IN THE SUPREME COURT

In re CERTIFIED QUESTION FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN.
SOUTHERN DIVISION

AFT MICHIGAN,

Plaintiff,

SC NO 162121
USDC-ED 4:17-cv-13292

v.

PROJECT VERITAS, et. al.,

Defendants

and

MICHIGAN ATTORNEY GENERAL,

Intervening Party

MARK H. COUSENS
Attorney for Plaintiff
26261 Evergreen Road, Suite 130
Southfield, MI 48076
cousens@cousenslaw.com
248-355-2150
P12273

PAUL M. MERSINO
Attorney for Defendants
Butzel Long
150 W. Jefferson Ste 200
Detroit, MI 48226
517-335-7628
mersino@butzel.com

JOSEPH E. SANDLER
Attorney for Plaintiff
Sandler Reiff Lamb Rosenstein & Birkenstock, P.C.
1090 Vermont Ave., N.W. Suite 750
Washington, D.C. 20005
sandler@sandlerreiff.com
202-479-1111
Temporary Admission Pending

STEPHEN R. KLEIN
Attorney for Defendants
Barr & Klein PLLC
1629 K Street, N.W. Suite 300
Washington, DC 20006
202-804-6676
steve@barrklein.com

ANN M. SHERMAN
Deputy Solicitor General
Attorney for Intervening Party
Attorney General of Michigan
P.O. Box 30212
Lansing MI 48909
517-335-7628
shermana@michigan.gov

BRIEF OF PLAINTIFF AFT MICHIGAN

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF BASIS OF JURISDICTION

The basis for jurisdiction in this Court is MCR 7.308(A)(2). The underlying case is *AFT Michigan v. Project Veritas, et. al.*, No. 4-17-cv-13292-LVP (E.D. Mich.). On September 28, 2020, the United States District Court for the Eastern District of Michigan issued an Opinion and Order granting a motion by Intervening Defendant Attorney General of Michigan to certify a question to this Court. (Joint Appendix ("JA") 85a-89a). On October 19, 2020, the federal District Court issued a Certified Question to this Court. JA 90a-93a (the "Certified Question").

STATEMENT OF QUESTION INVOLVED

The Certified Question is:

Whether MCL §§750.59a and 750.539c prohibit a party to a conversation from recording the conversation absent the consent of all other participants.

Trial Court's Answer: Yes.

STATEMENT OF FACTS

Plaintiff AFT Michigan is a labor organization. It is the Michigan affiliate of the American Federation of Teachers, AFL-CIO. (Certified Question, Stipulated Facts ¶1). Defendant Project Veritas is a nonprofit corporation that holds itself out as engaging in undercover journalism. (*Id.* ¶2). Defendant Maria Jorge is an individual who resides outside the State of Michigan. (*Id.* ¶3).

Plaintiff originally sued the Defendants in the Third Circuit Court for Wayne County Michigan in September 2017. The Defendants filed a Notice of Removal to the United States District Court for the Eastern District of Michigan. *AFT Michigan v. Project Veritas, et al.*, No. 17-cv-13292 (E.D. Mich.) (the "Federal Docket") ECF No.1). Plaintiff filed a Second Amended Complaint with Defendants' consent (*id.* ECF No. 6) and was then given leave to file a

Supplemental Pleading. (*Id.* ECF No. 71). On July 19, 2108, Plaintiff filed its Second Amended Complaint/Supplemental Pleading. (*Id.* ECF No. 72, JA 2a- 23a (the "SAC")). The SAC is now the operative pleading in the case.

In the SAC, Plaintiff alleges that Project Veritas is a nonprofit organization that has engaged in a national campaign to harm a wide variety of entities through implanting its agents in those entities and then secretly recording statements which are then manipulated and distorted. (SAC ¶3, JA 3a). Project Veritas' common technique is to have an individual gain access to an organization through false pretenses and misrepresentations, cause representatives or employees of the organization to make statements that are covertly recorded, then publish manipulated versions of those statements. (*Id.* ¶4, JA 3a-4a). Project Veritas founder and head James O'Keefe was arrested while breaking into the state office of a U.S. Senator and pleaded guilty to a misdemeanor. (*Id.* ¶5, JA 4a). The organization has been sued multiple times and, in one case, paid $100,000 to settle a suit brought for manipulating a video interview. (*Id.* ¶46, JA 10a). Among the organizations targeted by Project Veritas are labor organizations representing public school employees. (*Id.* ¶6, JA 4a).

