S260391

In the

Supreme Court

of the

State of California

JEREMIAH SMITH,
Plaintiff and Appellant,

v.

LOANME, INC.,
Defendant and Respondent.

AFTER A DECISION OF THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO (CASE NO. E069752)

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF *AMICI CURIAE* PROJECT VERITAS AND PROJECT VERITAS ACTION FUND IN SUPPORT OF RESPONDENT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned certifies that there are no interested entities or persons required to be listed under rule 8.208 of the California Rules of Court.

Dated: July 20, 2020

Respectfully submitted,

/s/ Benjamin Barr

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APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF LOANME, INC.

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA, and pursuant to Rule 8.520(f) of the California Rules of Court, Project Veritas and Project Veritas Action Fund respectfully request leave to file the accompanying *amici curiae* brief in support of Respondent LoanMe, Inc.

INTEREST OF *AMICI CURIAE*[1]

Project Veritas ("PV") and Project Veritas Action Fund ("PVA") exist to uncover fraud, waste, corruption, and abuse in public life. Project Veritas is registered as a 501(c)(3) organization under the Internal Revenue Code. Project Veritas Action Fund is registered as a 501(c)(4) organization under the Internal Revenue Code. Throughout their existence, both organizations have investigated and reported on items of public concern, almost exclusively through the use of surreptitious recording.

Amici regularly comply with different recording law standards across the United States and successfully challenged the secret recording ban under Massachusetts law as violative of

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[1] Pursuant to California Rule of Court 8.200(c)(3), PV and PVA certify that no party or any counsel for a party in the pending appeal authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution to either PV or PVA intended to fund the preparation or submission of the brief.

the First Amendment. *Martin v. Gross*, 380 F.Supp.3d 169 (D. Mass. 2019). Both PV and PVA are only able to comply with recording standards that are comprehensible and allow for the gathering of items of newsworthy concern. Where states maintain vague or unconstitutionally overbroad laws, PV and PVA challenge them proactively or seek to inform courts about constitutional issues unaddressed by the parties in a given case.

Amici have substantial experience with and knowledge of the consequences of secret recording laws. This Court's interpretation of California Penal Code Section 632.7 will have significant impact on investigative journalists who are not present in this matter. California recording law applicable to conversations occurring over cellular and cordless phones must grant sufficient breathing space for newsgathering operations, including the recording of one's own phone calls or communications—public gatherings—that occur over digital platforms like Zoom or Teams that are available on cellular phones, as permitted under many circumstances pursuant to California Penal Code Section 632. This brief will assist the Court by demonstrating why Section 632.7 should be construed to provide for one-party consent for the recording of communications over cellular and cordless phones given pragmatic and constitutional concerns.

CONCLUSION

For the foregoing reasons, Project Veritas and Project Veritas Action Fund respectfully ask that the Court grant their application for leave to appear as *amici curiae* and allow the attached brief to be filed.

Dated: July 20, 2020

Respectfully submitted,

/s/ Benjamin Barr

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INTRODUCTION

This Court should affirm that California Penal Code Section 632.7 allows for one-party consent and thereby offers breathing space for newsgathering across cellular and cordless telephones in California. "One-party consent" means that only a single participant in a conversation must give consent for the recording of any communications therein. In other words, someone may record his or her own cellular or cordless phone calls without the consent of others on those calls. Only this standard offers journalists the ability to safely record items of public interest, accurately preserving a digital record of the event, to share with the American public.

The Court should interpret California Penal Code Section 632.7[2] in favor one-party consent for three independent reasons that are all rooted in the First Amendment. *See* U.S. CONST. amend. I. First, if Section 632.7 requires all-party consent, it imposes a digital divide, negating a variety of secret recordings that are otherwise permissible under Section 632, including all cellular phone calls and other communications on digital platforms that are frequently accessed on cellular phones. *See* CAL. PENAL CODE § 632.7(c)(3) ("'communication' includes, but is not limited to, communications transmitted by voice, data, or image, including facsimile."). Important information is dispersed in public gatherings—some virtual, like Zoom, some not—and denying the ability to record and more accurately report upon

[2] Unless otherwise stated, all further statutory references refer to the California Penal Code.

them damages the First Amendment. Second, one-party consent is the only constitutional way to interpret Section 632.7. Finally, the lower court properly interpreted the statutory language in controversy, avoiding First Amendment vagueness concerns.

