STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

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

AFT MICHIGAN,

Plaintiff,

S. Ct. No. 162121
E.D. Mich. No. 4:17-cv-13292

v.

PROJECT VERITAS, et. al.,

Defendants,

and

MICHIGAN ATTORNEY GENERAL,

Intervening Party.
_____/

BRIEF OF PROPOSED *AMICI CURIAE* AMERICA VOTES, DETROIT REGIONAL CHAMBER, EQUALITY MICHIGAN, MICHIGAN VOICES, AND PLANNED PARENTHOOD OF IN MICHIGAN IN SUPPORT OF PLAINTIFF AFT MICHIGAN

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For

Rolland O'Hare
1925-2017

Co-Founder of the ACLU of Michigan,
Union Lawyer, Mentor, and Friend

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction under MCR 7.308(A)(2).

STATEMENT OF QUESTION INVOLVED

The Certified Question is:

Whether MCL 750.539a 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.

INTERESTS OF *AMICI CURIAE*

America Votes is the coordination hub of the progressive community, leading collaborative efforts among a diverse coalition of more than 400 state and national partner organizations, including the American Federation of Teachers. Groups that are part of America Votes and America Votes Michigan work on a broad range of issues including environmental protection, education, human and civil rights, women's rights, choice and labor. America Votes' infrastructure supports our coalition partners' advocacy efforts and voter outreach. America Votes is submitting this amicus brief to support the Plaintiff AFT Michigan's argument that MCL 750.539a and 750.539c prohibit a party to a conversation from recording the conversation absent the consent of all other participants to ensure that America Votes and its members can freely collaborate with its members and partners without concern that plans and discussions will be made public without the consent of all participants.

Detroit Regional Chamber has been serving the business community for more than 100 years and is one of the oldest, largest, and most respected chambers of commerce in the country.

As the voice for business in the 11-county Southeast Michigan region, the Chamber's mission is carried out by creating a business-friendly climate and providing value to its members. The Chamber also executes the statewide automotive and mobility cluster association, MICHauto, and hosts the nationally recognized Mackinac Policy Conference. Additionally, the Chamber leads the most comprehensive education and talent strategy in the state. The Chamber is recognized as the most bi-partisan business organization in Michigan and is actively supporting efforts to restore civility in public discourse; effective, responsive and transparent government; and has embraced sensible political reforms such as expansion of ballot access and non-partisan developed political boundaries.

Equality Michigan is Michigan's statewide lesbian, gay, bisexual, transgender, and queer (LGBTQ) political advocacy organization. Formerly the Triangle Foundation, Equality Michigan has been Michigan's premiere LGBTQ anti-violence and political advocacy organization for over 25 years and counting. Equality Michigan supports the all-party consent requirement of MCL 750.539a and 750.539c so that it and its partners as well as members of Michigan's LGBTQ community can live and work without fear of eavesdropping.

Michigan Voices is a 501(c)(3) organization which supports a network of more than fifty-five coalition partners and works to help them achieve their civic access, civic engagement, and civic representation goals through data support, capacity building, and grassroots organizing. Along with our partners, we work to engage and serve historically underrepresented and marginalized populations – including Black people, Indigenous peoples, and other people of color, LGBTQ people, low-income individuals, single women, and youth. Michigan Voices supports the all-party consent requirement of MCL 750.539a and 750.539c to ensure that Michigan Voices and its partners can work individually and collectively without fear of eavesdropping.

Planned Parenthood of Michigan's mission is Care. No Matter What. We specialize in providing high-quality, compassionate, judgment-free reproductive health care. As the target of covert recording attacks in 2015, we have experienced firsthand the harm they cause – particularly the harassment of staff and patients and increased violence around our health centers. The creation of a 1-party consent standard will give dishonest actors permission to launch more such attacks without fear of legal action, which will certainly impact our ability to provide care and our patients' ability to access care.

INTRODUCTION

You had to live – did live, from habit that became instinct – in the assumption that every sound you made was overheard

- George Orwell,
Nineteen Eighty-Four

The text, legislative history, contemporaneous construction, and purposes of 1966 PA 319 (hereinafter the "eavesdropping ban") as well as public policy all support its prohibition on a party to a conversation recording the conversation absent the consent of all other participants. This Court should uphold its all-party consent requirement, an important bulwark against an Orwellian world.[1]

STATEMENT OF FACTS

Amici Curiae adopt the Statement of Facts of Plaintiff AFT Michigan.

ARGUMENT

THE LEGISLATIVE HISTORY AND CONTEMPORANEOUS CONSTRUCTION OF THE EAVESDROPPING BAN, ITS VITAL ROLE IN MICHIGAN'S HISTORICAL PROTECTION OF THE RIGHT OF PRIVACY, AND PUBLIC POLICY SUPPORT ITS CLEAR TEXTUAL ALL-PARTY CONSENT REQUIREMENT

I. THE CONTEXT, LEGISLATIVE HISTORY, AND CONTEMPORANEOUS CONSTRUCTION OF THE EAVESDROPPING BAN AND ITS CONSTRUCTION BY THIS COURT SUPPORT ITS ALL-PARTY CONSENT REQUIREMENT.

As demonstrated in the briefs of AFT Michigan and the Attorney General Team Supporting AFT (hereinafter collectively "AFT Brief") the clear and unambiguous text of the eavesdropping

[1] Counsel for *amici curiae* is the sole author of this entire brief which was funded entirely by *amici curiae*. Neither undersigned counsel nor any other party or *amici curiae* made a monetary contribution to fund the preparation or submission of this brief.

ban requires all participants to consent to recording. This Court has long agreed with that reading of the text. *See, e g, People v Collins*, 438 Mich 8, 35 & n 45; 475 NW2d 684 (1991) ("MCL 750.539c makes it a felony to "willfully" use "any device to eavesdrop" upon a private conversation *without the consent of all participants.*") (emphasis added).