Defendant Maria Jorge is an agent of Project Veritas. (*Id.* ¶ 9, JA 4a). In the spring of 2017, she approached AFT Michigan and sought an assignment as a summer intern. (*Id.* ¶ 14, JA 5a). She represented herself as a student at the University of Michigan who planned to teach in the public schools. During her interview, she provided a false name; falsely represented that she was a student at the University of Michigan, which she was not; and represented that she was interested in working in the public schools, which she was not. (*Id.* ¶16, JA 6a). Jorge was accepted as an intern at AFT Michigan. (*Id.* ¶ 17, JA 6a).

Over the next three months, Jorge repeatedly sought information beyond her assignments, including information regarding employees suspected or disciplined for inappropriate sexual contact with students; sought and was granted access to confidential and proprietary AFT Michigan information including databases, confidential conferences and the status of grievance proceedings; and used her position as an intern to access the computers of several AFT Michigan staff members. (*Id.* ¶¶18-23, JA 6a-7a). She was repeatedly seen alone in other employees' offices accessing files and records and when questioned, lied about why she was doing that. (*Id.* ¶¶25-26, JA 7a).

Unbeknownst to AFT Michigan at the time, Jorge used a hidden camera to secretly make a video recording of a private conversation with an AFT Michigan staff member, during which she solicited information pertaining to resolution of a teacher disciplinary matter. (*Id.* ¶28, JA 8a). The conversation occurred in the staff member's private office; the staff member did not know he was being recorded and did not give any permission to be recorded. (*Id.* ¶¶29, 33, JA 8a). Jorge also recorded a conversation between the staff member and AFT Michigan's outside counsel—a conversation in which she was not a participant.

At the same time, Jorge asked AFT Michigan staff about documents relating to that disciplinary matter, but was told that those documents were private and that she could not see them. (*Id.* ¶41, JA 9a). Nevertheless, she secretly photographed those documents, which she found in a file cabinet in the office of the AFT Michigan staff member—a cabinet to which she had been denied access.

On May 9, 2018, Project Veritas published on YouTube portions of the video recording of the private conversation between Jorge and the AFT Michigan staff member. (*Id.* ¶34, JA 8a). The video had been edited so as to imply a distorted and false narrative as to AFT Michigan's role

in providing assistance to members of its affiliated unions. (*Id.* ¶36, JA 9a). Together with the video, Project Veritas published links to copies of the of confidential documents that Jorge had secretly photographed in the files of the AFT Michigan staff member. (*Id.* ¶41, JA 9a).

Based on these allegations, the SAC asserts causes of action for (1) fraudulent misrepresentation; (2) trespass; (3) unconsented recording of private conversations in violation of state law; (4) larceny by trick; (5) civil conspiracy; (6) violation of the Uniform Trade Secrets Act, MCL 445.1902; (7) breach of the duty of loyalty; (8) unlawful interception of oral communications in violation of the federal Wiretap Act, 18 U.S.C. §2511(d); and (9) violation of the Electronic Communications Privacy Act , 18 U.S.C. §2701(a)(1) & (2). (SAC ¶¶64-106, JA 13a-20a). The Complaint seeks injunctive relief, compensatory damages and punitive damages. (*Id.* at 20a-23a).

In August 2018, Defendants moved to dismiss the SAC for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). (Federal Docket, ECF No. 74). Among other things, Defendants asserted that the Michigan eavesdropping statute does not apply when a participant to the conversation is the one doing the recording; and that even if it did apply, its application to Project Veritas' conduct would be unconstitutional.

On June 14, 2019, the District Court issued its Opinion and Order, granting the Defendants' motion to dismiss in part and denying it in part. (Federal Docket ECF No. 104, JA 24a-52a). With respect to Count III, for eavesdropping in violation of state law, the Defendants had argued that MCL §750.539c does not apply because Jorge was a participant in the conversation she had secretly recorded. The District Court found that this Court had not specifically addressed the issue and proceeded to determine how this Court would rule on the issue. (JA 28a-29a). The District Court noted that Court of Appeals decisions, "although the starting point, are not controlling and

may be disregarded by the Court if convinced that the Michigan Supreme Court would decide otherwise." (*Id.* at 29a).

