No. S260391

IN THE SUPREME COURT OF CALIFORNIA

JEREMIAH SMITH, Plaintiff and Appellant,

v.

LOANME, INC., Defendant and Respondent.

After a Decision by the Court of Appeal

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

On Appeal from the Riverside County Superior Court

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

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

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INTRODUCTION

This case is about the proper interpretation of a criminal statute: California Penal Code section 632.7. Section 632.7 prohibits a person, without the consent of all parties to a communication, from intercepting or receiving and intentionally recording a telephone communication involving at least one cordless or cellular telephone. A person who violates section 632.7 is subject to criminal and civil liability.

The Court of Appeal held that Penal Code section 632.7 prohibits only third-party eavesdroppers from intentionally recording telephonic communications involving at least one cellular or cordless phone and, thus, does not prohibit the parties to the phone call from intentionally recording it (the "Opinion"). Based on its holding, the Court of Appeal found that Respondent LoanMe, Inc. is not liable under section 632.7 for recording a single, 18-second phone call with Appellant Jeremiah Smith in October 2015 (during which beep tones sounded). Smith asks this Court to reverse the Court of Appeal's decision.

Prior to the issuance of the Opinion, there were no appellate-level California cases interpreting section 632.7. Importantly, the Court of Appeal's decision does not impact causes of action under Penal Code section 632—part of California's Invasion of Privacy Act (Cal. Penal Code §§ 630 et seq. ("CIPA"))—which prohibits the intentional recording of "confidential" communications without the consent of all parties to the communication, whether by the parties to the communication or others. Thus, Smith's claim that the Court of Appeal's decision "effectively turns California into a one-party consent state" is false. In this case, Smith did not allege a cause of action under section 632 against LoanMe.

The Court of Appeal followed this Court's precedents regarding statutory interpretation in reaching its conclusion about section 632.7. First, the Court of Appeal examined the statutory language of section 632.7, giving it a plain and commonsense meaning and examining the language in the context of the statutory framework of CIPA as a whole, and concluded that section 632.7 clearly and unambiguously

applies only to third-party eavesdroppers. Second, in an abundance of caution, the Court of Appeal considered the legislative history of section 632.7 and concluded that it supports the interpretation of section 632.7 as limited to third-party eavesdroppers. The conclusion the Court of Appeal reached is sound considering its thoughtful approach to statutory interpretation—consistent with this Court's precedent—and it is correct in all respects.

As explained below, the word "receives" as used in section 632.7 (and also in section 632.5 and 632.6) does not apply to the parties to a phone communication. Instead, it applies only to those persons who listen in on a telephone communication that was not intended for them from the airwaves. But even if the word "receives" so applies, the parties to a telephone communication cannot violate section 632.7 because they must both (a) receive a communication without consent (which parties cannot do), **and** (b) intentionally record the communication without consent.

Because the language of section 632.7 does not permit more than one reasonable interpretation, the Court need not consult section 632.7's legislative history to determine the statute's meaning. If, however, the Court disagrees, the legislative history of section 632.7 shows that the statute does not apply to the parties to a telephone communication. Finally, if the Court finds that two reasonable interpretations of section 632.7 stand in relative equipoise, i.e., that resolution of section 632.7's ambiguities in a convincing manner is impracticable, the Court should apply the rule of lenity and construe section 632.7 in favor of LoanMe.

Smith's Opening Brief on the Merits fails to provide any legitimate reason for the Court to reverse the Court of Appeal's decision. Smith's arguments are based on his erroneous claim that this Court has previously ruled on the issue of whether section 632.7 applies to parties, a flawed interpretation of section 632.7, and a collection of federal district court cases that, unlike the Court of Appeal and LoanMe, did not engage in a thorough statutory interpretation analysis of section 632.7. Smith also is incorrect that the Legislature tacitly accepted those federal district court decisions which found that section 632.7 applies to the parties to a telephone communication because his argument is based on nothing more than legislative silence.

For these reasons, LoanMe requests that the Court affirm the Court of Appeal's decision and hold that Penal Code section 632.7 does not apply to the parties to a telephone communication.

STATEMENT OF THE CASE

A. Statement of Facts.

The parties stipulated to the following facts for purposes of the bench trial conducted in this case. (Clerk's Transcript on Appeal ("CT") pp. 72-74.)

LoanMe is a lender that offers personal and small business loans to qualified customers. (CT p. 73 (¶ 1).) Smith's wife obtained a loan from LoanMe. (CT p. 73 (¶ 2).)

In October 2015, LoanMe called Smith's wife to discuss her loan payment default. (CT p. 73 (¶ 3).) Smith answered his wife's phone and informed LoanMe that his wife was not home, after which

the call ended. (*Id.*) The call lasted approximately 18 seconds. (*Id.*) LoanMe conditionally accepts as true that its call to Smith's wife was placed to a cordless phone. (CT p. 73 (¶ 5).)

LoanMe recorded its 18-second call with Smith. (CT p. 73 (¶ 4).) 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. (CT p. 73 (¶ 9).) However, approximately 3 seconds into the call, LoanMe caused a "beep tone" to sound. (CT p. 73 (¶ 6).) A "beep tone" is played on outbound calls by LoanMe at regular intervals every 15 seconds. (CT p. 73 (¶ 8).)

B. Procedural History in the Trial Court.

On September 26, 2016, Smith filed a class action complaint against LoanMe, alleging violations of Penal Code section 632.7 on behalf of himself and a putative class. (CT pp. 1-14.) On December 9, 2016, LoanMe filed its First Amended Answer. (CT pp. 15-25.)

On July 13, 2017, the trial court entered an order on the parties' stipulation, agreeing to conduct a bifurcated bench trial on the issue of whether the use of beep tones by LoanMe disposed of the case. (CT pp. 26-29.) The parties filed pretrial briefs and a joint statement of stipulated facts. (CT pp. 30-90; Supplemental Clerk's Transcript on Appeal pp. 1-11.)

For purposes of the bifurcated trial, LoanMe contended 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 people who continue the conversation after a beep tone (or series of beep tones) has played have consented to the call being recorded as a matter of law. (CT p. 73 (¶ 10).) Accordingly, LoanMe contended

that Smith consented to his 18-second call with LoanMe being recorded because he continued the conversation after the beep tone played at the beginning of the call. (*Id.*)

Smith alleged that LoanMe's recording of the phone call violated Penal Code section 632.7 because the use of beep tones, without more, is insufficient notice that the call is being recorded. (CT pp. 73-74 (¶ 11).)

On October 13, 2017, the trial court conducted the bifurcated trial. (Reporter's Transcript on Appeal ("RT") pp. 1-19.) During the trial, the trial court listened to a recording of the 18-second call between Smith and LoanMe. (CT p. 91; RT p. 3.)

At the end of the bifurcated trial, the trial court concluded that the beep tones provided Smith sufficient notice under Penal Code section 632.7 that the call was being recorded, and Smith implicitly consented to being recorded by remaining on the call. (RT p. 17.) The trial court concluded therefore that Smith had not established a violation of Penal Code section 632.7 and ordered that judgment be entered in favor of LoanMe. (RT pp. 17-18.) On November 21, 2017, the trial court entered judgment. (CT pp. 92-104.)

C. The Appeal.

Smith appealed. After the parties briefed the issues on appeal, the Court of Appeal requested supplemental briefing on the issue of whether Penal Code section 632.7 applies to the recording of a phone call by a participant in the phone call or instead applies only to recording by third-party eavesdroppers. The Court of Appeal asked that the parties' briefs address the question asked in light of the language of Penal Code section 632.7, its legislative history, and its

relationship to other provisions of CIPA.