The clear text is reinforced by reviewing the historical context in which the eavesdropping ban was adopted, its legislative history, and its contemporaneous construction. As Justice Michael Cavanagh once observed:

> Reading the legislative history puts the judge better in touch with the values, vocabulary, and policy choices of the authors of the statute – just as The Federalist does for the framers of the Constitution.

In re Certified Question from the United States Court of Appeals for the Sixth Circuit (Kenneth Henes Special Projects Corp v Continental Biomass Industries), 468 Mich 109, 120 n 1; 659 NW2d 597 (2003) (Cavanagh, J, concurring) (*quoting* Eskridge, *Textualism, The unknown ideal?*, 96 Mich L Rev 1509, 1559 (1998)).

The Court will be in "better touch" with the statute's legislative authors by considering the historical context in which they worked, the history of their work, and the contemporaneous interpretation of 1966 PA 319.

A. The 1966 Revelations of Private Surveillance Abuses.

The year 1966 found

> American society. . . in the midst of a great debate over privacy, precipitated by the development and use of new surveillance devices and processes by both public and private authorities. The concern raised by these new means of augmented surveillance over individuals and groups now spans the ideological spectrum from extreme left to hard right. Worried protests against "Big Brother" tendencies have become a staple item in the press, government proceedings, law reviews, and social science journals.

Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's (Part I – The Current Impact of Surveillance on Privacy)*, 66 Colum L Rev 1003, 1003 (1966). Professor Westin went on to detail those current and future government and private sector threats to privacy including non-consensual surveillance, eavesdropping, and recording, *see id* at 1004-17, and to describe the privacy interests at risk, *see id* at 1017-50.

It was not only legal scholars who were grappling with these weighty issues of privacy, surveillance, and eavesdropping in 1965-66. The popular press was also full of books and articles about privacy and eavesdropping. *See, e g, The Big Snoop: Electronic Snooping – Insidious Invasions of Privacy*, Life Magazine (May 20, 1966) (copy in Amicus Appendix ("AA") at 1a); Pileggi, *Bugging the Bedroom*, 65 Esquire No. 5 at 96 (May, 1966); Packard, The Naked Society (1964); Breton, The Privacy Invaders (1964).

Finally, at least 6 Congressional committees were investigating privacy issues in 1965-66:

> So disturbing have these [eavesdropping] developments become that no less than half a dozen congressional subcommittees have gone into one or another phase of the privacy question since the present Congress convened in January 1965. One of the subcommittees, headed by Sen. Edward V. Long (D Mo.), has been unearthing hidden instances of privacy-invading practices by government agencies and non-government interests for the past two years and still has not completed its explorations.

Shaffer, *Protection of Privacy*, Congressional Quarterly Researcher at 3 (April 20, 1966). The United State Senate was holding public hearings on surveillance and privacy, the most extensive being before a subcommittee of the Judiciary Committee chaired by Senator Edward Long. *See Hearings on Invasion of Privacy Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Congress, 1st and 2d Sess (1966). The Long subcommittee

> devoted its first open session on invasions of privacy to a

demonstration of some of the latest eavesdropping gadgets. Sen. Long reported on them in an address to the Senate last July 30:

> The devices included innocent-looking flower vases and cigarette lighters cleverly concealing miniature microphones, a Dick Tracy wristwatch transmitter, a transmitter concealed in a martini olive, telephone attachments that could surreptitiously intercept and record either telephonic communications or normal conversations within an entire room. Once such device, when placed on a telephone line, could be activated by merely dialing the phone number. . . The eavesdropper could dial. . . from anywhere in the world. . . Hawaii to Washington, D.C.. . . and the bug would be activated.

Other devices shown were "pen mikes, attaché cases that were in reality small, compact and efficient broadcasting and recording studios, lapel mikes, mikes disguised as cigarette packs, as desk staplers, desk calendars and picture frames." Long said that "Due to the efficiency and size of these bugs. . . there is just about no way in which they cannot be concealed in any everyday object that we all have in our homes or offices."

Protection of Privacy, supra, at 6. The techniques of surveillance and eavesdropping were detailed by Congress in the Congressional Record, *see, e g,* Cong'l Record – Senate at 987-90 (January 24, 1966) (copy in AA at 11a). Proposed Federal remedies anticipated those included in 1966 PA 319 such as a ban on electronic eavesdropping enforced by civil and criminal penalties. *See id* at 991. Information before Congress included examples from Michigan of private sector eavesdropping. *See id* at 1006.

All of these investigations and revelations spurred state legislation as well. By April, 1966

> [s]even states [had] adopted statutes prohibiting eavesdropping by electronic devices. One state, Maryland, has made it unlawful to manufacture or possess any eavesdropping or wiretapping device unless it is registered with the state police. Two states, Maryland and Oregon, made the use of such devices illegal without the consent of all whose voices are picked up. The five other states – California, Illinois, Massachusetts, Nevada, New York – make eavesdropping unlawful without the consent of at least one party to a conversation.

Protection of Privacy, supra, at 6.

This was the milieu of intense concern over nonconsensual surveillance and eavesdropping, and legislative activity throughout the country in which the Michigan Legislature acted swiftly in 1966 to enact the comprehensive eavesdropping ban.