The District Court considered the Court of Appeals decision in *Sullivan v. Gray*, 117 Mich. App. 476, 324 N.W.2d 58 (1982). In that case, the Court of Appeals ruled that MCL §750.539c, ""unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to 'the private discourse of others.'" 117 Mich. App. at 481.

The District Court ruled that the *Sullivan* majority's interpretation "contravenes the Legislature's intent made clear by the plain unambiguous language of the statute…" (JA 32a). Instead, the District Court adopted the reasoning of Judge Brennan's dissent in that case: "As a matter of fact, the very first phrase of the statute indicates that participants to the conversation can violate the statute: '***Any*** person who is present…' (emphasis added). Moreover, the statue also states ***all*** participants in the conversation must consent to the overhearing, recording, amplifying or transmitting of the conversation." (JA 32a (quoting *Sullivan*, 117 Mich. App. at 483 (Brennan, J., dissenting) (emphasis in original)). The District Court was "convinced that the Michigan Supreme Court would decide in the same manner and apply the same construction advanced by Judge Brennan…." (JA 32a).

Based on that interpretation of the eavesdropping statute, and finding that Plaintiff had alleged all of the other requisite elements, the District Court denied Defendants' motion to dismiss Count III, the eavesdropping count. (*Id.* at 36a-37a). The District Court also denied the Defendants' motion to dismiss as to Counts I (fraudulent misrepresentation); II (trespass); V (civil conspiracy); VII (breach of duty of loyalty); and VIII (federal wiretapping statute). The District Court granted the motion to dismiss as to Counts IV (larceny by trick); VI (trade secrets); IX (federal Electronic Communications Privacy Act). (*Id.* 37a-44a).

In June 2019, because Defendants had served notice that they planned to challenge the constitutionality of the eavesdropping statute, the Attorney General of Michigan moved to intervene in the federal district court case. (Federal Docket ECF No. 106, JA 53a-69a). That motion was granted. (Federal Docket ECF No. 110, JA 70a-71a). Then, on September 10, 2019, the Attorney General filed a motion to request certification to the Michigan Supreme Court. (Federal Docket ECF No. 112, JA 72a-84a). The District Court granted that motion, finding that the "issue at bar is an unsettled question of state law;" that the issue would affect the outcome of the federal suit; and that "any delay or prejudice is not undue." (Federal Docket ECF No. 175, JA 88a, 89a).

On October 14, 2020, the District Court issued a Certified Question to the Michigan Supreme Court. (Federal Docket ECF No. 176). On October 19, the District Court issued an Amended Certified Question (Federal Docket ECF No. 177, JA 90a-93a), which is:

> **Whether Mich. Comp. Laws §§750.539a and 750.539c prohibit a party to a conversation from recording the conversation absent the consent of all other participants.**

The District Court stayed the case pending consideration by this Court. (JA 93a).

ARGUMENT

I. THIS COURT SHOULD RENDER A DECISION ON THE CERTIFIED QUESTION

This Court should render a decision on the Certified Question. The scope of the state eavesdropping law is an issue of increasing public importance that is likely to be repeatedly presented to the federal and state courts in the future. For the reasons set forth below, it is clear that the District Court's interpretation of the eavesdropping law is correct. However, it would be helpful for the federal courts to be provided binding guidance, from this Court, about this important

issue. "Answering certified questions is one reasonable means by which this Court minimizes the risk that Michigan laws will be misconstrued and misapplied by the federal courts." *In re Certified Questions from the United States Court of Appeals for the Sixth Circuit (Melson v. Prime Ins. Syndicate, Inc.)*, 472 Mich. 1225, 1233, 696 N.W.2d 687 (2005) (Markman, J., dissenting).

For these reasons, this Court should render a decision answering the Certified Question.

II. THE PLAIN LANGUAGE OF THE STATUTE MAKES IT APPLICABLE TO SECRET RECORDING OF A PRIVATE CONVERSATIONS BY A PARTICIPANT IN THAT CONVERSATION

