No. S260391

IN THE SUPREME COURT OF CALIFORNIA

JEREMIAH SMITH, Plaintiff and Appellant,

v.

LOANME, INC., Defendant and Respondent.

After a Decision by the Court of Appeal

Fourth Appellate District, Division Two (Case No. E069752)

On Appeal from the Riverside County Superior Court

(Case No. RIC1612501; Hon. Sharon J. Waters)

APPLICATION FOR LEAVE TO FILE *AMICUS* BRIEF AND PROPOSED BRIEF OF *AMICUS CURIAE* ATLANTIC CREDIT & FINANCE, INC.

Edward D. Totino, SBN 169237
edward.totino@bakermckenzie.com
Benjamin W. Turner, SBN 256092
ben.turner@bakermckenzie.com
BAKER MCKENZIE LLP
1901 Avenue of the Stars, Suite 950
Los Angeles, California 90067
Telephone: (310) 201-4728

Attorneys for Atlantic Credit & Finance, Inc.

CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

Pursuant to California Rules of Court 8.208 and 8.488, *Amicus Curiae* Atlantic Credit & Finance, Inc. identifies the following entities or persons that have a potential interest in the outcome of this case:

1. Encore Capital Group, Inc. (a publicly held corporation), which is the parent company of *Amicus Curiae*.

DATED: July 17, 2020

Respectfully submitted,

BAKER MCKENZIE LLP
EDWARD D. TOTINO
BENJAMIN W. TURNER

By: */s/ Edward D. Totino*
Edward D. Totino

Attorneys for Atlantic Credit & Finance, Inc.

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Cal. R. Ct. 8.520(f), Atlantic Credit & Finance, Inc. respectfully requests permission to file this *Amicus Curiae* brief in support Respondent of LoanMe, Inc. ("LoanMe"). This *Amicus Curiae* brief will assist the Court in deciding this matter in three respects.

First, *Amicus Curiae* addresses critical aspects of the grammatical structure, syntax, and text of California Penal Code section 632.7, not discussed in detail by the parties, that are relevant to the questions presented here. Much of the focus of the briefing in this action concerns the meaning of the terms "receives" and "consent." But in addition to word choice, "the ordinary rules of grammar . . . must be applied unless they lead to an absurd result." *Busching v. Superior Court*, 12 Cal. 3d 44, 52 (1974). *Amicus Curiae* explain that this case may be resolved by reference to basic rules of grammar, style, and usage. These principles demonstrate that "without the consent" modifies each of the three verbs – "intercepts," "receives," and "records" – in the clause that follows. Petitioner Jeremiah Smith ("Smith"), and any other individual who voluntarily answers a call to their phone and speaks with the other party, clearly consents to the parties to the call "receiv[ing]" the

communication and therefore the call does not come within the scope of the statute. *Amicus Curiae* further explain how the alternative interpretations urged by Smith and certain federal district courts violate several cardinal rules of statutory construction.

Second, *Amicus Curiae* outlines the absurd results that would follow if the interpretations urged by Smith and the federal district court orders to which he cites were adopted. "Interpretations that lead to absurd results . . . are to be avoided." *People v. Shabazz*, 38 Cal. 4th 55, 70 (2006). For instance, under the interpretation offered by certain federal district courts and Smith, answering the phone and saying "hello" without first being told by the caller that the call is being recorded could result in a violation of Section 632.7. Under Smith's interpretation, which demands that businesses provide a recording advisory at the outset of the call before any other words are spoken, Section 632.7 is violated if the person called does not speak English (or whatever other language in which the advisory is stated), or the phone signal is briefly lost during the advisory. In both of these situations, a company that had intended to comply in good faith with Section 632.7 would then be faced with a class action and subject to millions of dollars in statutory penalties.

Third, *Amicus Curiae* addresses principles of due process and fair

notice, which bar any retroactive application of California Penal Code Section 637.2's monetary penalty for violations of Section 632.7, if the Court adopts an expansive interpretation of Section 632.7's reach. Such an interpretation would be at odds with both the text of the statute and prior decisions from the California Court of Appeal and California Superior Courts. The United States Supreme Court has held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice" of both "the conduct that will subject him to punishment" and "the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). There are thus constitutional due process limitations on applying judicial interpretations retroactively, particularly when such interpretations are unexpected, diverge from judicial decisions previously expressed, or significantly alter the plain meaning of the statute's words. Here, the multiple, varying interpretations endorsed by different courts failed to put businesses on notice that they could be subject to millions of dollars or more in statutory penalties when they are unable to inform the consumers they are calling at the very beginning of the call that the call is being recorded because the consumer hangs up, the call reaches the wrong person, or for multiple other reasons. Because of the lack of clarity – and as this Court

previously recognized in *Kearney v. Salomon Smith Barney*, 39 Cal. 4th 95, 101 (2006), under similar circumstances – it would be unjust to apply the $5,000 per call penalty retroactively.

No party or counsel for a party in this pending appeal either authored any part of the *Amicus Curiae* brief nor made any monetary contribution intended to fund the preparation or submission of the brief. Further, no person or entity, other than *Amicus Curiae*, made a monetary contribution intended to fund the preparation or submission of this brief.

AMICUS CURIAE

Established in 1996, Atlantic Credit & Finance, Inc. and related companies ("Atlantic Credit") are servicers of unsecured, consumer-distressed assets with a direct and substantial interest in the issues presented in this case. Communicating by telephone is critical to Atlantic Credit and the consumers it reaches. Often times, consumers learn for the very first time of an outstanding debt obligation because Atlantic Credit calls them. During these calls, consumers are able to work with Atlantic Credit to design flexible, realistic payment plans that reduce their debt and improve their credit. Atlantic Credit records these calls as part of its continuing effort to improve its services to consumers, and to ensure consumers are treated fairly, courteously, and with

integrity.

Atlantic Credit thus has a vital interest in seeking clarification and guidance from this Court to ensure that its business practices fully comply with the laws of California. Certain federal district courts, in conflict with the California Court of Appeal and California Superior Courts, have adopted an impermissibly expansive interpretation of Section 632.7 that eliminates critical language, including the essential element that the call be "receive[d]" without the other party's consent. These district court orders subject businesses like Atlantic Credit to contradictory judicial rulings and frustrate their ability to comply with the law. Meanwhile, Smith urges this Court to adopt an entirely new, unworkable interpretation of the statute by grafting onto Section 632.7 an amorphous new term found nowhere in the statutory language – "conditional consent." Because of its extensive experience in call recording matters, Atlantic Credit is uniquely positioned to assess both the impact and implications of the legal issues presented in the Court's review and the interpretation of Section 632.7.