B. The Michigan Legislature's Prompt Reaction in 1966 to Private Surveillance Abuses.

The Michigan Legislature reacted with alacrity to the revelations of private eavesdropping and surveillance abuses in 1966. As detailed in the AFT Brief the bill which became 1966 PA 319 was introduced on March 7, 1966. The Legislature broadened the initial bill to prohibit eavesdropping by anyone present or not present during a private conversation. *See* Joint Appendix at 99a-110a.

The bill received overwhelming bipartisan support initially passing the House 80-0, *see* June 21, 1966 Gongwer Michigan Report at 3, with a subsequent conference report adopted 72-0 in the House, *see* June 23, 1966 Gongwer Michigan Report at 5. Similarly the Senate adopted the conference report 23-3. *See* 104 Journal of the Senate 2213-14 (June 23, 1966). One of the dissenting Senators voted no because the ban on eavesdropping *wasn't broad enough* as it exempted public utilities. *See id* (protest of Sen. Craig). Governor Romney signed the bill on July 19, 1966. *See* July 19, 1966 Gongwer Michigan Report at 4.

1966 PA 319, the eavesdropping ban, didn't merely regulate eavesdropping. It took the strongest possible action by amending the Penal Code to *ban* eavesdropping absent all-party consent. *See* MCL 750.539a and 750.539c. Moreover, violation of the ban was made a felony, not just a misdemeanor. *Id*. To further prevent eavesdropping the Legislature also criminalized the use or divulgence of information illegally acquired, *id* 750.539e, and the use, manufacture, possession, or transfer of eavesdropping devices, *id* 750.539d, 750.539f. Further reinforcing the

Legislature's firm policy decision to ban eavesdropping, it created a private cause of action for injunctive relief, as well as actual and punitive damages. *Id* 750.539h. PA 319 was thus a comprehensive ban on eavesdropping intended to stop it, prevent the use of its fruit, make it difficult to perform, and to punish it severely under both the criminal and civil law.

PA 319 contained only 4 narrow exceptions to its thoroughgoing ban on eavesdropping. *Id* 750.539g. Under the principle of *expressio unius* those are the only exceptions and a court should not create further exceptions by construction - that is the Legislature's job. *See, e g, Hoerstman General Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (the enumeration of exceptions eliminates the possibility of other exceptions under the legal maxim *expressio unius est exlusio alterius*); *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 72; 894 NW2d 535 (2017) (courts will not read requirements into a statute which do not appear in the plain language of the statute).

The historical context and legislative history of 1966 PA 319 reinforce the conclusion of the textual analysis: the eavesdropping ban requires all participating parties to consent to recording.

C. Contemporaneous Construction of the Eavesdropping Ban.

Contemporaneous construction of 1966 PA 319 confirms what the text and legislative history demonstrate: it requires all-party consent.

The 1960's saw great interest in reforming the criminal law nationally and in Michigan. The American Legal Institute published its Model Penal Code in 1962. Following this national trend in 1964 the State Bar of Michigan established a Joint Committee to create a revised criminal code. *See* Israel, *The Process of Penal Law Reform – A Look at the Proposed Michigan Revised Criminal Code*, 14 Wayne L Rev 772, 772-73 (1968). The Committee consisted of over 100

persons representing lawyers, judges, and the community. *See id* at 772 & n 3. The project was endorsed by the Legislature. *See id* at 773 & n 5.

In the course of its work the Committee reviewed recently enacted 1966 PA 319 and concluded that it required all-party consent. *See id* at 817-18. This contemporaneous construction by a large group of the finest lawyers practicing criminal law in Michigan together with several judges is strong evidence of the meaning of the eavesdropping ban. *Compare, e g, In re D'Amico Estate*, 435 Mich 551, 564; 460 NW2d 198 (1990) (state agency bound by contemporaneous construction of statute). The Committee recommended that the eavesdropping ban be amended to allow 1-party consent. *See* 14 Wayne L Rev at 817-18. The Legislature never did so.

The Legislature itself contemporaneously and subsequently construed 1966 PA 319 reinforcing the conclusion that it required all-party consent. *Compare, e g, Smith v Auditor General*, 165 Mich 140, 144; 130 NW 557 (1911) (contemporaneous and subsequent legislative construction of the state constitution entitled to great weight).

In 1974, legislation was introduced which, *inter alia*, would have changed PA 319 to a 1-party consent law and repealed § 539c altogether:

> Sec. 1
> . . .
>
> Sec. 539a. As used in sections 539a to ~~539i~~ 539V:
> . . .
>
> (2) "Eavesdrop" or "eavesdropping" means to overhear, record, amplify, or transmit any part of the private discourse of other without the ~~permission of all~~ CONSENT OF AT LEAST ONE OF THE persons engaged in the discourse, EXCEPT AS OTHERWISE PROVIDED BY LAW. ~~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 communication common carriers.~~
> . . .

> Section 2. Section 539c of Act No. 328 of the Public Acts of 1931, being section 750.539c of the Compiled Laws of 1970, is repealed.

1974 HB 6127, Section 1, § 539a; Section 2 (copy in AA at 17a). The bill died in the House Judiciary Committee.

In 1977 opponents of all-party consent tried again to eliminate it in SB 271:

> Section 1.
> . . .
>
> Sec. 539a. As used in sections 539a to ~~539i~~ 539U:
>
> ~~(2)~~ (8) "Eavesdrop or "eavesdropping" means to overhear, record, amplify, or transmit ~~any~~ A part of the private discourse of others without the ~~permission of all~~ CONSENT OF AT LEAST 1 OF THE 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.~~
> . . .
>
> Section 2. Section 539c of Act No. 328 of the Public Acts of 1931, being section 750.539c of the Compiled Laws of 1970, is repealed.