"The primary goal of statutory interpretation is to 'ascertain the legislative intent that may reasonably be inferred from the statutory language.'" *Krohn v. Home-Owners Inc. Co*., 490 Mich. 145, 156, 802 N.W.2d 281 (2011) (quoting *Griffith v. State Farm Mut. Auto Ins. Co*., 472 Mich. 521, 526, 697 N.W.2d 895 (2005)). "The first step in that determination is to review the language of the statute itself." *In re MCI Telecommunications Complaint*, 460 Mich. 396, 411, 596 N.W.2d 164 (1999)."'If the statute is unambiguous it must be enforced as written.'" *Fluor Enterprises, Inc. v. Revenue Div., Dep't of Treasury*, 477 Mich. 170, 174, 730 N.W.2d 722 (2007) (quoting *Title Office, Inc. v. Van Buren County Treasurer*, 469 Mich. 516, 519, 676 N.W.2d 207 (2004)). "A fundamental principle of statutory construction is that 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.'" *Smitter v. Thornapple Township*, 494 Mich. 121, 129, 833 N.W.2d 875 (2013)(quoting *In re Certified Question from the United States Court of Appeals for the Sixth Circuit (Kenneth Henese Special Projects Procurement v. Continental Biomass Indus., Inc*.), 468 Mich. 109, 113, 659 N.W.2d 597 (2002)(internal quotation omitted)).[1]

[1]This Court reviews questions of statutory construction *de novo*. *Fluor Enterprises, Inc. v. Revenue Div. of Treasury*, 477 Mich. 170, 174, 730 N.W.2d 722 (2007); *City of Taylor v. Detroit Edison Co*., 475 Mich. 109, 115, 715 N.W.2d 28 (2006).

In this case, the statute is clear and unambiguous that recording of discourse without the consent of all parties engaged in that discourse is prohibited, whether the person recording is participating in that discourse or not. MCL §750.539a defines "Eavesdrop" to mean:

> To overhear, record, amplify or transmit any part of the private discourse of others *without the permission of all persons engaged* in the discourse.

(emphasis added). MCL § 750.539c then provides that:

> Any person *who is present or who is not present* during a private conversation and who willfully uses any device to eavesdrop upon the conversation *without the consent of all parties thereto*, ….is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000 or both.

(emphasis added).

"We read the statutory language in context and as a whole, considering the plain and ordinary meaning of every word." *Hamed v. Wayne County*, 490 Mich. 1, 8, 803 N.W.2d 237 (2011). Here, the plain and ordinary meaning of the statutory language, taken as a whole, is unmistakable and inarguable. Under MCL §750.539c, any person, even if they are present during a "private conversation" who uses a device to eavesdrop on that conversation "*without the consent of all parties thereto*" violates the statute. And under MCL §750.539a, the definition of "eavesdrop" is to record any private discourse, that is, private conversation, "without the permission of *all parties* engaged in the" conversation. The plain and ordinary meaning of the words of the statute is that the statute is violated if *anyone, whether a participant or not,* records a "private conversation" without consent of all the others participating.[2]

[2] The only term that does not have a plain and ordinary meaning is "private discourse," that is, private conversation. This Court has already interpreted that term. "[W]hether plaintiff's conversation was private depends on whether she intended and reasonably expected it to be private at the time and under the circumstances involved." *Dickerson v. Raphael*, 461 Mich. 851, 601 N.W. 2d 108 (1999)(Table Decision). In this case, the recording was made in a private office in which only two individuals were present. (SAC ¶¶29, 33, JA 8a). Clearly the AFT Michigan staffer would reasonably have expected that the conversation would be private. In any

The only issue before this Court is whether the statute is inapplicable in those situations in which a person was both recording and participating in the conversation. That question is answered fully and unequivocally by the plain language of the statute. The statute applies to any person, "who is present or not present," that is, who is a participant or is not a participant, and who uses a device to record a conversation without the consent of all the other parties to that conversation.

There is simply no ambiguity in the language that is the subject of the Certified Question. Accordingly, the Court's inquiry must end there. "Where the statutory language is unambiguous, the plain meaning reflects the Legislature's intent and the statute must be applied as written. . . No further construction is necessary or allowed . . .." *Danse Corp. v. City of Madison Heights*, 466 Mich. 175, 182, 644 N.W.2d 721 (2002).

III. LEGISLATIVE INTENT AND HISTORY CONFIRM THAT THE EAVESDROPPING STATUTE APPLIES TO SECRET RECORDING OF A CONVERSATION BY A PARTICIPANT

"'[T]he words of a statute provide "the most reliable evidence of its intent…'" *Krohn*, 490 Mich. at 157 (quoting *Klooster v. City of Charlevoix*, 488 Mich. 289, 296, 795 N.W.2d 578 (2011)(internal quotation omitted). Here, as demonstrated above, the words of the eavesdropping statute make crystal clear the legislative intent that the statute applies to the secret recording of a private conversation by a participant in the conversation. But even if this Court were to look beyond the words of the statute, that legislative intent is confirmed by the purpose and legislative history of the statute.

