IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEREMIAH SMITH, Plaintiff and Appellant, v. LOANME, INC., Defendant and Appellee.	Supreme Court No. S260391 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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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

Todd M. Friedman (216752)
tfriedman@toddflaw.com
Adrian R. Bacon (280332)
abacon@toddflaw.com
Thomas E. Wheeler (SBN 308789)
twheeler@toddflaw.com
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard St., Suite 780
Woodland Hills, CA 91367
Phone: (877) 206-4741
Fax: (866)633-0228
Attorneys for Appellant/Plaintiff, Jeremiah Smith

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEREMIAH SMITH, Plaintiff and Appellant, v. LOANME, INC., Defendant and Appellee.	Supreme Court No. S260391 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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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

INTRODUCTION

LoanMe's Opposition Brief drastically undersells the importance of the issue that is subject to this Petition. Smith's Petition, and review of the Appellate Order is necessary to settle an important question of law that impacts every single resident of the state of California. Telephone privacy is increasingly subject to intrusions into the lives of the residents of this state, and for this reason, is increasingly important. Review of the Order would assist in securing uniformity in the construction of the IPA, and harmony between all parts of the statute, which as presently constructed in light of the Order, read as disjointed and inconsistent. LoanMe does not cite to or even attempt to distinguish even a single one of the over 24 decisions that disagree with the holding in the Appeal Order, nor does LoanMe attempt to square its inconsistencies with other Appellate and Supreme Court precedent, including *CashCall*, *Ribas*, *Flanagan or Kearney*. Indeed, LoanMe dedicates all but two sentences to the erroneous nature of the Appeal Order, as if its gross misstatement of the law was a mere insignificant afterthought that impacted nobody and meant nothing.

LoanMe's position seems to be: maybe the Court of Appeal got it wrong, but what's the big deal?[1] Ensuring that splits in authority are resolved is a big deal. Ensuring that the rule of law and principles of *stare decisis* are followed is a big deal. Ensuring that statutes are read in harmony amongst all of their parts is a big deal. Ensuring the judiciary run efficiently and preventing an inevitable onslaught of appeals across numerous districts and divisions over the coming years is a big deal. Ensuring that the Legislature's

[1] This much can be gleaned in part from the "additional issue" that LoanMe requests the Supreme Court take under review. But this issue should have been the only issue that was analyzed by the Court of Appeal, and yet no discussion of this issue took place by the Court of Appeal whatsoever. The Parties specifically teed up one issue for appeal, and were instead blindsided by a completely separate issue altogether after briefing was complete.

will is upheld is a big deal. Ensuring that outlier court decisions are not misused to harm consumers is a big deal. Protecting consumer privacy against the threat of surreptitious recordation is a big deal. This Petition is important for so many reasons, as encapsulated by Appellant's papers thus far, and as described in detail below. The standard, for review are satisfied, and the Court, respectfully, should review this case.

LEGAL ARGUMENT

This Petition is about so much more than the instant case at issue. The entire state of protecting consumer telephone privacy rights to not be recorded unless authorized in California hangs in the balance with the Court of Appeal's erroneous ruling.

The function of the Supreme Court is to preside over the orderly and consistent development of California case law, and the primary grounds for granting a petition for review are to 1) secure uniformity in decision, and 2) to settle an important question of law. Rule of Court 8.500(b). Both are implicated in the instant case in different ways.

A. A Mountain of Precedent Disagrees with the Court of Appeal – Demonstrating the Importance Of this Question of Law, and the Lack of Uniformity the Order will Create

By all accounts, the Court of Appeal's Order is an outlier. There have been roughly two dozen courts that have reached the opposite conclusion, and only one court that agreed. These decisions are described at length in Petitioner's Depublication Request filed last week and incorporated by reference for convenience of the Court. Even the California Attorney General, in imposing criminal sanctions, has interpreted § 632.7 as applying to parties to a call.