D. The Court of Appeal's Opinion.

On December 4, 2019, the Court of Appeal held oral argument, and the case was submitted. On December 20, 2019, the Court of Appeal issued its unanimous Opinion. The Opinion is reported at *Smith v. LoanMe, Inc.*, 43 Cal. App. 5th 844 (2019).

In its Opinion, the Court of Appeal explained that there were no California appellate decisions interpreting Penal Code section 632.7. *Id.* at 847. The Court of Appeal followed this Court's statutory interpretation framework in interpreting Penal Code section 632.7. *Id.* at 849. First, the Court of Appeal examined the statutory language of Penal Code section 632.7, giving it a plain and commonsense meaning and examining the language in the context of the statutory framework of CIPA as a whole, and concluded that section 632.7 clearly and unambiguously applies only to third-party eavesdroppers, not to the parties to a phone call. *Id.* at 849-55. Second, although not required based on the clear language of the statute, the Court of Appeal considered the legislative history of Penal Code section 632.7 and concluded that it supports the interpretation of section 632.7 as limited to third-party eavesdroppers. *Id.* at 857-59.

After having followed this Court's statutory interpretation framework, the Court of Appeal concluded unanimously that "[t]he plain language of section 632.7 clearly and unambiguously applies to third party eavesdroppers alone, not to the parties to cellular and cordless phone calls. The legislative history of section 632.7 confirms that interpretation. We must therefore affirm the judgment in favor of LoanMe, because Smith alleges only that LoanMe recorded calls to

which LoanMe was a party." *Id.* at 859. On January 19, 2020, the Court of Appeal's decision became final.

E. This Court Grants Review.

On January 28, 2020, Smith filed his Petition for Review with this Court. On April 1, 2020, this Court granted Smith's Petition. On May 1, 2020, Smith filed his Opening Brief on the Merits.

ARGUMENT

A. Analytical Framework for Statutory Interpretation.

This case involves a question of statutory interpretation, which this Court reviews independently. *See Cal. Bldg. Indus. Ass'n v. State Water Res. Control Bd.*, 4 Cal. 5th 1032, 1041 (2018). The analytical framework for statutory interpretation is well-established. In interpreting a statute, this Court's "fundamental task ... is to determine the Legislature's intent so as to effectuate the law's purpose." *Meza v. Portfolio Recovery Assocs., LLC*, 6 Cal. 5th 844, 856 (2019) (quotations omitted). This Court "first examine[s] the statutory language, giving it a plain and commonsense meaning." *Id.* (quotations omitted). This Court "do[es] not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." *Id.* (quotations omitted).

"If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." *Id.* (quotations omitted). "If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's

purpose, legislative history, and public policy." *Id.* (quotations omitted). "Furthermore, [this Court] consider[s] portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." *Id.* at 856-57 (quotations omitted). "Statutory interpretations that lead to absurd results or render words surplusage are to be avoided." *Tuolumne Jobs & Small Bus. Alliance v. Superior Ct.*, 59 Cal. 4th 1029, 1037 (2014) (quotations omitted).

B. CIPA and the Cordless and Cellular Radio Telephone Privacy Act of 1985.

In 1967, the Legislature enacted CIPA. One of the provisions of the original 1967 legislation was Penal Code section 632, which provides, in relevant part: "A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by" a fine, imprisonment, or both. Cal. Penal Code § 632(a). For purposes of the statute, "person" includes businesses. *Id.* § 632(b).

In addition to section 632's creation of criminal liability, Penal Code section 637.2, which also was part of the original CIPA legislation, subjects persons who violate CIPA to civil liability. For example, section 637.2 provides, in relevant part: "Any person who has been injured by a violation of this chapter may bring an action

against the person who committed the violation for the greater of the following amounts: (1) Five thousand dollars ($5,000) per violation. (2) Three times the amount of actual damages, if any, sustained by the plaintiff." Cal. Penal Code § 637.2(a).

Nearly 20 years later, in 1985, the Legislature enacted section 632.5 as part of the Cellular Radio Telephone Privacy Act of 1985 (a subpart of CIPA). *Smith*, 43 Cal. App. 5th at 850. Section 632.5 provides, in relevant part: "Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone shall be punished by" a fine, imprisonment, or both. Cal. Penal Code § 632.5(a).[1]

In 1990, the Legislature amended the 1985 legislation, renaming it the Cordless and Cellular Radio Telephone Privacy Act of 1985. *Smith*, 43 Cal. App. 5th at 850. The amendment added section 632.6, which provides, in relevant part: "Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cordless telephones ..., between any cordless telephone and a landline telephone, or between a cordless telephone and a cellular telephone shall be

[1] A "cellular radio telephone" is defined as a wireless telephone authorized "to operate in the frequency bandwidth reserved for cellular radio telephones." Cal. Penal Code § 632.5(c).

punished by" a fine, imprisonment, or both. Cal. Penal Code § 632.6(a).[2]

In 1992, the Legislature amended the Cordless and Cellular Radio Telephone Privacy Act of 1985 to add section 632.7. *Smith,* 43 Cal. App. 5th at 850. Section 632.7 provides, in relevant part: "Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by" a fine, imprisonment, or both. Cal. Penal Code § 632.7(a).

To summarize, Penal Code sections 632.5, 632.6, and 632.7 are all part of the Cordless and Cellular Radio Telephone Privacy Act of 1985. *Smith*, 43 Cal. App. 5th at 851. Section 632.5 prohibits the malicious and nonconsensual interception or receipt of cellular phone calls. Section 632.6 prohibits the malicious and nonconsensual interception or receipt of cordless phone calls. Section 632.7 prohibits the non-malicious, nonconsensual interception or receipt and intentional recording of cordless and cellular phone calls. Unlike

[2] A "cordless telephone" is defined as a "communication system consisting of two parts-a 'base' unit which connects to the public switched telephone network and a handset or 'remote' unit-which are connected by a radio link and authorized … to operate in the frequency bandwidths reserved for cordless telephones." Cal. Penal Code § 632.6(c).

section 632, sections 632.5, 632.6, and 632.7 do not require that the communication be "confidential."

C. The Proper Interpretation of Section 632.7.

Other than the Opinion, there are no California appellate-level cases that interpret Penal Code section 632.7 (or sections 632.5 or 632.6). *Smith*, 43 Cal. App. 5th at 851.

"California prohibits the recording of a telephone call without consent from all parties, but only if the call includes a 'confidential communication." *Flanagan v. Flanagan,* 27 Cal. 4th 766, 768 (2002) (citing Cal. Penal Code § 632(a). There is no dispute that Penal Code section 632 applies to the intentional recording of a confidential telephone communication by the parties to the telephone communication.

The question presented in this case is whether Penal Code section 632.7 likewise applies to the intentional recording of both confidential and non-confidential telephone communications by the parties to the telephone communications when at least one of the parties uses a cordless or cellular phone? The language of section 632.7, in the context of the Cordless and Cellular Radio Telephone Privacy Act of 1985 (and CIPA) as a whole, shows that it does not. In addition, a contrary interpretation would lead to absurd results.[3]

[3] The reasoning in this section was developed in large part from the decisions in *Smith*, 43 Cal. App. 5th 844; *Burkley v. Nine West Holdings Inc.*, No. BC641730, 2017 WL 4479316 (Cal. Super. Los Angeles County Sept. 5, 2017); and *Granina v. Eddie Bauer LLC*, No. BC569111, 2015 WL 9855304 (Cal. Super. Los Angeles County Dec. 2, 2015).