---

event, for purposes of deciding the Certified Question, that issue is not before this Court. If there were any genuine question about the AFT Michigan staff member's reasonable expectation of privacy (and there is not), that would be a factual question ultimately to be resolved by the trier of fact in the District Court.

It is apparent that in enacting this statute, the Legislature intended strongly to protect the privacy of individuals. "[The purpose of the eavesdropping statute is the protection of a person's privacy." *People v. Daulton*, No. 257443, 2006 WL 143128 at *2 (Mich. App., Jan. 19, 2006); *Accord, Navarra v. Bache Halsey Stuart Shields, Inc.*, 510 F. Supp. 831 835 (E.D. Mich. 1981)(the eavesdropping statute was "enacted to protect an individual's right to privacy"). Certainly excluding the secret recording of a conversation in which the person recording is a participant from the scope of the statute would be a profound failure to protect the privacy of the other party to the conversation. It would allow, as happened in this case, a person to misrepresent their identity, secretly record a private conversation, and then broadcast that conversation without permission. As noted, the AFT Michigan staffer in this case had every expectation that his conversation with Jorge taking place in a private office with no one else present would be private. Thus, the only interpretation consistent with the purpose of the statute is that the statute applies to the secret recording of any private conversation, even by a participant.

"'[W]e do not resort to legislative history to cloud a statutory text that is clear.'" *In re Certified Question (Henes v. Continental Biomass*), 468 Mich. at 166 (quoting *Chmielewski v. Xermac, Inc.*, 457 Mich. 593, 608, 580 N.W.2d 817 (1998) (internal quotation omitted)). In this case, the statutory text is clear and there is indeed no need to resort to legislative history. But even if this Court were inclined to consider it, the legislative history demonstrates the Legislature's intent to include secret participant recording within the scope of the eavesdropping statute.

The provisions that are now MCL §§750.539a—750.539i were first proposed as amendments to Act No. 328 of Public Acts of 1931, in Senate Bill 1070, introduced on March 7, 1966. (JA 99a-105a). The bill was referred to the Senate Judiciary Committee. As introduced, proposed new section 540E (now section 750.539c) read:

> *A person not present during a conversation* or discussion who willfully and by means of an instrument eavesdrops or records the conversation or discussion or who listens to the deliberations of a jury by means of instrument, or who aids, authorizes, employees, procures or permits another person to commit or to attempt to commit eavesdropping or recording is guilt of a felony, punishable by imprisonment in a state prison not more than 2 years, or by a fine of not more than $2,000.00.

(JA 100a) (emphasis added).

The Senate Judiciary Committee then amended the bill and reported it to the Senate on April 1, 1966. (JA 106a-112a). As amended and reported to the Senate, this section read::

> SEC. 540E. *Any person who is present or who is not present* during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000 or both.

57 Journal of the Senate 735 (April 1, 1966), JA 110a (emphasis added). The bill passed the Senate with the language in this form. The House amended other sections of the bill but left the language of this section intact. 97 Journal of the House 2789 (June 1, 1966). The bill finally passed with this language intact, and the language of this section (renumbered by the House as 750.539c) has remained unchanged to this day.

Thus, the Senate Judiciary Committee deliberately changed the language of this section so that instead of applying only to a "person *not* present during a conversation," it would be apply to, "Any person who *is* present…" as well. There could be no clearer indication of the Legislature's intent to make the statute applicable to a person "who is present" during the conversation being recorded—that is, a participant in the conversation.

The Legislature has left this language in place for more than fifty years. If this Court determined to look beyond the statutory language for evidence of legislative intent, the legislative

history simply confirms what the language unambiguously states: a participant in a private conversation who secretly records it has violated the eavesdropping statute.

IV. THIS COURT SHOULD DISREGARD THE NON-BINDING AND UNPERSUASIVE COURT OF APPEALS DECISION IN *SULLIVAN*

Although the Certified Question has not previously been addressed by this Court, as noted by the District Court, that question was addressed by the Court of Appeals in *Sullivan v. Gray, supra*. The Sullivan majority ruled that the language of MCL §750.539c excludes participant recording because the definition of eavesdropping, section 750.539a, is limited to the "private discourse of others." *Sullivan*, 117 Mich. App. at 481. The *Sullivan* majority reasoned that the word "others" contemplates "that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on." *Id.* In his dissent, however, Judge Brennan noted that

> the "very first phrase of the statute indicates that participants to the conversation can violate the statute: '*Any* person is present * * *' (emphasis added). Moreover, the statue also states that *all* participants in the conversation must consent to the overhearing, recording, amplifying or transmitting of the conversation. To me this plainly prohibits participants, as well as third parties, from the activities designated in the statute without disclosure to the other persons to the conversation that the conversation is being overheard, recorded, amplified or transmitted.

