STATE OF MICHIGAN
IN THE SUPREME COURT

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

Supreme Court No. 162121

USDC-ED: 4:17-cv-13292

AFT MICHIGAN,
Plaintiff,

v.

PROJECT VERITAS,
MARISA L. JORGE,
Defendants,

and

Michigan Attorney General,
Intervening Party.

DEFENDANTS' BRIEF
ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

Defendants Project Veritas and Marisa Jorge state that Plaintiff's statement of the basis of jurisdiction was complete and correct. This Court has jurisdiction to answer the certified question under Michigan Court Rule 7.308(A)(2)(a). This case originated in the Eastern District of Michigan as *AFT Michigan v Project Veritas, et al*, Case No 4:17-cv-13292-LVP (ED Mich). On September 28, 2020, Judge Linda V. Parker of the Eastern District of Michigan issued an Opinion and Order granting a motion by Intervening Party Attorney General of Michigan to certify the question presented herein to this Court. Joint Appendix ("Appx") 85a–89a. On October 19, 2020, the Eastern District of Michigan issued an Amended Certified Question to this Court. Appx 90a-93a.

STATEMENT OF CERTIFIED QUESTION

Whether Michigan Compiled Laws sections 750.539a(2) 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

Defendants' Answer: No

INTRODUCTION

This lawsuit was brought against the named Defendants in spite of their compliance with nearly forty years of well-established and universally accepted precedent. When the secret recordings of conversations at issue in this case were made, Defendants understood the plain meaning of the Michigan eavesdropping statute: that a participant to a conversation may record it without the consent of all participants, meaning that the law provides for one-party consent. *See* MCL 750.539a(2), MCL 750.539c. At that time, this meaning was supported by 35 years of interpretations by the Michigan Court of Appeals, Circuit Courts of Michigan, the United States District Courts for the Eastern and Western Districts of Michigan, the United States Court of Appeals for the Sixth Circuit, the Michigan Attorney General's office, other jurisdictions, and legal treatises. But the Defendants have now been sued in contradiction of this nearly universal interpretation of the law. Moreover, the Eastern District of Michigan—a federal court—has now ruled that longstanding Michigan state court interpretation of Michigan law is incorrect. The district court further assumed that this Court would rule differently than all the authorities noted above. Thus, this Court is being asked directly, on certification, to confirm the proper interpretation of the Michigan eavesdropping statute.

This case is not merely about the parties currently before this Court. It has broad, serious implications. The holding in this case will impact journalists, publishers, crime victims, law enforcement officers, and businesses across the state. It has First Amendment implications. It could also cause people who have relied on the law's plain meaning and widely accepted precedent established nearly four decades ago to now be deemed felons. This certified question is one of great import and impact.

This is not a political issue, a factual dispute, or a partisan concern. Rather, it is a matter of statutory interpretation that will govern everyone in Michigan. The Defendants respectfully ask this Court to clarify that the Michigan eavesdropping law provides for one-party consent.

COUNTER STATEMENT OF FACTS AND PROCEEDINGS

Defendants agree with the Attorney General Team Supporting Plaintiff's Interpretation of Michigan's Eavesdropping Statute ("AG Plaintiff Team") that "the facts of the underlying case are not relevant to the interpretation of Michigan's Eavesdropping Statutes." AG Plaintiff Team Br 3. Indeed, the statement of facts presented by AFT Michigan is actually a statement of allegations, citing to unsubstantiated assertions from its second amended complaint. AFT Br 1-4. Moreover, many of these allegations are not relevant to the certified question and AFT Michigan included allegations not pled or found in the record. *Id.* Defendants will only cite the allegations and occurrences relevant to the procedural history underlying this certified question and the application of the statutes in question.

AFT Michigan filed suit against Defendants in the Third Circuit Court for the County of Wayne in September 2017. Defendants removed the case to the Eastern District of Michigan. *See AFT Michigan v Project Veritas,* No 17-CV-13292, 2017 WL 6604040, at *1 (ED Mich Dec 27, 2017). Eventually, AFT Michigan filed a Second Amended Complaint (Supplemental Pleading), Appx 2a–23a, which is the operative pleading at this time. In this complaint, AFT Michigan alleged nine (9) causes of action. Defendants sought dismissal of each of these counts for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See* Appx 24a–52a. One count in question was for an alleged "Unconsented Recording of Private Conversations in Violation of State Law." Appx 8a–9a, 14a.

Defendants argued that the Michigan eavesdropping statute did not apply because the person making the recordings was a party to the conversations, and AFT Michigan had not pled that she was a nonparty who had recorded the conversations of others. *See* Appx 8a (alleging Marisa Jorge "employed a hidden camera to covertly record a private conversation *with* an AFT Michigan staff representative *during which* she solicited information . . . ." (emphasis added)); 27a–28a. This constituted one-party consent, which is permitted by the plain meaning of Michigan law and recognized by nearly forty years of precedent.

The district court acknowledged that two Michigan Court of Appeals decisions—*Sullivan v Gray*, 117 Mich App 476; 324 NW2d 58 (1982) and *Lewis v LeGrow*, 258 Mich App 175; 670 NW2d 675, 683–84 (2003)—"provide some support to [Defendants'] claim that a participant in a private conversation who records it absent the consent of all other participants is not liable under Michigan's eavesdropping statute[.]" Appx 27a–28a. The court, however, also noted that this Court "has not specifically addressed the question presented here." Appx 28a. The district court acknowledged that this Court has, on three occasions, ruled in cases in which the eavesdropping statute was in question, but that the Court did not need to or refrained from ruling on the specific question of one-party consent. Appx 28a (citing *Dickerson v Raphael*, 461 Mich 851; 601 NW2d 108 (1999); *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001); and *Bowens v Ary, Inc*, 489 Mich 851; 794 NW2d 842, 843 (2011)).

Because this Court has not "construed the portions of the statute that the Michigan Court of Appeals held as removing participants in a private conversation from the ambit of the statute's eavesdropping prohibitions[,]" the district court set out to "consider[] how the Michigan Supreme Court would construe the eavesdropping statute." Appx 30a-31a. It first looked to *Sullivan*, "the Michigan appellate court [case] that first construed the reach of the state's prohibition against

eavesdropping," which held that "the statutory language, on its face, unambiguously exclude[d] participant recording from the definition of eavesdropping by limiting the subject conversation to 'the private discourse of others.'" Appx 31a-32a (quoting *Sullivan*, 117 Mich App at 481). Nonetheless, the district court held that it was "convinced, however, that *Sullivan*'s construction contravenes the Legislature's intent made clear by the plain, unambiguous language of the statute." Appx 32a. The court was also "convinced that the Michigan Supreme Court would decide in the same manner and apply the same construction advanced by Judge Brennan in his dissenting opinion in *Sullivan*." *Id.*

The district court—eschewing one-party consent—held that AFT Michigan had sufficiently stated a claim under the eavesdropping statute by alleging that Defendant Jorge secretly recorded a private conversation, even though she was a party to it. Appx 36a–37a. Thus, the court denied Defendants' motion to dismiss the eavesdropping cause of action. Appx 37a. The district court did, however, grant Defendants the right to seek interlocutory appeal with the United States Court of Appeals for the Sixth Circuit, holding that there is a substantial ground for difference of opinion as to the meaning of the eavesdropping statute. Appx 46a–51a. "Therefore, the Court conclude[d] that Defendants' first issue regarding Michigan's eavesdropping statute deserve[d] interlocutory review . . . ." Appx 51a. The Sixth Circuit Court of Appeals denied the petition for interlocutory appeal on procedural grounds. *In re Project Veritas*, 2019 WL 4667711, Case 19-109, Doc: 9-1 (6th Cir Aug 16, 2019). Defendants' Supplemental Appendix ("Supp Appx") 492b.

Shortly thereafter, the Michigan Attorney General moved to intervene at the district court. That motion was granted. Appx 53a-69a; 70a-71a. The Attorney General then filed a motion requesting certification to this Court of the question whether Michigan's eavesdropping statute

prohibits a party to a conversation from recording it without the consent of all other participants. Appx 72a-84a. On September 28, 2020, the Eastern District of Michigan granted the motion for certification. Appx 85a-89a; 90a-93a. This Court agreed to accept briefing on this question.

ARGUMENT

I. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION.

"When a federal court . . . considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Court." MCR 7.308(A)(2)(a). That has occurred. Appx 85a–89a. When faced with such a certification, this Court "may deny the request for a certified question by order, issue a peremptory order, or render a decision in the ordinary form of an opinion to be published with other opinions of the Court." MCR 7.308(A)(5).

