

STATE OF MICHIGAN  
IN THE SUPREME COURT

*In Re* CERTIFIED QUESTION FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN,  
SOUTHERN DIVISION

AFT MICHIGAN

SC No. 162121  
USDC-ED 4:17-cv-13292

Plaintiff,

v.

PROJECT VERITAS, et.al.,

Defendant,

and

MICHIGAN ATTORNEY GENERAL,

Intervening Party

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**AMICUS CURIAE BRIEF OF**

**THE MICHIGAN COUNCIL OF PROFESSIONAL INVESTIGATORS and  
MICHIGAN ASSOCIATION OF SECURITY AND INVESTIGATIVE  
PROFESSIONALS**

NOW COMES the Michigan Counsel for Professional Investigators (MCPI) and the Michigan Association of Security and Investigative Professionals (MASIP), through their attorney James J. Makowski, and for their *amicus curiae* brief state as follows:

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**STATEMENT OF JURISDICTION**

As a certified question, this court has jurisdiction under MCR 7.308(A)(2).

**STATEMENT OF QUESTION PRESENTED**

For nearly forty years, Michigan courts have interpreted the eavesdropping statutes as applying only to the actions of third parties use of devices to overhear record amplify or transmit the private conversations of others without consent of all parties the certified question is as follows:

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

## APPLICABLE STATUTES

### **MCL 750.539a Definitions.**

Sec. 539a.

As used in sections 539a to 539i:

(1) "Private place" means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or substantial group of the public has access.

(2) "Eavesdrop" or "eavesdropping" means to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse. Neither this definition or any other provision of this act shall modify or affect any law or regulation concerning interception, divulgence or recording of messages transmitted by communications common carriers.

(3) "Surveillance" means to secretly observe the activities of another person for the purpose of spying upon and invading the privacy of the person observed.

(4) "Person" means any individual, partnership, corporation or association.

### **MCL 750.539c Eavesdropping upon private conversation.**

Sec. 539c.

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 750.539d Installation, placement, or use of device for observing, recording, transmitting, photographing or eavesdropping in private place.**

Sec. 539d.

(1) Except as otherwise provided in this section, a person shall not do either of the following:

(a) Install, place, or use in any private place, without the consent of the person or persons entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place.

(b) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section.

(2) This section does not prohibit security monitoring in a residence if conducted by or at the direction of the owner or principal occupant of that residence unless conducted for a lewd or lascivious purpose.

(3) A person who violates or attempts to violate this section is guilty of a crime as follows:

(a) For a violation or attempted violation of subsection (1)(a):

(i) Except as provided in subparagraph (ii), the person is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

(ii) If the person was previously convicted of violating or attempting to violate this section, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$5,000.00, or both.

(b) For a violation or attempted violation of subsection (1)(b), the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$5,000.00, or both.

(4) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate subsection (1)(a) or (b).

#### **MCL 750.539g Exceptions.**

Sec. 539g.

Sections 539a to 539f do not prohibit any of the following:

(a) Eavesdropping or surveillance not otherwise prohibited by law by a peace officer of this state or of the federal government, or the officer's agent, while in the performance of the officer's duties.

(b) Hearing a communication transmitted by common carrier facilities by an employee of a communications common carrier when acting in the course of his or her employment.

(c) The recording by a public utility of telephone communications to it requesting service or registering a complaint by a customer, if a record of the communications is required for legitimate business purposes and the agents, servants, and employees of the public utility are aware of the practice or surveillance by an employee safeguarding property owned by, or in custody of, his or her employer on his or her employer's property.

(d) The routine monitoring, including recording, by employees of the department of corrections of telephone communications on telephones available for use by prisoners in state correctional facilities, if the monitoring is conducted in the manner prescribed by section 70 of Act No. 232 of the Public Acts of 1953, being section 791.270 of the Michigan Compiled Laws, and rules promulgated under that section.

#### **MCL 750.539h Civil remedies.**

Sec. 539h.

Any parties to any conversation upon which eavesdropping is practiced contrary to this act shall be entitled to the following civil remedies:

- (a) An injunction by a court of record prohibiting further eavesdropping.
- (b) All actual damages against the person who eavesdrops.
- (c) Punitive damages as determined by the court or by a jury.

## INTRODUCTION

The Michigan Council of Professional Investigators (“MCPI”) and the Michigan Association of Security and Investigative Professionals (“MASIP”) are grateful for this opportunity to appear as *amicus curiae* in support of Project Veritas.