1977 SB 271, Section 1, § 539a; Section 2 (copy in AA at 35a). This bill died as its 1974 predecessor had.

1977 also saw legislation intended to eliminate the common carrier exemption. That legislation proposed no changes relevant here. However, in its analysis of that bill the House Legislative Analysis Section described existing law as requiring all-party consent:

> The Michigan Penal Code prohibits "eavesdropping" and recording of private conversations *without the permission of persons engaged in the conversation.*

House Legislative Analysis Section, *Synopsis of HB 4372 as Originally Introduced* (August 3, 1977) (emphasis added) (copy in AA at 44a).

Thus, the repeated contemporary and subsequent construction of 1966 PA 319 from 1967

through 1977 by Michigan experts in the criminal law and by the Legislature itself was that it required all-party consent.

In 1982, the divided Court of Appeals, ignoring all of this legislative history and acting like a legislature, did by judicial fiat what the Legislature itself had repeatedly refused to do: amend 1966 PA 319 to remove its all-party consent requirement. That Court in *Sullivan v Gray*, 117 Mich App 476; 324 NW2d 58 (1982) (*per curiam*), was wrong in doing so.[2]

D. This Court Has Construed 1966 PA 319 To Require All-Party Consent.

In 1991 this Court answered the question of whether a police informant's recording of a private conversation without a search warrant violated the Michigan Constitution's search and seizure provision. In holding that it did not this Court contrasted that 1-party consent situation with the Legislature's requirement of consent by all private parties in MCL 750.539c:

> MCL 750.539c makes it a felony to "willfully" use any "device to eavesdrop upon a private conversation *without the consent of all participants*."

Collins, supra, 438 Mich at 35 & n 45 (emphasis added).

Subsequently in *Dickerson v Raphael*, 461 Mich 851; 601 NW2d 851 (1999), this Court held that "a participant may not unilaterally nullify other participants' expectations of privacy by secretly broadcasting the conversation," an all-party consent requirement.

In both *Collins* and *Dickerson* this Court could have adopted *Sullivan v Gray's* 1-party consent interpretation of the eavesdropping ban but it did not.

[2] Because the statutory text isn't ambiguous and the legislative intent is clear, the use of the rule of lenity urged by the Attorney General Team Supporting Defendants and the Prosecuting Attorneys Association of Michigan isn't necessary. *See People v Wakeford*, 418 Mich 95, 113-14; 314 NW2d 68 (1983).

II. THE EAVESDROPPING BAN IS AN INTEGRAL PART OF MICHIGAN'S THREE-PRONGED PROTECTION OF THE RIGHT TO PRIVACY AND ITS EFFECTIVENESS DEPENDS ON THE ALL-PARTY CONSENT REQUIREMENT.

The eavesdropping ban was enacted "to protect an individual's right to privacy." *People v Stone*, 234 Mich App 117, 123; 593 NW2d 680 (1999). It is an integral part of Michigan's protection of the right to privacy and weakening it by removing the all-party consent requirement would severely undermine the protection of privacy in Michigan because the ban filled large gaps in privacy protections in 1966 and continues to fill them.

This is so because although there were common law and constitutional privacy rights in Michigan in 1966 and currently, they are inadequate to address private eavesdropping when compared to the comprehensive statutory eavesdropping ban.

We briefly survey the Michigan common law and constitutional right to privacy to demonstrate why they are an inadequate alternative to 1966 PA 319's all-party consent requirement.

A. The Common Law Right of Privacy in Michigan.

Michigan led the way nationally in developing the common law right of privacy. As this Court has declared:

> Michigan was one of the first jurisdictions to acknowledge the concept of "right of privacy" [i]n *DeMay v Roberts*, 46 Mich 160; 9 NW 146 (1881). . . . Warren and Brandeis, in their 1890 [Harvard Law Review] article *The Right to Privacy* provided tort law with the nucleus of the concept, invasion of privacy. The right of privacy, less than 100 years old, has yet to cease evolving. In *Pallas v Crowley, Milner & Co*, 322 Mich 411; 33 NW2d 911 (1948), a cause of action for invasion of privacy was again recognized by this Court. . . . Since 1948 Michigan has continued to recognize the right of the individual to privacy. An overwhelming majority of state courts has recognized a **common law** right to **privacy**, and the United Stated Supreme Court has also recognized a constitutional right to privacy.

Beaumont v Brown, 401 Mich 80, 93-95; 257 NW2d 522 (1977) (emphasis original) (footnotes citing Prosser, *Privacy*, 48 Cal L Rev 383 (1960) and *Griswold v Connecticut*, 381 US 479 (1965) omitted), *overruled in part on other grounds, Bradley v Saranac Board of Education,* 455 Mich 285, 302; 565 NW2d 650 (1977).[3]

This Court in *Beaumont* described Professor Prosser's four common law privacy torts:

> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Id at 95 n 10, *citing* Prosser, *supra*, 48 Cal L Rev at 389.

Private eavesdropping could be actionable under the first 2 of Prosser's privacy torts. However, common law privacy actions clearly had failed to stop the onslaught of surveillance and eavesdropping revealed in 1966 due to several shortcomings. *See* Westin, *supra*, *Part II*, 66 Colum L Rev 1205, 1236-37 (1966); Richards & Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 Cal L Rev 1887, 1917-24 (2010). In addition the common law could not criminalize eavesdropping nor prevent the manufacture, use, or possession of eavesdropping devices.

