opinion addresses the issue. Several federal district courts in California have analyzed the issue, and they are not in agreement.[2]

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[2] *Brinkley v. Monterey Fin. Servs., LLC* (S.D.Cal. 2018) 340 F.Supp.3d 1036, 1042-1043 (*Brinkley*); *Ades v. Omni Hotels Mgmt. Corp.* (C.D.Cal. 2014) 46 F.Supp.3d 999, 1017-1018; *Raffin v. Medicredit, Inc.* (C.D.Cal. Jan. 3, 2017, No. CV 15-4912-GHK (PJWx)) 2017 WL 131745, at pp. *6-*9; *Lal v. Capital One Fin. Corp.* (N.D.Cal. Apr. 12, 2017, No. 16-cv-06674-BLF) 2017 WL 1345636, at p. *8; *Ramos v. Capitol One, N.A.* (N.D.Cal. July 27, 2017, No. 17-cv-00435-BLF) 2017 WL 3232488, at pp. *8-*9; *Horowitz v. GC Services Ltd. Partnership* (S.D.Cal. Apr. 28, 2015, No. 14cv2512-MMA (RBB)) 2015 WL 1959377, at pp. *11-*12; *Young v. Hilton Worldwide, Inc.* (C.D.Cal. July 11, 2014, No. 2:12-cv-01788-R-(PJWx) 2014 WL 3434117, at pp. *1-*2; *Rezvanpour v. SGS Auto. Servs., Inc.* (C.D.Cal. July 11, 2014, No. 8:14-cv-00113-ODW (JPRx)) 2014 WL 3436811, at p. *4; *Montantes v. Inventure Foods* (C.D.Cal. July 2, 2014, No. CV-14-1128-MWF (RZx)) 2014 WL 3305578, at. pp. *2-*4; *Simpson v. Vantage Hospitality Group, Inc.* (N.D.Cal. Dec. 4, 2012, No. 12-cv-04814-YGR) 2012 WL 6025772, at pp. *5-*6; *Simpson v. Best Western Intern., Inc.* (N.D.Cal. Nov. 9, 2012, No. 3:12-cv-04672-JCS) 2012 WL 5499928, at pp. *6-*9; *Brown v. Defender Sec. Co.*

We conclude that section 632.7 prohibits only third party eavesdroppers from intentionally recording telephonic communications involving at least one cellular or cordless telephone. Conversely, section 632.7 does not prohibit the participants in a phone call from intentionally recording it. Consequently, Smith failed to state a claim against LoanMe under section 632.7. We therefore affirm the trial court's dismissal of Smith's lawsuit.

BACKGROUND[3]

LoanMe is in the business of providing personal and small business loans. Smith's wife is the borrower on a loan from LoanMe. In October 2015, an employee of LoanMe called the telephone number provided to LoanMe by Smith's wife to discuss the loan. Smith answered the call on a cordless telephone and informed the caller that his wife was not available, and the call then ended. The call lasted approximately 18 seconds. LoanMe recorded the call. Three seconds into the call LoanMe "caused a 'beep tone' to sound." It is LoanMe's practice to cause a beep tone to play at regular 15 second intervals on all of its outbound calls. LoanMe did not orally advise Smith that the call was being recorded. Smith also did not sign a contract granting LoanMe consent to record calls.

(C.D.Cal. Oct. 22, 2012, No. CV 12-7319-CAS (PJWx)) 2012 WL 5308964, at pp. *4-*5; *Kuschner v. Nationwide Credit, Inc.* (E.D.Cal. 2009) 256 F.R.D. 684, 688; *Ronquillo-Griffin v. Telus Communs., Inc.* (S.D.Cal. June 27, 2017, No. 17cv129 JM (BLM)) 2017 WL 2779329, at pp. *3-*4.

[3] We take these facts from the stipulation that the parties entered into for purposes of the bench trial.