1. The Word "Receives"

In order for Penal Code section 632.7 to apply, a person must first be found to have intercepted or received—or to have assisted in the interception or reception of—a telephone communication. The terms intercept and receive are not defined in the statute.

The first definition of the word "intercept" in the online Miriam-Webster dictionary is "stop, seize, or interrupt in progress or course or before arrival." Using the plain meaning of the word "intercept," the parties to a telephone communication do not intercept the communication under section 632.7 because they do not stop, seize, or interrupt the communication.

The first definition of the word "receive" in the online Miriam-Webster dictionary is "to come into possession of." Using just this definition, it is possible to argue that the parties to a telephone communication come into possession of the communication, i.e., they come into possession of the spoken words that were intended for them during the phone conversation. But the word "receives" cannot be examined in isolation. *See Meza*, 6 Cal. 5th at 856. Instead, the word "receives" must be examined in the context of section 632.7 and the Cordless and Cellular Radio Telephone Privacy Act of 1985 as a whole, and it must not be given a meaning that leads to absurd results. *See id.*

When Penal Code section 632.7 was enacted, Penal Code sections 632.5 and 632.6 were already in place. Sections 632.5 and 632.6 both use the phrase "intercepts, receives, or assists in intercepting or receiving a communication" and the word "maliciously." Section 632.7 uses a variation on the phrase

"intercepts, receives, or assists in intercepting or receiving a communication" used in sections 632.5 and 632.6 to grammatically accommodate the additional element of recording the communication. Specifically, section 632.7 uses the language "intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication." Section 632.7 does not use the word "maliciously."

Interpreting the word "receives" to include the parties to a telephone communication under sections 632.5 and 632.6 would lead to absurd results. For example, it is not clear how a person could ever "maliciously" "receive" a telephone communication that was directed to them or that was made by them. In addition, if "receives" includes accepting a cordless or cell phone call to one's own phone, it would seemingly punish "maliciously" answering a call that the answering party knew had been directed to a wrong number. If the Legislature had intended to punish receiving calls made to wrong phone numbers, it would have included communications between two landlines in sections 632.5 and 632.6. But the Legislature did not do so.

Thus, interpreting the word "receives" as used in sections 632.5 and 632.6 to include a party to the telephone communication is an untenable construction. To avoid this issue, the proper interpretation of the word "receives" as used in sections 632.5 and 632.6 is that a person "receives" a telephone communication when they listen in on (as opposed to intercept) a telephone communication that was not intended for them from the airwaves. A person does not "receive" a telephone communication within the meaning of sections 632.5 and

632.6 when the telephone communication is directed to them, or they initiate the communication.

The word "receives" as used in section 632.7 should be given the same meaning. *See People v. Wells*, 12 Cal. 4th 979, 986 (1996) (explaining that this Court presumes the Legislature intended that the same meaning be accorded to similar phrases). That is, a person "receives" a telephone communication when they listen in on (as opposed to intercept) a telephone communication that was not intended for them from the airwaves. A person does not "receive" a telephone communication within the meaning of section 632.7 when the telephone communication is directed to them, or they initiate the communication.

Interpreting the word "receives" as used in section 632.7 to include the parties to a telephone communication would lead to absurd results. For example, the parties' telephone service providers potentially could be liable for violating section 632.7 because they "assisted" the parties in hearing the words that were spoken during the call by providing telephone service to the parties. In addition, a person who picks up a ringing phone when a call comes in from a cordless or cell phone and hands the phone to the person to whom the call was made would be understood to "assist in" receiving a communication within the meaning of sections 632.7.

There is at least one additional problem with interpreting sections 632.5, 632.6, and 632.7 as applying to parties. These statutes apply only if at least one of the phones used in the call is a cellular or cordless phone. If these statutes apply to the parties to a call, then they would impose liability on the basis of pure happenstance. For

example, in this case, LoanMe called Smith's wife, and Smith allegedly answered the call on a cordless phone. Had Smith answered on a landline phone, section 632.7 could not apply under any interpretation had LoanMe been using a landline too. But because of the happenstance that Smith allegedly answered LoanMe's call on a cordless phone, section 632.7 subjects LoanMe to criminal and civil liability. Once again, the result is absurd.

Interpreting the word "receives" as used in sections 632.5, 632.6, and 632.7 to exclude the parties to a phone communication makes the language of the statutes consistent and clear, harmonizes the entire statutory scheme of the Cordless and Cellular Radio Telephone Privacy Act of 1985 (and CIPA), and avoids absurd results.

2. The "Consent" Element

Even if this Court were to conclude that the word "receives" as used in section 632.7 (and sections 632.5, 632.6) applies to the parties to a telephone communication, the Court should nevertheless conclude that the parties to a telephone communication cannot violate section 632.7 because they always receive the communication with all parties' consent.

As explained above, section 632.7 contains the following language: "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 …." Cal. Penal Code § 632.7(a). The phrase "without the consent of all parties," which precedes all verbs in the foregoing sentence, modifies all succeeding verbs (intercepts, receives, and records). The conjunction "or" between "intercepts"

and "receives" means the statute applies to any person who engages in either form of conduct without consent. The conjunction "and" means that violation of the statute requires two discrete activities: (a) an interception or receipt, and (b) an intentional recording.

Therefore, to violate section 632.7, a person must both (1) intercept or receive a communication without consent, **and** (2) intentionally record the communication without consent. But the parties to a phone call always consent to the receipt of their communications by each other. For example, in this case, LoanMe consented to Smith's receipt of LoanMe's communications ("Is Mrs. Smith there?"), and Smith consented to LoanMe's receipt of Smith's communications ("No."). Consequently, the parties to a phone call are incapable of violating section 632.7 because they do not receive each other's communications without all parties' consent.[4]

When both parties to the telephone communication consent to the communication but not to recording the communication, the unconsented recording is punishable under Penal Code section 632 if the communication is confidential. Section 632 applies to telephone calls made on landline and cellular telephones. Cal. Penal Code § 632(a) ("by means of a ... telephone"). A contrary interpretation would require the Court to conclude that the Legislature intended to punish unconsented recording of telephone calls in section 632 and in section 632.7, with the sole difference being that section 632.7 does

[4] Such a conclusion also would apply to Penal Code sections 632.5 and 632.6, as they both contain similar consent language. This too would avoid the absurdities that would result from a different interpretation (discussed above).

not require a finding that the communication be one that is confidential. There is no reasoned justification for such an interpretation.

Moreover, if the Legislature meant to protect both confidential and non-confidential cordless and cell phone communications from being recorded by the parties to the communications (without consent), the Legislature could have used a variation on section 632, such as the following: "Every person who, intentionally and without the consent of all parties to a communication, uses a recording device to record 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. It did not.

Accordingly, the language of section 632.7, in the context of the Cordless and Cellular Radio Telephone Privacy Act of 1985 (and CIPA), shows that section 632.7 does not apply to the parties to a telephone communication. A contrary interpretation would lead to absurd results. Thus, the Court of Appeal's conclusion was correct.

D. The Legislative History of Section 632.7 Supports LoanMe's Position.

Because the language of section 632.7 does not permit more than one reasonable interpretation, the Court need not consult section 632.7's legislative history to determine the statute's meaning. *See Meza,* 6 Cal. 5th at 856. If, however, the Court disagrees, the legislative history of section 632.7 shows that the statute does not apply to the parties to a telephone communication.