Because of the failure of the common law to stop the eavesdropping detailed in Part I.A. *supra*, the Legislature stepped in during 1966 with the far better statutory remedy, 1966 PA 319. Eviscerating 1966 PA 319 by changing its all-party consent requirement will leave private parties with only the inadequate eavesdropping remedies of the common law.

[3] Chief Justice Cooley also contributed to Michigan's early leadership on the common law of privacy in his seminal treatise on torts. *See* Cooley, Torts 29 (2d ed 1888) (using the phrase "the right to be let alone").

B. The Michigan Constitutional Right to Privacy.

Article 1, the Declaration of Rights, in the 1963 Constitution contains a constitutional right to privacy.

Prior to the 1961-62 Constitutional Convention, scholars urged that Michigan's state constitutional declaration of rights be examined and broadened:

> In any revision of a state constitution, the existing declaration of rights should be examined to determine whether some provisions are no longer necessary, whether some should be clarified or expanded, and whether new basic rights should be recognized.

Kauper, *The State Constitution: Its Nature and Purpose* 20 (Citizens Research Council of Michigan, 1961); *see also* Citizens Research Council of Michigan, *A Comparative Analysis of the Michigan Constitution Volumes I & II: Articles I-XVII* (October, 1961) (analyzing the 1908 Constitution's declaration of rights with suggestions for changes).

Under the leadership of University of Michigan Professor of Political Science James Pollock, the Convention's Committee on Rights, Suffrage and Elections embraced this mission and ultimately produced a Declaration of Rights with several significant changes. *See* Citizens Research Council of Michigan, *An Analysis of the Proposed Constitution: Declaration of Rights – Article I* (December 7, 1962) (discussing 7 major changes).

In the area of privacy, the Committee recommended to the Convention the addition of a new section to the Declaration of Rights:

> Section _____. The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Proposal 15 of the Committee on the Declaration of Rights, Suffrage and Elections 5 (January 4, 1962) (AA at 45a)[4].

[4] Privacy was a topic throughout the Convention. *See, e g,* 1961-62 Constitutional Convention Record at 400-01

The Committee's Report was explicit about the purpose of this new section:

> This language is taken from the Ninth Amendment to the Constitution of the United States. The Committee believes that its incorporation in the Michigan Constitution will set up a sound state parallel. The language recognizes that no Bill of Rights can ever enumerate or guarantee all the rights of the people and that *liberty under law is an ever-growing and ever-changing conception of a living society developing in a system of ordered liberty*.

Report of the Committee on Declaration of Rights, Suffrage and Election 23 (emphasis added) (AA at 50a); 1961-62 Constitutional Convention Record at 470. This new section was adopted by the Constitutional Convention, *id* at 3291-3301, becoming Article 1, § 23. It was described in the Address to the People:

> This is a new section taken from the 9th amendment to the U.S. Constitution. It recognizes that no Declaration of Rights can enumerate or guarantee all the rights of the people – *that it is presently difficult to specify all such rights which may encompass the future in a changing society.*

Id at 3365 (emphasis added).

Thus, it's clear that the list of individual state constitutional rights in the Declaration of Rights is *not* an exhaustive list of such rights in 1963 or of rights which should be recognized since. There are at least two sources of guidance on those rights – Ninth Amendment jurisprudence and the final phrases in the Con-Con Record and Address which recognize that rights change and evolve as society does.[5]

The U.S. Supreme Court has recognized privacy rights based on the Ninth Amendment. *See, e g, Griswold v Connecticut*, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965) (right of

(address of Governor Swainson); 678 (remarks of Delegate Norris); Delegate Proposals 1217 and 1234.

[5] Another possible source of guidance on certain aspects of those rights is the common law right of privacy. *See, e g, Roe v Wade*, 410 US 113, 132-36; 93 S Ct 705; 35 L Ed 2d 147 (1973) (discussing treatment of abortion by the common law); *DeMay, supra* (intrusion on relationship between a pregnant woman and her doctor violates the common law of privacy).

marital privacy), 381 US at 486-99 (Goldberg, J, concurring); *Roe v Wade*, 410 US 113, 153; 93 S Ct 705; 35 L Ed 2d 147 (1973) (right to privacy under Ninth Amendment "encompass[es] a woman's decision whether or not to terminate her pregnancy"); *Lawrence v Texas*, 539 US 558, 564-66; 123 S Ct 2472; 156 L Ed 2d 508 (2003) (right of same sex adult couples to private consensual sexual intimacy, *citing, e g, Griswold*); *Obergefell v Hodges*, 576 US 644, 663; 135 S Ct 2584; 192 L Ed 2d 609 (2015) (right of same sex couples to marry, *citing, e g, Griswold*); *see also NASA v Nelson,* 562 US 134, 155; 131 S Ct 746; 178 L Ed 2d 667 (2011) (constitutional right to informational privacy).

As Justice Goldberg stated in *Griswold* the Ninth Amendment protects fundamental rights, including privacy:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there]. . . as to be ranked as fundamental." *Snyder v Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions'. . . ." *Powell v Alabama*, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of. . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe v Ullman*, 367 U.S. 497, 517 (dissenting opinion of MR. JUSTICE DOUGLAS). . .

381 US at 493-94 (Goldberg, J, concurring); *compare Obergefell, supra*, 576 US at 663 (fundamental "liberties extend to certain personal choices central to individual dignity and autonomy", *citing Griswold*).