"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 US Court of Appeals for the Sixth Circuit (Melson v Prime Ins Syndicate, Inc)*, 472 Mich 1125, 1233; 696 NW2d 687 (2005) (MARKMAN, J., dissenting); *see also In re Certified Questions from the US Dist Court, Western Dist of Michigan, Southern Division (Midwest Inst of Health, PLLC v Whitmer)*, -- NW2d --; 2020 WL 5877599 (Oct 2, 2020) (holding that this Court will answer those questions from a federal court that it "is best equipped to answer . . . ."). In this case, the district court has noted a difference in opinion about how the Michigan law should be applied. *See* Appx 49a-50a. The Michigan Attorney General correctly argued that, absent a ruling by this Court, Michigan laws could be construed or applied differently between state and federal courts. Appx 81a ("certification would avoid potential friction between Michigan's state courts and the federal courts . . . ."). Indeed, the disparity between the federal district court's ruling in

this case and the great weight of precedent (both state and federal) for nearly forty years indicates that this Court should rule to minimize the risk that Michigan laws will be misconstrued and misapplied by the federal courts.

Thus, Defendants respectfully request that this Court render a decision on the certified question, answer it in the negative, and enter an opinion to that effect.[1]

II. MCL 750.539a(2) AND MCL 750.539c PERMIT A PARTY TO A CONVERSATION TO RECORD IT WITHOUT THE CONSENT OF ALL OTHER PARTICIPANTS.

There are two statutory sections at issue: Michigan's eavesdropping law and its definition of "eavesdropping." MCL 750.539c, MCL 750.539a(2). The eavesdropping law states:

> Any person who is present or who is not present during a private conversation and who wilfully 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 $2,000.00, or both.

MCL 750.539c. "Eavesdrop" and "eavesdropping" are defined as "to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse." MCL 750.539a(2). Taken together, these laws plainly permit one to record conversations to which he or she is a party *without* the consent of all other participants, because its prohibition only applies to "the private discourse *of others*[.]" *Id.* (emphasis added). That is, the laws provide for one-party consent.

A. A PLAIN READING OF THE LAW NECESSITATES A HOLDING FOR ONE-PARTY CONSENT.

"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

[1] Plaintiff AFT Michigan likewise stated in its appellate brief that "[t]his Court should render a decision on the Certified Question." AFT Br 6. The parties agree on this point.

145, 156–57; 802 NW 281 (2011). "The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Id.*[2] If a statute is unambiguous, judicial construction is not required or even permitted. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008); *People v Wood*, -- NW2d --; 2020 WL 4342281 (Mich July 28, 2020) (CLEMENT, J.).

Courts, of course, "may consult dictionary definitions to give words their common and ordinary meaning." *Krohn*, 490 Mich at 156 (citing *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004)). "When given their common and ordinary meaning, the words of a statute provide the most reliable evidence of its intent." *Id.* at 156–57 (quotations omitted) (citing *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002); *Klooster v Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011)); *see also DeRuiter v Byron Twp*, 505 Mich 130, 139; 949 NW2d 91 (2020) (BERNSTEIN, J.). Moreover, "statutory interpretation begins with the law's plain language, not with the policy that may have motivated it." *Progress Mich v Attorney General*, 506 Mich 74, n5; -- NW2d -- (2020) (MCCORMACK, C.J., concurring).

The plain language of MCL 750.539a(2) and MCL 750.539c does *not* prohibit a party to a conversation from recording it absent permission of all other persons engaged in the discourse. These statutes, rather, permit a party to record with strictly his or her own consent, or one-party consent. This conclusion is the only logical one given the plain meaning of the statutes' words.

The most commonly cited case regarding the statutory interpretation of these provisions is *Sullivan v Gray*, 117 Mich App 476. There, the court of appeals reviewed a nearly identical

[2] *See Tomra of N Amer, Inc v Dep't of Treasury*, 505 Mich 333, 339; -- NW2d -- (2020) (VIVIANO, J.) ("In every case requiring statutory interpretation, we seek to discern the ordinary meaning of the language in the context of the statute as a whole.").

question as that certified in this case. In *Sullivan*, the court noted that "[t]he issue here is strictly one of statutory construction." *Id.* at 480. Thus, the court's majority looked to the plain language of the statute and gave its words their ordinary meaning. *Id.* Although *Sullivan* is not binding on this Court, the majority's analysis is instructive and, indeed, sound.

In *Sullivan*, the court analyzed the term "eavesdrop," defined as "to overhear, record, amplify, or transmit any part of the private discourse *of others* without the permission of all persons engaged in the discourse." MCL 750.539a(2) (emphasis added); 117 Mich App at 478–79. The court held that "the statutory language, on its face, unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to 'the private discourse of others.'" *Sullivan*, 117 Mich App at 481. "The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on." *Id.* "Had the Legislature desired to include participants within the definition," the court noted, "the phrase 'of others' might have been excluded or exchanged to 'of others or with others.'" *Id.* Thus, the court held that on its face the statute did not require all participants in a conversation to consent to recording by one party.

The court also squarely addressed an issue raised by AFT Michigan and the AG Plaintiff Team in the instant case: that the law governs "any person who is present or who is not present during a private conversation . . . ." MCL 750.539c; *cf. Sullivan*, 117 Mich App at 481 *with* AFT Br 8-9; AG Plaintiff Team Br 6-9. The *Sullivan* Court concluded that to read that language as prohibiting participant recording "would render inoperative the words 'of others' in the statutory definition." 117 Mich App at 481. Moreover, "[t]he words '[a]ny person who is present or who is not present' merely acknowledge that eavesdropping may be committed by one who is actually in close physical proximity to a conversation or by one who is some distance away but eavesdrops

utilizing a mechanical device." *Id.* "Quite plainly," the court continued, "one may be 'present' during a conversation without being a party to the conversation and without his presence being apparent to those conversing. For example, the eavesdropping party could literally be under the eaves outside an open window." *Id.*[3] Simply put, the definition of eavesdropping does not depend on the *location* of the recorder. Rather, it depends on the *participation* of the recorder.

AFT Michigan attempts to impugn this ruling, arguing the *Sullivan* Court's holding was "strained" and "makes no sense." AFT Br 13. But the holding is not strained. It simply construes the relevant words by their ordinary meaning. It is, rather, AFT Michigan that strains in attempting to equate the words "present or not present" with one "who is a participant or not a participant." *Id.* at 9.[4] But those words are not synonyms and have substantially different meanings. AFT Michigan's attempt to substitute words that are present in the law with words that are not is strained and contradicts its argument that the plain meaning supports its position.

As the *Sullivan* Court noted, a person can be present, but not a participant to a conversation. *Sullivan*, 117 Mich App at 481. Just as importantly, a person can be a participant in a conversation but not be present. *See id.* at 478. Many cases—such as *Sullivan* itself and others cited in this brief—have stemmed from participant recording of telephone calls. Thus, the person who conducted the recording of the call was a participant, but they were not present. But this does not answer whether the recording was eavesdropping or not; the "present or not present" language is not dispositive. The question is whether someone who is present or not present during a private

[3] The dictionary definition of the term "eavesdropping" from the time the eavesdropping law was passed gives a similar example of eavesdropping as "he hid under the table and *eavesdropped* . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 717 (3d ed 1966).

[4] The AG Plaintiff Team likewise states, *ipse dixit*, that "[a] participant to a conversation is a person who is present during the conversation." AG Plaintiff Team Br 6. But that is not necessarily so. A person can be present but not a participant. And a person can be a participant but not present. Such conflation of terms does not assist the statutory interpretation.

conversation did, in fact, "eavesdrop" upon it. MCL 750.539c. And for that, no interpretation or construction is needed; we need look no further than the statute in which the legislature defined the term, MCL 750.539a(2). *See, e.g.*, *People v Williams*, 288 Mich App 67, 74; 792 NW2d 384 (2010) ("when a statute specifically defines a given term, that definition alone controls.").

The Legislature defined the term "eavesdrop" in relevant part as "to overhear, record, amplify, or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse." MCL 750.539a(2). The Legislature made clear that its definition pertained to the "private discourse of others," and not the discourse in which one was a participant. This comports with the plain and ordinary meaning of the word "eavesdrop" as found in dictionaries from the time the statute was passed as well as today. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 717 (3rd ed 1961) ("to listen secretly to what is said in private"); NEW OXFORD AMERICAN DICTIONARY 548 (3rd ed 2010) ("secretly listen to a conversation"), CAMBRIDGE DICTIONARY (2021) ("to listen to someone's private conversation without them knowing"). Black's Law Dictionary likewise defines "eavesdropping" as "[t]he act of secretly listening to the private conversations of others without their consent. Cf. BUGGING; WIRETAPPING." BLACK'S LAW DICTIONARY 588 (9th ed 2009).[5] All of these definitions—like the one the Legislature provided—pertain to listening secretly to the private conversations *of others*, not to conversations in which one is a party.

