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

APPELLANT'S OPENING BRIEF ON THE MERITS

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

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

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

Additionally, from Respondent's Answer to the Petition for Review:

III. For purposes of consent under Penal Code Section 632.7 does a party to a phone call consent to the call being recorded when he stays on the line after the other party causes a beep tone (or series of beep tones) to sound during the call?

INTRODUCTION

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

This Court has consistently applied the CIPA in a manner that furthers telephone privacy. In *Ribas v. Clark* (1985) 38 Cal.3d 355, this Court held that the CIPA's prohibition on non-consensual monitoring applies not only to interception while a telephone communication is in transit, but also to monitoring on an extension phone. In *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, this Court explained that § 632 protects from non-consensual recording any telephone call that a participant does not intend to be overheard or recorded (whether or not the content of the call is intended to remain secret) and that § 632.7 protects against intercepting or recording "*any* communication" involving a cellular phone or cordless phone. *Flanagan, supra*, 27 Cal.4th at 776. In *Kearney v. Salomon Smith Barney, Inc*. (2006) 39 Cal.4th 95, this Court affirmed the all-party consent requirement and held that it applies to out-of-state businesses that engage in telephone communications with California customers. Recording a telephone call without the consent of any party has been held to be "an affront to human dignity." *Friddle v. Epstein* (1993) 16 Cal. App. 4th 1649, 1660-61.

Consistent with this, "the Legislature found that 'the advent of widespread use of cellular radio telephone technology means that persons will be conversing over a network which cannot guarantee privacy in the same way that it is guaranteed over landline systems." *Flanagan*, *supra*, 27 Cal.4th at 775. The California Supreme Court addressed application of section 632.7 by holding that it was enacted in response "to the problem of protecting the privacy of parties to calls involving cellular or cordless telephones" and made unlawful "the intentional interception **or recording** of a communication involving a cellular phone or a cordless phone." *Id*. at 776 (emphasis added). Section 632.7 "protect[s] against interception or recording of *any* communication." *Id*. at 776 (italics in original). Thus, while together sections 632 and 632.7, "protect[ ] against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation or the type of telephone involved" (*Id*. at p. 776), for landline communications, section 632 imposes the added requirement that the plaintiff establish "an objectively reasonable expectation that the conversation is not being overheard or recorded." *Id.* at 777. This statutory background, described by the Supreme Court, is incredibly important because it frames *why* the Legislature enacted § 632.7. This Court was concerned that cellular phones and cordless phones would be determined by courts to be so insecure (due to eavesdropping) that there could be no reasonable expectation of privacy, and hence, § 632 would not prohibit recording such calls, since the statute required confidentiality, *i.e.* a reasonable expectation of privacy. Section 632.7 closed this foreseeable loophole. And, as further explained below, many federal district courts in California have held that § 632.7 protects against the non-consensual recording of telephone calls transmitted in whole or in part between cellular and/or cordless telephones.

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

If left to stand, the Court of Appeal's decision will have a devastating impact on the privacy rights of every Californian that have been in place and well understood for decades. As this Court has noted, consumers in California are accustomed to being informed at the outset of a call whenever a business entity intends to record the call. *Kearney*, *supra*, 39 Cal.4th at 118. The decision of the Court of Appeal decimates the legal foundation upon which that expectation is based, and is relevant to every California resident, as it affects the privacy rights of every person who use cellular or cordless telephones. Not only is the Appellate Order legally unsound, but it is also contrary to the clear policy underlying the Invasion of Privacy Act, and should therefore be reversed.

STATEMENT OF CASE AND FACTS

I. Procedural Background of Trial Court Proceedings

Smith filed his Class Action Complaint against LoanMe on September 26, 2016, alleging violations of Cal. Penal Code § 632.7 on behalf of himself and a putative class. Clerk's Transcript on Appeal, Vol. I ("CTA"), at 001. The parties jointly stipulated to and the Court ordered a bifurcated bench trial on a legal issue that ultimately is not relevant to this Appeal – whether beep tones constitute a sufficient notice advisory to a reasonable consumer that the call is being recorded. *Id.* at 015. The parties briefed the issue and appeared for a bifurcated bench trial on October 13,

2017. *Id.* at 026. The Court ruled in favor of LoanMe and entered Judgment against Plaintiff on November 21, 2017. *Id*. at 018 & 092. On January 2, 2018, Smith timely filed his Notice of Appeal from Judgment. *Id.* at 105. Following the Appellate Order, Smith timely filed his Petition for Review in the Supreme Court of California, which was granted on April 1, 2020.[1]

II. Statement of Facts

The parties stipulated and agreed on all facts for the bifurcated trial and appeal. CTA at 072-75. LoanMe is a lender that offers personal and small business loans to qualified customers. *Id.* at 073. Smith's wife is the borrower on a loan made to her by LoanMe. *Id.* In October 2015, LoanMe called the telephone number provided to it by Smith's wife to discuss her loan. *Id.* Smith answered the phone and informed LoanMe that his wife was not home, after which the call ended. *Id.* The call lasted approximately 18 seconds. *Id.* LoanMe recorded the call. *Id.*

Approximately 3 seconds into the call, LoanMe caused a "beep tone" to sound. *Id.* A "beep tone" is played on outbound calls made by LoanMe at regular intervals every 15 seconds. *Id.* LoanMe did not orally advise Smith that the call was being recorded, and Smith did not sign any contract with LoanMe granting consent to record calls with him. *Id.* For purposes of the bifurcated bench trial and appeal, LoanMe accepts that the recorded call was placed to a cordless telephone. *Id.*