In September 2016, Smith filed a class action complaint against LoanMe, alleging that LoanMe recorded phone calls without consent in violation of section 632.7 and seeking statutory damages and injunctive relief.[4] On the parties' stipulation, the trial court ordered a bifurcated bench trial to resolve the "the beep tone issue." After listening to a recording of the phone call, the trial court concluded that the beep tone provided Smith sufficient notice under section 632.7 that the call was being recorded and that Smith implicitly consented to being recorded by remaining on the call. The trial court entered judgment against Smith.

DISCUSSION

A. *Analytical Framework for Statutory Interpretation*

In interpreting a statute, our goal "'''''is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment.''''''' (*Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 856 (*Meza*).) In other words, "[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be

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[4] Smith argues for the first time on appeal that "LoanMe infringed on [his] right to privacy guaranteed by the California Constitution." Because Smith did not include a constitutional cause of action in his complaint and did not litigate the issue in the trial court, we do not address it. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564 ["'''''Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived''''''].)

harmonized to the extent possible." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "'''''If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.'''''' (*Meza*, *supra*, at p. 856.)

We independently review questions of statutory interpretation. (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1041.)

B. *The Privacy Act Provisions Relating to Cordless and Cellular Phones, and Section 632*

In 1967, the Legislature enacted the Privacy Act "to protect the right of privacy of the people of this state" from technological advances that "led to the development of new devices and techniques for the purpose of eavesdropping upon private communications." (§ 630.) The Legislature considered eavesdropping on private communications a serious threat that "cannot be tolerated in a free and civilized society." (§ 630; *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 115 (*Kearney*) [describing the Privacy Act as "a broad, protective invasion-of-privacy statute"].)

One of the provisions of the original 1967 legislation—section 632—prohibits the intentional recording of a confidential telephone communication without the consent of all parties. (*Kearney*, *supra*, 39 Cal.4th at p. 117.) In relevant part, section 632, subdivision (a), provides: "A person who, intentionally and without the consent of all

parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by" a fine, imprisonment, or both. For purposes of the statute, "person" includes businesses. (§ 632, subd. (b).)

In addition to section 632's creation of criminal liability for this invasion of a person's privacy, section 637.2, which was also part of the original legislation, "explicitly created a new, statutory private right of action, authorizing any person who has been injured by any violation of the invasion-of-privacy legislation to bring a civil action to recover damages and to obtain injunctive relief in response to such violation." (*Kearney*, *supra*, 39 Cal.4th at pp. 115-116.) Any person injured by a violation of the Privacy Act may recover $5,000 per violation. (§ 637.2, subd. (a)(1).)

In 1985, in response to the early stages of technological advances in wireless communication, particularly cellular radio telephones, the Legislature enacted section 632.5 as part of the Cellular Radio Telephone Privacy Act of 1985 (a subpart of the Privacy Act). (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 775.) Section 632.5 provides in relevant part: "Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones or between any cellular

radio telephone and a landline telephone shall be punished by" a fine, imprisonment, or both. (§ 632.5, subd. (a).)

In 1990, the Legislature amended the 1985 legislation, renaming it the Cordless and Cellular Radio Telephone Privacy Act of 1985. The amendment added section 632.6, which uses the same language as section 632.5 to extend the same protection to cordless telephones instead of cellular telephones. Under section 632.6, "[e]very person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cordless telephones . . . , between any cordless telephone and a landline telephone, or between a cordless telephone and a cellular telephone shall be punished by" a fine, imprisonment, or both. (§ 632.6, subd. (a); see also § 632.6, subd. (c) [defining cordless telephones as "consisting of two parts—a 'base' unit which connects to the public switched telephone network and a handset or 'remote' unit—which are connected by a radio link"].)

In 1992, the Legislature amended the Cordless and Cellular Radio Telephone Privacy Act of 1985 to add section 632.7. Section 632.7, subdivision (a), provides in relevant part: "Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a

cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by" a fine, imprisonment, or both.