Other words in the statutory definition of "eavesdropping" are also operative. The Legislature defined eavesdropping to mean to overhear, record, amplify, or transmit any part of the private discourse of others. "Discourse" is defined as the "verbal interchange of ideas."

[5] In the era when the statute was passed, Black's Law Dictionary defined the term "eavesdropping" as "listening under walls or windows, or the *eaves* of a house . . . ." BLACK'S LAW DICTIONARY 601 (4th ed 1951).

WEBSTER'S at 647. Thus, it is illegal to record the private "verbal interchange of ideas" of others. Again, a participant in such an interchange would be excluded from that definition. In fact, if there are only two speakers—as is often the case and as AFT Michigan alleges here—then a *party* could never record the "verbal interchange of ideas" of *others*. The term "discourse" contemplates multiple people speaking, and therefore a party (at least in a two-person discussion) would not be recording the discourse "of others."[6]

It is also instructive that the statutes prohibit not only recording the private discourse of others, but also "overhearing" such discourse with a device. MCL 750.539a(2). "Overhear" is not defined in the statute, but its plain meaning is to "hear (a speaker or his speech) without the speaker's knowledge or intention." NEW OXFORD AMERICAN DICTIONARY 1250 (3d ed. 2010); *see also* WEBSTER'S, at 1608 ("to hear without the speaker's knowledge or intention"). A party to a conversation cannot "overhear" it, because a party to a conversation is known to the speaker. Indeed, by AFT Michigan's reading of the law, using a "device" to "overhear" a conversation to which one is a party would make it illegal for someone using a hearing aid to engage in a conversation with another and would make every telephone call illegal, because that person would be using a "device" to "overhear" and "amplify" conversations by one who "is a participant."[7] *See*

[6] The AG Plaintiff Team argues that it should be illegal to "record[] the private discourse of *another* . . . ." AG Plaintiff Team Br 11. But one other person—"another"—cannot have "discourse." The team implicitly acknowledges that in the very same sentence, differentiating "discourse" from one's own "monologue." *Id.* That is, they recognize that "discourse" is the interchange of ideas between two or more people. This means that one cannot, by definition, eavesdrop on the "discourse of others" when he is a party to that discussion (at least, not when there are only two participants). While this all sounds of semantics and academic argument, it underscores that the way AFT Michigan and the AG Plaintiff Team are attempting to apply the words in question does not fit.

[7] If it were the Legislature's intent to prohibit recording, transmitting, or amplifying a conversation by a party, it likely would have added an express exclusion that telephones in their ordinary use and hearing aids are not eavesdropping devices. *See, e.g.*, SD Codified Laws § 23A-35A-1(6)(a)-(b).

AFT Br. 8-9. Such an absurd result cannot be intended. *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) ("Statutes must be construed to prevent absurd results . . . ."). This context affirms that, as with overhearing, one may "record, amplify or transmit" his own conversations under the law.[8]

The term "of others" in the definition of eavesdropping supports one-party consent under the negative implication canon. That is, "*expressio unius est exclusio alterius*," or the express mention of one thing—here, "the private discourse of others" in section 750.539a(2)—excludes from the regulation another thing—here, one's own private conversations. *See generally Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 707; 918 NW2d 756, reh'g denied sub nom *Mich Open Carry, Inc v Clio Area Sch Dist*, 503 Mich 920; 920 NW2d 372 (2018) (MCCORMACK, C.J.). By applying the statute to the conversations *of others*, a party is not prohibited from recording his or her own conversation.

The AG Plaintiff Team also would have this Court believe that *Sullivan* is "the only state-court interpretation of the question at issue," which as illustrated below is not true. There have been a plethora of state court decisions on the issue, this Court has declined to overrule such interpretations, and other courts have adopted or followed *Sullivan*. Numerous courts from other jurisdictions (state and federal) have followed the reasoning or have come to the same reasoning. *Sullivan* is not—as the AG Plaintiff Team would have it—some sort of outlier. It is, rather, the seminal case in a decades-long string of holdings.

[8] The "anomaly" noted in *Sullivan*, that "a participant may record a conversation [but] apparently may not employ third parties to do so for him[,]" is not at issue in this case. 117 Mich App at 482. This is not truly an "anomaly" at all, as explained by *Sullivan* and seemingly affirmed by this Court in *Dickerson*. *See* 461 Mich at 851. Ruling for one-party consent will not resolve this "anomaly" nor overturn *Dickerson*. *See* Part II(B).

In an interesting argument, the AG Plaintiff Team *concedes* that to "eavesdrop" is to overhear the discourse of others. AG Plaintiff Team Br 9. It admits that the "common definition" of eavesdropping is to "secretly listen to what is said in private," which "assumes that the one eavesdropping is an outsider to the conversation and is secretly listening to it." *Id.* at 10. "Indeed," the team continues, "that well-known definition is what most people would think of if they were warned that someone was 'eavesdropping' on their private conversation." *Id.*

Defendants agree, and this plain meaning of the term would prove that participant recording is simply not eavesdropping. But the AG Plaintiff Team goes a step farther, arguing that because the Legislature decided to define "eavesdropping" as overhearing, recording, amplifying, or transmitting the discourse "of others," somehow this reverses the ordinary meaning of the term eavesdropping. This is, we are told, "significant." But why it is significant, or how it somehow causes the definition of "eavesdrop" in the statute to become the opposite of (as opposed to a precise embodiment of) its common definition, is never explained.

The Legislature's definition of the term is not a "decidedly broader" definition. *Id.* at 10. It is, in fact, much the same definition, with clarity that eavesdropping includes overhearing and the attendant activities of recording, amplifying, or transmitting the private discourse of others. Simply because the statute prohibits these activities does not in any way change the fact that eavesdropping only pertains to the "private discourse of others." This is beyond a strained reading: it is an attempted perversion of the plain meaning of the language of the law.

In reviewing the language of the sections in question, and giving every word and phrase of the statutes their plain and ordinary meaning, the law's meaning and the Legislature's intent is clear. Sections 750.539c and 750.539a(2) do not prohibit a party to a conversation from recording

it without the consent of all parties. The law only prohibits the secret recording of private conversations of others.

B. THE ONE-PARTY CONSENT INTERPRETATION IS LONG-STANDING AND NEARLY UNANIMOUS.

AFT Michigan argues that this Court should disregard *Sullivan* because it "was clearly wrongly decided . . . ." AFT Br 12. But this Court has declined the opportunity to overturn *Sullivan* on past occasions and state and federal courts have almost uniformly followed its reasoning. The Michigan Attorney General has also repeatedly advised or argued that the eavesdropping statute provides for one-party consent. *Sullivan* did not seem clearly wrong in any of those instances to any of those parties.

In more than one instance, this Court has reviewed the eavesdropping statute while choosing not to address the question presented here. *See Dickerson v Raphael*, 461 Mich 851; 601 NW2d 108 (1999) (unpublished table decision); *Bowens v Ary, Inc*, 489 Mich 851; 794 NW2d 842 (2011) (memorandum).[9] Indeed *Sullivan* was appealed to this Court and the Court had the opportunity to overturn it if appropriate. Instead, this Court denied the application for leave to appeal, holding that it was "not persuaded that the question presented should be reviewed by this Court." *Sullivan v Gray*, per curium order denying appeal, issued June 30, 1983 (Mich Sup Ct Case No 69765). Supp Appx 181b.

In *Dickerson*, this Court reviewed a case in which the court of appeals applied *Sullivan*. There, a participant recorded her own conversation, but simultaneously broadcast it to others. *Dickerson*, 222 Mich App at 198. Following *Sullivan*, the court held that "a participant may tape-

[9] This Court also reviewed the eavesdropping statute in *People v Stone*, 463 Mich 558; 621 NW2d 702 (2001), in which it defined "private conversations" and set the parameters of an expectation of privacy. But that case pertained to an unknown third-party recording the conversations of others, and thus did not require review of one-party versus all-party consent.

record the participant's own conversation," but, "it may not permit unilaterally a third party to listen in upon a conversation." *Id.* The court of appeals reiterated that "a participant in a conversation may record or repeat a conversation . . . ." *Id.* at 200.