Indeed, Atlantic Credit has a particular interest in the issues raised here because it has been sued in California for allegedly violating Section 632.7. In *Monzon v. Atlantic Credit & Finance, Inc.* , Case No 19STVC11533, 2019 Cal. Super. LEXIS 1190 (Cal. Superior Court,

County of Los Angeles Oct. 25, 2019), Monzon sued Atlantic Credit for allegedly recording a telephone call he received on his cell phone that was meant for his mother. Monzon did not allege that anything improper was done on the call or with the recordings, but merely complains he was not told early enough in the conversation that the call would be recorded. The Superior Court in Atlantic Credit's case, consistent with the statutory text, rejected the erroneous interpretations of certain federal district courts and agreed that, because the plaintiff consented to receiving the call, Atlantic Credit did not violate Section 632.7. The case is now pending before the California Court of Appeal, Second District (Case No. B302501). Atlantic Credit thus has an acute interest in ensuring that Section 632.7 is subject to a uniform, binding interpretation from California's highest court, and that such an interpretation is consistent with the statute's text and the legislative intent.

When the California Legislature enacted Section 632.7 in 1993, the statute came in direct response to an incident in which an amateur radio buff used a scanner to receive and record a call by two owners of the Sacramento Kings. At the time of the incident, such a recording was not unlawful, so Section 632.7 was enacted. Nonetheless, Section 632.7 has become one of the centerpieces of class action litigation in

California, targeting thousands of businesses for whom telephone calls with consumers is essential. Well-meaning companies, who expend substantial time and resources in good faith attempts to comply with the statute, are nevertheless routinely sued in class actions under Section 632.7. Not only has Section 632.7 been coopted in a way the Legislature never intended, the statute is subject to significant abuse by litigants who seek to capitalize on the $5,000 per call statutory penalty. Because class actions aggregate the statutory penalty and companies often make tens of thousands of calls, facing a putative class action often presents an existential threat to companies.

As a result, plaintiffs have overwhelming settlement leverage. Multimillion dollar settlements, despite the absence of any actual harm, are common. Innocent companies that committed no wrongdoing and otherwise attempted to comply with the statute cannot face the risk of financial ruin by litigating the interpretation of Section 632.7, particularly in federal court where a number of district courts have, with little analysis, adopted an improper and incomplete interpretation of the statute. The companies are forced to settle and are thereby deprived of the opportunity to challenge the incorrect interpretations of Section 632.7, which is the main reason that the statute has so rarely been interpreted by appellate courts.

In short, Atlantic Credit has a substantial interest in explaining that the interpretation urged by Smith and endorsed by certain federal district courts is wrong. Atlantic Credit also has an interest in explaining how it would violate basic constitutional principles of due process and fair notice to subject Atlantic Credit and multiple other companies, retroactively, to millions of dollars in penalties based on a new interpretation this Court might adopt.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* respectfully requests that the Court accept the accompanying brief for filing in this case.

DATED: July 17, 2020

Respectfully submitted,

BAKER MCKENZIE LLP
EDWARD D. TOTINO
BENJAMIN W. TURNER

By: */s/ Edward D. Totino*
Edward D. Totino

Attorneys for Atlantic Credit & Finance, Inc.

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BRIEF OF *AMICUS CURIAE* ATLANTIC CREDIT & FINANCE, INC.

Edward D. Totino, SBN 169237
edward.totino@bakermckenzie.com
Benjamin W. Turner, SBN 256092
ben.turner@bakermckenzie.com
BAKER MCKENZIE LLP
1901 Avenue of the Stars, Suite 950
Los Angeles, California 90067
Telephone: (310) 201-4728

Attorneys for Atlantic Credit & Finance, Inc.

INTRODUCTION

The question presented in this case is of paramount importance to *Amicus Curiae* Atlantic Credit and to all businesses in California that communicate with consumers by telephone. During these communications, the consumers often use cellular or cordless phones. Evaluating and improving the quality of service provided during these calls necessitates that the businesses record them. Nothing in the language, structure, or legislative history of California Penal Code section 632.7 suggests that statute was intended to regulate this conduct by requiring that the consumers consent to the recording of every call involving a cell or cordless phone. Indeed, there is another statute within the California Invasion of Privacy Act ("CIPA") that specifically regulates the recording of calls in which one party does not consent – California Penal Code section 632.

Nonetheless, a sophisticated and well-organized plaintiffs' bar has, for the past decade, contorted Section 632.7 to file thousands of class actions that capitalize on the $5,000 per violation penalty available under California Penal Code section 637.2 for violations of Section 632.7 or other sections of the CIPA. These class actions urge an interpretation of Section 632.7 that excises critical words from the

statutory language. Under the reading proffered by these plaintiffs and Smith here, the statute's reach is nearly limitless – it prohibits the recording without consent of any telephone call where one party used a cell or cordless phone, even if the person consented to the call. Under this interpretation, when the consumer answers the call by saying "hello" without first being provided with a call recording advisory, Section 632.7 is violated, entitling the consumer to $5,000. Such a reading also makes Section 632.7 largely duplicative of Section 632, another statute within CIPA that already prohibits the recording of confidential telephone calls without all parties' consent.

Several federal district courts, with little analysis, have endorsed this flawed interpretation, which diverges from both the Court of Appeal's interpretation in this case and the reasoned and thorough orders of at least three California Superior Court judges. This has resulted in substantial uncertainty for businesses in California seeking to comply with Section 632.7 in good faith. By bringing class actions, plaintiffs transform the $5,000 statutory penalty into one amounting to potentially millions of dollars. Technical violations threaten financial ruin, even to companies that were attempting to comply in good faith with the statute.

The interpretation urged by Smith and these federal district courts

finds no support in the language of the statute, no support in the legislative history, and no support in this Court's precedent. 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. As the California Court of Appeal and three Superior Court judges correctly concluded, the most sensible reading of the provision is that the phrase "without the consent of all parties" modifies "intercepts," "receives," and "records," and therefore a plaintiff must prove under Section 632.7 that he or she did not consent that the defendant "receive" the communication ***and*** that he or she did not consent to the recording. This construction flows naturally from basic principles of style and usage – "without the consent" precedes each of the three verbs and most reasonably is read as modifying all three. Basic rules of grammar and syntax confirm this reading: the three verbs share a common object ("communication") and a dependent modifier ("without the consent").