To summarize: Sections 632.5, 632.6, and 632.7 are all parts of the Cordless and Cellular Radio Telephone Privacy Act of 1985. Section 632.5 prohibits the malicious and nonconsensual interception or receipt of cellular phone calls. Section 632.6 prohibits the malicious and nonconsensual interception or receipt of cordless phone calls. Section 632.7 prohibits the nonconsensual interception or receipt and intentional recording of cellular and cordless phone calls. That is, section 632.7 differs from sections 632.5 and 632.6 in that it (1) removes the element of malice, (2) adds the element of (nonconsensual) intentional recording, and (3) covers both cellular phones and cordless phones in a single code provision.

There are no California cases interpreting sections 632.5, 632.6, and 632.7.

C. *Plain Language Interpretation of Section 632.7*

LoanMe contends that section 632.7 clearly and unambiguously applies only to third party eavesdroppers. Smith contends, to the contrary, that section 632.7 clearly and unambiguously applies to the parties to the phone call as well as to third party eavesdroppers. The mere existence of the parties' disagreement does not show that the statute is unclear or ambiguous. (See *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 597.) We conclude that LoanMe is correct.

Section 632.7 imposes liability on any person "who, without the consent of all parties to a communication, intercepts or receives and intentionally records" a

communication involving a cellular phone or a cordless phone. The statute thus requires that the interception or receipt of the communication be without the parties' consent. But the parties to a phone call always consent to the receipt of their communications by each other—that is what it means to be a party to the call (or at least that is part of what it means). In this case, for example, LoanMe consented to Smith's receipt of LoanMe's communications ("Is Mrs. Smith there?"), and Smith consented to LoanMe's receipt of Smith's communications ("No."). Consequently, the parties to a phone call are incapable of violating section 632.7, because they do not intercept or receive each other's communications without all parties' consent.

That interpretation of the plain meaning of section 632.7 aligns with the plain meaning of sections 632.5 and 632.6, whose language section 632.7 borrows. Sections 632.5 and 632.6 impose liability on anyone "who, maliciously and without the consent of all parties to the communication, intercepts [or] receives" a communication involving a cellular phone (§ 632.5) or a cordless phone (§ 632.6). Like section 632.7, sections 632.5 and 632.6 cannot apply to the parties to a phone call, because sections 632.5 and 632.6 apply only to someone who intercepts or receives a communication without all parties' consent. Sections 632.5 and 632.6 thus prohibit only malicious third party eavesdropping on cordless or cellular phone calls.[5]

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[5] The requirement that the alleged wrongdoer intercept or receive the communication without all parties' consent distinguishes sections 632.5, 632.6, and 632.7 from section 632, which also contains a consent requirement *but applies it to different conduct*. Section 632 provides that "[a] person who, intentionally and without the consent of all parties to a confidential communication, *uses an electronic amplifying or*

A contrary interpretation, according to which sections 632.5 and 632.6 apply not only to third party eavesdroppers but also to the parties to cordless and cellular phone calls, would be absurd and unintelligible. First, in order for a party to a call to be liable under either section, the party would have to receive the other party's communications *without all parties' consent*. We do not see how that is possible. As we have already explained, if one is a party to a call, then, by that very fact, one consents to the other party's receipt of one's communications—that is (part of) what it means to be a party to the call. Second, in order for a party to a call to be liable under either section, the party would have to receive the other party's communications *maliciously*. Again, we do not see how that is possible—it is not clear what it would mean for one party to receive the other party's communications *with malice*. Statutory interpretations that lead to absurd results are to be avoided. (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037 (*Tuolumne*).)