This Court accepted the appeal of *Dickerson*. One of the questions presented was whether the *Dickerson* opinion conflicted with *Sullivan* regarding the rights of a party to a conversation to record or broadcast the conversation.[10] This Court reversed the court of appeals as to its application of the definition of "private conversation," but expressly declined to address the question of participant recording, in effect preserving *Sullivan*. *Id.* (reversing the court of appeals on other grounds and noting that "[w]e do not reach the question of whether the Court of Appeals properly construed other portions of the eavesdropping statute."). Again, this Court had opportunity to overturn the one-party consent interpretation of Michigan's eavesdropping statute, but declined to do so, leaving *Sullivan* in place. The Court should now take the opportunity to expressly and definitively uphold the long-standing one party consent interpretation.

Other Michigan courts have routinely held that Michigan is a one-party consent state. Although, like *Sullivan*, the following precedent is not binding on this Court, it is certainly instructive and persuasive. Since *Sullivan*, state courts have never disagreed with its holding and have consistently applied its reasoning. *See, e.g.*, *LeGrow*, 258 Mich App at 185 ("[p]articipant[s] in a private conversation may record it without 'eavesdropping' because the conversation is not the 'discourse of others.'");[11] *Dickerson v Raphael*, 222 Mich App at 201 ("a participant may tape-

[10] *See Dickerson v Raphael*, Brief on Appeal of Appellants Sally Jessy Raphael and Multimedia Entertainment, Inc, 1999 WL 33896749 (Jan 11, 1999). Supp Appx 111b-180b.

[11] This decision alone dispels AFT Michigan's argument that "*Sullivan* . . . is not binding precedent even in the Court of Appeals" pursuant to Michigan Court Rule 7.215(J)(1). AFT Br 12. *LeGrow* was decided well after November 1, 1990, and tersely made the same interpretation of the eavesdropping statute as *Sullivan* without reservation. 258 Mich App at 185.

record the participant's own conversation"); *Kasper v Rupprecht*, 2014 WL 265542 at *2 (Mich App Jan 23, 2014) (Supp Appx 396b-398b) ("a participant in a private conversation may record it without 'eavesdropping' because the conversation is not the 'discourse of others . . . .'"); *Bloom v Pegasus Investigations, Inc*, 2002 WL 1375726 at *1 (Mich App June 25, 2002) (Supp Appx 358b-359b) ("As the parties agree, an eavesdropper must be a third party who is not otherwise involved in the conversation being eavesdropped on."); *Iska v Iska*, 2006 WL 2787889 (Mich App Sept 28, 2006) (Supp Appx 392b-395b) (ruling that a divorcee who recorded her former spouse "did not violate state law by recording the telephone conversation with defendant where plaintiff was a party to the conversation.").

Other courts have likewise adhered to the one-party consent interpretation. The Eastern District of Michigan has routinely held that participant recording is permitted under Michigan law. *See, e.g.*, *Carrier v LJ Ross & Assocs*, 2008 WL 544550 at *3 (ED Mich Feb 26, 2008) (Supp Appx 360b-362b) (holding that the Michigan eavesdropping statute "is not applicable here because the recordings were neither made by a third-party eavesdropper nor secretly published."); *Dearborn Tree Service, Inc v Gray's Outdoorservices, LLC*, 2014 WL 6886330 at *7 (ED Mich Dec 4, 2014) (Supp Appx 363b-369b) ("[t]he Michigan Court of Appeals has interpreted MCL 750.539c to permit a party to the conversation to record a private conversation without the consent of the other parties, but prohibits a party from allowing or employing a third party to do so."); *Ferrara v Detroit Free Press, Inc*, 1998 WL 1788159 at **8–9 (ED Mich May 6, 1998) (Supp Appx 370b-378b) (dismissing a claim alleging violation of the Michigan eavesdropping statute, noting that "[i]n *Sullivan* . . . the court held that the statutory definition of eavesdropping precluded an eavesdropping action against a participant of the conversation." Because the defendant in that case "participated in the conversation," the court granted summary judgment); *Ruth v Superior*

Consulting Holdings Corp, 2000 WL 1769576 at *3 (ED Mich Oct 16, 2000) (Supp Appx 502b-510b) (holding that a party is "permitted under federal and state law to record his conversations.").

The Western District of Michigan has also agreed. In *Gamrat v Allard*, 320 F Supp 3d 927 (WD Mich 2018), the court analyzed a situation in which the defendant was a participant in the conversation in question. The court held that the defendant "violated neither federal nor state law because there is no violation when the individual recording the conversation is also a participant." *Id.* at 945.

The Sixth Circuit, too, has ruled that Michigan law provides for one-party consent. In *Ferrara v Detroit Free Press, Inc*, 52 F App'x 229 (6th Cir 2002), the court reviewed a dismissal of such a claim based on the one-party consent interpretation, and held that "[t]he district court was clearly correct to grant summary judgment on this claim." *Id.* at 233. The Court adopted the proposition that the eavesdropping statute "unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to 'the private discourse of others.'" *Id.*

The one-party consent interpretation has been the settled law of Michigan for years, cited by treatises and secondary sources. *See, e.g.*, Employment Law for Michigan Employers ch 4: Social Media and Employee Privacy (Claudia R. Ellmann & Charles T. Oxender eds, Michigan Institute of Continuing Legal Education 3d ed. 2017), *available at* http://bit.ly/ICLE-ELME (last updated January 8, 2021) ("a participant in a private conversation may record it without the other participant's consent."); Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L REV 837, 848 (1998) ("Michigan courts interpret statutory language to allow participant taping across the board."); Jonathan Tukel, *When Words Come Back to Haunt You; A Primer on the Use and Admissibility of Surreptitiously Recorded*

Conversations in Civil Cases, 87 MICH B J 26, Oct 2008 ("a participant may 'record and utilize conversations he participates in,' (participant monitoring is lawful), but the participant may not delegate that authority to a third party (consensual monitoring is unlawful) because the third party becomes an eavesdropper."). While there is no model criminal or civil jury instruction on point, the Michigan Non-Standard Jury Instructions Civil defines an essential element of a cause of action under the eavesdropping statute to be that "[t]he defendant was not a party to the conversation." Michigan Non-Standard Jury Instr Civil § 32:1.

Just in the past year, since the motion to certify was filed, several cases have upheld the one-party consent interpretation. In *Ross v Jackson Nat Life Ins Co*, 2020 WL 2850290, *8 (D Mass Jun 2, 2020), the United States District Court of Massachusetts reviewed a case under Michigan law, dismissing an eavesdropping claim because the telephone call in question was recorded "in Michigan, a one-party consent state." Supp Appx 493b-501b. Similarly, in *People v Williams*, 2020 WL 2601567 (Mich App May 21, 2020), the Michigan Court of Appeals again held that the Michigan eavesdropping statute "unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to the private discourse of others." Supp Appx 466b-470b. "The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on." *Id.* "Accordingly, a participant in a conversation does not violate MCL 750.539c by recording the conversation without the other party's knowledge or consent." *Id.* More recently, the Sixth Circuit Court of Appeals upheld a ruling from the Western District of Michigan that dismissed an eavesdropping claim because it was based on participant recording. *Gamrat v McBroom*, 2020 WL 4346677 at *2 (6th Cir July 29, 2020) ("under that law, participants in private conversations likewise may record those conversations."). Supp Appx 388b-391b.

Even after this Court accepted briefing on the certified question, courts continue to follow *Sullivan* (and disregard the district court holding in this case). *See Fisher v Perron*, 2021 WL 103633, Case No 20-12403 (ED Mich Jan 12, 2021). Supp Appx 379b-387b. In *Fisher*, the Eastern District acknowledged the holding in this case and the certification to this Court, yet still held that it "should continue to apply the holding of *Sullivan* . . . ." *Id.* at *4. The court noted *Sullivan*'s holding that the statutory language "on its face, unambiguously excludes participant recording . . . ." *Id*. It also noted the "other persuasive state and federal precedent which uniformly continue to apply the majority's holding in the Michigan Court of Appeal's *Sullivan* decision." *Id*. The court also stated that it, "respectfully, is unpersuaded by the reasoning in *AFT Michigan* . . . ." *Id.* Lastly, the court noted its belief in the "low probability, in this court's view, that the Michigan Supreme Court will abandon *Sullivan*." *Id.* at *4, n 2. Thus, because the "Defendant was a participant in the calls she recorded, the court finds that her alleged actions cannot constitute a violation of the Michigan Eavesdropping statute . . . ." *Id.* at *5.