ARGUMENT

I. Affirming the One-Party Interpretation of Section 632.7 Would Equalize Recording Rights in Digital Spaces Under California Law

Recognizing a right to record non-confidential communications, California law permits reporters to capture audio where there is no reasonable expectation of privacy including, generally, over telephone calls. *See* CAL. PENAL CODE § 632. Pursuant to the ruling below, when it comes to communications that include a cellular telephone—including mobile applications like Zoom and other videoconferencing software—California law also respects important First Amendment rights to record in digital spaces. CAL. PENAL CODE § 632.7; *cf. Rezvanpour v. SGS Auto. Servs., Inc.*, No. 8:14-CV-00113-ODW, 2014 WL 3436811, at *3 (C.D. Cal. July 11, 2014) (unreported). A ruling to the contrary would create an impassable digital divide for reporters seeking to investigate and report upon matters of public interest. This Court should recognize that by its own terms Section 632.7 provides for one-party consent, or the recording of communications made over cellular and cordless phones by one who is a party to a call.

A. First Amendment Newsgathering Rights Favor the Right to Record in Digital Fora

The First Amendment protects the right to "film matters of public interest." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th

Cir. 1995). As the United States Supreme Court has recognized, there is an "undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)). California appellate courts have consistently held that reporting news is speech subject to the protection of the First Amendment. *See, e.g.*, *Braun v. Chronicle Publishing Co.*, 52 Cal.App.4th 1036, 1047 n.5 (1997); *M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623, 629 (2001); *Briscoe v. Reader's Digest Association, Inc.*, 4 Cal.3d 529, 536 (1971). At the same time, California courts have been careful to narrowly construe recording and privacy provisions to give space for newsgathering activities. *See, e.g.*, *Sanders v. American Broadcasting Companies, Inc.*, 978 P.2d 67 (Cal. 1999); *Lieberman v. KCOP Television, Inc.*, 110 Cal.App.4th 156 (2003). Similarly, for purposes of California's Anti-SLAPP law, recording and reporting the news, especially about "major societal ills," is protected under the First Amendment. *See Lieberman*, 110 Cal.App.4th at 164.

California's eavesdropping and recording statute generally applies to in-person recordings in California as well as telephone calls. CAL. PENAL CODE § 632. Importantly, the law operates to balance two competing interests, privacy and the First Amendment right to record non-confidential communications. *Id.* Indeed, Section 632 even includes a built-in harbor for free speech by exempting public gatherings from the reach of the law. *Id.* By contrast, the state's "intentional recordation of communications" statute for cordless or cellular telephones

includes no explicit safeguards to balance the important, conflicting interests of privacy and free speech. CAL. PENAL CODE § 632.7. Rather, this section has been errantly interpreted by some courts to operate in blanket fashion to prohibit the recording of communications over any cellular phone in California "without the consent of all parties." *Id.*; *see, e.g.*, *Brinkley v. Monterey Fin. Servs., LLC*, 340 F. Supp. 3d 1036, 1043 (S.D. Cal. 2018), *reconsideration denied,* No. 16-CV-1103-WQH-WVG, 2020 WL 1929023 (S.D. Cal. Apr. 21, 2020).

California's disparate treatment of participant recording through Section 632 and participant cellular recording through Section 632.7 raises substantial First Amendment concerns. For in-person situations and telephone calls generally, a journalist may record when there is no reasonable expectation of privacy under Section 632. But should a newsworthy event occur in digital space accessed over a cellular phone, Section 632.7 would prohibit recording without first notifying everyone involved under errant interpretations of the law. The Supreme Court has been clear that laws that foreclose First Amendment rights over an entire medium are unsustainable. *See, e.g.*, *City of Ladue v. Gileo*, 512 U.S. 43, 55 (1994); *Lovell v. City of Griffin*, 303 U.S. 444, 451–52 (1938); *Frisby v. Schulz*, 487 U.S. 474, 486 (1988). This is especially true when the underlying means of First Amendment conduct are especially cheap or convenient. *City of Ladue*, 512 U.S. at 56. In 2020, interaction over cellular phones is ubiquitous and a necessary medium for important public gatherings.