LoanMe contends that causing beep tones to sound at regular intervals during a phone call puts people on notice that the call is being recorded, and that, as a matter of law, people who continue the conversation

[1] Due to the COVID19 crisis causing the closure of the Fourth Appellate District, Appellant was unable to obtain a copy of the Record on Appeal for the proceedings that occurred at the appellate level that were electronically transmitted to This Court. Thus, for these documents, Appellant will refer to them by document title and page number.

after a beep tone (or series of tones) have consented to the call being recorded. *Id.* Smith alleges that the use of beep tones, in the manner beep tones were used by LoanMe as demonstrated during the recorded phone call at issue, without more, are insufficient notice that the call is being recorded. *Id.* This was the sole issue on which the parties requested review by the Court of Appeal. There were no other disputes of law or fact raised by the parties. ***LoanMe did not argue that § 632.7 did not apply to it as a party to the call.***

III. The Court of Appeal Invokes Government Code § 68081

For reasons that are unclear, after the legal issues surrounding beep tones had been fully briefed before the Court of Appeal, the Court issued a short Order requesting further briefing on a completely unrelated question: "should Penal Code § 632.7 be interpreted as applying only to the recording of a wireless communication that was 'hacked' or 'pirated' by someone who was not a party to the communication?" Order Pursuant To Gov. C. § 68081 (June 25, 2019) at p. 1. Appellant was given only five pages of briefing on this issue.

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

It is well established that with the passage of the California Invasion of Privacy Act (§ 630 et seq.) in 1967, California became a two-party consent state, which means that all parties to a telephone call must consent before their conversation can be recorded. As stated by this Court,

> [¶]The California Invasion of Privacy Act (§ 630 et seq.) was enacted in 1967, replacing prior laws that permitted the recording of telephone conversations with the consent of one party to the conversation. [Citation omitted.] The purpose of the act was to protect the right of privacy by, among other things, requiring that all parties consent to a recording of their conversation. (Flanagan, supra, 27 Cal.4th at 768-769.)

In *Flanagan*, this Court addressed application of § 632.7 by holding that § 632.7 was enacted in response "to the problem of protecting the privacy of parties to calls involving cellular or cordless telephones" and made unlawful "the intentional interception or recording of a communication involving a cellular phone or a cordless phone." *Id*. at 776. *Flanagan* further held that section 632.7 "protect[s] against interception or recording of *any* communication." *Id*. (italics in the original.)[2] The Appellate Court does not discuss this holding in *Flanagan*.[3]

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[2] Specifically, this Court in *Flanagan* held,

> "Responding to the problem of protecting the privacy of parties to calls involving cellular or cordless telephones, the Legislature prohibited the malicious interception of calls from or to cellular or cordless phones (§§ 632.5, 632.6) and the intentional interception or recording of a communication involving a cellular phone or a cordless phone (§ 632.7)." (emphasis added)
>
> [¶] Significantly, those statutes protect against interception or recording of *any* communication. When the Legislature determined that there was no practical means of protecting cordless and cellular phone conversations from accidental eavesdropping, it chose to protect all such conversations from malicious or intentional eavesdropping or recording, rather than protecting only conversations where a party wanted to keep the content secret. The scope of this prohibition indicates, as we suggested in *Ribas*, supra, 38 Cal.3d at pages 360-361, that the Legislature's ongoing concern is with eavesdropping or recording of conversations, not later dissemination." (*Flanagan*, supra, 27 Cal.4th at 776 (italics in the original).

[3] Importantly, The Appellate Court's conclusion that

> "[S]ection 632.7 prohibits only third party eavesdroppers from intentionally recording telephonic communications involving at least one cellular or cordless telephone. Conversely, section 632.7 does not prohibit the participants in a phone call from intentionally recording it,"

Court of Appeal's Opinion ("Slip. Op.") at p. 3 [43 Cal.App.5th at 848], is contrary to *Flanagan.* Under the Appellate Court's interpretation of § 632.7, any call made by Smith to LoanMe - or any call made to anyone, for that matter - could be recorded by the recipient (LoanMe) because the dialer (Smith) necessarily consented to the other party "receiving" the call.

Thus, § 632.7 prohibits the secret recording of telephone calls that occur on a cell phone or cordless landline phone.[4] Or rather, it did until the Court of Appeal unexpectedly issued an unprompted ruling that § 632.7 applied only to eavesdroppers and not to parties to the call. The Court's Order analyzes a single legal question relating generally to the Invasion of Privacy Act: does § 632.7 apply to the surreptitious recording of a telephone call by a participant in the phone call, or instead does it apply *only* to the recording of a communication by an undisclosed third-party eavesdropper? Slip Op. at p. 3.[5] The Court of Appeal ruled that § 632.7 applies only to eavesdroppers, and that parties to a call are free to receive and secretly record communications without the consent of another party to the call without violating the statute.[6] The ruling acknowledges that the majority of federal courts, in more than a dozen cases, have held otherwise.

The Court of Appeal Order is based on a misreading of the plain language of § 632.7 and the broader CIPA. Rather than starting with the language of § 632.7, the Court of Appeal started by looking at CIPA as a whole and concluding that telephone calls that were confidential were already protected from recording under the circumstances by parties to a call under § 632. Slip Op. at pp. 5-6. The Court went on to look at Penal

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

[5] Citations to the Court of Appeal's Opinion in this case are in the form of "Slip Op. at [ ]."