There is no natural reading of this language that allows liability merely for recording a cellular or cordless telephone call without the consent of all parties. Nor does the language permit Smith's alternative proposed interpretation – that the statute demands that defendants prove they obtained "conditional consent" – which according to Smith means

that consent is "condition[ed]" on the caller not recording the call. To satisfy this "conditional consent" requirement, Smith contends that businesses must provide a recording advisory at the outset of calls. Such interpretations not only reverse the presumption of innocence embedded in criminal statutes and run against the plain language of the statute, they also violate several cardinal rules of statutory construction. These interpretations would require the Court to insert entirely new terms – even phrases – into the statute, excise existing language, and render other language superfluous.

These proffered interpretations would also lead to all manner of absurd results and have a devastating impact on companies like Atlantic Credit. Companies would be subject to catastrophic financial liability or intense settlement pressure if human error, a technical glitch or signal loss prevented the call recording advisory from being heard by the person called. And the statute would also be violated if the person answering the phone happened not to speak English, Spanish or any other language in which the recording advisory is made. The Court should interpret Section 632.7, as its text requires, so that it is not violated unless the communication is received without the consent of all parties.

If this Court were inclined to adopt an expansive and counter-

textual interpretation of Section 632.7, basic principles of fairness and due process preclude retroactive application of the statute's associated penalties. Due process requires that a defendant have fair notice of the conduct that will subject it to punishment. Retroactive application of Section 632.7's penalty violates this principle because a controlling, precedential interpretation that establishes liability – without regard as to whether there was consent to "receive" the communication – would have been created for the first time in this litigation. Preceding this case, courts reached divergent interpretations of the statute. And prior to the Court of Appeal's opinion in December of last year, no appellate-level court issued a decision interpreting the statute's reach. In attempting to conform to Section 632.7's requirements, Atlantic Credit and businesses like it reasonably relied on the plain text of the statute and reasoned opinions from California Superior Court judges. Plaintiffs should not be able to recover penalties for violation of the statute – particularly penalties that amount to millions of dollars – based on a counter-textual reading that no controlling California Court of Appeal or this Court had yet endorsed.

For all these reasons, as set forth below, this Court should hold that the "without the consent" clause of Section 632.7 applies to both "intercepts or receives" and "records," and therefore, to establish a

violation, a plaintiff must prove both that: (1) he or she did not consent to the interception or receipt of the communication; and (2) he or she did not consent to the recording of the communication.

ARGUMENT

A. Under The Text And Structure Of Section 632.7, The "Without the Consent" Requirement Applies To Both "Intercepts Or Receives" And "Intentionally Records"

1. A Plain Reading Of The Statute Bars Plaintiff's Interpretation Of Section 632.7

Section 632.7 is clear:

> 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 . . . .

Cal. Pen. Code § 632.7(a) (emphasis added). The California Legislature provided, in unmistakable terms, a requirement that "without the consent of all parties" applies to both "intercepts and receives" and "intentionally records."

This is made clear by the Legislature's considered decision to specifically place "without the consent" near the beginning of the statute, before the verbs "intercepts," "receives" and "records." These

three linked verbs share a common object ("a communication"), and a modifier ("without the consent of all parties") that is set off by a comma. Under basic principles of style, usage, and syntax, "without the consent" applies to all of these verbs.

This plain reading is buttressed by the series-qualifier cannon. As applied here, the canon indicates that "without the consent" modifies the series of verbs that follow it. *See Lockhart v. United States*, -- U.S. --, 136 S.Ct. 958, 963 (2016) (series-qualifier canon "requires a modifier to apply to all items in a series when such an application would represent a natural construction"). To violate Section 632.7, therefore, a person must: (1) intercept the communication without consent or receive the communication without consent, ***and*** (2) intentionally record the communication without consent.[1]

Smith turns this natural construction on its head. According to Smith, Section 632.7 instead 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." Op. Brief at 28-29. Smith further argues that

[1] This straightforward reading does not limit Section 632.7 to third party recording. For instance, Party A could "receive" Party B's communications without Party B's consent if Party B, using a smart phone, "pocket-dialed" or otherwise inadvertently called Party A without realizing he or she had placed the call. If Party A then recorded the call without Party B's consent, perhaps to embarrass Party B, Section 632.7 would be violated.

the language "makes consent conditional upon informed knowledge whereby a party is advised if his or her communication is *either* intercepted *or* received and recorded." *Id.* at 25-26 (emphasis original). This atextual reading suffers from at least two fundamental flaws.

First, Section 632.7 is a criminal statute, and the modifier "without the consent" is written as an element of proof for the prosecutor or plaintiff. Smith's reading would impermissibly shift the burden of proof by requiring a defendant to establish his or her own innocence. Under Penal Code section 1096, however, the defendant "is presumed to be innocent until the contrary is proved." *See also Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 879-80 (1992) (explaining that it is plaintiff's burden to establish the elements of his or her cause of action). Second, Smith's reading departs from basic rules of statutory construction by inserting words into the statute. There is no way to sensibly read the language of Section 632.7 – as it is written – to require either that the defendant "prove" consent, or that "consent" actually means "conditional consent." "Consent" is not framed as an affirmative defense, and the modifiers "conditional" or "informed" appear nowhere in the statute. Indeed, this burden of proof is reflected in the Judicial Council of California Civil Jury Instructions for the elements needed to establish violation of Section 632 of CIPA, which governs the recording

of confidential communications. *See* CACI 1808, *Recording of Confidential Information (Pen. Code, §§ 632, 637.2)* ("To establish this claim, [name of plaintiff] must prove all of the following: . . . That [name of defendant] did not have the consent of all parties to the conversation to [eavesdrop on/record]"). "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 365 (1931).

2. The Punctuation Of The Statute Further Confirms That "Without The Consent" Modifies All Three Verbs

The straightforward reading outlined above – that "without the consent" modifies "intercepts or receives" and "records" – is reinforced by the punctuation of the statute. "[T]he meaning of a statute will typically heed the commands of its punctuation." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993); *Renee J. v. Superior Court*, 26 Cal. 4th 735, 747 (2001) ("the presence or absence of commas is a factor to be considered in interpreting a statute") (superseded by statute on other grounds); *Cal. Correctional Peace Officers Assn. v. Schwarzenegger*, 163 Cal. App. 4th 802, 814 n.3 (2008) (rejecting "grammatically incorrect reading of statute").

The Legislature specifically placed a comma to separate two

linked clauses: (1) "without the consent"; and (2) "intercepts or receives and intentionally records." In doing so, the Legislature intended to link the entirety of the latter clause to the former, indicating that "without the consent" was a dependent clause modifying "intercepts or receives and intentionally records." *See* Chicago Manual of Style § 6.24 (17th ed. 2017) ("When a dependent clause precedes the main, independent clause, it should be followed by a comma."); *see id.* § 5.225 (explaining that the function of a dependent clause is to, among other things, serve as "an adverbial clause modifying a verb").