When examining Section 632.7, this Court should consider its disparity when compared to Section 632. In 2020, Donald Trump, Republican candidate for the presidency, is conducting townhall meetings virtually. *Donald Trump Virtual Town Hall Transcript May 3*, REV, May 3, 2020, https://www.rev.com/blog/transcripts/donald-trump-virtual-town-hall-transcript-may-3. Across the nation, candidates and political causes of every ideological variety are turning to Zoom and other virtual online platforms as readily as traditional public fora to be heard. Ashley Hiruko, *Campaigning during coronavirus: Candidates get creative*, KUOW NPR, June 2, 2020, https://www.kuow.org/stories/candidates-get-creative-during-covid-19-pandemic. Important social issues of the day are being heard not in the traditional townhall but over digital platforms, including how best to address race relations in America. Jeff Piorkowski, *Beachwood mayor plans Zoom town hall meetings on race relations*, June 3, 2020, CLEVELAND.COM, https://www.cleveland.com/community/2020/06/beachwood-mayor-horwitz-is-planning-zoom-town-hall-meeting-on-topic-of-race-relations.html. Instead of operating in traditional public fora, political campaigns and activist movements are adapting to the requirements of the outbreak of the COVID-19 virus and making their events happen digitally. This starkly reflects the dangers of a blanket interpretation of Section 632.7 since the law applies to communications transmitted by voice, data, or image. CAL. PENAL CODE § 632.7(c)(3).

In an ordinary year devoid of a pandemic, undercover reporters would be allowed to secretly record in-person conversations at "public gatherings" under Section 632. In 2020, as more gatherings have shifted online, Section 632.7 would deny reporters the same right to record if joined over a cellular phone through an incorrect all-party consent interpretation of the law. This would be an odd result under the statute, since everyone joining the call must necessarily consent to being "intercepted." And it is within these public gatherings that important, newsworthy information should be captured and delivered to the American public.[3] If Section 632.7 only allows recording when notice has been given this would, at best, make communications less candid, and, at worst, deprive reporters of the ability to capture corrupt or fraudulent details of political or public life over cellular devices.[4] These important First Amendment

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[3] Political fundraisers are a common space for undercover news journalists on either side of the ideological divide to capture newsworthy information. Consider the 2012 presidential election, where reporters secretly recorded Mitt Romney discussing his view about "47 percent" of Americans. David Corn, *SECRET VIDEO: Romney Tells Millionaire Donors What He REALLY Thinks of Obama Voters*, MOTHER JONES, Sept. 7, 2012, https://www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser/. Or consider President Obama's comments in 2008 at a fundraiser that rural Americans cling to "religion, guns, xenophobia." Ben Smith, *Obama on small-town Pa.: Clinging to religion, guns, xenophobia*," POLITICO, April 11, 2008, https://www.politico.com/blogs/ben-smith/2008/04/obama-on-small-town-pa-clinging-to-religion-guns-xenophobia-007737.

[4] That journalists may record the candid statements of political candidates secretly in person in public places, but not over cellular devices, shuts down an entire form of digital

considerations should weigh on how this Court interprets Section 632.7, that is, in favor of one-party consent.

B. Important News of Public Interest Should be Protected Under the Law

In 2016, Democratic candidate for President, Hillary Clinton, gave a speech about national defense in a most public of fora, Balboa Park in San Diego, California. Debbi Baker, *Supporters lined up for Hillary Clinton's speech at Balboa Park*, BALTIMORE SUN, June 2, 2016, *available at* https://www.baltimoresun.com/sdut-hillary-clinton-speech-balboa-park-2016jun02-story.html. Not to be outdone, Donald Trump rallied the conservative base in Sacramento that same summer. Ben Bradford, *Trump Draws Thousands At Sacramento Rally*, CAPITAL PUBLIC RADIO NETWORK, June 2, 2016, https://www.capradio.org/articles/2016/06/02/trump-tells-sacramento-crowd-he-wants-to-win-general-election-in-california/. On June 2, 2020, Democratic candidate for President, Joe Biden, held a Northern California organizing meeting by Zoom, to discuss how to win the 2020 election. *Northern California Virtual Organizing Meeting*, BIDEN FOR PRESIDENT, *available at* https://www.mobilize.us/joebiden/event/275935/. Similarly, President Trump has crisscrossed the state to gain electoral support. Sam Metz, *Trump's California visit:*

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newsgathering. California "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

President soaks up campaign cash, riles up Democratic leaders, THE DESERT SUN, Feb. 17, 2020, https://www.desertsun.com/story/news/politics/2020/02/18/trumps-california-visit-president-looks-support-blue-state/4787470002/. Under existing California law and First Amendment precedent, few would doubt the legality, and the public good, of being able to record any candidate for public office in a public space. But Californians who wish to attend a public gathering online from their home state via cellular phone, whether to stay safe from the dangers of COVID-19 or simply out of convenience, could not record virtual meetings without the consent of all parties under the incorrect interpretation of Section 632.7. *See, e.g.*, *Brinkley*, 340 F. Supp. 3d at 1043. This flies in the face of the First Amendment and common sense.