[6] The Court of Appeal did not address the beep tones issue at all in its Order. The only mention of beep tones in the Court of Appeal's Order is in the recitation of facts.

Code § 632.5 and 632.6, which prohibit the *malicious* interception or receipt of cellular phone or cordless phone communications without consent of the parties. Slip Op. at pp. 6-7. Nothing in the plain language of either of these statues specifies that they inherently apply only to third party eavesdroppers. Nevertheless, the Court read such a requirement into these two statutes due solely to their inclusion of the word "malicious," which is not present in § 632.7. Slip Op. at pp. 7-8. Penal Code § 632.5 and 632.6 were also enacted in legislation in 1992 completely separately from § 632.7 which was enacted in 1993. Finally, the Court looked at the language of § 632.7: "Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by" a fine, imprisonment, or both. Slip Op. at pp. 7-8. Nonetheless, rather than focusing on the language of the statute, the remainder of the Order attempts to frame § 632.7 in the context of §§ 632.5 and 632.6, with the assumption that neither applies to parties to a call and therefore, that § 632.7 must only apply to third parties to a call as well. Slip Op. at pp. 8-11. The conclusion appears to rest solely on the observation that *some* of the same language in § 632.7 also appears in §§ 632.5 and 632.6.

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

> "The statute thus requires that the interception or receipt of the communication be without the parties' consent. But the

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

Slip Op. at p. 9.

The Court of Appeal's error was supported thereafter by a strawman argument, whereby the Court looked at § 632.5 and § 632.6 in its own rewritten context of applying only to eavesdroppers, despite such a restriction being nowhere in § 632.5 or § 632.6, and notwithstanding the only reason the Court of Appeal reached such a conclusion was due to the presence of the word "malicious" in § 632.5 and § 632.6. Slip Op. at p. 9. Yet the word "malicious" does not appear in § 632.7, so the same logic does not apply. The Appellate Court went on to conclude that the only way to harmonize the three statutes was to rule also that § 632.7 only applied to third parties. *Id.* The Appellate Court appears to have conducted the analysis backward, looking at the conclusion and determining how best to reach it, rather than starting with the plain language of the statute and looking elsewhere only if necessary to resolve ambiguity. The only justification offered for having taken that backwards method of statutory interpretation was the Appellate Court's statement: "it is not clear what it would mean for one party to receive the other party's communications with malice." Slip Op. at p. 10. The Appellate Court's attempt to square the inconsistency of its statutory interpretation with *Kearney* strains credulity when compared with this Court's interpretation of consent under § 632:

> "Although parties to a phone call always consent to each other's receipt of their communications, they do not always consent to the use of an electronic amplifying or recording device to eavesdrop upon or record the communication. It is consequently unsurprising that section 632 can apply to the

> parties to a communication. (*Kearney*, supra, 39 Cal.4th at pp. 117-118.)[7]

Slip Op. at fn. 5.[8] This Court's interpretation of consent in *Kearney* as applied § 632 would naturally lead to the conclusion that § 632.7 applies to a party to the communication. The Court of Appeal was unpersuaded by *Kearney*'s logic, and instead held without adequate justification that under § 632.7, consent is only required for someone who was not a party to the communication.

The Court goes on to ignore the reasoning of more than a dozen published federal decisions that have analyzed these questions thoroughly and persuasively from multiple angles and have come to a contrary conclusion. The Appellate Court fails to note that of the fourteen cases it cites, *thirteen* explicitly reject its holding. *Id.* at 847, n. 2 (citing *Brinkley v. Monterey Fin. Svcs.* (S.D. Cal. 2018) 340 F. Supp. 3d 1036, 1043 (agreeing that "a party to a call who records part of the conversation without the other party's consent violates § 632.7"); *Ades v. Omni Hotels Management Corp.* (C.D. Cal. 2014) 46 F. Supp. 3d 999, 1017-1018 ("§ 632.7 should not be limited to situations in which unknown third parties record a

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[7] After *Flanagan*, this Court in *Kearney* once again interpreted § 632 to require that the parties to a telephone call must consent to the recording of the conversation by holding "[¶] The recording of telephone conversations is governed by the provisions of section 632, one of the original provisions of the 1967 legislation.... [¶] As made clear by the terms of section 632 as a whole, this provision does not absolutely preclude a party to a telephone conversation from recording the conversation, but rather simply prohibits such a party from secretly or surreptitiously recording the conversation, that is, from recording the conversation without first informing all parties to the conversation that the conversation is being recorded." (*Kearney*, supra, 39 Cal.4th at 117-118 [footnote omitted]).