Other jurisdictions have likewise long recognized that Michigan law permits recording conversations with one-party consent. *See, e.g.*, *State v Braddock*, 452 NW2d 785 (SD 1990) (citing *Sullivan* as persuasive authority in holding that its own statute permits one-party consent recording); *State v Egerson*, 315 Wis 2d 768 (2008) ("Michigan law permits one-party consent recording"); *Thompson v GC Services Ltd P'ship*, 2006 WL 8451617 (SD Cal May 30, 2006) (Supp Appx 511b-522b) ("the Michigan statute . . . has been interpreted to permit the recording of a conversation by one of the participants without the consent of other participants.").

Notably, the Legislature's meaning of the eavesdropping statute has been affirmed by the Legislature itself. In recent years, numerous cases have been filed against the Michigan House of Representatives, counsel for the house, and individual members of the house. *See, e.g.*, *Courser v*

Mich House of Representatives, 6th Cir Case No. 19-1840; *Gamrat v McBroom*, 6th Cir Case No. 19-2364. In those cases, former members of the Michigan House of Representatives alleged violation of the Michigan eavesdropping statute because their telephone calls had been recorded without their consent. The House of Representatives, however, argued that Michigan law permits such recordings via one-party consent. *See* Brief of Defendants-Appellees Michigan House of Representatives, et al, 2019 WL 5701171, *49-50 (6th Cir Oct 25, 2019) (arguing that the "the district court correctly held that [Plaintiff] fails to state a . . . state eavesdropping claim" when the district court dismissed such a claim in part because the person recording the call "was a conversational participant."). Supp Appx 039b-076b. Indeed, the General Counsel for the House of Representatives argued that "[t]he law is well-settled: A participant to a conversation may lawfully record the conversation without the consent or knowledge of any other party to the conversation without violating either federal or Michigan law." Brief of Appellees Brock Swartzle and Norm Saari, 2019 WL 5701170, *35 (6th Cir Oct 25, 2019), Supp Appx 203b-227b; *see also* Brief of Appellees Brock Swartzle and Norm Saari, 2020 WL 1496213, *33 (6th Cir Mar 19, 2020). Supp Appx 182b-202b.

Also telling is that the Michigan Attorney General's office—until the AG Plaintiff Team's brief in this case—has consistently argued that Michigan law provides for one-party consent. As long ago as 1982, the Attorney General (then Frank Kelly) issued an opinion stating that "the eavesdropping statute does not prohibit recording of a conversation by a participant in the conversation without consent of all the parties." OAG, 1981-1982, No 6,100, p 741 (Sept 10, 1982); *see also* OAG 1985-1986, No 6,369 (June 9, 1986) (in answering whether a medical examiner can record telephone conversations without the permission of others on the call, emphasizing that the statute only prohibits recording "the private discourse of <u>others</u>," and stating

"[i]t is my opinion . . . that the medical examiner may record his or her telephonic conversation . . . .") (emphasis in original Attorney General opinion). Since that time, the Attorney General's office has repeatedly argued the same position. In *Courser v Allard*, 2016 WL 9109050, *18 (WD Mich Nov 21, 2016) for example, the Michigan Attorney General argued that "a claim is not stated where a participant to the conversation made the recording." Supp Appx 077b-098b. In *Williams v Campbell*, the Attorney General argued that "a participant in a private conversation may record it without 'eavesdropping' because the conversation is not the 'discourse of others.'" Attorney General's Answer in Opposition to Petition for Writ of Habeas Corpus, *Williams v Campbell*, Case No 2:15-cv-12914-NGE-APP (ED Mich Feb 22, 2016). Supp Appx 228b-348b.

For nearly forty years before the district court's order in this case, Michigan's eavesdropping statute was interpreted to provide for one-party consent, barring claims against participant recording. Since the district court's interpretation in this matter, Michigan and federal courts have continued to follow *Sullivan*. Respectfully, this Court should now definitively rule that Michigan's eavesdropping statute permits one-party consent, as it has always been known to do.

C. OTHER MAXIMS OF STATUTORY CONSTRUCTION AFFIRM THAT THE LAW PERMITS ONE-PARTY CONSENT.

As discussed above, the eavesdropping statute is unambiguous and plainly provides for one-party consent. Several maxims of statutory construction also support this conclusion.

1. THE INTERPRETATION OF AFT MICHIGAN AND THE AG PLAINTIFF TEAM WOULD RENDER THE WORDS "OF OTHERS" IN THE STATUTE SURPLUSAGE OR NUGATORY, FAVORING AN INTERPRETATION OF ONE-PARTY CONSENT.

"[A]s a general rule, 'we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *People v Pinkney*,

501 Mich 259, 282 (2018) (VIVIANO, J.) (quoting *People v Miller*, 498 Mich 13, 25 (2015)). To interpret the definition of eavesdropping under MCL 750.539a(2) to apply to conversations in which one is a party would make the language "the private discourse of others"—specifically, "of others"—surplusage or nugatory. To give effect to the words "of others," any interpretation of the eavesdropping statute should limit the reach of the law to conversations *of others*.

AFT Michigan's and the AG Plaintiff Team's interpretation would leave "eavesdropping" to simply mean "to overhear, record, amplify or transmit any part of [] private discourse . . . without the permission of all persons engaged in the discourse." *See* MCL 750.539a(2). Judge BRENNAN, dissenting in *Sullivan*, urged that "[t]he phrase 'of others' modifies 'private discourse,' which does not *necessarily* imply that a potential eavesdropper must be a third party not otherwise involved in the conversation." *Sullivan*, 117 Mich App at 484–85 (emphasis added). But he never explained what it might mean otherwise, instead asserting that the provision "without the permission of all persons engaged in the discourse" that closes the sentence overrides "of others[.]" *Id.* at 485. This only affirms, and in no way justifies, that the interpretation leaves the term nugatory or surplusage.[12]

Like AFT Michigan, the plaintiff in *Sullivan* argued that because MCL 750.539c prohibits "[a]ny person who is present or who is not present during a private conversation" from using a device to eavesdrop, the statute prohibits participant recording. But that court rightfully concluded that this "would render inoperative the words 'of others' in the statutory definition." *Sullivan*, 117 Mich App at 481. This is because "one may be 'present' during a conversation without being a

[12] "Logically, 'the canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute.'" *People v Pinkney*, 501 Mich 259, 284; 912 NW2d 535 (2018) (quoting *Microsoft Corp v i4i Ltd P'ship*, 564 US 91, 106 (2011) (quotation marks and citations omitted)).

party to the conversation and without his presence being apparent to those conversing." *Id.*; *see* Part II(A). Interpreting the statute to prohibit participant recording would effectively nullify the words "of others." But those words should not be nullified; they should instead be given effect. That effect amounts to one-party consent.

2. IF THE EAVESDROPPING STATUTE IS HELD TO BE AMBIGUOUS, THE RULE OF LENITY FAVORS AN INTERPRETATION OF ONE-PARTY CONSENT.

Because MCL 750.539c is a penal statute—a felony—if it or MCL 750.539a(2) are ambiguous, interpretation must also be undertaken subject to the rule of lenity. This Court has held that "[b]ecause courts *are wary of creating crimes*, penal statutes are to be strictly construed and any ambiguity is to be resolved in favor of lenity." *People v Gilbert*, 414 Mich 191, 211; 324 NW2d 834 (1982) (citing *People v Hall*, 391 Mich 175, 189–190; 215 NW2d 166 (1974)) (emphasis added). Further:

> When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

Id. (quoting *Bell v United States*, 349 US 81, 83 (1955);[13] *People v Bergevin*, 406 Mich 307, 312 (1979)). Thus, if "[t]he scope of [a] statute is at least uncertain[,] it should be applied only to those acts which the Legislature clearly meant to proscribe." *Id.* Doubts about whether the private conversations "of others" include conversations to which one is a party—doubts that could result in the imposition of a felony—must be resolved against inclusion, or in favor of one-party consent.

[13] *Bell* was cited favorably by the United States Supreme Court most recently in 2008, when it ruled that the rule of lenity required interpreting "proceeds" to mean profits, as opposed to receipts, under the federal money laundering statute. *United States v Santos*, 553 US 507, 515 (2008).