Case law and news stories nationwide reveal that journalists and concerned citizens frequently happen upon stories of public interest by means of telephone discussion—especially cellular phones, or "cellular radio telephone[s]" under Section 632.7. In 2012, two officers with the Nevada Taxicab Authority discussed how the Authority could be heavy-handed and another investigator recorded this through a phone call. Ben Botkin, *Taxicab authority can't be 'heavy-handed,' chief says in secret recording*, LAS VEGAS REV. J., Feb. 15, 2014, *available at* https://www.reviewjournal.com/news/taxicab-authority-cant-be-heavy-handed-chief-says-in-secret-recording/ (detailing wiretap charges brought against employee who recorded his supervisor engaging in allegedly corrupt practices). Other forms of telephone

recordings have sought to bring accountability to government officials. In *Ferrara v. Detroit Free Press*, the ex-husband of a Michigan judge sought to reveal taped telephone conversations demonstrating the judge was racist and anti-Semitic. 1998 WL 1788159 (E.D. Mich. May 6, 1998) (Unreported). When obtained from a third party, the U.S. Supreme Court allowed illegally recorded cell phone conversations between a union negotiator and union president to be published due to their First Amendment value. *Bartnicki v. Vopper*, 532 U.S. 514, 519 (2001). The Court found no violation of the law for a publisher to share newsworthy information—the recording of a cell phone call where a union president suggested going to school board members' homes to "blow off their front porches. . . ." *Id.* And in Texas, a concerned neighbor picked up communications over a cordless phone on a police scanner that implicated potentially corrupt acts within the Dallas Independent School District. *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000).

In the past, PV and PVA have captured items of public newsworthiness in jurisdictions that allow for the recording of communications over cellular devices. In 2019, PV released a story obtained by an insider at CNN. This included recordings of conference calls from CNN's president, Jeff Zucker, who instructed his network that "impeachment [of President Trump] is the story" in a context more suggestive of advocating for impeachment rather than reporting on its development. *Expose CNN, Part 1: CNN Insider Blows Whistle on Network President Jeff Zucker's Personal Vendetta Against POTUS*, PVA, Oct. 14,

2019, https://www.projectveritas.com/news/exposecnnpart1/. Only by its source being able to record teleconference meetings could PV deliver this story to the American public.

In an investigation during the 2016 election, a PVA journalist recorded the communications on his cellular call with a political consultant who had previously bragged about "starting anarchy" at rallies for then-candidate Trump and other Republicans. On the call, the consultant summarized himself and his compatriots as "all part of the old school method where it doesn't matter what the freakin' legal and ethics people say, we need to win this mother-[expletive]." *Rigging the Election – Video I: Clinton Campaign and DNC Incite Violence at Trump Rallies*, PVA, Oct. 17, 2016, https://www.projectveritasaction.com/video/rigging-the-election-video-i-clinton-campaign-and-dnc-incite-violence-at-trump-rallies/. Had this occurred in California, regardless of the importance of the information or any other circumstances of the call, the recording could have subjected PVA and its journalists to imprisonment and fines under the incorrect all-party interpretation of Section 632.7.

In 2019, PV uncovered evidence of Chase Bank removing the accounts of conservative political activists. *DEBANKING: Chase Bank Says 'moral character' a Reason Why They Don't Do Business with 'those types of people*, PV, Apr. 16, 2019, https://www.projectveritas.com/news/debanking-chase-bank-says-moral-character-a-reason-why-they-dont-do-business-with-those-types-of-people/. To produce its story and share this information

with the public, PV published communications that were recorded over telephone lines with Chase Bank representatives by PV sources. This led to an examination of "debanking", when political pressure is put on banks to remove political activists' accounts in order to stifle their free expression. This story was largely possible due to the ability to record telephone calls. Were these calls recorded in California over a cellular phone under the incorrect all-party interpretation, this would be illegal under Section 632.7.

The case before this Court implicates loan servicing calls in California, but much broader rights are implicated by how this Court interprets Section 632.7. Modern life increasingly happens not just in physical public fora, but on digital public fora that are attended via cellular phones. Important happenings occur there, from political dynamos discussing campaign strategies to crooks detailing their next corrupt act, to activists arranging for a peace vigil. Just as courts recognize the First Amendment importance for journalists to be able to record in public places, that right must be co-extensive in digital public fora. At the very least, Section 632.7 should not be interpreted to nullify the protection of Section 632, such as recording digital public gatherings.

But to interpret Section 632.7 as requiring all-party consent to record any communications over cellular phones no matter any other circumstances would also leave the law unconstitutional under either strict or intermediate scrutiny under the First Amendment. *See* CAL. PENAL CODE 632.7(c)(3). The Court should decline that interpretation.