There is at least one additional problem with interpreting sections 632.5 and 632.6 as applying to parties and not solely to third party eavesdroppers. The provisions apply only if at least one of the phones used in the call is a cellular or cordless phone. Consequently, if the provisions could apply to parties to the call, then they would impose liability on the basis of factors that are often beyond the putative wrongdoer's knowledge

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recording device to eavesdrop upon or record the confidential communication" shall be punished by a fine, incarceration, or both. (Italics added.) Although parties to a phone call always consent to each other's receipt of their communications, they do not always consent to the use of an electronic amplifying or recording device to eavesdrop upon or record the communication. It is consequently unsurprising that section 632 can apply to the parties to a communication. (*Kearney*, *supra*, 39 Cal.4th at pp. 117-118.)

or control. For example, if you answered a call on a landline phone maliciously and without consent (whatever that might mean), then you would thereby be liable if the call was placed from a cellular phone (§ 632.5) or a cordless phone (§ 632.6) but not if it was placed from a landline phone. Likewise, if you placed a call from a landline phone maliciously and without consent (whatever that might mean), then you would thereby be liable if the call was answered on a cellular phone (§ 632.5) or a cordless phone (§ 632.6) but not if it was answered on a landline phone. But one often (though not always) has no way of knowing what kind of phone the other party to a call is using, and no way of controlling it. Thus, if the statutes were interpreted as applying to parties, they would impose liability on the basis of pure happenstance. Again, such a result is absurd, and any interpretation leading to it is to be avoided. (*Tuolumne*, *supra*, 59 Cal.4th at p. 1037.)

That problem is not mere speculation or conjecture and is not limited to sections 632.5 and 632.6. Rather, the same problem arises under section 632.7, and the alleged facts of the instant case actually illustrate it. LoanMe called Smith's home, and Smith allegedly answered the call on a cordless phone. Had Smith answered on a landline phone, section 632.7 could not apply under any interpretation, assuming LoanMe too was using a landline. But because of the happenstance that Smith allegedly answered on a cordless phone—a fact that was absolutely beyond LoanMe's knowledge or control—section 632.7 as interpreted by Smith subjects LoanMe to criminal and civil liability. Once again, the result is absurd.

All of those problems with all three statutes are avoided by following the plain meaning of the requirement that the communication be intercepted or received "without the consent of all parties," which all three statutes include. That phrase limits application of all three statutes to third party eavesdroppers, and that limitation explains why the statutes treat landlines differently from cellular and cordless phones: The manifest purpose of all three statutes is to target the greater vulnerability of wireless communications to third party listening and recording. So interpreted, the statutes do not impose liability on the basis of factors beyond the knowledge or control of the wrongdoer. A third party eavesdropping on a wireless communication is ordinarily aware that the communication is wireless.

In sum, we see no viable alternative to interpreting sections 632.5 and 632.6 as limited to third party eavesdroppers, because they apply only to persons who intercept or receive communications without all parties' consent. Section 632.7 contains the same restriction in the same language ("without the consent of all parties . . . intercepts or receives"), and we must interpret section 632.7 in a way that harmonizes it with the statutory scheme of which it is a part. (*Meza*, *supra*, 6 Cal.5th at p. 856.) For all of the foregoing reasons, we conclude that section 632.7 clearly and unambiguously applies only to third party eavesdroppers, not to the parties to a phone call.

D. *Intercepts or Receives*

Smith's argument to the contrary is based on section 632.7's use of the phrase "intercepts or receives." Smith reasons that because the statute uses both of the terms

"intercepts" and "receives," those terms must refer to different types of conduct. "Intercepts" is naturally understood as referring to eavesdropping, so "receives" must refer to something else. And the parties to a phone call do receive each other's communications from each other. Therefore, Smith concludes, section 632.7 applies to the parties to a phone call, because they receive each other's communications. Several federal decisions endorse the same line of argument. (See *Ades v. Omni Hotels Management Corp.*, *supra*, 46 F.Supp.3d at pp. 1017-1018; *Ronquillo-Griffin v. Telus Communs., Inc.*, *supra*, 2017 WL 2779329, at pp. *3-*4; *Horowitz v. GC Services Ltd. Partnership*, *supra*, 2015 WL 1959377, at p. *11; *Montantes v. Inventure Foods*, *supra*, 2014 WL 3305578 at p. *3; *Simpson v. Best Western Intern., Inc.*, *supra*, 2012 WL 5499928, at p. *8; *Brown v. Defender Sec. Co.*, *supra,* 2012 WL 5308964, at pp. *4-*5.)