When the Legislature enacted section 632.5 in 1985 and section 632.6 in 1990, its concern was that eavesdroppers could more easily access conversations occurring over cellular and cordless phones than over landline phones. *Smith*, 43 Cal. App. 5th at 857. The 1985 legislation was enacted in response to media reports of "widespread eavesdropping on cellular radio telephone conversations" and of devices "being developed with the sole or primary purpose of listening in on car telephone conversations." *Id.* (quoting Assem. Com. on Pub. Safety, Analysis of Sen. Bill No. 1431 (1985-1986 Reg. Sess.) Aug. 19, 1985, p. 1). Concerned about the ease with which it was "possible to listen in on conversations randomly picked up by radio scanners and other scanning devices specifically designed to pick up cellular conversations," section 632.5 was enacted to "establish[ ] criminal penalties for persons who intercept or eavesdrop on a conversation where one or more parties uses a radio telephone." *Id.* (quoting Assem. Com. on Pub. Safety, Analysis of Sen. Bill No. 1431 (1985-1986 Reg. Sess.) Aug. 19, 1985, p. 1; Legis. Analyst, analysis of Sen. Bill No. 1431 (1985-1986 Reg. Sess.) as Amended Aug. 27, 1985).

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

"The legislative history thus shows that sections 632.5 and 632.6 were intended to apply only to third party eavesdroppers."

Smith, 43 Cal. App. 5th at 857. The legislative history of sections 632.5 and 632.6 thus supports LoanMe's interpretation of section 632.7 because the Legislature used the same language in section 632.7. *Id.* at 857-58.

The legislative history of section 632.7 itself less clear, particularly when certain statements are taken out of context and the legislative history is not read as a whole. *Id.* at 858. For example, the analysis by the Senate Rules Committee quotes the bill's author, Senator Lloyd. G. Connelly, as follows: Under the proposed legislation, "'[t]he innocent, merely curious, or non-malicious interception of cellular or cordless telephone conversation will remain legal. However, it will be illegal to record the same conversations. Henceforth, persons using cellular or cordless telephones may do so knowing that their conversations are not being recorded." *Id.* (quoting Sen. Rules Com., Off. of Sen. Floor Analyses Rep. on Assem. Bill No. 2465 (1992 Reg. Sess.) June 1, 1992, p. 3); Appellant's Req. for Jud. Notice ("RJN") at p. 40.

"Considered in isolation, that passage is ambiguous." *Id.* "On the one hand, it could mean that it will be illegal for *anyone* to record cellular and cordless phone conversations." *Id.* (emphasis in original). "On the other hand, it could mean that it will be illegal for *eavesdroppers* (who are referred to in the first quoted sentence) or unintended recipients of the call to record cellular and cordless phone conversations." *Id.* (emphasis in original).

Even without considering the broader context, LoanMe submits that the latter interpretation is more plausible, for two reasons. *Id.* "First, the statement that 'it will be illegal to record the same

conversations' must be incomplete, because it omits both the requirement that the parties do not consent and the requirement that the recording be intentional." *Id.* "Thus, the lack of an explicit reference to eavesdroppers in that sentence does not mean that the prohibition on recording was not intended to be limited to eavesdroppers." *Id.* "Second, the first quoted sentence is about eavesdroppers ('interception of cellular or cordless telephone conversations'), and it is difficult to understand the connection between that sentence and the two that follow it if they are not similarly limited to eavesdroppers." *Id.*

The broader context confirms that interpretation. *Id.* at 859. "The Senate Rules Committee's analysis shows that the animating concern behind the legislation is the vulnerability of wireless communications to eavesdropping." *Id.* "The primary intent" of the statute "is to provide a greater degree of privacy and security to persons who use cellular or cordless telephones." *Id.* (quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Assem. Bill No. 2465 (1992 Reg. Sess.) June 1, 1992, p. 3); RJN at p. 40. Cordless and cellular phones are "inherently[ ] less secure" than landlines, which therefore carry "a greater expectation of privacy." *Id.* "But while users of cordless and cellular phones might consequently assume that their wireless communications are relatively vulnerable to unauthorized third party listening", they will not "reasonably anticipate that their conversations will be both intercepted and recorded," that is, recorded by eavesdroppers." *Id.* "And as the "popularity of cellular and cordless telephones" continues to grow,

"the opportunity for unscrupulous individuals to intercept and record conversations grows." *Id.*

"Thus, read as a whole, the Senate Rules Committee analysis reflects the Legislature's concern about recording of cordless and cellular phone calls by third party eavesdroppers." *Id.* The analysis does not contain any concern about recording by the **parties** to the calls. *Id.* It is therefore unreasonable to interpret the potentially ambiguous language above (i.e., "it will be illegal to record the same conversations") as meaning that the bill would make it illegal for anyone to record cellular or cordless phone calls. *Id.* "The Legislature was not interested in recording by parties." *Id.* "The Legislature was targeting recording by eavesdroppers, and for that reason used the same language it had used in sections 632.5 and 632.6, which target eavesdroppers." *Id.*

Other statements in the legislative materials submitted by Smith further support this understanding:

Department of Finance Materials: Making clear that the concern being addressed was recording by eavesdroppers - AB 2465 "[e]xpand[s] existing law related to include the intentional recordings of **unlawfully intercepted communications** between cordless, cellular and landline telephones [proposed PC § 632.7]." RJN at 14 (emphasis added).

Legislative Counsel Letter: "Based on the legislative history of Sections 632.5 and 632.6, we conclude that the Legislature wanted to extend privacy rights to communications transmitted between two telephones, one of which is a cordless telephone or a cellular telephone, and that in order to do this, where the technologies

involved make the communications inherently public rather than confidential, the Legislature had to eliminate the requirement that a communication must be confidential before it will be protected from **eavesdropping.**" RJN at 27 (emphasis added).

Senate Rules Committee: "[T]here is currently no statute prohibiting a person from intercepting and intentionally recording a communication transmitted via cellular or cordless telephones." RJN at 39.

Author's Statement of Intent: "However, this does not mean that persons who use cellular or cordless telephones may reasonably anticipate that their conversations will be both intercepted and recorded. While there may be utility in retaining relatively unimpeded access to the public 'air waves,' there is no value in permitting private telephone conversations that employ the 'air waves' to be indiscriminately recorded." RJN at 45.

Accordingly, the legislative history of section 632.7 supports LoanMe's position that the statute does not apply to the parties to a telephone communication.

E. Smith's Arguments Fail.

As explained above, Smith did not allege a cause of action against LoanMe under section 632. In his Opening Brief on the Merits, Smith contends that the Court of Appeal erred in finding that section 632.7 does not apply to the parties to a telephone communication. Opening Br. at p. 24. According to Smith, section 632.7 prohibits recording communications without consent of the party whose communications are being received. *Id.* at p. 28. Smith contends that (a) the plain language of Penal Code section 632.7

refutes the Court of Appeal's ruling; (b) nearly all federal district courts that have ruled on the issue disagree with the Court of Appeal's ruling; (c) the broader CIPA supports Smith's view; (d) the Legislature was aware that section 632.7 was interpreted as applied to parties and tacitly accepted the precedent surrounding this important question or law; and (e) the legislative history of section 632.7 supports Smith's view. *Id.* at pp. 28-42. Smith's arguments all fail.