Was the Court of Appeal the only court that had it right? No. But even if that were the case, these other dozens of instances of disagreement plant a compelling counterargument on firm footing, and their reasoning will

continue to be litigated as persuasive precedent unless or until this Court grants review on the issue. That is because this legal question is important. It is important for obvious reasons – people do not like being recorded without knowledge or consent, people in modern day typically talk to others via their cell phones, and recording someone without their knowledge is easy to do when you are not in their visible line of sight (such as when you are on the other end of a cellular telephone line). Defendant's Opposition brief fails to discuss any of the dozens of contrary cases and also fails to discuss how the Court of Appeal decision flies in the face of other appellate and Supreme Court jurisprudence. Defendant's intentional choice to sidestep the clear error of the ruling stands as a deafening silence highlighting the erroneous nature of the Court of Appeal Order, as well as how important this issue is to Californians.

B. The Dignity of Protection Against Surreptitious Recordation Involves an Important Question of Law that Affects Every Single California Resident

Recording a telephone call without the consent of any party is "an affront to human dignity." *Friddle v. Epstein* (1993) 16 Cal. App. 4th 1649, 1660-61. As such, this Court has held that California is an all-party consent state, 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 v. Salomon Smith Barney, Inc*. (2006) 39 Cal. 4th 95, 118. This Court has also observed that "California consumers are accustomed to being informed at the outset of a telephone call whenever a business entity intends to record the call." *Id.* "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.

Every single person who resides in California and has made, or plans to make a call using a cellular telephone is affected by the *Smith v LoanMe* Court of Appeal ruling. The percentage of Californians who have been subject to a recording practice by a company with which they do business is surely very close to 100%. And yet, such companies are apparently no longer accountable under § 632.7 for surreptitiously recording such calls without a recording advisory, unless or until the Court of Appeal Order is depublished or reversed. Each one of us that live in California is impacted by this decision. Its scope cannot be debated, nor can its novelty, in turning California into a one-party consent state.

Disregarding this Court's instructions as to the importance of establishing robust privacy restrictions surrounding recordation and the liberal construction of the CIPA generally that is required by Courts in reviewing the statute, the Court of Appeal issued a crushing outlier decision which effectively eviscerated the CIPA as it is being enforced in courts today. The decision upended the well-understood application of the statute and ignored dozens of decisions on the topic that have shaped the law for more than a decade. One can survey the landscape of decisions and see that they almost all involve the same fact pattern – a company recorded consumers on their cell phones without telling them at the outset of the call that they were being recorded. The past 10 years of the statute has seen 127 published decisions regarding § 632.7. Almost every decision involved a similar fact pattern, and very few, if any, decisions involve a third-party hacking into a cell phone call. The former scenario is far more common yet is equally invasive.

People use landlines much less frequently than cellular telephones in modern day, and this trend will continue. Absent a robust statute (§ 632.7) which specifically prohibits recordation of cellular telephone

communications, California citizens' telephone calls can and will be recorded by companies without the need to provide recording advisories - a gross intrusion of the very privacy rights this Court has held should be protected by the CIPA. Moreover, the Court of Appeal ruling, if left intact, cuts the legs out from under the only active enforcement of the CIPA that is regularly taking place, as is evidenced by the two dozen cases cited in the Depublication request, the Attorney General's actions in enforcing § 632.7, and a cursory examination of available legal research on published decisions and active filings. For these reasons, the mountain of contrary legal authority strongly suggests this case involves an important question of law.

C. The Legislature was Aware that § 632.7 was Interpreted as Applied to Parties and Tacitly Accepted the Precedent Surrounding this Important Question of Law

It is a well-accepted cannon of jurisprudence that when a legislature is aware of a particular interpretation of a statute being advanced by courts and/or the executive branch, has an opportunity to amend that statute, and choses to leave it untouched as it pertains to the precedent set by said courts, that the legislature has effectively blessed the rulings of the courts as a correct interpretation of its intent. That is exactly what happened with respect to the CIPA in 2016.