The dissent in *Sullivan*, on which the district court and the other parties rely, applies the opposite of this tenet. "[I]f the Legislature had intended that the statute *not* apply to participants, I think that it would have stated that intention in clear language." *Sullivan*, 117 Mich App at 483 (BRENNAN, J., dissenting) (emphasis added). But this is a reversal of the standard in the rule of lenity, which holds that if the Legislature had intended that the statutes *do apply to* parties to private discourse, it should have stated that intention in clear language. If the Legislature did not do this, the rule of lenity requires construing "the private discourse of others" to not include parties to the conversation. This, again, the *Sullivan* majority got right: "[h]ad the Legislature desired to include participants within the definition, the phrase 'of others' might have been excluded or changed to 'of others or with others.'" 117 Mich App at 481.

The statutes at issue date to 1966, and *Sullivan* to 1982. Between the law's enactment and *Sullivan*, the law was never interpreted to regulate the recording of conversations as a party. *Id.* at 479 ("The question of whether participant recording is forbidden is a novel one to this jurisdiction."). As discussed thoroughly above, *Sullivan* was universally applied and followed until the district court's interpretation in 2019. *See* Part II(B). This Court is thus in the position of creating a crime in MCL 750.539c in situations where none previously existed. To do so would violate the rule of lenity.

D. A STATUTORY INTERPRETATION OF ONE-PARTY CONSENT IS CONSISTENT WITH THE INTERPRETATION OF SIMILAR STATUTES.

While not binding on this Court, it is persuasive and helpful to consider how courts in other jurisdictions have interpreted eavesdropping statutes with similar—sometimes almost identical—language as the Michigan eavesdropping law. These courts have also concluded that such language provides for one-party consent.

Georgia's statute, for example, holds that it is unlawful for "Any person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation *of another* which shall originate in any private place." Ga Code Ann § 16-11-62(1) (emphasis added). The Georgia Court of Appeals has interpreted this as not applying to participant recording, stating that the prohibitions "logically relate to one who is not a party to the conversation itself." *Cross v State*, 128 Ga App 837, 838–39 (1973). "One does not 'intercept' or 'overhear' a conversation that is made directly to him. He is not an eavesdropper nor does he have the conversation under 'surveillance.'" *Id.* (citing BLACK'S LAW DICTIONARY).

Although the Georgia statute has a specific and express exception for conversations in which "at least one party thereto shall consent," the Georgia court held that that "section is also applicable, though redundant in view of the above interpretation" of the general rule. *Id.* at 840. Georgia's Supreme Court adopted this interpretation and holding. *Mitchell v State*, 239 Ga 3, 3–5 (1977) (following the reasoning in *Cross*, noting that the "statute implicitly refers to persons who are not parties to the conversation."); *State v Birge*, 240 Ga 501, 502 (1978) (in upholding one-party consent, rhetorically asking: "Is it criminal in Georgia to overhear one's own conversation?").

Alabama's eavesdropping statute has very similar language to Michigan's with regard to being "present at the time" of the recording. *See* Ala Code § 13A-11-31 ("a person commits the crime of criminal eavesdropping if he intentionally uses any device to eavesdrop, whether or not he is present at the time."). The statute goes on to define "Eavesdrop" as "to overhear, record, amplify or transmit any part of the private communications of others without the consent of at least one of the persons engaged in the communication, except as otherwise provided by law." Thus, the language "present or not present" or "whether or not he is present" is not operative, let alone

dispositive, of the question of one-party consent. And Alabama courts have held that "consent of one or more of the parties is a defense to a charge of violating" the Alabama eavesdropping statute. *Stinson v Larson*, 893 So2d 462, 467 (Ala App 2004) (citing *Alonzo v State ex rel Booth*, 283 Ala 607; 219 So2d 858, 869 (1969)).

Just as these states have interpreted their statutes with language similar to Michigan's eavesdropping statute to permit one-party consent, so, too, should this Court hold that Michigan law provides for it.

E. THE EAVESDROPPING STATUTE'S LEGISLATIVE HISTORY SUPPORTS ONE-PARTY CONSENT.

Both AFT Michigan and the AG Plaintiff Team attempt to argue that the legislative history of the Michigan eavesdropping statute lends credence to their position. AFT Br 9-12; AG Plaintiff Team Br 14. But "[t]he touchstone of legislative intent is the statute's language." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *Id.*; quoting *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). Accordingly, when statutory language is unambiguous (as all parties contend here), judicial construction is not required or permitted, and legislative history need not be divined. *Id.* *See also In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003) ("it bears repeating that resort to legislative history of any form is proper *only* where a genuine ambiguity exists in the statute. Legislative history cannot be used to create ambiguity where one does not otherwise exist."). But even if legislative history were consulted, it supports the conclusion that the Legislature only intended to prohibit eavesdropping on the discourse of others.

AFT Michigan and the Attorney General team attempt to make something out of the words "who is present" in MCL 750.539c because, as introduced, the section would have only applied to "a person not present." AFT Br 10-12; AG Plaintiff Team Br 14. But, as discussed previously, this amendment only clarifies that eavesdropping on the private conversations of others is impermissible whether or not one is present; it does not speak to the operative language of what actually constitutes eavesdropping. *See* Part II(A). For example, with the addition, the law prohibits someone from using a shotgun microphone to overhear a private conversation in a park from hundreds of feet away as clearly as it prohibits that person from bugging a park bench to overhear a private conversation from hundreds of miles away. This amendment clarified that the *location* of the eavesdropper is immaterial; it did not alter the definition of eavesdropping itself.[14]

As to the actual definition of "eavesdropping," both AFT Michigan and the AG Plaintiff Team fail to note that the phrase "of others" was included at introduction, and remained through passage even with other extensive amendments to the definition in the process. *Cf.* Appx 100a *with* Appx 109a. Regardless of what other terms changed, all available versions of the bill leading up to codification of what is now MCL 750.539a(2) limit "eavesdropping" to the conversations "of others." This says more about the Legislature's intent than anything else. And the law has not changed since.

[14] It is also just as plausible that the legislature added the language "who is present" to section 750.539c in order to remove an apparent inconsistency between that section as originally written and section 750.539b, which states that "[a] person who trespasses on property owned or under the control of any other person, to subject that person to eavesdropping or surveillance is guilty of a misdemeanor." Thus, section 750.539b *assumes one who is present*, but as originally written section 750.539c only applied to "a person not present." Modifying the latter section to apply to "one who is present or not present" removed that inconsistency. Of course, the Court need not speculate as to the reason for any such additions or omissions, and can instead rely on the definition and words actually used by the legislature.

There is a risk, in reviewing legislative history, of going too far (or, indeed, in engaging in the exercise at all).[15] For example, the original proposed statute included a provision prohibiting one "who listens to the deliberations of a jury by means of instrument . . . ." Appx 100a. That language was removed from the act before it was passed. *See* Appx 110a. But the omission of this language from the final statute does not mean that one may, therefore, eavesdrop on the deliberations of a jury with impunity. This illustrates the dangers in relying on legislative history, particularly when the legislature expressly defined the term in question. Even if the statute were ambiguous (and it is not), the legislative history of the eavesdropping statute supports the argument that the law only reaches the private conversations of others.

III. TO INTERPRET THE STATUTE TO MANDATE ALL-PARTY CONSENT WOULD LEAVE THE STATUTE UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE CONSTITUTIONAL DOUBT CANON.

"In cases of [constitutional] doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act." *Sears v Cottrell*, 5 Mich 251, 259 (1858). "[S]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Certified Questions From US Dist Court, W Dist of Michigan, S Div*, No. 161492, -- NW2d --, 2020 WL 5877599, at *4 (Mich Oct 2, 2020) (quoting *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018) (other citations omitted)). To interpret eavesdropping to include one's own conversations would raise constitutional doubts about MCL 750.539a(2) and MCL 750.539c

[15] *See, e.g.*, *Griffin v Swartz Ambulance Serv*, 947 NW2d 826 (Mich 2020) (mem) (VIVIANO, J., dissenting) ("I would question whether the Court should turn to legislative history even after such a finding [of ambiguity] because of the many problems with reliance on legislative history."); citing Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 376 ("the use of legislative history to find 'purpose' in a statute is a legal fiction that provides great potential for manipulation and distortion.").

under the vagueness doctrines of the First and Fifth Amendments to the United States Constitution, respectively.[16] For this additional reason, the Court should resolve any ambiguity in favor of one-party consent.

Before the district court's interpretation in this case, the Michigan eavesdropping statute was held by nearly all courts and understood by citizens, journalists, and other individuals to allow individuals to secretly record conversations to which they are a party. *See* Part II(B). Even since this case began, television journalists in Michigan have engaged in such activity.[17] Before taking any action in the state of Michigan, Defendants relied on the statute's language and nearly 40 years of state and federal court precedent. Any holding that this precedent was not valid or is no longer valid would simply illustrate that the statute was, at best, vague.