This reading is confirmed by the punctuation canon, which holds that: "the series 'A or B, with respect to C' contains these two items: (1) 'A with respect to C' and (2) 'B with respect to C.'" *Stepnowski v. C.I.R.*, 456 F.3d 320, 324 n.7 (3d Cir. 2006). That is, a modifying clause (in this case, the words "without the consent"), when set off by a comma, necessarily applies to each item in a series that follows. Thus, the punctuation confirms the natural reading that "without the consent" is meant to apply to all three verbs.

3. Several Well-Reasoned Decisions Likewise Apply The "Without The Consent" Modifier To All Three Verbs That Follow

Consistent with the statutory text, several courts – including at least three California courts – have correctly concluded that "without the

consent" modifies "intercepts or receives." For example, in *Granina v. Eddie Bauer LLC*, 2015 WL 9855304 (Cal. Super. Dec. 02, 2015), the plaintiff alleged that she used her cellular telephone to call Eddie Bauer's toll-free number. After carefully reviewing the language of the statute, Judge Amy D. Hogue ruled: "Under the plain language of Section 632.7, a person may not be punished unless he or she engages in ***both*** the unconsented receipt and the intentional unconsented recording of a telephone call." *Granina*, 2015 WL 9855304, at *3 (emphasis in original). Judge Hogue noted that "[t]he phrase 'without the consent of all parties,' which precedes all verbs in the sentence, necessarily modifies all succeeding verbs (intercept, receive and record)" and, as a result, "[t]here is no ambiguity in this language." *Id.* at *3 (emphasis added).

Judge Hogue's reading was further buttressed by the Legislature's placement of "and" between "intercepts or receives" and "intentionally records." As she correctly reasoned, "[t]he conjunction 'and' means that violation of the statute requires two discrete activities: (1) an unlawful interception or receipt ***and*** (2) an intentional recording." *Id.* (emphasis in original). Therefore, Judge Hogue sustained Eddie Bauer's demurrer to plaintiff's Section 632.7 cause of action on the grounds that plaintiff failed to allege that, without her consent, Eddie Bauer both

received and intentionally recorded her call. *Id.* at *4.

Judge Carolyn B. Kuhl in *Burkley v Nine West Holdings Inc.*, 2017 WL 4479316, at *1 (Cal. Super. Sep. 05, 2017), reached the same conclusion after thoroughly analyzing the meaning of "intercepts" and "receives" in Section 632.7 and CIPA generally. In her comprehensive opinion, Judge Kuhl observed that both Sections 632.5 and 632.6 of CIPA, like Section 632.7, use the word "receives." The former two sections, however, clearly intended "receives" to "punish either a passive means of capturing a communication not intended for that person or taking possession of a communication after it was intercepted by another." *Id.* At *6. Judge Kuhl thus invoked a basic canon of statutory construction holding that, "[w]hen a statute uses the same term or phrase as a previously enacted statute in a similar context, it should be assumed that the Legislature intended the term or phrase to have a similar meaning." *Id.* (citing *Scottsdale Ins. Co. v. State Farm Mutual Automobile Ins. Co.*, 130 Cal. App. 4th 890, 899 (2005)).

Judge Kuhl further noted that the California Legislature already provided for a cause of action under a different section of CIPA – section 632 – "[w]hen both parties to the communication consent to the communication but not to recording the communication." *Id.* Thus, Judge Kuhl found that "Section 632.7 is intended to punish interceptions

from the airwaves without consent when the communication is recorded, not the recording of cell phone calls when both parties to the communication consent to the communication but not the recording."[2]

More recently, Judge Rafael A. Ongkeko likewise concluded that the most natural reading of the statute is that "without the consent" modifies all three verbs that follow it:

> Read plainly, § 632.7 punishes: (1) a non-consensual interception or reception (or assistance in the interception or reception) of a communication involving at least one cellular or cordless telephone; **and** (2) a non-consensual intentional recordation (or assistance in the intentional recordation) of a communication involving at least one cellular or cordless telephone.

Monzon v. Atl. Credit & Fin., 2019 Cal. Super. LEXIS 1190, *4 (Cal. Superior Court, County of Los Angeles Oct. 19, 2019) (emphasis original).

Judge Ongkeko also noted that the Legislature used the term

[2] Judge Kuhl's interpretation of Section 632.7 is also consistent with the other parts of the text of Section 632.7. The statute only applies to the interception or reception and recording 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[.]" Cal. Penal Code §632.7(a) (emphasis added). Once the communication reaches its destination, the communication is no longer being transmitted between these devices, and Section 632.7 by its terms does not apply, demonstrating that the statute is aimed at reception or interception from the airwaves.

"receives" in both Sections 632.5 and 632.6 of CIPA, and in those two statutes, "[j]ust like 'intercepts,' 'receives' has always been paired with the required 'without consent.'" *Id.* a *10. Thus, in those two statutes, the "receives" or reception element "can only be met if there is no consent to receipt of the communication from all the parties." *Id.* Judge Ongkeko then rightly concluded that "receives" in Section 632.7 should likewise be modified by "without the consent." *Id.* Nothing in the text or structure of the statute, he observed, suggested that the "consent" modifier was any different for Section 632.7 than it was for Sections 632.5 and 632.7 *Id.*

Certain federal courts have also correctly interpreted the statute to conclude that "without the consent" modifies "intercepts" and "receives." For example, in *Young v. Hilton Worldwide, Inc.*, 2014 WL 3434117 (C.D. Cal. July 11, 2014), the court explained that there was no violation because "to any extent that Hilton received such calls, it had the consent from the caller." *Id*. at 2. And while there is no controlling federal appellate decision listing the elements of a Section 632.7 claim, jurists on the Ninth Circuit have signaled support for this reading of the statute. *See Young v. Hilton Worldwide, Inc.*, 565 F. App'x 595, 598 (9th Cir. 2014) ("the recording of a non-confidential call . . . ***by an intended recipient*** of the communication may well not be prohibited by

§ 632.7") (emphasis added) (Motz, J., dissenting).

4. The Federal District Court Orders Upon Which Smith Relies All Misread The Statute

In the face of reasoned decisions by California trial court judges and the Court of Appeal that fully address the language and structure of Section 632.7, Smith urges this Court to adopt an erroneous interpretation endorsed in various federal district court orders. These orders have no precedential value within their own jurisdiction, much less before the California Supreme Court.