1. This Court has not Previously Determined that Penal Code Section 632.7 Applies to Parties.

At the outset, it is important to note that despite Smith's representations to the contrary, there is no controlling precedent from this Court regarding the interpretation of Penal Code section 632.7. Opening Br. at p. 10. Smith cites this Court's decision in *Flanagan*, 27 Cal. 4th 766, for the proposition that this Court has already ruled that section 632.7 applies to the parties to a telephone communication. *Id.* at 10, 14. This is false: *Flanagan* did not involve a cause of action under section 632.7. *See id.* at 771, n.2 ("Michael's complaint, however, asserted only a cause of action under [Penal Code] section 632, not under section 632.7.").

The same is true for *Ribas v. Clark*, 38 Cal. 3d 355 (1985) (involving a cause of action under Penal Code section 631), and *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95 (2006) (involving a cause of action under Penal Code section 632).[5] Thus, these three cases are not dispositive of the issue to be decided in this

[5] *Friddle v. Epstein*, 16 Cal. App. 4th 1649 (1993), *opinion modified on denial of reh'g* (July 7, 1993), does not even mention section 632.7

case. *See Ginns v. Savage*, 61 Cal. 2d 520, 524 n.2 (1964) ("Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.") (citations omitted).

2. Smith's Analysis of Penal Code Section 632.7 is Flawed.

With respect to the plain language of section 632.7, Smith contends that the word "receives" applies to the parties to a telephone communication and 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.'" Opening Br. at pp. 25, 29 (emphasis in original). As explained above, these arguments are incorrect. The parties to a telephone communication do not "receive" the communication within the meaning of section 632.7, and, even if they did, to violate section 632.7, a person must both (a) intercept or receive a communication without consent (which parties cannot do), **and** (b) intentionally record the communication without consent. Thus, Smith's proposed interpretation is unreasonable.

Smith claims that *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999 (C.D. Cal. 2014), is the most persuasive case regarding the interpretation of the word "receives" as used in section 632.7. Opening Br. at p. 30. But the *Ades* court never considered sections 632.5 or 632.6 and did not address the absurdities that would result if

"receives" applies to the parties to a telephone communication. Instead, the *Ades* court stated:

> Initially, as a matter of common usage, the participants in a conversation "receive" communications from each other. This ***alone*** suggests that § 632.7 should not be limited to situations in which unknown third parties record a conversation. Additional support for the Court's interpretation lies in the fact that the statute uses the terms "receives" and "intercepts" disjunctively, which suggests that these terms are meant to apply to distinct kinds of conduct. Since "intercepts" is most naturally interpreted to refer to conduct whereby an unknown party secretly accesses a conversations, "receives" is naturally read to refer to something other than access to a conversation by an unknown interloper.

46 F. Supp. 3d at 1017-18 (emphasis added). Thus, *Ades* did not conduct a thorough statutory interpretation analysis of section 632.7.

3. The Federal Cases Cited by Smith are Inapplicable or Unpersuasive.

With respect to Smith's argument regarding certain federal trial court decisions involving section 632.7, it is true that some federal district judges in California have taken the position that Penal Code section 632.7 applies to the parties to a telephone communication. Opening Br. at pp. 31-35. As explained above (for *Ades*) and below, those cases were wrongly decided.

Before addressing those cases in substance, it is important to note that several state and federal judges agree with LoanMe's interpretation of section 632.7. First and foremost, the three Court of Appeal Justices who issued the Opinion unanimously agree with LoanMe. Second, at least two California superior court judges do as well. *See Burkley v. Nine West Holdings Inc.*, No. BC641730, 2017

WL 4479316, at *3 (Cal. Super. Los Angeles County Sept. 5, 2017) (a person does not "receive" a phone communication "within the meaning of [Penal Code] section 632.7 when the telephone call is directed to him."); *Granina v. Eddie Bauer LLC*, No. BC569111, 2015 WL 9855304, at *4 (Cal. Super. Los Angeles County Dec. 2, 2015) ("[Penal Code section] 632.7 was designed to *prohibit third parties*, who intercepted or otherwise received wireless communications, from intentionally recording them.") (emphasis added).

Third, at least two federal judges agree with LoanMe. *See Young v. Hilton Worldwide, Inc.*, No. 2:12–cv–01788–R–(PJWx), 2014 WL 3434117, at *1 (C.D. Cal. July 11, 2014) ("[Penal Code] Sections 632.5, 632.6, and 632.7 restrict *third-party* interception of cellular and cordless telephonic radio transmissions.") (emphasis in original); *Young v. Hilton Worldwide, Inc.*, 565 Fed. App'x 595, 599 (9th Cir. 2014) (J. Motz, dissenting) ("[R]eading [Penal Code] § 632.7 as covering persons who intercept or receive a cellular communication *other than a person who is an intended party to the communication* effectuates the California legislature's intent.") (emphasis in original).

In addition, as the United States Supreme Court recognizes, "California courts are the ultimate authority on [California] law." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). And "California courts are not bound by decisions of federal district courts …." *People v. Uribe*, 199 Cal. App. 4th 836, 875 (2011) (citations omitted). Nevertheless, as LoanMe does below, the Court of Appeal considered—and rejected—the reasoning of those federal district

courts that reached a different conclusion about Penal Code section 632.7. *Smith*, 43 Cal. App. 4th at 854-56.

The cases cited by Smith (many of which involve early pleading challenges) fall into one of three categories – (a) cases in which the courts did not address whether section 632.7 applied to the parties to a telephone communication at all, (b) cases in which the courts' analyses are incomplete or flawed, or (c) cases in which courts relied exclusively on the incomplete or flawed analysis of other cases.

Specifically, in the following cases, the courts did not analyze whether section 632.7 applied to the parties to a telephone communication: *AJ Reyes v. Educ. Credit Mgmt. Corp.*, 2016 WL 2944294 (S.D. Cal. May 19, 2016); *Branca v. Ocwen Loan Serv., LLC*, 2013 WL 12120261 (C.D. Cal. Dec. 27, 2013); *Sentz v. Euromarket Designs, Inc.*, 2013 WL 12139140 (C.D. Cal. May 16, 2013); *Maghen v. Quicken Loans, Inc.*, 94 F. Supp. 3d 1141 (C.D. Cal. 2015); *Foote v. Credit One Bank, N.A.*, 2014 WL 12607687 (C.D. Cal. Mar. 10, 2014); and *Zaklit v. Nationstar Mortgage LLC*, 2017 WL 3174901 (C.D. Cal. July 24, 2017).

In *Rezvanpour v. SGS Auto. Servs.*, 2014 WL 3436811 (C.D. Cal. July 11, 2014), the court considered and rejected only the defendant's arguments about the constitutionality of section 632.7 (i.e., that it violates the First Amendment and is void for vagueness, and unduly burdens interstate commerce). *Zephyr v. Saxon Mortg. Services, Inc.*, 873 F. Supp. 2d 1223 (E.D. Cal. June 5, 2012), likewise involved a constitutional challenge to section 632.7. In *Raffin v. Medicredit, Inc.*, 2017 WL 131745 (C.D. Cal. Jan. 3, 2017), the court explained that it was not interpreting the word "receives" or

determining whether section 632.7 applied to the parties to a phone communication: "Either § 632.7 prohibits only third-party recordings, and the class's claims fail because they center on the participants to a call; or it does not, and the class's claims are viable." *Id.* at *5. In *Lewis v. Costco Wholesale Corp.*, 2012 WL 13012729 (C.D. Cal. Oct. 5, 2012), the court considered whether section 632.7 applied to confidential and non-confidential communications.