We conclude that Smith's argument lacks merit because it offers no solution to the fundamental problem identified in Part C, *ante*: Section 632.7 applies only to persons who receive (or intercept) communications *without all parties' consent*. Because the parties to a phone call do consent to each other's receipt of each other's communications, section 632.7 cannot apply to them. The federal decisions (with one exception, which we address in Part E, *post*) likewise fail to address this point, so we do not find their reasoning persuasive.

There is a related and equally conclusive reason why Smith's argument is meritless. As explained in Part C, *ante*, sections 632.5 and 632.6 incontrovertibly apply only to third party eavesdroppers, not to the parties to a call. But sections 632.5 and

632.6 employ the same language as section 632.7—they expressly apply to anyone who "intercepts" or "receives" a wireless communication maliciously and without consent. Consequently, regardless of what exactly "receives" means in sections 632.5 and 632.6, and regardless of how it differs from "intercepts," it *must* mean some form of eavesdropping, because sections 632.5 and 632.6 apply only to eavesdropping. And whatever "receives" means in sections 632.5 and 632.6, it can and presumably does mean the same thing in section 632.7. Smith's argument—that in section 632.7 "intercepts" refers to eavesdropping, so "receives" must refer to something else—therefore fails.

For the foregoing reasons, the precise meaning of "receives" in sections 632.5, 632.6, and 632.7 does not really matter, because sections 632.5 and 632.6 show that both "intercepts" and "receives" must refer to forms of eavesdropping. One possibility is that "intercepts" refers to more active, targeted eavesdropping (perhaps directed at a specific phone number or wireless frequency), while "receives" refers to more passive, less specific eavesdropping (perhaps via a scanner that sweeps up a broad spectrum of wireless signals). Another possibility is that "intercepts" refers to eavesdropping in which the wireless signal is captured and prevented from reaching its intended target, while "receives" refers to eavesdropping in which the wireless signal reaches its intended target despite also being picked up by the eavesdropper. But again, regardless of exactly what "receives" means, sections 632.5 and 632.6 demonstrate that it must mean some form of eavesdropping.

We therefore reject Smith's argument. The phrase "intercepts or receives" in section 632.7 does not indicate that the statute applies to the parties to a phone call. Rather, the statutory language is fully consistent with our interpretation of section 632.7 (and sections 632.5 and 632.6) as applying only to third party eavesdroppers.

E. *Brinkley v. Monterey Financial Services, LLC*

One federal case contains an additional argument against our interpretation of section 632.7. In *Brinkley v. Monterey Fin. Servs., LLC*, *supra*, 340 F.Supp.3d 1036 (*Brinkley*), the court concluded that section 632.7 is susceptible of two reasonable interpretations, and the court used the statute's legislative history to resolve the ambiguity. (*Brinkley*, at p. 1043.) We disagree with the court's analysis—the statute is not ambiguous, so resort to its legislative history is not necessary. But we address the court's analysis in detail because it is the only argument of which we are aware that recognizes section 632.7's consent requirement but ultimately reaches a conclusion different from our own.

The *Brinkley* court begins by acknowledging that in section 632.7, the phrase "'"without the consent of all parties to a communication"' can reasonably be interpreted as modifying "both 'intercepts or receives' and 'intentionally records.'" (*Brinkley*, *supra*, 340 F.Supp.3d at p. 1043.) That is how we interpret it: The statute is violated only if the defendant (1) intercepts or receives a communication without all parties' consent *and* (2)

intentionally records the communication without all parties' consent.[6] On that interpretation, the statute cannot be violated if the communication was received with all parties' consent.