In 2016, the California Legislature had the opportunity to amend the CIPA, and against the backdrop of these aforementioned decisions, chose not to clarify the language of § 632.7, apparently being satisfied that courts were applying the law in the manner in which the Legislature intended. *See generally* 2016 Cal. Legis. Serv. Ch. 855 (A.B. 1671) (WEST). Under these circumstances, this Court holds that the Legislature's inaction signals an acceptance of existing case law. "[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in light of such decisions as have

a direct bearing on them." *People v. Overstreet,* (1986) 42 Cal. 3d 891, 897; see also *In re W.B.*, (2012) 55 Cal. 4th 30, 57 (presuming Legislature was aware of existing Fifth Circuit opinion and acceded to it because "[t]he Legislature did not signal an intent to supersede this holding."). Indeed, the Ninth Circuit applied similar reasoning recently in interpreting the federal TCPA (another privacy statute involving invasion of privacy that takes place with respect to phone calls), by holding that a 2015 amendment to the statute that occurred shortly after a highly publicized and disputed FCC interpretation of the statute "suggests Congress gave the interpretation its tacit approval." *Marks v. Crunch San Diego, LLC* (9th Cir. 2018) 904 F.3d 1041, 1052.

Here, the California Legislature made detailed changes to CIPA in 2016, by which time more than a dozen federal courts had ruled that § 632.7 extends to parties to a wireless telephone call. The Legislature did nothing to disturb those holdings. The *Gamez* court said it best:

> If the California legislature intended the statute not to have that reach, it has been on notice of court opinions to the contrary for several years, and has done nothing, though there are numerous ways to make that limitation plain. … If the legislature did not want a 'party to a communication' to be covered by Section 632.7's prohibition on recording, it could have said (or could still say, through amendment) just that.

Gamez v. Hilton Grand Vacations, Inc., (C.D. Cal. Oct. 22, 2018) No. 18-cv-04803 GW (JPRx), 2018 WL 8050479, * 3. The court then concluded, "[t]his Court can presume that the California legislature is well aware of the courts' almost-uniform construction of Section 632.7 in this regard. The legislature's silence on the issue is somewhat deafening, and does nothing to disabuse this Court of its conclusion on the matter." See *Id*., * 3, n. 6; see also *McEwan v. OSP Grp., L.P.*, (S.D. Cal. July 2, 2015) 2015 WL 13374016, at *4 (presuming Legislature had notice of existing case law concerning CIPA).

If both the courts and the executive branch are actively interpreting § 632.7 to apply to parties to a call, the legislative branch should be presumed to be aware of that activity. Yet, the Court of Appeal never addresses this Court's commitment to the idea of an informed, knowledgeable Legislature. The fact that the Court of Appeal never addresses this basic principle of statutory construction is yet another reason that the decision was in error. Moreover, given that the Legislature tacitly blessed all of these prior judicial and executive acts, this gives even more credence to the importance of the issue. Indeed, it appears that every one of the three branches of the California government has disagreed with the Court of Appeal ruling, and yet its ruling is now binding precedent until this Court says otherwise. Such circumstances underscore the importance of why the Appellate Order should be subject to review.

D. The Court of Appeal's Decision is Unharmonious with the Remainder of the Statute

An important function of this Court is to ensure that the statutes of California are interpreted in a manner that are harmonious with their other parts, and with the intent of the Legislature. *Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 856. The lack of harmony between the Court of Appeal decision and the broader IPA were exhaustively discussed throughout Appellant's Petition for Review. And yet, there are even more examples where a lack of harmony can be seen as a result of the erroneous appellate order that warrant mention and further support depublication. The Court of Appeal honed in on the language "intercepts of receives" and noted that the same language was present in §§ 632.5 and 632.6, thereafter assuming that neither statute applied to third parties, and

therefore concluding that therefore, § 632.7 must also not apply to third parties.[2]

The Petition for Review should be granted so as to close the loopholes created by the Court of Appeal decision, which effectively allows companies to circumvent § 632.7, and record customers, debtors, or other unwitting consumers without consent, and without even affording them the dignity of advising that the company is doing so. The Order renders § 632.7 completely meaningless, as the only remaining scenario that it could *possibly* be read to prohibit (which is not already prohibited by other portions of the CIPA) would be one in which a third-party interloper inadvertently recorded a phone call of someone upon whom it unintentionally eavesdropped. That scenario is facially implausible – how could anyone accidentally record a telephone call upon which they accidentally eavesdropped? This was obviously not the target of the Legislature.