II. A One-Party Consent Interpretation of Section 632.7 Comports With The First Amendment, But An All-Party Consent Interpretation Does Not

A. Blanket All-Party Consent Laws Are Unconstitutional

In the 1960s, concerns grew over the impact of technology on privacy. Alan Westin, a leading scholar on privacy, wrote two influential law review articles addressing privacy concerns for the future. *See* Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's, Part I—The Current Impact of Surveillance on Privacy*, 66 COLUMBIA L. REV. 1003 (1966); Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's, Part II—Balancing the Conflicting Demands of Privacy, Disclosure, and Surveillance*, 66 COLUMBIA L. REV. 1205 (1966). Like many at the time, Professor Westin was wary of new technologies and supported efforts to "restrain the abuses of such scientific techniques." *Id.* at 1205. Indeed, scenarios Professor Westin worried about in 1966 are now commonplace: "Increased miniaturization . . . will make possible smaller and smaller signal tags and room microphones. TV 'eyes' the size of buttons may be perfected, operating by microwave transmission rather than cables. Existing 'voiceprint' identification systems may be linked to computers . . . ." *Id.* at 1009. From nanny cams to Snapchat Spectacles, today's technology demonstrates a marked "evolution in social norms and [privacy] expectations." Rauvin Johl, *Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default*, 12 HARV. L & POL'Y REV. 177, 190 (2018).

As states weighed differing approaches to safeguarding privacy, a minority of states enacted laws requiring "all-party consent", which usually means, as in Section 632, that everyone in a conversation must consent to be recorded *if they have a reasonable expectation of privacy*. These minority of states decided, as a matter of policy, that protecting privacy was more important than the speech interests in recording. *See, e.g.*, *Commonwealth v. McCoy*, 275 A.2d 28, 30 (Pa. 1971) ("the Legislature has determined as a matter of state public policy that the right of any caller to the privacy of his conversation is of greater societal value than the interest served by permitting eavesdropping or wiretapping"); *Bid to Weaken Anti-Wiretap Bill Defeated: State Senate Refuses to Reconsider Vote*, CHI. TRIB., June 11, 1963, at 7 (Illinois State Senator Thomas McGloon: "'unless we prohibit electronic eavesdropping, it could and would be used in business in connection with civil cases, not just by police.'"). Today, some twelve states feature some form of all-party consent recording laws for recording in-person communications. The remaining 38 states largely allow recording to occur freely under one-party consent standards.

Illinois and Massachusetts were the two regimes that went furthest by unequivocally banning secret recording *under almost any circumstances*, but those laws were struck down on First Amendment grounds over the last decade. In Illinois, in *People v. Clark* the defendant was charged with eavesdropping after secretly recording some of his conversations with an attorney and a judge. 6 N.E.3d 154, 156 (Ill. 2014). Recognizing a

governmental interest in conversational privacy, the Illinois Supreme Court ruled the law's restrictions nevertheless went too far:

> It criminalizes a whole range of conduct involving the audio recording of conversations that cannot be deemed in any way private. For example, the statute prohibits recording (1) a loud argument on the street; (2) a political debate in a park; (3) the public interactions of police officers with citizens (if done by a member of the general public); and (4) any other conversation loud enough to be overheard by others whether in a private or public setting. None of these examples implicate privacy interests, yet the statute makes it a felony to audio record each one.

Id. at 161. The court ruled the statute as violative of the First Amendment under the overbreadth doctrine. *Id.* at 162. At the time of this writing, the Massachusetts secret recording statute is pending appeal before the federal First Circuit on a similar facial challenge, based on the same reasons raised in *Clark*. However, the federal district court in that case has already ruled that, as applied, prohibiting the secret recording of government officials performing their duties in public violates the First Amendment. *Martin v. Gross*, 340 F.Supp.3d 87 (D. Mass. 2018).

In the context of Section 632.7, California may follow the single-party consent interpretation without issue, but it may not issue an unequivocal ban that goes so far beyond phone calls. *See supra* part I. As recognized in *Clark* and *Martin*, an unequivocal all-party consent standard is problematic. It runs roughshod over the First Amendment, valuing unenumerated rights to privacy

over enumerated free speech rights. This damages newsgathering and public debate of controversial issues—rights protected at the very core of the First Amendment. *Roth v. U.S.*, 354 U.S. 476, 484 (1957) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution"). To secretly record a loud argument on the street, a political debate in a park, or civil servants engaged in their duties in public places would not violate Section 632, but secretly recording via the myriad uses of modern cell phones and applications on cell phones in those exact same circumstances will be illegal under Section 632.7 if this Court reverses the Court below.