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

conversation."); *Raffin v. Medicredit, Inc.* (C.D. Cal. Jan. 3, 2017) No. CV 15-4912-GHK (PJWx); 2017 WL 131745, * 8 (concluding California Supreme Court would find that § 632.7 requires a disclosure to all parties to a call that recording is occurring); *Lal v. Capital One Financial Corp.* (N.D. Cal. Apr. 12, 2017) No. 16-cv-06674-BLF, 2017 WL 1345636 at * 9 (agreeing "that § 632.7 applies to parties to the communications as well as third parties"); *Ramos v. Capital One, N.A.* (N.D. Cal. July 27, 2017) No. 17-cv-00435-BLF, 2017 WL 3232488 at * 9 ("the Court finds that [§ 632.7] could still apply to [parties]"); *Horowitz v. GC Services Limited Partnership* (S.D. Cal. Dec. 12, 2016) No. 14cv2512-MMA RBB, 2016 WL 7188238 at * 15 ("the Court is not persuaded" that § 632.7 is limited to third party interceptions); *Rezvanpour v. SGS Automotive Services, Inc.* (C.D. Cal. July 11, 2014) No. 14-cv-00113-ODW(JPRx), 2014 WL 3436811 at * 4 ("It is clear that section 632.7 prohibits nonconsensual recording of communications where at least one party is using a cellphone."); *Montantes v. Inventure Foods* (C.D. Cal. July 2, 2014) No. CV-14-1129-MWF (RZx), 2014 WL 3305578 at 3 ("text of § 632.7 unambiguously includes a person who 'receives' a protected 'communication,' whether or not the communication is received while in transit *or at* its destination." (emphasis added)); *Simpson v. Best Western Intern., Inc.* (N.D. Cal. Nov. 13, 2012) No. 12-cv-04672-JCS, 2012 WL 5499928 at *8 ("the Court finds that § 632.7 applies to parties to the communication as well as third parties."); *Simpson v. Vantage Hospitality Group, Inc.* (N.D. Cal. Dec. 4, 2012) No. 12-cv-04814-YGR, 2012 WL 6025772 at *5-6 ("Because the Court applies each part of "intercepts or receives" by its plain meaning, it must reject Defendant's argument that the statute can only apply to third parties"); *Brown v. Defender Sec. Co.* (C.D. Cal. Oct. 22, 2012) No. CV 12-7319-CAS (PJWx), 2012 WL 5308964 at *5 ("§ 632.7 prevents a party to a cell phone conversation from recording it

without the consent of all parties"); *Kuschner v. Nationwide Credit, Inc.* (E.D. Cal. 2009) 256 F.R.D. 684, 688 (permitting § 632.7 claim that involved recording by a party to a call); *Ronquillo-Griffin v. TELUS Communications, Inc.* (S.D. Cal. June 27, 2017) No. 17cv129 JM (BLM), 2017 WL 2779329 (agreeing with "the bulk of authority holding that section 632.7 applies to parties to the call.").

Of the fourteen cases cited by the *Smith v. LoanMe, Inc*. decision, only *Young v. Hilton Worldwide, Inc.* (C.D. Cal. July 11, 2014) No. 12-cv-01788-R (PJWx), 2014 WL 3434117 at *1, reaches the same result as the Appellate Court. But, in turn, multiple courts have considered the *Young* decision and declined to follow it. *See, e.g., Gamez v. Hilton Grand Vacations, Inc.* (C.D. Cal. Oct. 22, 2018) No. 18-cv-04803 GW (JPRx), 2018 WL 8050479 at *3 (recognizing that *Young* is sole federal case to find § 632.7 does not apply to parties to a call); *Carrese v. Yes Online, Inc.* (C.D. Cal. Oct. 13, 2016) No. CV 16-05301 SJO (AFMx), 2016 WL 6069198 at *8 (same); *Horowitz*, 2016 WL 7188238 at *15 ("the Court is not persuaded" by *Young*); *Portillo v. ICON Health & Fitness, Inc.* (C.D. Cal. Dec. 16, 2019) 2019 WL 6840759 at *3 (rejecting *Young* in favor "the well-established precedent rejecting ICON's narrow interpretation of section 632.7."); *Lal*, 2017 WL 1345636 at *9 (declining to follow *Young*); *Ramos*, 2017 WL 3232488 at *9 (same); *Brinkley*, 340 F. Supp. 3d at 1043 (same); *and see NEI Contracting and Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc.* (Mar. 24, 2015) No. 12-cv-01685-BAS(JLB), 2015 WL 1346110 at*5-6 (rejecting *Young*'s holding that CIPA contains a customer service exception).

Making matters worse, there are at least 5 more cases that go uncited in *Smith v. LoanMe, Inc*. but that directly contradict the *Smith v. LoanMe, Inc*. court's holding. *See, e.g., Maghen v. Quicken Loans, Inc.* (C.D. Cal. 2015) 94 F. Supp. 3d 1141, 1146 ("A business satisfies Section 632.7,

however, by warning a party at the outset of a 'conversation.'"); *Lerman v. Swarovski North America Limited* (S.D. Cal. Sept. 10, 2019) No. 19cv638-LAB (BLM), 2019 WL 4277408 at *2 ("Crafty defendants have played up the ambiguity of section 632.7 for years" and finding that limiting statute to third parties would frustrate purpose of statute); *McEwan v. OSP Group, L.P.* (S.D. Cal. July 2, 2015) No. 14-cv-2823-BEN (WVG), 2015 WL 13374016 at *5 ("The language of section 632.7 is unambiguous and it prohibits a participant of a phone conversation from intentionally recording it."); *McCabe v. Intercontinental Hotels Group Resources, Inc.* (N.D. Cal. Dec. 18, 2012) No. 12-cv-04818 NC, 2012 WL 13060326 at *5 ("Interception by a non-participant, therefore is not required by the statute, and as such, the statute appears to also prohibit the receiving and intentional recording of a communication [by a party]."); *Sentz v. Euromarket Designs, Inc.* (C.D. Cal. May 16, 2013) No. EDCV 12-00487-VAP (SPx), 2013 WL 12139140 at *5 ("All that Plaintiff must allege to state a Section 632.7 claim is that 'Defendant received her communications via calls made on her [wireless] phone, that Defendant recorded the calls, and that Defendant did so without obtaining her consent.'" (citation omitted)).