Apart from having no precedential value, these decisions have no persuasive value. Not a single one of the decisions cited by Smith even questions whether the "without the consent" clause modifies "intercepts or receives," and instead simply end the analysis by concluding that "without the consent" modifies "intentionally records." *See, e.g., Raffin v. Medicredit, Inc.*, No. CV 15-4912-GHK (PJWx); 2017 WL 131745, * 8 (C.D. Cal. Jan. 3, 2017); *Lal v. Capital One Financial Corp.*, No. 16-cv-06674-BLF, 2017 WL 1345636, at * 9 (N.D. Cal. Apr. 12, 2017). These orders thus summarily conclude that the statute is violated so long as the recording is made "without the consent." Under this incomplete, half-done analysis, it is irrelevant that all parties consented to receiving the communication. According to these courts, the phrase "without the

consent" apparently should be read to modify only "intentionally records," but not the preceding verbs "intercepts" and "receives."

The construction endorsed by these federal courts cannot be squared with the statute's plain text. Interpreting the phrase "without the consent" to modify only "intentionally records" renders much of the language and punctuation in the statute superfluous. These decisions effectively rewrite the statute as:

> 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[.]

In other words, under those federal courts' incorrect interpretation, the words "intercepts or receives and" as well as the words "interception or reception and" mean nothing at all. Under this interpretation, the comma separating "without the consent" from "intercepts or receives and intentionally records" is likewise surplusage. If the California Legislature intended to define consent in the way these federal district courts assumed, the Legislature would not have set off the "without the consent" clause completely from the "intercepts or receives and intentionally records," clause. Instead, the Legislature simply could have placed the modifier, "without the consent," directly before "intentionally records"

and left "intercepts or receives and" as well as "interception or reception and" out of the statute altogether. That it did not do so has significance.

By excising "intercepts or receives" from the statute, the strained reading by these district courts renders recording *any call* involving a cell or cordless phone unlawful if it is recorded without all party's consent. Smith urges this same overbroad reading, arguing 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." Op. Brief at 42. But that reading would make Section 632.7 largely duplicative of Section 632, which already covers recording calls without all parties' consent so long as the communication is confidential. In any case, if the Legislature intended Section 632.7 to read as Smith suggests, it could have written the statute to simply say so. For instance, the Legislature could have drafted Section 632.7 to provide:

> Every person who, without the consent of all parties to a cellular or cordless telephone call, intentionally records, or assists in the intentional recordation of, that call, shall be punished . . . ."

Instead, the Legislature adopted a broader, defined term – "communication" – and then enumerated the specific types of transmissions that could be "intercept[ed]" or "receive[d]." That is, communications "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." *See* Cal. Penal Code § 632.7.

The most significant problem with the federal courts' interpretation is that it flies in the face of a pillar of statutory construction – that courts must give meaning to every word in the statute. "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose ... a construction making some words surplusage is to be avoided." *Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal. 3d 222, 230 (1973); *Hughes Elec. Corp. v. Citibank Delaware*, 120 Cal. App. 4th 251, 259 n.18 (2004) ("[w]herever possible, [courts] must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless") (citations omitted). The interpretation urged by Smith and adopted by certain federal district courts ignores significant portions of the statutory language, an untenable result under the rule against superfluity. *Kulshrestha v. First Union Commercial Corp.*, 33 Cal. 4th 601, 611 (2004) ("courts may not excise words from statutes. . . . We assume each term has meaning and appears for a reason").

The well-reasoned decision of the Court of Appeal in this case, as well as those of Judge Hogue, Judge Kuhl and Judge Ongkeko, each

apply ordinary principles of grammar and usage along with proper statutory construction. Each of their analyses gives full and complete meaning to each word and phrase in the statute. And each court arrived at the same – and correct – conclusion. The phrase "without the consent of all parties to a communication" applies to both "intercepts or receives" and "intentionally records." Therefore, to establish a violation of Section 632.7, the plaintiff must plead and prove that the communication was intercepted or received without his or her consent. For example, a plaintiff could allege that the cell phone call was received on a radio scanner or other device and then recorded. Or the plaintiff could allege that someone physically pulled a fax page from the fax machine that was intended for plaintiff and then photographed it.[3] Only this reading of Section 632.7 comports with California's policy of interpreting statutes in a reasonable and commonsense manner that gives significance to every word therein. *Tucker Land Co. v. State*, 94 Cal. App. 4th 1191, 1197 (2001).

B. The Legislative History Is Consistent With An Unconsented To Interception Or Reception Being Required For A Violation Of Section 632.7

[3] Section 632.7's definition of "communication" includes physical objects such as images. *See* Cal. Penal Code § 632.7(c)(3) ("'Communication' includes, but is not limited to, communications transmitted by voice, data, or image, including facsimile.").

Although there is no need to examine the legislative history of Section 632.7 as the language of the statute is unambiguous, interpreting the statute to give meaning to all of its words by requiring an unconsented to interception or reception of a communication is supported by the legislative history of Section 632.7. The impetus to the statute was an incident where two of the owners of the Sacramento Kings were talking on a cordless phone about a prospective new partner. A third party (an amateur radio buff) used a scanner to listen to and record the call. Someone then offered to sell the recording. When the third party was not prosecuted, a local Sacramento attorney wrote a letter to Assembly Member Lloyd Connelly contending that a new statute was warranted. *See* Request for Judicial Notice ("RJN"), Exhibit A. This led Mr. Connelly to write AB 2465 which became Section 632.7.

In his Author's Statement of Intent, Mr. Connelly stated that while there is a greater expectation of privacy on traditional landline phones than wireless phones, "this does not mean that persons who use cellular or cordless telephones may reasonably anticipate that their conversations will be **both** intercepted **and** recorded. While there may be utility in retaining the relatively unimpeded access to the public 'air waves,' there is no value in permitting private telephone conversations

that employ the 'air waves' be indiscriminately record[ed]." *See* RJN, Exhibit B (emphasis in original). Thus, Section 632.7 was aimed at intercepting or receiving cellular or cordless radio transmissions and recording them. Applying the "without the consent" language to intercepting, receiving and recording focuses the statute on this legislative purpose.

Judge Hogue in *Granina* confirmed this when she succinctly detailed the relevant history as follows:

> As explained in his Statement of Intent, the author of the bill, Lloyd G. Connelly, was concerned that "under [then] current law" [Section 632.6 passed in 1990], it [was] only illegal to 'maliciously' intercept a conversation transmitted between [cordless telephones]. There [was] no prohibition against recording a conversation transmitted between cellular or cordless telephones." He went on to explain that "[t]he innocent, merely curious, or non-malicious interception of cellular or cordless telephone conversations will remain legal [but that] it will be illegal to record the same conversations." The Court's interpretation harmonizes what otherwise appears to be an inconsistency between Section 632, which punishes the intentional recording of confidential communications by a party to an otherwise consensual communication, and Section 632.7, which punishes the intentional recording of wireless communications, regardless whether the information is confidential, so long as the recorder gained access to the communication without consent."