Vagueness is foremost a due process concern. *See* US Const, Am V ("No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"). "A statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential

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[16] "The Fifth Amendment has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment." *People v Clary*, 494 Mich 260, 265; 833 NW2d 308 (2013) (citing *Malloy v Hogan,* 378 US 1, 3 (1964)). "Generally, the First Amendment freedom of the press and speech provisions are applicable to the states through the Due Process Clause of the Fourteenth Amendment." *In re Midland Pub Co, Inc*, 420 Mich 148, 166 n 19; 362 NW2d 580 (1984) (citing *Near v Minnesota ex rel Olson,* 283 US 697, 51 (1931)).

[17] *See, e.g.*, *Hidden camera investigation exposes Detroit woman performing illegal dental procedures at her home*, CLICKONDETROIT, June 20, 2018, http://bit.ly/COD-Dental; *Hidden camera investigation raises questions about botox injections at Clinton Township beauty bar*, CLICKONDETROIT, April 3, 2019, http://bit.ly/COD-Botox; *Hidden camera captures a Michigan nursing home employee allegedly abusing a resident*, YOUTUBE, Mar. 10, 2018, https://youtu.be/jgUCybcKeHc; Simon Shaykhet, *Hidden camera investigation shows Uber & Lyft drivers willing to break law*, WXYZ DETROIT, May 21, 2018, http://bit.ly/WXYZ-Uber-Lyft; *Hidden camera investigation reveals sales pitch in Metro Detroit stores selling CBD products*, CLICKONDETROIT, August 5, 2019, http://bit.ly/COD-CBD; *Video shows apparent unlawful activity by Unlock Michigan signature collectors*, DETROIT FREE PRESS, Sept. 30, 2020, http://bit.ly/Freep-Unlock-MI.

of due process of law." *Columbia Nat Res, Inc v Tatum*, 58 F3d 1101, 1105 (6th Cir 1995) (quoting *Connally v Gen Constr Co,* 269 US 385, 391 (1926)). The void-for-vagueness doctrine exists to "ensure fair notice to the citizenry; second to provide standards for enforcement by the police, judges, and juries." *Id.* at 1104. The latter concern—to provide standards for enforcement by police, judges, and juries—is "the most important." *Id.*[18]

This Court's interpretation will, of course, have criminal implications. Although this case was brought under the law's civil provision, the statute is a criminal law, and so it implicates police along with judges and juries. *See* MCL 750.539h, MCL 750.539c (eavesdropping is a felony).[19] If the Court rules that the eavesdropping statute does not provide for one-party consent, activity that for nearly 40 years was deemed legal would now make a felon of those people who had followed the consistent interpretation of the law and comported their actions therewith—from journalists to everyday citizens—and would do so in effectively an *ex post facto* manner.

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

Skilling v United States, 561 US 358, 402–03 (2010) (quoting *Kolender v Lawson,* 461 US 352, 357 (1983)). The law does not definitely prohibit the secret recording of one's own conversations, and to rule otherwise would leave the law unconstitutionally vague facially and as applied to Defendants' recordings in this case.

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[18] Fair notice also supports the separation of powers, for "'[i]t is the legislature, not the court, which is to define a crime, and ordain its punishment[.]'" *Tatum*, 58 F3d at 1105 (quoting *United States v Wiltberger*, 18 US (5 Wheat) 76 (1820)).

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

The strictest vagueness doctrine is implicated under the First Amendment by laws that regulate speech activity, and that doctrine is implicated by the Michigan eavesdropping statute because audio recording is the creation of speech. *See, e.g.*, *Am Civil Liberties Union of Illinois v Alvarez*, 679 F3d 583, 595–604 (7th Cir 2012) ("The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected[.]"); *ETW Corp v Jireh Pub, Inc*, 332 F3d 915, 924 (6th Cir 2003) (quoting *Hurley v Irish–American Gay, Lesbian and Bisexual Group of Boston,* 515 US 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression.")). The dissent in *Sullivan* tacitly acknowledged the value of audio recording: "[t]here is obviously more credence given to a tape recording than a verbal recollection." *Sullivan*, 117 Mich App at 485 (BRENNAN, J., dissenting). This means that MCL 750.539c, which regulates audio recording, would require the most stringent vagueness analysis.

"[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill of Hoffman Estates v Flipside, Hoffman Estates, Inc*, 455 US 489, 499 (1982). "*If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply*." *Id.* (emphasis added). To interpret the Michigan eavesdropping statute to regulate the recording of one's own conversations would leave the law unconstitutionally vague under both the Due Process Clause as well as the First Amendment.

Neither the district court in the present case nor the *Sullivan* court—or any other—has undertaken a vagueness analysis of the statutes, because it has not been necessary. If this Court holds that the eavesdropping statute requires all-party consent, however, the law will penalize—as a felony—one-party recordings under a statute in which the operative language relates only to

"the private discourse of others." MCL 750.539a(2), MCL 750.539c.[20] To draw this conclusion will mean that persons of ordinary intelligence have guessed incorrectly as to the meaning of this term for nearly four decades, far from the sufficient definiteness required of penal statutes. *See Skilling*, 561 US at 402–03.

If the statute in question is interpreted to disallow one-party consent, it will not withstand the vagueness scrutiny of due process, and certainly not the most stringent vagueness standards of the First Amendment. For decades, persons of common intelligence have analyzed the meaning of Michigan's eavesdropping statute and come to an almost uniform conclusion, contrary to the district court in this case and to what AFT Michigan is arguing. Likewise, judges from state and federal courts have interpreted the meaning of Michigan's eavesdropping provisions and have only differed as to its application twice. If, as the Eastern District stated, "there is a substantial ground for difference of opinion" about the interpretation of this statute,[21] the law is not merely ambiguous, it is unconstitutionally vague. *See* Appx 49a.

IV. EQUITY AND PUBLIC POLICY WOULD BE BEST SERVED BY UPHOLDING THE LONG-STANDING ONE-PARTY CONSENT INTERPRETATION.

The AG Plaintiff Team states that "it would be tempting to resolve this certified question based on policy," and lists a number of public policy concerns it alleges militate in favor of its position. AG Plaintiff Team Br 1, 16-23. Such public policy concerns are, however, properly left

[20] In his dissent in *Sullivan*, it is notable that Judge BRENNAN equivocated during his interpretation. "The phrase 'of others' modifies 'private discourse,' which does not *necessarily* imply that a potential eavesdropper must be a third party not otherwise involved in the conversation." *Sullivan*, 117 Mich App at 484–85 (BRENNAN, J., dissenting). Respectfully, criminal statutes carrying felony offenses and jail time should *necessarily* be clear, both to the courts applying them and the citizens to whom the statutes will be applied.

[21] The district court noted that "this is evidenced by *Sullivan*, the 2-1 split, *per curiam* Michigan Court of Appeals decision that excludes participants in a private conversation from the ambit of the eavesdropping statute's prohibitions." Appx 49a.

to the Legislature and not the courts. Nonetheless, this Court's ruling could have far-reaching repercussions on thousands of citizens and entities. Even if such concerns of equity and policy are considered, they favor continued recognition of one-party consent.

For example, the implications of overturning the decades-long precedent of one-party consent would censor investigations by journalists throughout Michigan. As the Detroit Free Press argued to this Court in an *amicus* brief in a prior case, any holding that would nullify one-party consent under Michigan law would "affect[] every Michigan reporter who seeks to gather and disseminate information, [and] effectively strip[] journalists of an important means of both uncovering wrong-doing and ensuring and proving the accuracy of reporting[.]" Detroit Free Press' Amicus Curiae Brief in Support of Petitioners-Appellees' Brief on Appeal in the case of *Dickerson v Raphael*, 1999 WL 3389750 (Mich Jan 11, 1999). Supp Appx 099b-110b. This is because electronic devices to record conversations "are important tools that allow journalists to conduct investigations and to ensure that their reporting is, among other things, accurate and subject to corroboration. The pages of newspapers across the nation, on a daily basis, contain examples of articles discussing weighty public issues the publication of which would not have been possible absent the use of recording or other electronic devices." *Id.*

Beyond journalists, this Court's holding will affect myriad Michigan residents facing stressful, dire, and even life-threatening situations. Divorce and parenting time cases in Michigan routinely involve instances of a participant recording a spouse or former spouse; overturning Michigan's one-party consent rule would make felons of countless divorcees. Victims of abuse, domestic violence, and other physical crimes often rely on one-party consent laws to record their

assailants, often as the only way to gain evidence in order to escape a deadly situation.[22] A contrary interpretation of the eavesdropping statute would not only turn those victims into felons, but also subject such victims to civil claims brought by their very abusers, in which the abusers could be entitled to punitive damages. *See* MCL 750.539h.