Instead, it focused on a single opinion – *Brinkley v Monterey Financial Services, LLC* (S.D.Cal. 2018) 340 F.Supp.3d 1036. Slip Op. at pp. 15-17 [*Smith v. LoanMe, Inc*. (2019) 43 Cal.App.5th 844, 855-856]. The federal court in *Brinkley* held that "a party to a call who records part of the conversation without the other party's consent violates § 632.7 by 'receiv[ing] and intentionally record[ing]' a communication without the other party's consent." *Brinkley*, 340 F.Supp.3d at 1043. That decision recognized the reading of "consent" advanced in *Kearney* – that consent was conditional and required both consent to receive and consent to record, in order to amount to consent for the otherwise prohibited conduct. Despite

consent being an affirmative defense under Black's Law Dictionary's definition, (Black's Law Dictionary Eighth Edition at Pg. 827) and being written conjunctively in the statute, the Court summarily dismisses that interpretation by simply concluding that the introductory prepositional phrase "without the consent of all parties to a communication" modified both "intercepts or receives" and "intentionally records" as separate acts and thus required a *lack of consent* for both elements in order for a violation to occur. This Court's reading of the statute distorts what the term "consent" means in everyday use, in the legislative history, and according to legal dictionaries. While the Court went on to discuss the legislative history in its Order, it made clear that because it was ruling that the statute was unambiguous, it placed no weight on the Legislative History. Slip Op. at pp. 17-18.

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

V. The California Invasion Of Privacy Act

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

it without the consent of all parties involved," but "***§ 632.7 grants a wider range of protection to conversations where one participant uses a cellular phone or cordless phone***," without the need for a "confidential" communication) (emphasis added).

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

The California Supreme Court has held that an appropriate warning the call is being recorded, must be given "at the outset of the conversation" and that the CIPA prohibits the recording of any conversation "without first informing all parties to the conversation that the conversation is being recorded." *Kearney, supra,* 39 Cal.4th at 118.[9] As this Court observed:

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

Id. at fn. 10. "California must be viewed as having a strong and continuing interest in the full and vigorous application of [CIPA] prohibiting the recording of telephone conversations without the knowledge or consent of all

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

parties to the conversation." *Id*. at 125. Citing to *Kearney*, the Court of Appeal has observed:

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

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

ARGUMENT

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

California Penal Code § 632.7 was designed to prevent anyone, party or interloper, from recording a qualifying telephone conversation without the knowledge or consent of all parties. The plain language of the statute, the overwhelming body of case law, and even the Legislative History of CIPA all support this reading. The Court of Appeal's ruling effectively rewrites the language of the statute. The Invasion of Privacy Act codified under Cal. Penal Code §§630 *et seq*. was designed to broadly protect the privacy of California consumers, from having certain types of conversations recorded without their knowledge or consent. This Court, and every court thereafter, have held that California is a two-party consent state. As this Court has held, § 632.7 was enacted in response "to the problem of protecting the privacy of parties to calls involving cellular or cordless telephones" and made unlawful "the intentional interception **or recording** of a communication involving a cellular phone or a cordless

phone." *Flanagan, supra,* 27 Cal. 4th at 776 (emphasis added). The Court of Appeal disregarded this precedent by holding that § 632.7 only applies to eavesdroppers, not parties who secretly record a conversation without the consent of another party. The plain language of the statute makes it clear that the Court of Appeal' Order is flawed:

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

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

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

Second, the Order ignores the statute's clear statement that an entity must have "consent" to both a) intercept or receive, and b) record. Consent to receive alone is insufficient, as the statute clearly makes consent conditional upon informed knowledge whereby a party is advised if his or

her communication is *either* intercepted *or* received *and* recorded. What use is having a consumer's consent to what they already know - that they are voluntarily communicating to a party - if they have no idea that their conversation is being secretly recorded as well? Section 632.7 is a prohibition on recording. Thus, it follows that a consumer who is communicating with someone who is secretly recording the call does not have knowledge of the full risks of the communication, because he or she has not been given the dignity and protection of a recording advisory, and therefore has *not* in fact consented to that conversation taking place under the full scope of circumstances. Many consumers under these circumstances would no doubt say "yes I was speaking to you voluntarily, but I would not have done so if I knew you were secretly recording me!" That is the crux of the problem with the Court of Appeal's ruling – consent to receive is conditional, not unconditional, and the language of § 632.7 makes that clear. Anything less would amount to uninformed consent, a contradiction in terms.[10]

[10] In a third, more minor line of reasoning, the Appellate Court expresses concern that, if § 632.7 applies to parties to a call, there may be instances where the recording party is liable "because of the happenstance" that the recorded party answered on a wireless phone as opposed to a landline phone. Slip Op. at p. 11 [43 Cal.App.5th at 852]. According to the Court of Appeal, the type of phone used by the recorded party is "a fact that was absolutely beyond LoanMe's knowledge or control" and it would be "absurd" to expose the recording party to liability on that basis. *See id*. It is true that § 632.7 is not violated when a landline phone is involved, but it strains credulity to say that avoiding liability under § 632.7 is "absolutely beyond" the control of a party that is recording a phone call. Indeed, as pointed out in case law, avoiding liability under § 632.7 is extremely simple and, as understood by residents of this state, normal business practice if a party intends to record a call: "informing all parties to the conversation that the conversation is being recorded." *Kearney*, supra, 39 Cal.4th at 118. Moreover, technology that allows businesses to scrub their outbound dial lists for cellular phones are widely available and commonly used across