The Court should not give heed to unworkable, unconstitutional interpretations. It is bound to do just the opposite. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). For purposes of practicality and preserving important First Amendment freedoms, one-party consent should be the governing standard when interpreting Section 632.7.

B. The Court Should Move Towards the Recognition of a First Amendment Right to Single-Party Consent

In examining whether one-party or all-party consent should be applied to Section 632.7, this Court should examine which

standard protects First Amendment rights and presents a workable rule. Importantly, affirming the interpretation of Section 632.7 by the court below would *not* undermine all-party consent required in Section 632, which includes an important expectation of privacy standard and a public gatherings exception. But two-party consent standards are disfavored nationally, constitutionally suspect, and difficult to apply. The persuasive precedent of *Clark* confirms that Section 632.7 may not introduce an unequivocal ban to recording all communications transmitted over a cellular phone. But the Court should go farther still, and consider that Section 632.7 and *its related statutes* should provide for one-party consent because that is the only standard that comports with the First Amendment and is readily understood.

Determinations about expectations of privacy make all-party consent laws difficult and complex for average citizens and journalists to understand. May one record her own conversation with a person sitting four feet away at the same table at a sidewalk café when others are five feet away? What about when others are ten feet away? Twelve feet away? May one record as a participant in a Zoom meeting from New York when there are attendees from thirteen different states, one of them California? May that same person continue to record the Zoom meeting if participation dwindles to three people, including the California attendee? If that same person, by happenstance, accidentally records a side-conversation by one of the Zoom participants, is that legal? The elastic, floating standards for determining

expectations of privacy leave their interpretation to "policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

Constitutional interests aside, all-party consent laws do not work for pragmatic reasons. No law can prohibit parties to a conversation from sharing that content with others.[5] But all-party consent laws prevent the preservation of accurate conversations. In contrast, one-party consent laws protect parties to a conversation from real eavesdropping—third parties recording the conversation with no knowledge or consent from a single communicant—while allowing for proper digital preservation of conversations to occur among participants. Consequently, all-party consent standards simply mean that less accurate remembrances of discussions will be shared with the public. *See Martin*, 340 F.Supp. at 108 ("the 'self-authenticating character' of audio recording 'makes it highly unlikely that other methods could be considered reasonably adequate substitutes'").

All-party consent standards harm the effectiveness of journalism. It is quite limiting to report, for example, that "Mayor Doe told our undercover journalist that contributions to his political committee would give our company preferential municipal bidding treatment." But it is much more effective when an undercover reporter can go into the field and act, as Judge

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[5] Notable exceptions to this are rare and include attorney-client privilege or doctor-patient confidentiality.

Posner once observed, like a "tester" who is freely able to record a much more impactful piece of journalism. *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1352–53 (7th Cir. 1995). The first instance reflects but state-hobbled, government-curated reporting in the form of "trust us, we heard this." The second instance is self-authenticating: the previous example becomes a recording of Mayor Doe actually soliciting an illegal payment on the phone. All-party consent for phone calls, even under the expectation of privacy standard, makes self-authenticating publications largely impossible. To state the obvious: Mayor Doe would be unlikely to suggest an illegal act if recording beeps occur on the phone line or if an undercover journalist asks for his permission to record.

All-party consent standards do further harm to democratic self-governance by removing important information from the stock of public knowledge. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). So far, 2020 has borne witness to mass protests and riots in American cities related to police abuse. The most accurate and safe way of being able to record government actors' misdeeds is secretly and without announcing the recording beforehand. This occurs over a variety of situations and circumstances, from recording on-the-street protests, to phone calls with officials trying to elicit bribes, to Zoom meetings held by government officials in which candid remarks are made.[6] Each

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[6] Or consider a hybrid situation, giving rise to application of both Section 632.7 and Section 632. Suppose a concerned citizen desires to protest police brutality and racial injustice in Sacramento. Suppose further that her friends cannot attend the protest, but wish to partake digitally. To do so, she sets up a

situation presents worthwhile information the public should learn about, but only one-party consent fully protects the ability of newsgatherers to gather that information and report on it.