Granina, 2015 WL 9855304, at *3 (emphasis in original).

Interpreting Section 632.7 as it was interpreted by Judge Hogue,

Judge Kuhl, and Judge Ongkeko therefore is consistent not only with the with the intent apparent from statute's text and context, but also with the intent derived from its legislative history. Section 632.7 simply was not intended to apply to situations like those presented in this case, or when companies like Atlantic Credit communicate with consumers.

C. Absurd Results Follow From The Interpretations Proffered By Smith And The Federal District Courts He Cites

Smith's argument also falls afoul of another black-letter canon of statutory interpretation. Courts are required to eschew a statutory interpretation that leads to absurd results. "Interpretations that lead to absurd results . . . are to be avoided." *Tuolumne Jobs & Small Bus. All. v. Superior Court*, 59 Cal. 4th 1029, 1037 (2014). To the extent "uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation. In this regard, it is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences." *Santa Clara Cty. Local Transportation Auth. v. Guardino*, 11 Cal. 4th 220, 235 (1995).

Smith's argument leads to patently absurd results. Each violation of Section 632.7 is a crime and allows for a steep statutory penalty of $5,000. *See* Cal. Penal Code §637.2. Class actions aggregate those

statutory penalties. *See, e.g., Brinkley v. Monterey Fin. Servs., Inc.*, No. 16CV1103-WQH-WVG, 2016 WL 4886934, at *11 (S.D. Cal. Sept. 15, 2016) ("Monterey recorded well over 5,000 telephone calls to/from individuals living in and calling from California alone during the class period. … Thus, the amount in controversy exceeds the jurisdictional limit of $5,000,000."). Thus, a company that even inadvertently violates Section 632.7 in the manner Smith posits will be liable for potentially millions of dollars in a class action. Minor, unintentional errors that cause no actual harm – even one as miniscule as calling a wrong number and being told so before notification of recording can be given – become an existential threat to companies that were simply trying to improve the customer service experience by reviewing communications with customers.

If the statute requires "conditional consent" – which Smith urges must be obtained using a "recording advisory at the outset of the call" – all manner of harmless conduct will be penalized and subject to steep statutory penalties. For instance, the statute would be violated if: (1) a company dialed a wrong number while intending to contact a customer who has already consented to recorded phone calls; (2) a company dialed a number as intended, and the recipient answered the phone "hello" and then immediately hung up without saying a single other

word or allowing any "recording advisory" to be provided; (3) a company dialed a number as intended, but another person in the intended recipient's household or workplace answered the phone, said "hold on", and then passed the phone to the intended recipient without further discussion; or (4) a company dialed a number as intended, and the recipient answered the phone, said "This is Mr. Smith," but the signal was lost shortly thereafter and before notice of recording could be given. Each of these situations would entitled the person answering the call to $5,000, though no injury was suffered by anyone.

And even under Smith's interpretation, a "recording advisory at the outset of the call" would not establish the "informed consent" Smith demands. For instance, the recipient may not speak English, or may not listen to or hear the advisory. Alternatively, the recipient may pass the call to another party who would not have heard the advisory.

The insupportable and inequitable distinctions that Smith's construction would create further demonstrate the untenability of his position. Under Smith's interpretation, a company violates the statute under all of the above scenarios, in which an unintended hyper-technical violation occurs, but there is no actual injury much less real harm. Indeed, under Smith's "informed consent" requirement, a company violates the statute the microsecond after the recipient answers a

recorded call, even if they are entirely indifferent to be recorded, or assume they will be recorded. Nothing in the text or legislative history of Section 632.7 permits the statute to be given such an unfair and unjust interpretation.

D. If the Court Agrees With Smith, It Should Apply That Novel Interpretation Only Prospectively

Even if the Court were to hold that Section 632.7 applies where any cell or cordless call is recorded without consent, it should confine that interpretation – or at least the $5,000 statutory penalty for violations – to prospective cases.

1. Applying The Penalty Retroactively Would Be Unjust And Serve No Deterrent Effect

When this Court interpreted CIPA to apply extraterritorially for the first time, it applied monetary penalties based on that interpretation to prospective cases only. *See Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 101 (2006). This Court did so in acknowledgment that, "[p]rior to our resolution of the issue in this case[,] a business entity reasonably might have been uncertain as to which state's law was applicable and reasonably might have relied upon the law of the state in which its employee was located." *Id*. at 130. This Court further recognized that, because the primary purpose of the statute was to govern conduct rather than compensate an injured plaintiff, California's

interests would not be materially compromised by limiting the violating party to an injunction against future violations of the California statute. *Id*.

This Court's decision in *Kearney* to apply its interpretation only prospectively is consistent with the exception to the rule that judicial decisions have retroactive effect. That exception bars retroactive effect on decisions that "change[] a settled rule on which the parties below have relied." *Claxton v. Walters*, 34 Cal. 4th 367, 378 (2004). In such cases, "'[c]onsiderations of fairness and public policy' may require that a decision be given only prospective application." *Id.* Relevant considerations include "the reasonableness of the parties' reliance on the former rule" and "the nature of the change as substantive or procedural." *Id*. at 378-79.

The same principles animating *Kearney* and the exception against retroactive effect apply here. Section 632.7 has been the subject of extensive litigation, with courts adopting divergent interpretations of the statute. Three California Superior Court judges and the California Court of Appeal have, consistent with the statutory text, held that "without the consent" modifies "intercepts," "receives," and "records." Various federal district courts – who are not the arbiters on the meaning of California statutes – have endorsed a contrary interpretation that excises

the terms "intercepts" and "receives" from the statute. This has led to significant uncertainty for companies that have tried in good faith to comply with the law.

Faced with competing interpretations, Atlantic Credit and other companies like it have reasonably acted in conformity with Section 632.7, as interpreted by California state courts. As in *Kearney*, a "business entity reasonably might have been uncertain" as to which court's interpretation of the statute was the correct one, and "reasonably might have relied upon" the interpretation adopted by California state courts, rather than federal district courts. *See Kearney,* 39 Cal. 4th. at 130. This case would be the very first time a California appellate-level court endorsed an interpretation of Section 632.7 that subjected Atlantic Credit and other companies to millions of dollars in liability – all for failing to meet a standard pronounced years after the fact and that is contrary to the text of the statute at issue.