In *Montantes v. Inventure Foods*, 2014 WL 3305578 (C.D. Cal. July 2, 2014), the court, like the *Ades* court, engaged only in a superficial analysis of the word "receives" as used in section 632.7 based solely on a dictionary definition. *Id.* at *2-3. In *Kuschner v. Nationwide Credit, Inc.*, 256 F.R.D. 684 (E.D. Cal. 2009), the court did not engage in any meaningful statutory interpretation analysis of the word "receives." *Id.* at 688-89. In *Brown v. Defender Sec. Co.*, 2012 WL 5308964 (C.D. Cal. Oct. 22, 2012), engaged in the same deficient analysis as the *Ades* court. *Id.* at *4-5.

In *Lal v. Capital One Fin. Corp.*, 2017 WL 1345636 (N.D. Cal. April 12, 2017), the court did not engage in any meaningful statutory interpretation analysis of the word "receives." *Id.* at *8-9. In *Ramos v. Capital One, N.A.*, 2017 WL 3232488 (N.D. Cal. July 27, 2017), the court's analysis consisted of nothing more than repeating its decision in *Lal* (the cases involved the same judge). *Id.* at *8-9.

In *Horowitz v. GC Services Ltd. P'ship*, 2015 WL 1959377 (S.D. Cal. April 28, 2015), the court relied heavily on *Brown* (which as mentioned above engaged in the same deficient analysis as the *Ades* court), *Ades*, and the two *Simpson* cases cited below. *Id.* at *11. In *Simpson v. Vantage Hospitality Grp., Inc.*, 2012 WL 6025772

(N.D. Cal. Dec.4, 2012), the court, like the *Ades* court, engaged only in a superficial analysis of the word "receives" as used in section 632.7 based solely on a dictionary definition. *Id.* at *6. In *Simpson v. Best Western Int'l, Inc.*, 2012 WL 5499928 (N.D. Cal. Nov. 13, 2012), the court found that the word "receives" plausibly had two interpretations and considered the statute's legislative history. *Id.* at *6-9. But, as explained above, the legislative history of section 632.7 supports LoanMe's position, not Smith's.

In *Ronquillo-Griffin v. TELUS Communications, Inc.*, 2017 WL 2779329 (S.D. Cal. June 27, 2017), the court relied on the flawed analysis in *Brown*, *Ades*, and the two *Simpson* cases discussed previously. *Id.* at *3. In *Carrese v. Yes Online, Inc.*, 2016 WL 6069198 (C.D. Cal. Oct. 13, 2016), the court relied on the flawed analysis from *Horowitz* and *Brown*.

In *Portillo v. ICON Health & Fitness, Inc.*, 2019 WL 6840759 (C.D. Cal. Dec. 16, 2019), the court relied on the flawed reasoning from *Ades*. In *McEwan v. OSP Grp., L.P.*, 2015 WL 13374016 (S.D. Cal. July 2, 2015), the court relied on the flawed reasoning from *Ades* and *Montantes*. In *Gamez v. Hilton Grand Vacations, Inc.*, 2018 WL 8050479 (C.D. Cal. Oct. 22, 2018), the court relied on the flawed reasoning from *Ades*, *McEwan*, and *Simpson*.

In *Lerman v. Swarovski N. Am. Ltd.*, 2019 WL 4277408 (S.D. Cal. Sept. 10, 2019), and *McCabe v. Intercontinental Hotels Grp. Res., Inc.*, 2012 WL 13060326 (N.D. Cal. Dec. 18, 2012), the courts made the same flawed argument that Smith asserts about the parties having to obtain consent to receive a communication and a separate consent to record the communication, which LoanMe refuted above.

Brinkley v. Monterey Fin. Servs., LLC, 340 F. Supp. 3d 1036 (S.D. Cal. 2018), *reconsideration denied*, 2020 WL 1929023 (S.D. Cal. Apr. 21, 2020), which the Court of Appeal discussed at length in the Opinion, suffers from similar deficiencies as the cases cited above. In *Brinkley*, the court found "that § 632.7 is susceptible to two different reasonable interpretations." *Id.* at 1043. "The first is the interpretation suggested by [the defendant], that 'without the consent of all parties to the communication' modifies both 'intercepts or receives' and 'intentionally records.'" *Id.* (citations omitted). "Under this interpretation, a party who receives a communication with the consent of the communicator and records that communication without the communicator's consent does not violate § 632.7." *Id.*

"The second reasonable interpretation of § 632.7 is that 'without the consent of all parties to the communication' modifies two conjunctives 'intercepts and intentionally records' and 'receives and intentionally records.'" *Id.* (citation omitted). "Under this interpretation, 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." *Id.* (citation omitted). The *Brinkley* court concluded that the second interpretation was appropriate. *Id.*

As the Court of Appeal explained in the Opinion, the *Brinkley* court's second possible interpretation is not reasonable. *Smith*, 43 Cal. App. 5th at 855-56. First, the introductory prepositional phrase "without the consent of all parties to a communication" in section 632.7 appears on its face to modify the entire verb phrase "intercepts or receives and intentionally records." *Id.* at 856. Second, the

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

As shown above, the cases relied on by Smith are either inapplicable or unpersuasive because they were wrongly decided.

4. The Legislature did not Tacitly Accept any Judicial Decisions Concerning Section 632.7.

With respect to Smith's argument about the Legislature's alleged tacit acceptance of the federal district court decisions discussed above (Opening Br. at pp. 38-40), Smith is again wrong. Although it is true that "the Legislature is deemed to be aware of existing … 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*, 42

Cal. 3d 891, 897 (1986), this principle has no application to Penal Code section 632.7.

As Smith acknowledges, the Legislature has not amended Penal Code section 632.7 since the federal district court decisions he cites to were issued. Opening Br. at p. 38. As this Court has "repeatedly observed, Legislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval.... But something more than mere silence is required before that acquiescence is elevated into a species of implied legislation." *Ornelas v. Randolph*, 4 Cal. 4th 1095, 1107-08 (1993) (quotations omitted; alterations in original). "In the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry. [L]egislative inaction is a weak read upon which to lean." *Id.* at 1108 (quotations omitted; alterations in original).

Accordingly, Smith's argument that the Legislature has tacitly accepted the decision of any federal district court regarding the interpretation of Penal Code section 632.7 is unfounded.[6]

[6] Smith's argument that Penal Code section 633.5 supports his position likewise fails. Opening Br. at p. 37. Section 633.5 states, in relevant 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. At best, this statute is hopelessly ambiguous as it relates to this case, given that sections 632.5, 632.6, and 632.7 apply to more than '"confidential" communications, and sections 632.5 and 632.6 do not prohibit recording at all.

5. The Legislature History of Section 632.7 Favors LoanMe's Position.

With respect to Smith's argument about the legislative history of section 632.7 (Opening Br. at pp. 40-42), reviewing such legislative history is not necessary for the reasons stated above. If the Court were to review the legislative history of section 632.7, LoanMe relies on its discussion of such history above.

It is worth noting Smith's argument that "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" is false. Opening Br. at p. 41. Section 632.7, unlike sections 632.5 and 632.6, applies to non-malicious interception and receipt of telephone communications too.