Founded in 1985, the MCPI is a voluntary, nonprofit association of licensed Professional Investigators from across the State of Michigan. The purpose of the MCPI is to 1) Project a positive public image of honesty, ethics, high standards, and integrity; 2) Keep abreast of all state or federal legislative and regulatory activity affecting the industry including new or proposed laws and issues; 3) Bring about networking for the membership, so as to provide referrals and quality subcontractors throughout the state; 4) Provide training and education to keep members up to speed on current methods, techniques, and technology; and 5) Work together as an organized group to bring about fair legislation that will benefit both the investigator, the client, and the public.

MASIP is a voluntary nonprofit organization founded in 2002, whose membership consists of small business owners and Security Agency Licensees. The mission of MASIP is to “enhance professionalism in the Security Industry through the establishment of standards and the promotion and promulgation of ethics and education, and to engage the political process for the good of the industry.”

## STATEMENT OF FACTS AND PROCEEDINGS

Amici Curiae MCPI and MASIP adopt the Statement of Facts and Proceedings as outlined below by the Michigan Attorney General's Office:

### **American Federation of Teachers files suit against Project Veritas.**

The facts of the underlying case are not relevant to the interpretation of Michigan's Eavesdropping Statutes. Nevertheless, in compliance with the federal rules, the parties submitted a statement of relevant facts to the Eastern District of Michigan. Those facts create the necessary context and need no summarizing here.

### **The Attorney General intervenes and requests certification.**

Defendants, intending to challenge the Michigan Eavesdropping Statutes on vagueness grounds, notified the Michigan Department of Attorney General, as required. At that point, Michigan's Attorney General, Dana Nessel, moved to intervene in order to participate in a determination of the proper interpretation of state law. (Appx 53a–69a.) She argued that she had an unconditional right to intervene under 28 USC 2403(b), under which Congress provided that “[i]n any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene . . . .” (Appx 66a.) She also argued that, as a state governmental officer and Michigan's chief law enforcement officer, she has constitutional and statutory responsibility to “intervene in and appear for the people of this state in any other court or tribunal, in any

cause or matter, civil or criminal, in which the people of this state may be a party or interested.” (Appx 67a, citing MCL 14.28.)

This Court granted the Attorney General’s motion to intervene. (Appx 70a–71a.)

On September 12, 2019, Attorney General Nessel filed a motion requesting certification to this Court as to the question of whether the Michigan Eavesdropping Statutes prohibit recording where the individual performing the recording is a party to the conversation. (Appx 72a–84a.) That motion remained pending for just over a year while AFT and Project Veritas engaged in motion practice and discovery. The Attorney General submitted no further briefing and did not participate in discovery.

On September 28, 2020, Eastern District of Michigan Judge Linda Parker opined that, pursuant to Eastern District of Michigan Local Rule 83.40 and Michigan Court Rule 7.308, this case presents an unsettled issue of state law that is likely to affect the outcome of the case. Accordingly, she concluded that certification of the question to this Court was appropriate. (Appx 85a–89a; 90a–93a.)

Given that the only state-court interpretation of the question at issue is a Michigan Court of Appeals case with a strong dissent—*Sullivan v Gray*, 117 Mich App 476, 481 (1982)—and because Judge Parker opined that this Court, if asked, would interpret the statute as did the dissent in *Sullivan*, the Attorney General requested and the parties agreed that the Department of Attorney General should erect a conflict wall and vigorously brief both sides of the issue. (Appx 93a.)

The underlying case is stayed pending the outcome of the certified question.

### **The Eavesdropping Statutes**

In Michigan, unlawful eavesdropping is a felony, punishable by imprisonment in a state prison for not more than two years or by a fine of not more than \$2,000.00, or both. MCL 750.539c. Similarly, divulging unlawfully obtained information is 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. MCL 750.539e.

Michigan statutory law provides the following civil remedies for eavesdropping violations: “(a) An injunction by a court of record prohibiting further eavesdropping; (b) All actual damages against the person who eavesdrops; (c) Punitive damages as determined by the court or by a jury.” MCL 750.539h.

**STANDARD OF REVIEW**

This Court reviews de novo issues of statutory construction. *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 65 (2007), citing *Quinto v Cross & Peters Co.*, 451 Mich 358, 362–363 (1996).

## ARGUMENT

### I. **The plain wording of MCL 750.539a clearly allows for a participant in a conversation to memorialize it with a recording.**

The wording of MCL 750.539a(2) could not possibly be more clear. To eavesdrop means to “over here, record, amplify or transmit any part of the private discourse of others without the permission of our persons engaged in the discourse. The pivotal wording, “of others,” clearly demonstrates the intent of the legislature to allow the recording of conversations in which one participates. There can be no other interpretation of this language. MCL 750.539c further makes it clear a participant to a conversation can memorialize the discourse through recording it.