In addition to all of the other reasons discussed in the opening Petition, there is yet another section of the CIPA that throws a wrench in the proverbial gears as to the Court of Appeal's conclusion - § 633.5, which states in pertinent part:

> Sections 631, 632, 632.5, 632.6, and 632.7 do not prohibit one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, [or various other criminal offenses].

Cal. Penal Code § 633.5. As one federal court noted, "the very fact that Section 633.5 specifically indicated that 'Section []… 632.7 do[es] not prohibit one party to a confidential communication from recording the communication' under such circumstances strongly suggests that a 'party to

[2] The pointed absence of the word "malicious" in § 632.7 renders this a strawman position by the Court of Appeal.

a confidential communication' is otherwise covered by Section 632.7, meaning that Section 632.7 is not limited to third parties who record such communications." *See Gamez*, 2018 WL 8050479, * 3, n. 7. Indeed, it would be wholly inconsistent and incoherent to conclude that even though the Legislature specifically contemplated application by courts of § 632.7 to parties to a communication, so much that the Legislature felt it necessary to create a carve out in such applications, that the legislature didn't believe § 632.7 applied to parties to a communication at all. What would be the point of including § 632.7 in § 633.5? There wouldn't be any.

The Court of Appeal's incomplete and cherry-picked "harmonization" of the statute is yet another important reason that this Court should review this disputed question of law. If the CIPA is being applied in an incorrect manner to incorrect entities and individuals, then not only will wrongdoers escape scrutiny, but also, the Legislature's intent will not be carried out and the statute will be interpreted in an unharmonious manner. Every person who resides in California is impacted by this drastic rewriting and narrowing of California privacy rights.

E. Stare Decisis Supports Review

Against two dozen contrary decisions, and the advisory opinions of the California Attorney General, only two (*Young* and the Court of Appeal's decision)[3] have disagreed with the position advanced by Appellant. This

[3] LoanMe improperly cites to two unpublished state trial court decisions (*Granina* and *Burkley*). However, such decisions are not even permitted to be cited per the California Rules of Court: Any decision that is not certified for publication "must not be cited or relied on by a court or a party in any other action." (Cal. R. Ct. 8.1115(a).) Trial court cases interpreting a statute are not citable under the Rules of Court, and therefore bear no precedential weight. *County of San Bernardino v. Cohen* (2015) 195 Cal.Rptr.3d 439, 242; *Farmers Ins. Exchange v. Superior Court* (2013) 159 Cal.Rptr.3d 580, 218 Cal.App.4th 96. It is improper to cite or rely upon unpublished opinions. *People v. Gray* (2014) 176 Cal.Rptr.3d 837.

Court has repeatedly stressed the importance of *stare decisis*, a concept "based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system, i.e. that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." *Moradi-Shalal v. Fireman's Fund Ins. Companies*, (1988). 46 Cal. 3d 287, 296. "Considerations of stare decisis are particularly forceful in the area of statutory construction[.]" *Coker v. JP Morgan Chase Bank, N.A.*, (2016) 62 Cal. 4th 667, 676 (quoting *IBP, Inc. v. Alvarez*, (2005) 546 U.S. 21, 32). California has been recognized as a two-party consent state for decades. See *Kearney, supra*, 39 Cal.4th at 118. Allowing the about-face set forth in this new precedent to stand would invite instability into the rule of law.

The appellate court's ruling decimates this Court's precedent and sets a new unsupportable and dangerous precedent that must be followed until sister courts have had a chance to weigh in and correct the error, and even then, may yet be followed by lower courts as persuasive authority until this Court corrects the innumerable errors throughout the decision by issuing its own opinion. In the meantime, dozens of pending § 632.7 class actions throughout the state will be put through expensive and protracted litigation and appeals, causing uncertainty and disrupting business compliance practices, leading to unfair, unpredictable and disparate results for consumers and an invasion of their privacy rights, and generally causing temporary chaos in this oft-litigated area of privacy regulation.