2020 is the year that made Zoom the digital public forum. The American public only learned about former CrossFit CEO Greg Glassman's insensitive George Floyd comments because of a recorded Zoom call. Ryan Brooks & David Mack, *The Head of CrossFit Has Stepped Down After Telling Staff On A Zoom Call, "We're Not Mourning For George Floyd*," BUZZFEED NEWS, June 9, 2020, https://www.buzzfeednews.com/article/ryancbrooks/crossfit-ceo-founder-zoom-greg-glassman-george-floyd. Or consider the City of Philadelphia attempting to use Zoom to bring its residents together, but which caused division and acrimony over Black Lives Matter. Anna Orso, *Fishtown Zoom call devolves after police brass apologize but captain says, 'Black lives matter, white lives matter*," THE PHILADELPHIA INQUIRER, June 30, 2020, https://www.inquirer.com/news/fishtown-philadelphia-community-meeting-zoom-protesters-vigilantes-police-20200630.html. Where one-party consent standards govern, Americans receive more useful and candid news items.

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popular Zoom meeting via her phone and 30 friends join to observe her march in Sacramento and to shout out their own slogans. While this citizen would be protected to record a public gathering under Section 632, if two-party/advance notice consent governs Section 632.7, her friends would be denied a similar First Amendment right to record those happenstances.

It should be noted that not all solutions to concerns over privacy emanate from government. That is, individuals in a free society are tasked in managing their own privacy to differing degrees.[7] One can elect to go out to a popular bar on a Saturday night and speak loudly about embarrassing details of his life. Alternatively, he can choose to stay home or not talk about embarrassing life facts in public places. Every day, people take actions to guard their own privacy. A political operative can decide whether to trust a stranger he just met at an online networking event and to offer details about corrupt politicians he has worked with in the past, or he can employ a "healthy skepticism" about what his newfound friend might reveal to the public. *Desnick*, 44 F.3d at 1354. Policing trust and social bonds is best left to individuals exercising moral agency in a free society. *See* Rauvin, *supra*, at 177, 184–85.

Moreover, privacy is not an unmitigated force for good in civil society. As Judge Richard Posner has recognized, privacy inflicts costs on individuals and institutions and protects the withholding of true information. *See* Richard A. Posner, *The Right of Privacy,* 12 GA. L. REV. 393, 399 (1978). Privacy allows for concealment, which allows for some to mislead others. This inflicts costs on transactions and interferes with other constitutional values, such as free expression. Cate, *supra*, at

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[7] Information privacy scholars refer to this as the need for "open information flows." That is, the free flow of information is essential "in any form of democratic or market economy." Fred H. Cate, *Principles of Internet Privacy*, 32 CONN. L. REV. 877, 881 (2000).

887. Thus, while it may be laudable for a state to protect against intrusions of the most sensitive areas of privacy, this Court should balance privacy interests against other competing concerns.[8]

This Court is tasked with deciding whether Section 632.7 should be interpreted as requiring one-party or all-party consent to record conversations occurring across cellular devices. This brief presents sound constitutional and pragmatic considerations as to why one-party consent should govern. It also so happens that today, much of public life occurs on digital spaces on cellular phones. And newsgathering must go where stories of public import can be found—Zoom, Teams, and elsewhere. Rather than require a hobbling two-party consent standard or advance notice to record, this Court should rule in favor of the First Amendment friendly one-party consent rule, because when the "First Amendment is implicated, the tie goes to the speaker, not the censor." *Fed. Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

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[8] As Professor Edelman has observed, where privacy and speech interests collide, the Supreme Court almost always sides in favor of speech. Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1198 (1990). Over time and precedent, "phantom torts" protecting privacy have given way to the First Amendment right to publish truthful information. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362 (1983).

III. The Lower Court's Construction Correctly Interpreted the Law in Favor of One-Party Consent, Avoiding First Amendment Vagueness

The court below thoroughly and correctly analyzed the text of Section 632.7 in tandem with similar language in Sections 632.5 and 632.6. *LoanMe, Inc.*, 43 Cal. App. 5th at 851–53. The opinion alludes to, but does not discuss, that the alternative interpretation of Section 632.7 would practically nullify Section 632, outlawing a broad range of recording that is otherwise permitted under the law. *See id.* at 849–50, 852 n.5; *see supra* part I. Moreover, the blanket all-party interpretation would make the law unconstitutional. *See supra* part II. Finally, the dueling interpretations of Section 632.7 should fall in favor of single-party consent to avoid vagueness under both due process and First Amendment analyses.

The law states, in pertinent part:

> Every person who, *without the consent of all parties to a communication, intercepts or receives and intentionally records*, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

CAL. PENAL CODE § 632.7 (emphasis added). Vagueness is foremost a due process concern. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property,

without due process of law[.]"). That is, a law that "'either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Connor v. First Student, Inc.*, 5 Cal.5th 1026, 1034 (2018) (quoting *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926)). "The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." *Connally*, 269 U.S. at 393.