In the wake of *Griswold* and *Roe* this Court declared that there is a Michigan constitutional right to privacy of no *"less breadth than the guarantees of the United States Constitution:"*

> The United States Supreme Court has recognized the presence of constitutionally protected "zones of privacy." *Griswold v*

> *Connecticut*, 381 U.S. 479, 484; 85 S Ct 1678; 14 L Ed 2d 510 (1965); *Roe v Wade*, 410 U.S. 113; 93 S Ct 705; 35 L Ed 2d 147 (1973). These zones have been described as being within "penumbras" emanating from specific constitutional guarantees. Often mentioned as a basis of the right to privacy are the 1st, 3rd, 4th, 5th, 9th, and 14th Amendments to the United States Constitution. *The people of this state have adopted corresponding provisions in art 1 of our Constitution*.
> . . .
>
> The right to privacy includes certain activities which are fundamental to our concept of ordered liberty. Rights of this magnitude can only be abridged by governmental action where there exists a "compelling state interest." *Roe, supra*, 152, 155.

Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich 465, 504-05; 424 NW2d 3 (1976) (emphasis added). This Court recognized that the federal constitution sets a floor not a ceiling for the state constitutional right to privacy, the same recognition found in the Con-Con Record and Address to the People.

However, while there is a Michigan constitutional right to privacy at least as extensive as *Griswold* and *Roe* this Court has yet to define the scope of its protection against eavesdropping, nor would it prevent the *private* eavesdropping here.

C. The Important Gap-Filling Function of The Statutory Eavesdropping Ban.

As has been demonstrated, while the common law and a state constitutional right to privacy could provide important privacy protections against non-consensual eavesdropping, they have significant shortcomings addressed by the statutory eavesdropping ban.

First, not only is the state constitutional right of privacy's protection against eavesdropping not yet defined by this Court but it would not apply to eavesdropping by *private* actors as occurred here, a large gap in privacy protection filled by the statutory eavesdropping ban of 1966 PA 319.

Second, common law privacy actions have several shortcomings. In the context of eavesdropping, the common law cannot, for example, criminalize it, prevent the manufacture, use,

or possession of eavesdropping devices, or adapt rapidly to new eavesdropping threats. All of those shortcomings and more are addressed by the comprehensive statutory eavesdropping ban of 1966 PA 319.

Thus, the statutory eavesdropping ban is a vital gap-filling complement to the eavesdropping remedies of the common law and it fills the current state constitutional privacy vacuum, preventing eavesdropping where they do not or cannot and providing more comprehensive remedies.

Changing the all-party consent requirement to one-party consent will eviscerate the statute, leaving every private conversation in Michigan subject to secret recording and disclosure by any participant. That evisceration will create an enormous gap in privacy protections in Michigan that neither the State Constitution nor the common law can fill.

III. PUBLIC POLICY SUPPORTS THE EAVESDROPPING BAN WITH ALL-PARTY CONSENT.

A. Eavesdropping Has A Discriminatory Impact on Minorities, The Poor, And Other Disadvantaged Groups.

The burden of government surveillance and eavesdropping falls most heavily on "communities already disadvantaged by their poverty, race, religion, ethnicity, and immigration status." Gellman and Adler-Bell, *The Disparate Impact of Surveillance* at 2 (The Century Foundation 2017).

The burden of private surveillance and eavesdropping also falls disproportionately on racial and other minorities. *See, e g,* Green, *Big Brother Is Listening to You: Digital Eavesdropping in the Advertising Industry*, 16 Duke Law & Technology Review 352, 360-61 (2018). Thus lifting the all-party consent requirement will subject those communities to more of the social and economic harms than majority communities.

B. The Misuse of One-Party Consent Recordings Threatens The Integrity of American Democracy.

The misuse of one-party consent recordings by Project Veritas and its copycats threatened the integrity of American democracy in 2020 and will do so again if allowed to continue by ending the all-party consent requirement.

Project Veritas was part of a national effort to delegitimize mail-in balloting in the 2020 election. The goal was to infiltrate groups, secretly audio and video record conversations and activities, and then selectively edit and release the recordings to make it appear that election laws had been broken:

> For well over a year, Project Veritas has been secretly producing undercover stings designed to undermine the integrity of absentee and mail-in ballot counts – an endeavor codenamed "Diamond Dog," according to documents we have obtained.
>
> . . .
>
> [D]etails about the group's undercover operation for the 2020 campaign cycle. . . included schemes to procure evidence of "illegal aliens voting," mail-in ballot tampering at "nursing homes," and "the sale of absentee ballots and voter profiles on the 'Dark Web.'"
>
> . . .
>
> Diamond Dog [was]. . . a cross-country effort, based on internal Project Veritas memos, research notes, and other documents that we have obtained. In California and Texas, Project Veritas has tasked its operatives with unearthing supposed evidence of widespread mail-in ballot forgery. In both states, Project Veritas has worked to infiltrate the groups of volunteers and paid canvassers who collect absentee and mail-in voter applications from low-income, elderly, and minority groups – a perfectly legal practice in most states that conservatives have tried to label as nefarious "ballot harvesting."
>
> . . .
>
> [Diamond Dog sought to expose] "corruption within CA ballot harvesting companies and other states (TX) based on intel gains." A Project Veritas undercover operative codenamed "Magnum" had been busy "attending local Democratic events in CA to find

> discussions of harvesting." Another operative codenamed "GDog" was creating an entrapment scheme by posting "ads online looking for people to join his ballot harvesting."

Phelan & Hecker, *Inside the Project Veritas Plan to Steal the Election*, The New Republic 1, 2, 4 (August 3, 2020) (copy in AA at 75a).