Not only would such penalties be unjust in light of the legal uncertainty preceding such a decision, "the deterrent value of such a potential monetary recovery cannot affect conduct that already has occurred." *See id.* Retrospective application would not further the goals of Section 632.7 as businesses like Atlantic Credit cannot go back in time to make previously made calls comply with a new standard. Just as

in *Kearney*, any interpretation of Section 632.7 that expands the reach of the statute – and the scope of conduct that triggers its statutory penalties – should be given only prospective effect.

2. Retroactive Application Of Monetary Penalties For Violating Section 632.7 Would Raise Serious Due Process Concerns

Basic principles of due process also preclude retroactive application in this case. The U.S. Supreme Court has held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice" of both "the conduct that will subject him to punishment" and "the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003); *Hale v. Morgan*, 22 Cal. 3d 388, 398-99 (1978) (superseded by statute on other grounds).

Fair notice requires that a defendant be able to tell, in advance, based on objectively identifiable standards, what conduct can give rise to criminal or civil sanction. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294, 316 (1996) ("[F]undamental fairness dictates that before a law subjects persons to such significant sanctions, criminal or civil, it should give 'fair notice' ... in language that the common world will understand, of

what the law intends to do …."); *see, e.g. F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 258 (2012) (holding that broadcasters were not given constitutionally sufficient notice of prohibited conduct); *Marks v. United States*, 430 U.S. 188, 196 (1977) (defendants "had no fair warning that their products might be subjected to the new standards"); *Rabe v. Washington*, 405 U.S. 313, 315 (1972) (law did not give "fair notice that [the] conduct [wa]s proscribed").

Penalties also cannot be imposed where they would effect a retroactive punishment based on conduct that was not illegal at the time it was carried out. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986) ("the retrospective imposition of punitive damages under a new cause of action" would "raise important issues" under the Due Process Clause). And the United States Supreme Court in *Gore* and *State Farm* repeatedly emphasized that due process protections apply to civil penalties generally. *Gore*, 517 U.S. at 574 n.22 ("[T]he basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil penalties."); *State Farm*, 538 U.S. at 416 (due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor").

Given the substantial uncertainty and divergent interpretations of Section 632.7, applying the statute's monetary penalty retroactively, to

reach the past business practices of companies like LoanMe or Atlantic Credit, would violate these principles. Although courts may clarify the law and apply that clarification to past behavior, "the principle of fair warning" requires that novel standards announced in adjudications "not be given retroactive effect ... where [they are] unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers v. Tennessee*, 532 U.S. 451, 462, (2001).

That principle applies not only in criminal cases, but also in the civil context. In *Fox Television*, for example, the Supreme Court held that the FCC violated due process by penalizing broadcasters pursuant to novel standards announced in adjudications because the broadcasters "lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionabl[e] ... under then-existing policies." 567 U.S. at 258. Applying these novel standards retroactively violated due process because, among other things, "[l]iving under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" *Id.* at 253 (citation omitted); *see also Sessions v. Dimaya*, -- U.S. --, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring in part) ("[I]n the criminal context this Court has generally insisted that the law must afford 'ordinary people ... fair notice of the conduct it punishes.'

And I cannot see how the Due Process Clause might often require any less than that in the civil context either.").

If this Court reverses the Court of Appeal or otherwise endorses a novel and counter-textual reading of Section 632.7 that reaches telephone communications that all parties consented to receive, this would be the first time a higher California court has done so. Thus, neither the statute's plain text nor California decisional law prior to such a reversal would have put companies like Atlantic Credit on notice "as to what the State commands or forbids." In particular, business entities lacked notice – based on then-existing California decisional law – that they could be subject to millions of dollars in liability when consumers hang up before there is a chance to notify the consumers that the call is being recorded, or where the notification of recording happens after a few words are spoken. Under a natural reading of the statute's plain terms, liability is not triggered unless the plaintiff proves he did not consent to the defendant receiving the communication. No person or entity could have had fair notice of its obligations under Section 632.7 if Smith's "conditional consent" interpretation, or the federal district court's interpretation ignoring "intercepts or receives," were to prevail over a straightforward one.

Like the broadcasters in *Fox Television*, companies such as

Atlantic Credit "lacked notice at the time" that their conduct could trigger millions of dollars in liability "under then-existing policies." 567 U.S. at 258. Far from clarifying the law, a reversal by this Court would effectuate an "unpredictable break[ ] with prior" law. *Rogers*, 532 U.S. at 462. Retroactive application of Section 632.7's monetary penalty here would thus be an affront to due process.

3. The Rule Of Lenity And The Vagueness Doctrines Also Counsel In Favor Of Prospective-Only Application

To the extent there is any ambiguity in Section 632.7, the rule of lenity also militates in favor of applying any novel interpretation of the statute only prospectively. Under the rule of lenity, "California [courts] will construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit." *In re Michael D.*, 100 Cal. App. 4th 115, 125 (2002). Although the rule of lenity is a canon of statutory construction, it is intertwined with the concepts of fair notice and due process.[4] The rule "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *People v. Spurlock*, 114 Cal. App. 4th 1122, 1132 (2003).

[4] As noted in LoanMe's Answering Brief, the rule of lenity also counsels in favor of a narrower construction of Section 632.7. *See* Ans. Br. at 42-43.

The related vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *In re Sheena K.*, 40 Cal. 4th 875, 890 (2007). Such a vague statute "violates the first essential of due process of law.'" *Cranston v. City of Richmond*, 40 Cal. 3d 755, 763 (1985) (citation. omitted). Courts apply these principles in connection with the "fair warning" doctrine to ensure "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *See Grayned*, 408 U.S. at 108.

These principles are implicated here. The business practices of companies like Atlantic Credit – to record consented-to communications with consumers – was not "conduct clearly covered" under the plain language of Section 632.7 and the diverging interpretations endorsed by different courts. Prior to the Court of Appeal's decision, people of "ordinary intelligence" in the industry were left to guess as to which interpretation they were bound. If this Court were to now conclude that Section 632.7 covers the telephone calls placed by Atlantic Credit and other companies, the rule of lenity and vagueness doctrines counsel towards a prospective application only. *See Lanzetta v. New Jersey*, 306 U.S. 451, 456-57 (1939) (stating that the New Jersey Supreme Court

improperly applied its interpretation of a vague statute against defendants because "[i]t would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the language later used by the court").