Although this case was brought by Smith under the law's civil provision, Section 632.7 is a criminal law, and so it implicates police along with judges and juries. *See* CAL. PENAL CODE § 632.7 (recording without consent following interception or receipt is a misdemeanor).[9] Understanding is thus paramount:

> To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." . . . . The void-for-vagueness doctrine embraces these requirements.

Skilling v. United States, 561 U.S. 358, 402–03 (2010) (quoting *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). Section 632.7 does

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[9] "The Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982) (citation omitted). Here, the consequences are qualitatively severe.

not definitely prohibit secretly recording one's own conversations, but intentionally recording, or assisting in intentional recording, communications *via interception or receipt that is accomplished* "without the consent of all parties to a communication[.]" A broader prohibition, contrary interpretations notwithstanding, is not sufficiently definite for due process purposes.

"Intercept" is not defined in the statute, but it "is naturally understood as referring to eavesdropping[.]" *LoanMe, Inc.*, 43 Cal. App. 5th at 854. This is bolstered by its common legal usage as well. *See, e.g.*, *Intercept*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Something that is at least temporarily cut off from its manifest destination; *that which is seized or stopped from reaching its intended recipient*." (emphasis added)). A known participant to a conversation cannot intercept the communications therein. "Receipt" is a broader term, and part of the cause of the confusion in interpreting Section 632.7. Nevertheless, as the court below concluded, "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)." *LoanMe, Inc.*, 43 Cal. App. 5th at 844 (emphasis added). And, by the statute's terms, recording is only prohibited when it *accompanies* unauthorized interception or receipt of the communication. This interpretation provides for one-party consent, while the other provides a blanket prohibition that is confusing on the face of the statute and, as discussed previously, makes no sense in light of its related sections. *Id.* at 853; *see supra* part I. The blanket prohibition would leave the statute

(and its accompanying statutes in the privacy act) unconstitutionally vague, and should be avoided. *See Skilling*, 561 U.S. at 404.

Due process concerns aside, the strictest vagueness doctrine is implicated under the First Amendment by laws that regulate speech activity, and applies to Section 632.7 because audio recording is the creation of speech. *See, e.g.*, *Martin*, 380 F.Supp.3d 169; *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595–604 (7th Cir. 2012) ("The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected[.]"). This requires the most stringent vagueness analysis:

> [P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. *If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply*.

Hoffman Estates, Inc., 455 U.S. at 499 (emphasis added). If the law were meant to restrict interception or receipt *or* recording without consent, that must be spelled out within the statute. But with a reasonable—the most reasonable—reading holding that recording is only prohibited when it accompanies non-consensual interception or receipt, other interpretations must be rejected. Section 632.7 will be left unconstitutionally vague under both due process and First Amendment vagueness standards if it is interpreted beyond one-party consent.

The court below did not undertake a vagueness analysis. Indeed, that would be a bit strange for a court to do after finding a statute clear and unambiguous. *See LoanMe, Inc.*, 43 Cal. App. 5th at 851. But should this Court disagree with its interpretation, it must consider whether it is appropriate for a law to penalize—as a misdemeanor—recordings of communications to which one is a party under a statute in which the operative language relates only recordings of communications *received or intercepted* without consent. CAL PENAL CODE § 632.7. To draw a contrary conclusion requires broadening the meanings of "intercept" or "receipt" and ends with arbitrary and discriminatory enforcement of the statute. *See, e.g.*, *Brinkley*, 340 F. Supp. 3d at 1043

Persons of common intelligence have guessed at the meaning of Section 632.7 and come to different conclusions. Moreover, judges from state and federal courts have interpreted the meaning of its provisions and have differed. This is the pinnacle of vagueness. Section 632.7, as interpreted by the court below, complies with the first essential of due process of law. Even if the blanket all-party consent interpretation could pass muster under due process, as a restriction on a speech activity it does not meet the strict standards of the First Amendment. For these reasons, if necessary, on vagueness grounds this Court should affirm the one-party interpretation of the court below.

CONCLUSION

To interpret Section 632.7 as all-party consent would contradict the free speech protections of Section 632 and leave the law unconstitutional under the First Amendment and vagueness doctrines. *Amici* Project Veritas and Project Veritas Action Fund respectfully urge the Court to affirm the court below and rule that Section 632.7 allows the recording of one's own conversations on cellular and cordless phones.

Dated: July 20, 2020

Respectfully submitted,

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Dated: July 20, 2020

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