The results of this activity surfaced during the 2020 election. For example, in September Project Veritas released a "deceptive video. . . which claimed. . . that Representative Ilhan Omar's campaign had collected ballots illegally." Astor, *Project Veritas Video Was a 'Coordinated Disinformation Campaign', Researchers Say*, The New York Times, September 29, 2020 (copy in AA at 86a).

There were also organizations which copied Project Veritas' tactics. For example in North Carolina an operative from New York named James Fortune showed up in July, 2020:

> A Policy Watch investigation has found links between Fortune, who progressive organizations in the state say has tried to infiltrate their groups, and many far-right political operatives, some as high-level as a one-time member of the Trump White House.
>
> The tactic is similar to that used by Project Veritas, which for years has tried to infiltrate progressive organizations and Democratic campaigns in hopes of catching them in violating election law.
>
> Earlier this week, the *Milwaukee Sentinel Journal* reported that Project Veritas had deployed people who misrepresented themselves as documentary filmmakers to gain access to several progressive and nonpartisan voter education organizations.
> . . .
>
> Fortune has since disappeared. But he left behind [evidence] that could unravel what appears to be a sprawling scheme by far-right groups with ties to the Trump administration to entrap several North Carolina nonpartisan voter education nonprofits into violating election law.

North Carolina Policy Watch, *Special Report* at 3-4 (Sept. 18, 2020) (copy in AA at 88a).

These infiltration and secret recording tactics employed by Project Veritas and its copycats

during the 2020 elections are the same tactics used in this case. Michigan's eavesdropping ban and its all-party consent requirement can stop these democracy-threatening tactics. But a 1-party consent construction by this Court will allow these tactics in Michigan with dire consequences for future elections and democracy itself.

C. Eavesdropping Curtails Free Speech and Causes Other Social and Economic Harms.

> *[F]reedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office.*
>
> - Justice William Brennan (dissenting in *Lopez v United States*, 373 US 427, 470 (1963))

Although Justice Brennan was speaking in the context of government surveillance the threats posed to free speech by private eavesdropping are the same. *See also, e g, United States v White*, 401 US 745, 762-63; 91 S Ct 1122; 28 L Ed 2d 453 (1971) (Douglas, J, dissenting). Not only does eavesdropping undermine free speech, it also robs a person of their privacy – their right to be let alone and to live in anonymity if they choose. *See* 373 US at 470-71.

Eavesdropping causes other social harms as well:

> [P]rivacy of communication. . . performs a number of important social functions in a free society. Maintenance of a sense of personal autonomy depends in large part on being able to control the breadth of dissemination of one's intimate concerns. If the only choice were to remain silent or expose one's personal concerns. If the only choice were to remain silent or expose one's personal concerns to unknown and unsympathetic listeners, it would be a bleak choice, one that would eventually stultify creative individuality. Private communications are also an important form of emotional release; people need to be able to drop their social masks, to blow off steam against their bosses or the system, to disregard minor social conventions. . . "Free conversation is often characterized by exaggeration, obscenity, agreeable falsehoods, and the expression of anti-social desires or views not intended to be taken seriously. The unedited quality of conversation is essential if it is to preserve its

intimate, personal and informal character."

> If one is to make creative social contributions, the frank comments of friends and associates on one's half-formed and tentative ideas are essential, and one must be able to control when his thoughts are made public. Within and among social organizations there are similar needs for frank private communications. . . .
>
> In short, it is plain that confidential communication plays an important role in preserving the sort of individuality prized by liberal democratic traditions and is essential for the effective working of social organizations in a pluralist society. The serious inhibition of such communication that would result from a general lack of confidence in the sanctity of private expressions would pose a grave danger to a free and open society.

Greenawalt, *The Consent Problem In Wiretapping & Eavesdropping: Surreptitious Monitoring With The Consent Of A Participant In A Conversation*, 68 Colum L Rev 189, 216-17 (1968) (footnotes citing authorities omitted).

Finally, eavesdropping causes enormous economic damage. It is estimated that industrial (domestic) espionage accomplished through eavesdropping and other means costs the United States economy billions of dollars annually. *See, e g, The FBI's decades-long fight against industrial espionage hasn't really worked*, MIT Technology Review (August 19, 2020).

The individual, social, and economic harm caused by eavesdropping strongly supports maintaining the eavesdropping ban's all-party consent requirement.

D. The Threat of Private Eavesdropping Now Is Worse Than It Was In 1966.

The Legislature's strong reaction to privacy threats in 1966 PA 319 was not only the right antidote then but it was prescient for the far worse privacy threats to come:

> The monitoring of human activities has never been as ubiquitous and massive as today, with millions of sensors deployed in almost every urban area, industrial facility and critical environment, increasing rapidly in terms of both amount and scope.

Crocco, Cristani and Murino, *Audio Surveillance: A Systematic Review,* Italian Institute of Technology at 1 (2014). Eavesdropping technology is far more advanced today than in 1966:

> Transistors, microcircuits, and lasers, all products of space-age technology, have revolutionized the art of electronic eavesdropping. One group of the new investigative tools takes the shape of a ray gun that transmits radio waves or laser beams. The ray is directed at the object of the investigation from hundreds of feet away and can imperceptibly pick up a conversation and return it to the listener. The power necessary to transmit a laser beam for carrying voices many miles is extremely small, and a laser beam is more difficult to detect than radio signals. The most efficient and least expensive form of listening device is a radio transmitter made out of integrated microcircuits. One hundred typical microcircuits can be made on a piece of material smaller and thinner than a postage stamp. A transmitter so constructed can be concealed in a playing card or behind wallpaper.