As the court is well aware, the seminal case in Michigan regarding consent to record conversations comes from *Sullivan v Gray*, 117 Mich App 476, 482; 324 NW2d 58 (1982). “We believe 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”. The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on. Had 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”. *Sullivan v Gray*, 117 Mich App 476, 481; 324 NW2d 58 (1982).

In the past thirty-eight plus years since *Sullivan* was decided, while this Court has not addressed this specific issue, the Court of Appeals has done so at least twenty-six (26) times. “The Michigan Legislature unambiguously excluded participant recording from the definition of eavesdropping by defining the subject conversation as “the private discourse

of others." *Williams v Williams*, 229 Mich App 318, 323; 581 NW2d 777 (1998). "MCL 750.539c prohibits eavesdropping but that prohibition is limited by subsection 539a(2) to overhearing, recording, amplifying or transmitting the private *discourse of others* without the permission of all persons engaged in the *discourse*." *Lewis v LeGrow*, 258 Mich App 175, 185; 670 NW2d 675 (2003).

**II. The legislature defined "eavesdrop" to not include conversations in which the person memorializing the conversation was included.**

The *Merriam Webster* dictionary definition of eavesdropping is, "the act of secretly listening to something private." The definition supplied by the Michigan Legislature follows this common definition.

The *Sullivan* court noted there was an apparent conflict between MCL 750.539a and MCL 750.539c. In noting this anomaly, the *Sullivan* court noted, "While a participant may record a conversation with apparent impunity, his sole consent is insufficient to make permissible the eavesdropping of a third party. Thus, while a participant may record a conversation, he apparently may not employ third parties to do so for him. However, this result, although incongruous on its face, is not necessarily an inconsistency. An individual may not expect those he converses with to record their discourses. Still, absent a request that discussions be held "off the record", it is only reasonable to expect that a conversation may be repeated, perhaps from memory or from the handwritten notes of a party to the conversation. A recording made by a participant is nothing more than a more accurate record of what was said." *Id.*, at 481.

In reaching its conclusion, the *Sullivan* court used the rules for statutory construction to resolve ambiguities, as this court should do. "Meaning will be given to one section only

after due consideration of other sections so as to give effect to each provision and to produce a harmonious and consistent result.” *Ram Broadcasting of Mich, Inc v Mich Pub Serv Com*, 113 Mich App 79, 88; 317 NW2d 295 (1982).

When applying the rules of statutory construction to MCL 750.539 *et seq.*, it is clear the Court of Appeals’ decision in *Sullivan* should be upheld. The *Sullivan* decision is consistent, harmonious, and resolves any ambiguities.

**III. Plaintiff’s interpretation of MCL 750.539, *et seq.* would lead to results clearly at odds with logic.**

If one were to accept the Plaintiff’s argument, virtually every conversation recorded in this state would be subject to criminal prosecution. People would be guilty of eavesdropping for recording their own conversations. This interpretation is tortuous logic at best and clearly ignores the legislative intent of the act.

**IV. Should the Court rule in favor of Plaintiff, the ability of Private Investigators to perform their work would be severely hampered.**

The ramifications of this case extend far beyond this plaintiff and defendant. If plaintiff’s interpretation of the eavesdropping statutes are adopted it will hinder the ability of private investigators to do their work. Different criminal prosecution and punishment may detour or prohibit surveillance activities to the grave detriment of the profession. Professional investigators, contrary to television portrayals, are highly focused on the morals and ethics of their profession. An adverse ruling in this matter would have a chilling effect on the industry.

Professional private investigators conduct surveillance every day on behalf of individuals and corporations. Frequently these surveillance operations involve audio and video recordings. These cases range from insurance fraud, investigations criminal defense investigations or simple marital infidelity. If the court were to adopt the all-parties consent interpretation urged by plaintiff, uncertainty as to the legal implications of recording conversations involving individuals would overturn this important industry. The valuable services provided by professional investigators might no longer be available should this court ruling Plaintiff's favor.

#### **CONCLUSION**

We both stated reasons the Michigan Council of Professional Investigators and the Michigan Association of Security and Investigation Professionals pray this honorable court will hold the eavesdropping statutes do not put a party to a conversation from recording that conversation without the consent of other participants.

Respectfully Submitted,

Dated: February 24, 2021

/s/ James J. Makowski P62115  
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