But the *Brinkley* court next concludes that the following alternative interpretation is also reasonable: The statute is violated whenever the defendant (1) intercepts-and-intentionally-records a communication without all parties' consent, *or* (2) receives-and-intentionally-records a communication without all parties' consent. (*Brinkley*, *supra*, 340 F.Supp.3d at p. 1043.) On that interpretation, the statute is violated if the defendant *receives* the communication *with* all parties' consent but *intentionally records* it *without* all parties' consent, because in that situation the parties did not consent to receipt-and-intentional-recording of the communication. (*Ibid.*)

We do not agree that such an interpretation of section 632.7 is reasonable. By its terms, section 632.7 is violated by "[e]very person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication" involving a cordless or cellular phone. The introductory prepositional phrase "without the consent of all parties to a communication" appears on its face to modify the entire verb phrase "intercepts or receives and intentionally records." We do not believe it is reasonable to suppose that by such language the Legislature intended to enact a criminal prohibition

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[6] This is actually an oversimplification, because section 632.7 also applies to a defendant who *assists* in the nonconsensual interception or reception and intentional recording. Sections 632.5 and 632.6 likewise apply to those who *assist* in the interception or reception. That complication does not affect our analysis.

that can be violated by someone who receives a communication *with* the consent of all parties.

The unreasonableness of such an interpretation is apparent when section 632.7 is considered in light of its predecessors, sections 632.5 and 632.6. Sections 632.5 and 632.6 are violated by "[e]very person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication" involving a cellular (§ 632.5) or cordless (§ 632.6) phone. The clear and unambiguous effect of the consent requirement is to limit sections 632.5 and 632.6 to third party eavesdroppers—the statutes are violated only if the communication was intercepted or received without all parties' consent. It is therefore not reasonable to suppose that when the Legislature enacted section 632.7, it used the same language ("without the consent of all parties to the communication, intercepts or receives") to create a criminal prohibition that can be violated even if the communication was intercepted or received *with* all parties' consent.

For all of the foregoing reasons, we conclude that the alternative interpretation of section 632.7 identified in *Brinkley*, *supra*, 340 F.Supp.3d 1036, is not reasonable. The analysis in *Brinkley* therefore does not undermine our prior conclusion that section 632.7 clearly and unambiguously is limited to third party eavesdroppers.

F. *Legislative History*

Because section 632.7 is clear and unambiguous, we need not consult its legislative history to determine the statute's meaning. We discuss the legislative history

nonetheless, both out of an abundance of caution and because both Smith and several federal cases claim that the legislative history shows that section 632.7 was intended to prohibit recording by the parties to a phone call, not just by third party eavesdroppers. (See *Brinkley*, *supra*, 340 F.Supp.3d at p. 1043; *Ronquillo-Griffin v. Telus Communs., Inc.*, *supra*, 2017 WL 2779329, at *3-*4; *Simpson v. Best Western Intern., Inc.*, *supra*, 2012 WL 5499928, at *8.) We conclude that Smith and the federal cases are mistaken and that the legislative history supports our interpretation of section 632.7.[7]

When the Legislature enacted section 632.5 in 1985 and section 632.6 in 1990, the Legislature's sole concern was that eavesdroppers could more easily access conversations occurring over cellular and cordless phones than over landline phones. The 1985 legislation was enacted in response to media reports of "widespread eavesdropping on cellular radio telephone conversations" and of devices "being developed with the sole or primary purpose of listening in on car telephone conversations." (Assem. Com. on Pub. Safety, Analysis of Sen. Bill No. 1431 (1985-1986 Reg. Sess.) Aug. 19, 1985, p. 1.) Concerned about the ease with which it was "possible to listen in on conversations randomly picked up by radio scanners and other scanning devices specifically designed to pick up cellular conversations" (*ibid.*), section 632.5 was enacted to "establish[ ] criminal penalties for persons who intercept or eavesdrop on a conversation where one or more parties uses a radio telephone." (Legis. Analyst, analysis of Sen. Bill No. 1431 (1985-

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[7] Smith attempted to file a request for judicial notice of certain portions of the legislative history, but our clerk's office rejected the filing because of nonconformance with procedural requirements. Smith did not refile the request. In any event, we have reviewed the legislative histories of sections 632.5, 632.6, and 632.7.