While there is not a traditional split in authority between Districts in the Court of Appeal as of yet, there may as well be. Dozens of pending § 632.7 class action cases brought by as many consumers and law firms are currently in various stages of litigation and have all eyes and ears pointed towards this Petition. Many of these cases involved a prior court order where a motion to dismiss was denied on grounds that mirrored the mountain of

authority cited in the Depublication Request. Yet now each of these cases is under renewed scrutiny by defendants who are requesting reconsideration and/or dismissal, and wherein consumers are taking a similar position to that taken by Petitioner here (that the Court of Appeal got it wrong). No doubt the reviewing district courts and trial courts will follow the correct procedure and treat the *LoanMe* decision as binding authority until this Court holds otherwise, or a split emerges. But a split will emerge, because the decision is patently flawed on numerous levels. Appeals will ensue, litigation will continue, and the court system will be burdened with dozens of dockets attempting to sterilize the fallout caused by the Court of Appeal decision in this case. The petition for review is necessary to secure uniformity in the construction of the CIPA, which has (aside from the Order of the Court of Appeal) consistently been applied it in a manner that furthers telephone privacy. As such, principle of *stare decisis*, coupled with the outlier nature of the Court of Appeal Order, strongly supports a review by this Court. These doctrines are themselves important questions of law, and moreover, further this Court's goal of promoting unanimity and certainty amongst California courts.

CONCLUSION

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

Dated: February 24, 2020

Respectfully submitted,

/s/ Todd M. Friedman
Todd M. Friedman
State Bar No. 216752
Adrian R. Bacon
State Bar No. 280332
Thomas E. Wheeler
State Bar No. 308789
Attorneys for Plaintiff and Appellant
Jeremiah Smith

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 3,619 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: February 24, 2020

Respectfully submitted,

/s/ Todd M. Friedman
Todd M. Friedman
State Bar No. 216752
Adrian R. Bacon
State Bar No. 280332
Thomas E. Wheeler
State Bar No. 308789
Attorneys for Plaintiff and Appellant
Jeremiah Smith

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

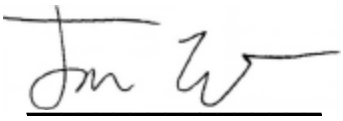
The Supreme Court of the State of California

Fourth Appellate District, Second Division, County of Riverside

Jared Toffer & Matthew Lilly
Attorneys for Respondent LoanMe, Inc.

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

Executed on February 24, 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: **SMITH v. LOANME**
Case Number: **S260391**
Lower Court Case Number: **E069752**

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**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REPLY TO ANSWER TO PETITION FOR REVIEW	Reply Petition-for-Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
Todd Friedman Law Offices of Todd M. Friedman, P.C. 216752	tfriedman@toddflaw.com	e-Serve	2/24/2020 4:25:43 PM
Jared Toffer Finlayson Toffer Roosevelt & Lilly, LLP 223139	jtoffer@ftrlfirm.com	e-Serve	2/24/2020 4:25:43 PM
Ignacio Hernandez Court Added Pro Per	mail@consumercal.org	e-Serve	2/24/2020 4:25:43 PM
Patrick Keegan Keegan Baker, LLP 167698	pkeegan@keeganbaker.com	e-Serve	2/24/2020 4:25:43 PM
Michael Williams Finlayson, Toffer, Roosevelt & Lilly LLP 196863	mwilliams@ftrlfirm.com	e-Serve	2/24/2020 4:25:43 PM
Zach Dostart Dostart Hannink & Coveney LLP 255071	zdostart@sdlaw.com	e-Serve	2/24/2020 4:25:43 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

2/24/2020
Date

/s/Todd Friedman

Signature

Friedman, Todd (216752)

Last Name, First Name (PNum)

Law Offices of Todd M. Friedman, PC

Law Firm