F. The Rule of Lenity.

Under the "rule of lenity," "courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor." *People v. Avery*, 27 Cal. 4th 49, 57 (2002). This Court has "repeatedly stated that when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant." *Id.* (citing *People v. Garcia*, 21 Cal. 4th 1, 10 (1999); *People v. Gardeley*, 14 Cal. 4th 605, 622 (1996)). "This rule has constitutional underpinnings. Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Id.* (quotations omitted).

In *Avery*, the Court considered these principles in light of Penal Code section 4, which provides that "[t]he rule of the common law, that penal statutes are to be strictly construed, has no application to this Code," and concluded that "[t]he rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable." *Id.* at 57-58 (quotations omitted). "[T]rue ambiguities are resolved in a defendant's favor …." *Id.* at 58.

A person who violates section 632.7 is subject to criminal and civil liability. Thus, if the Court finds that two reasonable interpretations of section 632.7 stand in relative equipoise, i.e., that resolution of section 632.7's ambiguities in a convincing manner is impracticable, the Court should apply the rule of lenity and construe section 632.7 in favor of LoanMe. *See id.*

G. Separate Basis for Affirming the Trial Court's Ruling.

As explained above, the trial court concluded that the beep tones that played during Smith's call with LoanMe provided Smith sufficient notice under Penal Code section 632.7 that the call was being recorded, and that Smith implicitly consented to being recorded by remaining on the call. The trial court concluded therefore that Smith had not established a violation of Penal Code section 632.7. As also explained above, the Court of Appeal did not rule on this issue when it issued the Opinion.

In LoanMe's Answer to Smith's Petition for Review, LoanMe proposed the following additional issue for review if the Court were to grants Smith's Petition: 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? *See also* Opening Br. at p. 8. LoanMe explained that it was proposing this additional issue so as to avoid a waiver argument.

Smith did not address LoanMe's proposed additional issue for review in substance in his Opening Brief on the Merits. However, if the Court concludes that Penal Code section 632.7 applies to the parties to a telephone communication and intends to address the beep tone issue, LoanMe submits the following argument:

The Penal Code, California regulatory authority, and case law have unanimously concluded that the use of beep tones is sufficient to put a person on notice that his telephone call is being recorded. Here, by staying on the line after the beep tone sounded, Smith consented to his 18-second telephone call being recorded by LoanMe as a matter of law. Thus, LoanMe has no liability to Smith under Penal Code section 632.7.

1. Consent is a Complete Defense to Liability Under Penal Code Section 632.7; Consent Can Be Express or Implied.

"[C]onsent is a complete defense to a Section 632.7 claim." *Maghen v. Quicken Loans Inc.*, 94 F. Supp. 3d 1141, 1145 (C.D. Cal. 2015), *aff'd in part, dism. in part*, 680 F. Appx. 554 (9th Cir. 2017). Consent may be express or implied. *NEI Contracting & Eng'g, Inc. v.*

Hanson Aggregates Pac. S.W., Inc., 2016 WL 4886933, at *3 (S.D. Cal. Sept. 15, 2016); *Horowitz v. GC Servs. Ltd. P'ship*, 2016 WL 7188238, at *15 (S.D. Cal. Dec. 12, 2016).

Courts have found that a plaintiff gives implied consent for call recording when he is provided with notice at the outset of the conversation that the call is being recorded and stays on the line. *E.g.*, *NEI*, 2016 WL 4886933, at *3 (explaining that, "[i]n the typical implied in fact consent scenario, a party is informed that his call will be recorded, and he continues to use the communication system after receiving notice the [call is being recorded]."") (citation omitted); *Horowitz*, 2016 WL 7188238, at *15 (same); *see also Kearney*, 39 Cal. 4th at 118 ("If, after being [advised about call recording], another party does not wish to participate in the conversation, he or she simply may decline to continue the communication.").

Indeed, as this Court concluded in a case involving Penal Code section 632 (which, as shown above, has consent language nearly identical to Penal Code section 632.7), "[a] business that adequately advises all parties to a telephone call, at the outset of the conversation, of its intent to record the call would not violate [section 632]." *Kearney*, 39 Cal. 4th at 118 (emphasis added).

2. According to All Relevant Authority, Beep Tones Provide Sufficient Notice that a Telephone Call is Being Recorded.

For purposes of implied consent under Penal Code section 632.7, courts have found that sufficient notice of call recording may be given by (1) a verbal advisement (e.g., "all of our calls are recorded for quality assurance"), or (2) the use of beep tones. *See Maghen*, 94

F. Supp. 3d at 1143, 1146 (defendant provided a verbal advisement); *NEI*, 2016 WL 4886933, at *3-4 (defendant caused beep tones to sound).

Years before CIPA was enacted, the California Public Utilities Commission ("CPUC") addressed the issue of telephone call monitoring and recording by businesses. The CPUC, which has broad authority to issue regulations governing the telecommunications industry (see, e.g., Cal. Pub. Util. Code § 701), has been "directed by the California legislature to play a part in ensuring privacy rights" for telephone communications. *Air Transp. Assoc. of Am. v. Public Utils. Comm'n of Cal.*, 833 F.2d 200, 205 (9th Cir. 1987) (citing Cal. Pub. Util. Code §§ 7905-7906).

In 1961, the CPUC issued General Order 107, which dealt with telephone call privacy issues as they related to conduct by telephone companies. *Re Monitoring of Telephone Conversations*, 11 CPUC 2d 692, 1983 WL 908950, at p. 1 (Cal. Pub. Util. Comm'n June 1, 1983). In 1964, the CPUC commenced an investigation because it learned that telephone companies were offering their subscribers call monitoring and recording equipment – which was under the control of the subscribers and not the telephone companies – for the purpose of training and observing employees in their duties. *In re PT&T Co.*, 83 CPUC 149, 1977 WL 42994 at *3 (Cal. Pub. Util. Comm'n Dec. 13, 1977). The CPUC found that "subscribers were unable to insure, and were unwilling to attempt to insure, that monitoring equipment would not be used for purposes other than those allowed by the authorized conditions of service." *Id.* In a 1965 order, the CPUC required that

any monitoring equipment furnished to subscribers be equipped with an automatic toning device. *Id.*

In 1966, the CPUC reopened its investigation and, in 1967, issued an order prohibiting call monitoring or recording without notice. *Id.* One of the prescribed methods of giving notice was providing a beep tone. *Id.* at *3-6.

Recognizing the privacy protections provided by the CPUC related to call monitoring and recording, the Legislature excluded from Penal Code Sections 631 and 632 "[t]he use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility." Cal. Penal Code §§ 631(b)(2), 632(e)(2).

In July 1983, almost ten years before Penal Code section 632.7 was enacted, the CPUC noted that its "present orders dealing with telephone privacy did not anticipate legal and other changes which would result in a competitive market in telecommunications terminal equipment rather than monopoly control by telephone utilities." *Re Monitoring of Telephone Conversations*, 11 CPUC 2d 692, 1983 WL 908950, at p. 1 (Cal. Pub. Util. Comm'n June 1, 1983). Telephone companies were no longer the only source of monitoring or recording equipment. This caused an enforcement issue for the CPUC. *Id.* at p. 2.

The CPUC therefore decided to augment General Order 107 by issuing General Order 107-B, which was titled "Rules and Regulations Concerning the Privacy of Telephone Communications." *Id.*, Appx. A. In the opinion preceding General Order 107-B, the CPUC explained that the order was "intended to accomplish two purposes: (1) assuring privacy on the same basis as it existed before

the widespread use of independently-furnished terminal (in this case, primarily PBX) equipment; (2) including in the [General Order] a concise and easy-to-read restatement of our privacy orders originally published in our 1965 and 1967 decisions on the subject." *Id.* at p. 4.