The legislative history and existence of other provisions in CIPA support Appellant's view. Indeed, the Legislature enacted § 632.7, shortly after enacting §§ 632.5 and 632.6, which unquestionably already protected communications on cellular phones from malicious eavesdropping. Why then would § 632.7 relate only to eavesdropping, and not to recording, when other sections of CIPA already made it illegal for eavesdropping to occur? Moreover, why ascribe to §§ 632.5 and 632.6 a requirement that a violation can be asserted only against a third party when the statute does not expressly say that? What's more, even if that were a correct reading, such a reading could be supported only by the inclusion of the term "maliciously" in the statutory text of §§ 632.5 and 632.6. But unlike §§ 632.5 and 632.6, § 632.7 contains no requirement of malice, suggesting the statute governs broader conduct, *i.e.* both recording by parties and eavesdroppers. Finally, there is § 633.5, which expressly by its plain language contemplates that § 632.7 applies to parties to the call. And yet, the Court of Appeal never discusses any of these inharmonious inconsistencies in its interpretation of CIPA's overall text.

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

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most law-abiding industries. This concern of the Appellate Court was not a convincing reason for it to depart from *Kearney* and *Flanagan*.

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

Penal Code § 632.7 is not limited to situations in which third parties eavesdrop on a telephone call and record the conversation without the knowledge or consent of the parties to the call. Such a misreading has the effect of gutting this important privacy statute with respect to calls placed to cellular phones, which is where most phone calls now are made. The Court of Appeal's Order turns California into a one-party consent state, which is contrary to what this Court has held in other CIPA decisions.

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

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

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

> "Every person who, [(1)] without the consent of all parties to a communication, [(2)] intercepts **or receives and**

> **intentionally records**, or assists in the interception or **reception and intentional recordation** of, [(3)] a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine ... or by imprisonment...."

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

The conduct that Smith alleged to be unlawful is that LoanMe "received" "communications" from Plaintiff, which it "recorded" "without the consent" of Plaintiff, when it recorded the conversation without advising that the call was being recorded. There is no need to consult with legislative history or case law when the statute is so clear on its face. Perhaps no case makes this more clear than *Ades v. Omni Hotels Management Corp*. (C.D. Cal. 2014) 46 F.Supp.3d 999. There, the defendant argued that § 632.7 applied only to recordings made by eavesdroppers. *Id*. at 1017-18. Defendant argued that differences between § 632 and § 632.7 demonstrated that § 632.7 does not apply to participants to a call, and instead applied only to third parties. Plaintiffs argued that § 632.7 uses the word "receive" and "intercept" separately, which implies that the words have two different meanings. The court agreed with plaintiff that "§ 632.7 prevents a party to a cellular telephone conversation from recording without the consent of all parties to the conversation." *Id*. This reading is supported by the definition of "intercept" in Black's Law Dictionary, which defines it as "to covertly receive or listen to (a communication). The term usually refers to covert reception by a law enforcement agency. See wiretapping." Black's Law Dictionary Eighth Edition at pg. 827.

The *Ades* court looked at the common usage of the term "receive" and observed that participants in a conversation normally "receive" communications from one another, making it clear that § 632.7 is not limited to situations involving eavesdroppers. The court found that the word "receives" does not implicitly appear to refer to an unknown interloper but rather to someone who was the target of a communication, *i.e.* its intended recipient. Because the terms "receives" and "intercepts" were used disjunctively, the terms are plainly meant to "apply to distinct kinds of conduct." *Id*. The Court also noted that other district courts

investigated the legislative history and found that "[i]nterpreting § 632.7 to only apply to third parties would defeat the Legislature's intent." *Simpson v. Best Western Int'l, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5499928, at *9. The *Ades* case presents a much more logical straightforward analysis of § 632.7's plain meaning than does the Court of Appeal's Order.

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

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

Other courts have held the same. *See Kuschner v. Nationwide Credit, Inc*. (E.D. Cal. 2009) 256 F.R.D. 684, 688 (permitting amendment by a debt collection company to add counterclaim under § 632.7, where consumer recorded debt collector without consent, holding that § 632.7 applies to a claim that one party to a telephone conversation had recorded it

without the other party's consent); *Brown v. Defender Sec. Co.* (C.D. Cal. Oct. 22, 2012) 2012 WL 5308964 (same); *Lal v. Capital One Financial* (N.D. Cal. April 12, 2017) 2017 WL 1345636 ("[a]fter examining the case law and the legislative history, the court concluded that the law prohibits any party, not just third parties, to a confidential communication from recording that communication without knowledge or consent of the other party."); *Ramos v. Capital One*, (N.D. Cal. July 27, 2017) 2017 WL 3232488 (same); *Foote v. Credit One Bank, N.A*. (C.D. Cal. Mar. 10, 2014) 2014 WL 12607687; *Rezvanpour v. SGS Auto. Servs.* (C.D. Cal. July 11, 2014) 2014 WL 3436811, at *3 ("The only burden on speech activity imposed by the statute is that parties to a phone call involving a cellphone must be informed that the call is being recorded, after which consent may be given or the phone call ended."); *Lewis v. Costco Wholesale Corporation, et al*. (C.D. Cal. 2012, No. 2:12-cv-04820-JAK-AJW) Dkt. #29 ("on its face, § 632.7 is unambiguous: it precludes the recording of all communications involving a cellular telephone"); and *Lerman v. Swarovski N. Am. Ltd.*, (S.D. Cal. Sept. 10, 2019) 2019 WL 4277408 *1 (convincingly rejecting identical reasoning as that adopted by the Court of Appeal).