This conclusion is not altered by the fact that Smith is attempting to enforce a private right of action. As a threshold matter, "civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited." *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 231 (1969). But in any event, Section 632.7 has both civil and criminal applications. Courts must give such dual-application statutes a single, cohesive meaning and the narrower, criminal-law construction trumps any broader civil-law construction. *See, e.g., United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 & n.10 (plurality opinion) (applying rule of lenity to civil tax case that turned on language that had civil and criminal applications); *WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 203–04 (4th Cir. 2012) ("Where . . . our analysis involves a statute whose provisions have both civil and criminal application, our task merits special attention because our interpretation applies uniformly in both contexts. Thus, we follow 'the canon of strict construction of criminal statutes, or rule of lenity.'"); *In re Woolsey*, 696 F.3d 1266, 1277 (10th Cir. 2012) (for hybrid statutes, "the rule of lenity

must apply equally to civil litigants to whom lenity would not ordinarily extend").

Accordingly, the rule of lenity and the vagueness doctrine – along with basic principles of fairness – also compel the conclusion that any expansion of Section 632.7 be limited to future violations where the parties have the benefit of this Court's guidance.

4. A Novel Interpretation Of Section 632.7 Need Not Be Applied Retroactively To Address Any Harm Consumers Might Have Suffered From A Call Recording

While retroactive application of newly-announced judicial decisions often serves to address prior harms, that is not the case here. Atlantic Credit recognizes that consumers may indeed have suffered real injury from the recording of their cell or cordless telephone calls if, for instance, private information were disclosed during the call and later misused. But there is already a separate statute in CIPA – California Penal Code section 632 – that prohibits the recording of confidential communications without consent. And violations of that statute likewise have a $5,000 penalty. *See* Cal. Penal Code § 637.2

Applying a novel interpretation of Section 632.7 only prospectively – at least for purposes of the statutory penalty – would exclude only a small category of past claims, such as those based upon short calls where the recording advisory was not provided due to

insufficient time, human error or technical error. Such short calls likely would not have progressed to the point where the parties would have a reasonable expectation that the call was not being overheard or recorded as is required for a violation of Section 632. Even as to these short calls, consumers could still obtain injunctive relief barring businesses from continuing to record them.

CONCLUSION

For the reasons set forth above, Atlantic Credit requests that the Court affirm the Court of Appeal's decision and hold that California Penal Code section 632.7 does not apply unless the communication at issue was intercepted or received without consent. If the Court instead interprets Section 632.7 so that the interception or receipt of the communication without consent is not required for the statute to be violated, Atlantic Credit requests that the Court temper its ruling by holding that this new interpretation only applies to future violations and/or that statutory penalties are only available for future violations.

DATED: July 17, 2020

Respectfully submitted,

BAKER MCKENZIE LLP
EDWARD D. TOTINO
BENJAMIN W. TURNER

By: */s/ Edward D. Totino*
Edward D. Totino

Attorneys for Atlantic Credit & Finance, Inc.

CERTIFICATE OF WORD COUNT

The text of this Answering Brief on the Merits consists of 7,970 words as counted by the word-count function in the Microsoft Office Word 2016 program used to generate this brief.

DATED: July 17, 2020

Respectfully submitted,

BAKER MCKENZIE LLP
EDWARD D. TOTINO
BENJAMIN W. TURNER

By: */s/ Edward D. Totino*
Edward D. Totino

Attorneys for Atlantic Credit & Finance, Inc.

PROOF OF SERVICE

I am over the age of eighteen years and am not a party to the within action. I am employed in the County of Los Angeles, State of California, at the law offices of Baker & McKenzie LLP, members of the bar of this Court. My business address is 1910 Avenue of the Stars, Suite 950, Los Angeles, California 90067. On July 17, 2020, I served a true copy document(s) described as:

APPLICATION TO FILE REQUEST FOR JUDICIAL NOTICE AND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF AMICUS BRIEF OF AMICUS CURIAE ATLANTIC CREDIT & FINANCE, INC.

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I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct. Executed on July 20, 2020.

/s/ Edward D. Totino
Edward D. Totino

Jeremiah Smith v. LoanMe, Inc.
Case No. RIC 1612501
Appellate No. E069752
Supreme Court Case No. S260391
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VIA TRUEFILING Michael R. Williams mwilliams@ftrlfirm.com Jared M. Toffer jtoffer@ftrlfirm.com FINLAYSON TOFFER ROOSEVELT & LILLY LLP 15615 Alton Parkway, Suite 250 Irvine, California 92618 Telephone: (949) 759-3810	Attorneys for Defendant and Respondent LOANME, INC.
VIA TRUEFILING The Supreme Court of the State of California	
VIA TRUEFILING Fourth Appellate District, Second Division County of Riverside	
VIA FIRST CLASS MAIL Clerk of the Superior Court Attn: Judge Sharon J. Waters Superior Court of Riverside County Riverside Historic Courthouse 4050 Main Street Department 10 Riverside, CA 92501	

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Lower Court Case Number: **E069752**

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Ignacio Hernandez Court Added Pro Per	mail@consumercal.org	e-Serve	7/17/2020 8:23:42 PM
Benjamin Barr Barr & Klein PLLC 6274521	ben@barrklein.com	e-Serve	7/17/2020 8:23:42 PM
Stephen Klein Barr & Klein PLLC 177056	steve@barrklein.com	e-Serve	7/17/2020 8:23:42 PM
G. David Rubin Litchfield Cavo 181293	rubin@litchfieldcavo.com	e-Serve	7/17/2020 8:23:42 PM
Patrick Keegan Keegan Baker, LLP 167698	pkeegan@keeganbaker.com	e-Serve	7/17/2020 8:23:42 PM
Thomas Wheeler Law Offices of Todd M. Friedman P.C. 308789	twheeler@toddflaw.com	e-Serve	7/17/2020 8:23:42 PM
Michael Williams Finlayson, Toffer, Roosevelt & Lilly LLP	mwilliams@ftrlfirm.com	e-Serve	7/17/2020 8:23:42 PM

196863			
Zach Dostart Dostart Hannink & Coveney LLP 255071	zdostart@sdlaw.com	e-Serve	7/17/2020 8:23:42 PM
Edward Totino Baker & McKenzie.com 169237	edward.totino@bakermckenzie.com	e-Serve	7/17/2020 8:23:42 PM
Benjamin W. Turner	Ben.Turner@bakermckenzie.com	e-Serve	7/17/2020 8:23:42 PM

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

7/17/2020

Date

/s/Edward Totino

Signature

Totino, Edward (169237)

Last Name, First Name (PNum)

Baker & McKenzie.com

Law Firm