1986 Reg. Sess.) as Amended Aug. 27, 1985.) In response to the same concern about cordless telephones, in 1990 section 632.6 was enacted to "prohibit[] the malicious interception of communications—eavesdropping—between cordless telephones" and other phones. (Legis. Analyst, analysis of Assem. Bill No. 3457 (1989-1990 Reg. Sess.) as Amended Apr. 26, 1990.)

The legislative history thus shows that sections 632.5 and 632.6 were intended to apply only to third party eavesdroppers. The legislative history of sections 632.5 and 632.6 thus supports our interpretation of section 632.7, because (1) the legislative history shows that sections 632.5 and 632.6 target only eavesdroppers, not the parties to wireless phone calls; (2) the Legislature wrote that limitation into sections 632.5 and 632.6 by requiring that the communication be intercepted or received "without the consent of all parties to the communication" (§§ 632.5, 632.6); and (3) the Legislature used the same language in section 632.7.

The legislative history of section 632.7 itself, however, is somewhat less clear, largely because it contains certain statements that appear ambiguous when taken out of context. For example, the analysis by the Senate Rules Committee quotes the bill's author as follows: Under the proposed legislation, "'[t]he innocent, merely curious, or non-malicious interception of cellular or cordless telephone conversation will remain legal. However, it will be illegal to record the same conversations. Henceforth, persons using cellular or cordless telephones may do so knowing that their conversations are not

being recorded.'"[8] (Sen. Rules Com., Off. of Sen. Floor Analyses Rep. on Assem. Bill No. 2465 (1992 Reg. Sess.) June 1, 1992, p. 3.) Considered in isolation, that passage is ambiguous. On the one hand, it could mean that it will be illegal for *anyone* to record cellular and cordless phone conversations. On the other hand, it could mean that it will be illegal for *eavesdroppers* (who are referred to in the first quoted sentence) to record cellular and cordless phone conversations.

Even without considering the broader context, we find the latter interpretation more plausible, for two reasons. First, the statement that "it will be illegal to record the same conversations" *must* be incomplete, because it omits both the requirement that the parties do not consent and the requirement that the recording be intentional. Thus, the lack of an explicit reference to eavesdroppers in that sentence does not mean that the prohibition on recording is not limited to eavesdroppers. Second, the first quoted sentence is about eavesdroppers ("interception of cellular or cordless telephone conversations"), and it is difficult to understand the connection between that sentence and the two that follow it if they are not similarly limited to eavesdroppers.

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[8] The Senate Rules Committee quoted extensively from and adopted the statement of intent from the bill's author, Senator Connelly. (Sen. Rules Com., Off. of Sen. Floor Analyses Rep. on Assem. Bill No. 2465 (1992 Reg. Sess.) June 1, 1992, p. 3.) "Although the motives or understanding of individual legislators cannot be considered in determining the meaning of the bill, a legislator's statement is entitled to consideration 'when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion.'" (*Bosley Medical Group v. Abramson* (1984) 161 Cal.App.3d 284, 290.)

Because the author's statement of intent was incorporated into the Senate Rules Committee's analysis, we assume that the author's understanding of the bill was considered by the entire Legislature as part of its analysis. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700.)

Consideration of the broader context confirms that interpretation. The Senate Rules Committee's analysis shows that the animating concern behind the legislation is the vulnerability of wireless communications to eavesdropping. "'The primary intent'" of the statute "'is to provide a greater degree of privacy and security to persons who use cellular or cordless telephones.'" (Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Assem. Bill No. 2465 (1992 Reg. Sess.) June 1, 1992, p. 3.) Cordless and cellular phones are "'inherently[] less secure'" than landlines, which therefore carry "'a greater expectation of privacy.'" (*Ibid.*) But while users of cordless and cellular phones might consequently assume that their wireless communications are relatively vulnerable to unauthorized third party listening, they will not "'reasonably anticipate that their conversations will be both intercepted and recorded'" (*ibid.*), that is, recorded by eavesdroppers. And as the "'popularity of cellular and cordless telephones'" continues to grow, "'the opportunity for unscrupulous individuals to intercept and record conversations grows.'" (*Id.* at pp. 3-4.)