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

> Here, the Court finds that there is no ambiguity in the language of Section 632.7 and that Defendant's proffered interpretation effectively eliminates the words "or" and "receives" in their entirety. While the common understanding of "intercept" (i.e., "to stop, seize, or interrupt in progress or course or before arrival") contemplates the existence of a third party (Webster's Ninth New Collegiate Dictionary

("Webster's") at 630 (1988)), the same is not true of "receives," which very broadly means "to come into possession of." (Webster's at 982.) Because the inclusion of "receives" is presumed to have been purposeful, the Court must apply the statute as written and using the term's plain (and broad) meaning. Further, the use of "or" also has plain meaning-it is disjunctive and expresses that either alternative of "intercepts" or "receives" will suffice. (See Webster's at 829.) Because the Court applies each part of "intercepts or receives" by its plain meaning, it must reject Defendant's argument that the statute can only apply to third parties. No persuasive reason has been presented why Defendant did not "receive" Plaintiff's communications in the ordinary sense.

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

> In 1992, the California Legislature passed § 632.7 without any opposition. Cal. Dept. of Consumer Affairs, Enrolled Bill Report on Assem. Bill No. 2465 (1992), at 4. The statute was intended to simply extend to persons who use cellular or cordless telephones the same protection from recordation that persons using 'landline' telephones presently enjoy.' Author Lloyd G. Connelly's Statement of Intent, Assem. Bill No. 2465 (1992), at 1. At the time, § 632 prohibited recording confidential communications, but the Legislature assumed that § 632 only applied to communications made on landlines and not to communications made on cellular or cordless phones. See Letter to Governor Pete Wilson from Assembly

> Member Lloyd G. Connelly (July 2, 1992) ('under existing law, it is not illegal to record the otherwise private conversations of persons using cellular or cordless telephones'). Moreover, at the time, §§ 632.5 and 632.6 protected communications made on cellular or cordless phones from malicious eavesdropping, but those statutes did not protect against recording. See §§ 632.5–632.6. The Legislature sought to fill in this gap by similarly prohibiting the recordation of communications made on cellular or cordless phones. Notably, then-existing law prohibiting the recording of landline communications extended to parties of the conversation. See *Warner v. Kahn*, 99 Cal. App. 3d 805 (1979) (stating the language in § 632 'has uniformly been construed to prohibit one party to a confidential communication from recording that communication without the knowledge or consent of the other party'); see also *Flanagan* [v. Flanagan], 27 Cal. 4th [766,] 777 [(2002)] (holding a party to the conversation liable).

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

The court in *Ronquillo-Griffin v. TELUS Communications, Inc.*, (S.D. Cal. June 27, 2017) 2017 WL 2779329 cited to this very language, as well as the *Raffin* decisions, and held that "[t]his court agrees with *Simpson's* thorough and well-reasoned conclusion, which is in line with the bulk of authority holding that section 632.7 applies to parties to the call." In certifying a class action, the former Chief Judge of the Central District of California relied on California law interpreting similar language in 632 in order to come to the conclusion that the California Supreme Court would interpret § 632.7 to require a party's consent to record a conversation at the very outset of the call. *Raffin v. Medicredit, Inc*. (C.D. Cal. Jan. 3, 2017) 2017 WL 131745, at *6-8; *see also Zaklit v. Nationstar Mortgage LLC*

(C.D. Cal. July 24, 2017, No. 5:15-cv-2190-CAS(KKx)) 2017 WL 3174901 *4-5 (holding the same). § 632.7 clearly applies to parties of the call, because they "receive" communications, and because consent to receive is conditioned upon also having consent to record, which can only be obtained through a conspicuous recording advisory made at the outset of a call.[11] Even the California Attorney General has enforced § 632.7 consistent with Appellant's position. *See* Press Release, *Attorney General Kamala Harris Announces Settlement with Houzz, Inc. Over Privacy Violations* (Oct. 2, 2015) *available at* https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-settlement-houzz-inc-over-privacy (CIPA enforcement action applied § 632.7 to parties to calls); Complaint against Houzz, Inc. (Oct. 2, 2015) *available at* https://oag.ca.gov/system/files/attachments/press_releases/2015%2010-02%20%20Complaint.pdf? (alleging § 632.7 violations for recording parties to calls). A mountain of persuasive authority exists for the Court to consider as to any number of reasons that the Court of Appeal's decision was in error.

3. The Broader CIPA Supports Plaintiff's View

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. As the Supreme Court held, an advisory that the call is being recorded, must be given "at the outset of the conversation" and the CIPA prohibits the recording of any conversation

[11] Even more courts have agreed. *Zephyr v. Saxon Mortg. Services, Inc*., (E.D. Cal. June 5, 2012) 873 F. Supp. 2d 1223, 1225; *Branca v. Ocwen Loan Servicing, LLC*, (C.D. Cal. Dec. 27, 2013) No. CV 13-7502 BRO (Ex), 2013 WL 12120261; *AJ Reyes v. Educational Credit Management Corp*., (S.D. Cal. May 19, 2016) No. 15-cv-00628-BAS-JMA, 2016 WL 2944294 at * 6.