Law enforcement and prosecutors rely on recordings of informants, who are not law enforcement themselves, in order to prosecute crimes or to stop potential crimes.[23] There is a growing body of case law pertaining to employees' rights to record their employer in the work place.[24] And companies like Amazon, Google, and Ring Doorbell could find themselves subject to a profusion of litigation for the alleged recording and transmitting practices of their in-home devices, just as they have already seen such litigation in California, an all-party consent state.[25]

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[22] *See, e.g.*, John E.B. Myers, *California's Eavesdropping Law Endangers Victims of Domestic Violence*, 31 J MARSHALL J INFO TECH & PRIVACY L 57, 65 (2014) ("In many domestic violence cases, the most powerful evidence of abuse is the angry telephone call or the heated face-to-face confrontation, where the abuser thinks the only one listening is the victim."). This journal article further notes that one-party consent states do not have the same dilemma as all-party consent states, which may make evidence of such violence inadmissible and even illegal. Such all-party consent rules make this dilemma "acute and potentially deadly." *Id.* *See also*, "Recording Phone Calls Can Help Prove Abuse," https://perma.cc/4A5C-5Y2F (Dec 9, 2019) ("Proving nonphysical abuse in court is tricky for domestic violence survivor but one way survivors can get evidence against an abuser is to secretly record phone calls, which is legal without the other person's consent in 38 states.") ("Audio recording is one of the best and most important things for a domestic violence victim to do. So many cases are 'he said, she said,' and getting a recording completely changes that . . . .").

[23] Although the eavesdropping statute has an exception for "a peace officer of this state or of the federal government, or the officer's agent," that exception would not always apply to informants or private citizens who take it upon themselves to record illegal plots. Such recordings can be integral in stopping potential crimes and prosecuting those responsible. *See, e.g.*, Robert Snell & Melissa Nann Burke, *Plans to Kidnap Whitmer, Overthrow Government Spoiled, Officials Say*, DET NEWS (Oct 9, 2020), https://perma.cc/AN7A-K2VQ.

[24] In one high profile employment case, former Fox News personality Gretchen Carlson used her smartphone to secretly record conversations between herself and her boss Roger Ailes. These recordings were used to substantiate allegations of workplace sexual harassment. *See* Gabriel Sherman, *The Revenge of Roger's Angels*, NY MAG (Sept 5, 2016), http://nym.ag/362JKHi.

[25] One study conducted in the early 2000s indicated that of the approximately 160 reported decisions up to that time concerning alleged violations of the interception, disclosure, or use

The issue presented to this Court is a far reaching one that could have severe consequences—some unintended and even unforeseen—in everyday life. Although the plain language of the statute should lead this Court to conclude that Michigan's eavesdropping statute permits participant recording, should this Court consider any of the policy concerns, equitable considerations, and pragmatic effects of its rulings, these too should lead this Court to preserve the *status quo ante* of Michigan's one-party consent law.

V. SHOULD THE COURT, *ARGUENDO*, INTERPRET THE LAW TO REQUIRE ALL-PARTY CONSENT EVEN FOR PARTIES TO RECORD A CONVERSATION, THE COURT'S HOLDING SHOULD APPLY ONLY PROSPECTIVELY, AND SHOULD NOT BE GIVEN RETROACTIVE APPLICATION.

If this Court were to rule that the Michigan eavesdropping statute requires all party consent with no exception for participant recording, any such holding should only be applied prospectively to future cases, and not retroactively to this case or other actions brought prior to this Court's ruling. Such prospective application would be proper given that the holding would constitute a "new rule." Such a prospective application would also be appropriate given the equities at hand.[26]

Under this Court's jurisprudence, prospective application of its holdings is preferred over full or limited retroactive application when overruling an established precedent or when deciding an issue of first impression with a resolution that was not clearly foreshadowed. *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982) (citing *Chevron Oil Co v Huson*, 404 US 97, 106 (1971)). This recognizes that citizens must "rely on the law as it then was," and courts should not "indulge

provisions of the federal wiretapping statute, approximately 75% of those cases arose in either the law enforcement, commercial, or domestic relations contexts. *See*, Brief for Respondents, *Barnicki v Vopper*, 2000 WL 1614392, 19, n 24 (Sup Ct Oct 25, 2000). Supp Appx 001b-038b.

[26] While Defendants believe such prospective application would be appropriate should this Court reverse the holding of *Sullivan*, they reiterate that this Court should uphold and affirm the holding in *Sullivan* and make this section moot.

in the fiction that the law now announced has always been the law . . . ." *Chevron*, 404 US at 107. Such concerns should be considered whether the issue at hand is a criminal matter or noncriminal matter. *Id.* at 105–06.

This Court has noted that "in each instant" that it overrules prior precedent, it "must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change." *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003). Where injustice might result from a holding that imposes retroactive application, "a more flexible approach is warranted." *Id.* This is particularly so when "there has been extensive reliance" on the prior interpretation of a statute. *Id.* This Court has, in cases past, even set forth a future date by when its holdings will have prospective application. *See, e.g.*, *Gladych*, 468 Mich at 607 ("this decision will have prospective application, effective September 1, 2003").

Factors courts utilize in weighing prospective application versus retroactive application—based on this Court's jurisprudence—include: 1) the purpose of the new rule; 2) the general reliance on the old rule; and 3) the effect of full retroactive application on the administration of justice. *See Collins v Dep't of Corrections*, 167 Mich App 263, 266–67; 421 NW2d 657 (1998) (citing *Faigenbaum v Oakland Med Ctr*, 143 Mich App 303, 312–13; 373 NW2d 161 (1985); *Rozier v Dep't of Pub Health*, 161 Mich App 591, 599; 411 NW2d 786 (1987)).

This Court's holding can be considered a "new rule" when overruling an established precedent or when deciding an issue of first impression whose resolution was not clearly foreshadowed. *Phillips*, 416 Mich at 68. Also relevant is whether there existed, prior to this Court's ruling, a conflict of opinion within the jurisdiction. *See Collins*, 167 Mich App at 267.[27]

[27] The court of appeals held that the ruling in question was not a "new law" because "the conflict in this Court did not establish a clear precedent," and the conflict "was sufficient to put persons on

Although there was a sole dissenting opinion in *Sullivan*, the majority opinion in that case has been consistently—and exclusively, until the underlying matter—followed and applied. There was no conflict before the instant matter. Instead, courts, Defendants, litigants across the state, and even the Attorney General's office have relied on *Sullivan*. *See* Part II(B). This reliance has been consistent for nearly forty years.

Lastly, the effect of retroactive application of the new rule—should there be one—would be far reaching. As noted in Part IV, such a ruling would make defendants of an untold number of citizens who previously relied on *Sullivan* and its progeny. The eavesdropping statute is subject to a six-year statute of limitations, threatening to reach back more than half a decade. *See* MCL 767.24(10). Violators would include divorcees, victims of domestic abuse, journalists and broadcasters, and prosecutors who have relied on *Sullivan* for admitting such recordings into evidence. *See* Part IV. In *Collins*, prospective application was deemed appropriate because the holding in question would invalidate the misconduct violations of thousands of prisoners. *Collins*, 167 Mich App at 267. In this case, the same rationale should apply when the new rule would create felons and defendants out of heretofore law-abiding citizens.

Defendants request that this Court uphold and affirm the long-standing interpretation from *Sullivan*. If, for any reason, this Court should overturn that precedent, Defendants respectfully request that such a holding only be given prospective application from a future date. This will permit citizens to adjust their behavior accordingly and not find themselves, overnight, subject to litigation or criminal prosecution for what in effect will be a new rule and an *ex post facto* law.

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notice that our Supreme Court could resolve the issue either way and was sufficient to clearly foreshadow" the ruling in question. *Collins*, 167 Mich App at 267. The same cannot be said here.

RELIEF REQUESTED

For the foregoing reasons, Defendants request that this Court accept this certified question and hold that MCL 750.539a(2) and MCL 750.539c do ***not*** prohibit a party to a conversation from recording the conversation absent the consent of all other participants, and that such participant recording is lawful under Michigan's long-standing one-party consent rule.

Dated: February 3, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2021, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all registered ECF participants listed for this case.

Respectfully submitted,

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