Thus, read as a whole, the Senate Rules Committee analysis reflects the Legislature's concern about recording of cordless and cellular phone calls by third party eavesdroppers. The analysis contains not a hint of concern about recording by the parties to the calls. It is therefore unreasonable to interpret the ambiguous language quoted *ante* ("it will be illegal to record the same conversations") as meaning that the bill would make it illegal for *anyone* to record cellular or cordless phone calls. The Legislature was not interested in recording by parties. The Legislature was targeting recording by

eavesdroppers, so it used the same language it had used in sections 632.5 and 632.6, which target eavesdroppers.

Similar observations hold true of all of the legislative history materials that we have reviewed. Throughout the legislative history of section 632.7, the Legislature demonstrates its concern with eavesdropping on wireless communications, and it never shows any concern about recording by parties. We therefore conclude that the legislative history supports our interpretation of section 632.7 as limited to third party eavesdroppers.

To summarize: The plain language of section 632.7 clearly and unambiguously applies to third party eavesdroppers alone, not to the parties to cellular and cordless phone calls. The legislative history of section 632.7 confirms that interpretation. We must therefore affirm the judgment in favor of LoanMe, because Smith alleges only that LoanMe recorded calls to which LoanMe was a party.

DISPOSITION

The judgment is affirmed. LoanMe shall recover its costs of appeal.

CERTIFIED FOR PUBLICATION

MENETREZ
J.

We concur:

MILLER
Acting P. J.

RAPHAEL
J.

EXHIBIT B
Superior Court, County of Riverside
Fourth District Second Division Order Pursuant to Gov. C. § 68081

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

JEREMIAH SMITH, Plaintiff and Appellant, v. LOANME, INC., Defendant and Respondent.	E069752 (Super.Ct.No. RIC1612501) The County of Riverside

THE COURT:

Pursuant to Government Code section 68081, the parties are invited to file simultaneous supplemental letter briefs addressing the following questions:

Given the language of Penal Code section 632.7, its legislative history, and its relationship to other provisions of the California Invasion of Privacy Act (Pen. Code, § 630, et seq.), should Penal Code section 632.7 be interpreted as applying only to the recording of a wireless communication that was "hacked" or "pirated" by someone who was not a party to the communication? If so, does that interpretation provide an alternative basis for affirmance of the judgment in favor of defendant?

The letter briefs shall be filed and served on or before 30 days from the date of this order and are not to exceed five single-spaced pages.

RAMIREZ
Presiding Justice

cc: See attached list

MAILING LIST FOR CASE: E069752
Jeremiah Smith v. LoanMe, Inc.

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business Address is 21550 Oxnard St., Ste. 780, Woodland Hills, CA 91367. On January 28, 2020 I served the following document(s) described as: Appellant's Petition for Review on all interested parties in this action by placing a true copy:

[X] BY ESERVICE THROUGH TRUEFILING, on

The Supreme Court of the State of California

Fourth Appellate District, Second Division, County of Riverside

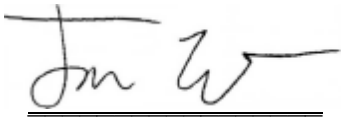
Jared Toffer & Michael Williams
Attorneys for Respondent LoanMe, Inc.

[X] BY ENTRUSTING THE DOCUMENT TO A PERSONAL COURIER TO BE DELIVERED ON JANUARY 28, 2020, on:

Dept. 10
Superior Court of Riverside
4050 Main St.,
Riverside, CA 92501-3703

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

Executed on January 28, 2020, at Los Angeles, California.

By: 

Thomas Wheeler

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Jeremiah Smith v. LoanMe, Inc.**
Case Number: **TEMP-MQWPMEHK**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **tfriedman@toddflaw.com**

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Title(s) of papers e-served:

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/s/Thomas Wheeler
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Friedman, Todd (216752)
Last Name, First Name (PNum)

Law Offices of Todd M. Friedman, PC
Law Firm