"without first informing all parties to the conversation that the conversation is being recorded." *Kearney, supra,* 39 Cal.4th at 118. Section 632.7 merely took out the requirement that such communications be confidential, instead applying to all communications, and applied it to cell phones and cordless phones. This view is supported by the legislative history and by other provisions in CIPA.

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

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

Cal. Penal Code § 632.5 (emphasis added). A hypothetical interloper already would have intercepted a call and would be liable for doing so under § 632.5 and § 632.6. What purpose would be served by § 632.7's prohibition on recording if not for the fact that it applied to *anyone* recording such a call, whether it be a party or interloper? Such a reading, as was advanced by the Court of Appeal, would render § 632.7 superfluous because one cannot eavesdrop and record, without eavesdropping. Courts must interpret statutes as a symmetrical and coherent regulatory scheme,

and fit, if possible, all parts into a harmonious whole. *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089-90. Reading § 632.7 to govern only eavesdroppers would render it meaningless, thereby reducing the CIPA to a patchwork, rather than a harmonious whole.

In addition to these concerns, § 633.5 additionally calls into question the logic of the Court of Appeal's ruling. The Section 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 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 v. Hilton Grand Vacations, Inc*. (C.D. Cal. Oct. 22, 2018) No. 18-cv-04803 GW (JPRx), 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 overturn the lower court's Order. 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. Such a ruling undermines the privacy of every California citizen.

4. 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 dozens of decisions applying § 632.7 to parties to a call, 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. Such circumstances underscore the importance of why the Appellate Order should be reversed.

5. The Legislative History Supports Plaintiff's View

Finally, the legislative history of § 632.7 further support Appellant's interpretation. A letter from the bill's sponsor states that the § 632.7 bill was "relating to the recordation of cellular or cordless telephone conversations." Letter of Gene Erbin to Steve White re: AB 2465, February 6, 1992. The letter strongly suggests that § 632.7 was meant to be a counterpart to § 632 and ensure its privacy against recordation provided codified protection for cellular and cordless telephone users, as evolving technology and case law made the future of such protection uncertain under the existing § 632 framework.

The Author's Statements of Intent in the legislative history strongly indicates that § 632.7 was concerned with the recording of calls on cellular phones and was attempting to expand on existing statutory provisions of CIPA that governed recording of landline calls, or interception of calls, but not necessarily situations where a cell phone conversation was recorded. AB 2465: Author's Statement of Intent. As the Statement of Intent succinctly states: "AB 2465 prohibits persons from recording conversations transmitted between cellular or cordless telephones. In this matter, AB 2465 simply extends to persons who use cellular or cordless telephones the same protection <u>from recordation</u> that persons using "landline" telephones presently enjoy." *Id.*

"The primary intent of this measure is to provide a greater degree of privacy and security to persons who use cellular or cordless telephones. Specifically, AB 2465 prohibits persons from recording conversations transmitted between cellular or cordless telephones." (emphasis added). It further acknowledges that at the time § 632.7 was passed, "[t]here [was] no prohibition against recording a conversation transmitted between cellular or cordless telephones." (citing § 632 and 632.5). *Id*. It went on to acknowledge that it was illegal to "intercept or record a conversation transmitted between landline or traditional, telephones." *Id*. (citing § 632). From there, the letter suggests that cordless and cellular calls should be afforded the same level of protection. It is clear from this history that both interception and recordation of calls were separate and distinct concerns of the Legislature, which was trying to close a policy gap in the face of evolving technology.

The legislative history also contains Legislative Counsel's Analysis of § 632.5 and 632.6, which it acknowledges explicitly chose not to take the measures prescribed in § 632.7, *i.e.* by prohibiting recording. Notably, the analysis recognizes the failure of the Legislature to prohibit the recording of a communication between two telephones where one is a landline and one is a cellular or cordless phone. Legislative Counsel Letter at p. 4 (citing *Lambert v Conrad* (1960) 185 Cal. App. 2d 85, 95). The analysis goes on to state that a person who unlawfully or maliciously intercepts such a communication would already be violating these sections. Ergo, if § 632.7 required third party interception, and not merely recordation, it would be a useless provision, since interception was already unlawful under § 632.5 and 632.6, per the legislative history. *Id*. Section 632.7 was enacted to fill this gap and prohibit both, with the emphasis being on recordation of calls involving cordless or cellular phones, which the Legislature was concerned would lose privacy protection under § 632 due to a lessening expectation of

privacy that was developing with such forms of telephonic communication, as technology and jurisprudence continued to evolve. Accordingly, the Legislative History addresses the very arguments made in § V(A)(3) of this Brief and emphasizes that this is the correct interpretation of CIPA.

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

CONCLUSION

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

Dated: May 1, 2020

Respectfully submitted,

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I, Todd M. Friedman, hereby certify in accordance with California Rules of Court, rule 8.520(c)(1), that this brief contains 12,152 words as calculated by the Microsoft Word software in which it was written.

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Dated: May 1, 2020

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Fourth Appellate District, Second Division, County of Riverside

Jared Toffer & Matthew Lilly
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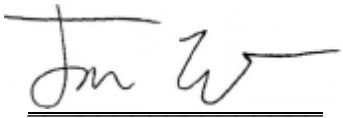
By: 
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Supreme Court of California

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