With respect to recording telephone calls, General Order 107-B provides that such recording "shall not be conducted except pursuant to this General Order." *Id.*, Appx. A, § II(A). General Order 107-B prohibits the recording of telephone calls unless (1) "all the parties to the communication give their prior express consent to the . . . recording," or (2) "notice that such . . . recording is taking place is given to the parties to the conversation by one of the methods required in this order." *Id.*, Appx. A, § II(A)(4).

Under General Order 107-B, one of the ways that notice of call recording can be given is "[b]y an automatic tone warning device which shall automatically produce the distinct tone warning signal known as a 'beep tone' which is audible to all parties to a communication and which is repeated at regular intervals during the course of the communication whenever the communication is being recorded." *Id.*, Appx. A, § II(A)(5)(a). The beep tone must meet certain technical requirements concerning length and pitch of the tone, and repeat every 12-to-18 seconds if the call lasts that long. *Id.*, Appx. A, § II(A)(7).

General Order 107-B mandates that "[e]ach California public utility telephone corporation which offers monitoring or recording equipment to its customers shall file and maintain on file, with this Commission a tariff setting forth the requirements and restrictions for the use of this equipment." *Id.*, Appx. A, § II(A)(8). In addition, "[i]n

order to assure the same degree of privacy for telephone conversations conducted over the California lines of telephone utilities interconnected with terminal equipment provided by customers of telephone utilities," General Order 107-B further mandates that "each telephone utility shall file, and maintain on file, with this Commission a tariff which provides as conditions of use of the telephone network: . . . That these customers shall provide notice of the monitoring or recording by use of one of the methods authorized for equipment provided by the telephone utility." *Id.*, Appx. A, § II(B)(2).

As it had done previously with Penal Code sections 631 and 632, the Legislature, recognizing the privacy protections provided by the CPUC related to call monitoring and recording, excluded from Penal Code section 632.7 "[t]he use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility." Cal. Penal Code § 632.7(b)(2).

As detailed above, General Order 107-B unequivocally demonstrates that the use of beep tones places a caller on notice that his telephone call is being recorded. In addition, Penal Code section 632.7 and other CIPA sections acknowledge that the CPUC has enacted sufficient privacy protections for the recording of telephone calls as shown through the public utility tariff exclusions in those statutes.

Case law further supports the conclusion that beep tones are sufficient to place a caller on notice that his telephone call is being recorded. In *NEI*, 2016 WL 4886933, the only reported decision addressing beep tones in the context of Penal Code section 632.7 of which LoanMe is aware, the plaintiff – just as Smith does here –

alleged that the defendant "unlawfully recorded and intercepted cellular telephone communications pursuant to California Penal Code Section 632.7 . . . ." *Id.* at *1. After a bench trial, the court ruled in favor of the defendant, based in part on a finding that beep tones are sufficient to put callers on notice of call recording as a matter of law:

> Prior to July 15, 2009, [Defendant] used a Voice Print International ('VPI') phone system. While the VPI system was in place, [Defendant] used 'beep tone generators' on all of its telephones that received calls to the dispatch lines. The beep tone generators qualified as notice of recording.
> . . .
>
> Before July 2009, the beep tone generator in the VPI system gave [Plaintiff] notice that [Defendant] was recording its telephone calls. Despite this notice, [Plaintiff] continued to place orders with [Defendant]. Therefore, prior to July 2009, [Plaintiff] consented to having its telephone calls recorded.

Id. at *2, *4 (emphasis added).

According to all relevant authority, as shown above, beep tones provide sufficient notice that a telephone call is being recorded.

3. By Staying on the Line with LoanMe after Hearing a Beep Tone, Smith Consented to the Recording of His Telephone Call.

As shown above, the Penal Code, California regulatory authority, and case law demonstrate conclusively that the use of beep tones is sufficient to put a caller on notice that his telephone call is being recorded and that the right to privacy is not infringed when a caller chooses to stay on the line after beep tones are played.

These principles are fatal to Smith's theory of liability because there is no dispute that (1) LoanMe caused a beep tone to sound at the outset of the 18-second call at issue, and (2) Smith continued the conversation after the beep tone sounded. (CT p. 73.) By staying on the line after the beep tone sounded, Smith consented to his 18-second telephone call being recorded as a matter of law. *See NEI*, 2016 WL 4886933, at *4; *see also Kearney*, 39 Cal. 4th at 118. Thus, LoanMe has no liability under Penal Code section 632.7. Accordingly, the Court should affirm the trial court's ruling.

4. Response to Smith's Prior Arguments Regarding Beep Tones.

LoanMe agrees that General Order 107-B–by itself–is not dispositive of the issue of consent in this case. General Order 107-B, however, is compelling authority that, under California law, beep tones provide sufficient notice to a person that his telephone call is being recorded.

General Order 107-B acknowledges express and implied consent as means by which call recording is permissible. Specifically, the order states that call recording is permissible when either "prior express consent" has been obtained (notably, Penal Code section 637.2 does not use the term "express consent") or "notice that such . . . recording is taking place is given to the parties to the conversation by one of the methods required in this order," which includes the use of beep tones. *Re Monitoring of Telephone Conversations*, 11 CPUC 2d 692, 1983 WL 908950, at Appx. A, § II(A)(4) (Cal. Pub. Util. Comm'n June 1, 1983). This is no different from how consent has been interpreted under Penal Code section 632.7 – there is express

consent and implied consent, and implied consent may be obtained by providing notice of call recording, including through the use of beep tones. *See NEI*, 2016 WL 4886933, at *1-4.

Here, there is no allegation that LoanMe obtained personal or sensitive information from Smith prior to providing a recording advisory. Instead, it is undisputed that LoanMe caused a beep tone to sound three seconds into the call before any substantive conversation could possibly take place, that Smith continued the call after the beep tone sounded, and that Smith merely informed LoanMe that his wife was not at home.

The Court, therefore, should affirm the trial court's decision that Smith had not established a violation of Penal Code section 632.7 based on his consent for the recording.

CONCLUSION

For the reasons set forth above, LoanMe requests that the Court affirm the Court of Appeal's decision and hold that Penal Code section 632.7 does not apply to the parties to a telephone communication.

DATED: June 1, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this Answering Brief on the Merits consists of 11,381 words as counted by the word-count function in the Microsoft Office Word 2016 program used to generate this brief.

DATED: June 1, 2020

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PROOF OF SERVICE

I am over the age of eighteen years and am not a party to the within action. I am employed in the County of Orange, State of California, at the law offices of Finlayson Toffer Roosevelt & Lilly LLP, members of the bar of this Court. My business address is 15615 Alton Parkway, Suite 250, Irvine, California 92618. On June 1, 2020, I served ☑ a true copy / ☐ the original of the foregoing document(s) described as:

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

✓ **BY ELECTRONIC TRANSMISSION THROUGH TRUEFILING**: Pursuant to Rule 2.251(b)(1)(B) of the California Rules of Court, I caused the document(s) to be sent to the parties on the attached Service List who have registered for electronic service in this action at the electronic mail addresses listed.

✓ **BY UNITED STATES MAIL**: I enclosed the document(s) in a sealed envelope or package to the parties on the attached Service List and placed it for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct. Executed on June 1, 2020.

/s/ Hind AbdulKader
Hind AbdulKader

Jeremiah Smith v. LoanMe, Inc.
Case No. RIC 1612501
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