Id. at 483 (Brennan, J., dissenting)(emphasis in original).

As *Sullivan* was decided before November 1, 1990, it is not binding precedent even in the Court of Appeals. MRC 7.215(J)(1). Nor should it be considered at all persuasive, as it was clearly wrongly decided based on the actual text of the statute. The *Sullivan* majority acknowledged that its reading was not consistent with the statute's use of the phrase "[a]ny person who is present or who is not present," and conceded that this "phrase arguably creates an ambiguity as to the persons affected by the act…" 117 Mich. App. at 481.

In that regard, the majority was concerned about use of the words "of others" in the definition of eavesdropping in section 750.539a. *Id.* The majority thought that use of the word "others" "contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on." *Id*. That notion compelled the majority to strain to reconcile that notion with use of the phrase "any person who is present or not present." The strained interpretation arrived at by the majority was that this phrase--"present or not present"--refers to the fact that eavesdropping can be conducted either by "one who is actually in close physical proximity to a conversation or by one who is some distance away but eavesdrops using a mechanical device" –as long as the person does not participate in the conversation. *Id.* Apparently the majority thought the term "present" was intended to refer to someone close by but unseen.

That interpretation, however, makes no sense. Under that interpretation, if a person who is physically present, standing next to two other people, stays silent and does not participate in the conversation at all, that person is prohibited from recording it. But let that person say a single word, let her nod and say "uh-huh" one time in an hour long discussion, and magically that same recording now becomes lawful. Manifestly the Legislature could not have intended such an absurd result.

In any event, the statutory language itself must be considered before any thought is given to intent. And the statutory language must be read "in context and as a whole, considering the plain and ordinary meaning of every word." *Hamed*, 490 Mich. at 8. "The court must presume that every word has some meaning and if possible, effect should be given to each provision." *Danse Corp*., 466 Mich. at 182. Here, it is only possible to give meaning to each word by reading "others" in its plain and usual sense—as referring to anyone "other" than the person doing the

recording. That reading is consistent with use of the phrase "any person present or not present" and allows the statute to be read consistently and to make sense "as a whole."

Indeed, although this Court has not addressed the question directly, it has evidently assumed that the eavesdropping statute does apply to participant recordings. In *Matter of Jenkins*, 437 Mich. 15, 465 N.W.2d 317 (1991), this Court upheld the decision of a special master in a judicial disciplinary proceeding, to allow in evidence secret recordings made by an FBI informant of that informant's conversations with the respondent judge. Among other points, this Court rejected respondent's contention that the recordings violated the eavesdropping statute, MCL §750.539c, because the statute specifically exempts recordings made by law enforcement agents acting within the scope of their authority. MCL §750.539g(a). This Court thus assumed that, but for this exemption, the statute would have applied to the recordings even though the recordings were made by a participant in the conversation.[3]

For these reasons, *Sullivan* was wrongly decided, as the District Court found. That decision should be given no deference or consideration by this Court.

CONCLUSION

The plain language of the eavesdropping statute makes it applicable to a person who participates in a private conversation and secretly records it. The intent and legislative history point to the same conclusion. The Certified Question should be answered in the affirmative.

[3] Likewise, in 1981-1982 Mich. OAG No. 6106, the Attorney General determined that an officer monitoring an undercover police officer who records a conversation in which the undercover officer participates, is eavesdropping unless the law enforcement exception applies. The Attorney General thus necessarily assumed that participant recording is covered by the statute.

Respectfully submitted,

/s Mark H. Cousens

MARK H. COUSENS

/s/ Joseph E. Sandler

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2020, I electronically filed the foregoing Brief of Plaintiff AFT Michigan with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Mark H. Cousens

MARK H. COUSENS

Attorney for Plaintiff
6261 Evergreen Road, Suite 130
Southfield, MI 48076
cousens@cousenslaw.com
248-355-2150
P12273