Electronic Eavesdropping, Britannica at 3-4.

In *Olmstead v United States*, 277 US 438; 48 S Ct 564; 72 L Ed 944 (1928), Justice Brandeis declared that as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government" the Supreme Court was required to guarantee that the "progress of science" doesn't weaken Fourth Amendment safeguards. *Id* at 473-74 (Brandeis, J, dissenting) (*quoted with approval in Carpenter v United States*, ___ US ___, ___; 138 S Ct 2206, 2223; 201 L Ed 2d 507 (2018)).

The same is true here – the "progress of science" in improved eavesdropping technology threatens privacy as never before and this Court must ensure that privacy continues to be protected by upholding the all-party consent requirement of the eavesdropping ban.

IV. THE POLICY ARGUMENTS OF THE ATTORNEY GENERAL SUPPORTING THE DEFENDANTS AND THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN ARE WRONG.

A. One-Party Consent Is Not The Traditional or Settled Interpretation.

The Attorney General Team Supporting the Defendants argues that it is supporting the

"traditional interpretation" of MCL 750.539c. Relatedly, the Prosecuting Attorneys Association of Michigan (PAAM) asks the Court not to disturb "settled expectations." Brief at 9, 17-18.

As demonstrated *supra* in Parts I.B.-D., there is no such "tradition." From the Legislature's actions in 1966 to the State Bar's 1968 Joint Committee analysis to legislative activity in the 1970's through this Court's 1991 decision in *Collins* and 1999 decision in *Dickerson*, MCL 750.539a and 750.539c have been consistently read to require all-party consent.

The split decision in *Sullivan v Gray*, *supra*, and the case which followed it, *Lewis v LeGrow,* 258 Mich App 175, 185; 670 NW2d 675 (2003), are outliers not creators of an undisputed "tradition." Even if there was a "tradition" of 1-party consent – and there isn't – that does not bind this Court or allow it to ignore the statutory text. *See, e g, Fluor Enterprises v Dept of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007) (language of statute controls); *compare Bostock v Clayton County*, ____ US ___; 140 S Ct 1731, 1749-52; 207 L Ed 2d 218 (2020) (applying Title VII to LGBT individuals and rejecting attempts to override its text based on over 50 years of "expectations").

Even if there is a "settled" interpretation which has created "expectations," PAAM offers no limiting principle to its novel concept of "downward" or "descending" stare decisis, PAAM Brief at 17-18, under which *Sullivan v Gray* cannot be overruled by this Court even if its textual interpretation is wrong. Is every Court of Appeals decision untouchable by this Court simply because of the passage of time has created "expectations" regardless of whether the decision was correct? The U.S. Supreme Court properly rejected an "expectations" standard for interpreting statutes in *Bostock* and so should this Court.

B. 1966 PA 319 Does Not Codify The Common Law Definition of Eavesdropping.

PAAM asserts that 1966 PA 319 simply adopted the limited common law definition of

eavesdropping which PAAM defined as follows:

> Eavesdropping was understood at the common law as "[t]o stand within the 'eavesdrop' of a house [under the eave] in order to listen to secrets." Blackstone describes eavesdroppers as "such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales." And Bishop's old treatise, citing and quoting Blackstone, says that eavesdropping "is an offense at the common law," one "addressed to hanging about the dwelling-house of another, hearing tattle, and repeating it to the disturbance of the neighborhood."

PAAM Brief at 7-9 (footnotes omitted); *see also* Brief of Attorney General Supporting Defendants at 15 (in PA 319 Legislature was not addressing the definition of eavesdropping).

That argument reflects a fundamental misunderstanding of the revolutionary change in eavesdropping law wrought by MCL 750.539a(2).

Even a cursory comparison with the statutory definition of eavesdropping reveals that it is far broader than the common law:

> "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.

MCL 750.539a(2). Unlike the common law definition of "eavesdropping" the statutory definition is 1) *not* restricted to a house or any physical place, but can apply anywhere "private discourse" occurs; 2) applies *not* just to overhearing and repeating, but also to recording, amplifying, and transmitting; 3) is *not* restricted to "tattle" or "slanderous. . . tales" but applies to *all* of the overheard private conversation's content; and 4) requires no "disturbance" or "framing" to be actionable.

The first-listed change in the definition of eavesdropping – from its home and place moorings in the common law to apply to people anywhere under MCL 750.539a(2) – was a fundamental, indeed revolutionary, change.

The common law protection against eavesdropping was rooted in property and in physical places, *see* Westin, *supra,* 61 Colum L Rev at 1236, as the definitions quoted by PAAM illustrate. Fourth Amendment protections had similarly been linked to property. *See, e g, Olmstead, supra* (wiretaps do not violate Fourth Amendment because there was no physical entry into homes or offices).

But in the 1960's the protection of privacy and prevention of eavesdropping moved away from a property-based model toward one protecting people regardless of location. Indeed, the people-focused protection of MCL 750.539a(2) in 1966 PA 319 presaged the U.S. Supreme Court's adoption of the same scope of protection under the Fourth Amendment in *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967) ("[T]he Fourth Amendment protects people not places," *overruling Olmstead*).

Thus, the far broader definition of "eavesdropping" in MCL 750.539a(2) is not remotely the common law definition of eavesdropping. The common law focused on location while MCL 750.539a(2) protects people without regard to location.

Finally, it would have made no logical sense for the Legislature to simply codify the common law definition in this remedial statute. As detailed in Part I.A. *supra*, the common law had failed – massively – to stop the surveillance and eavesdropping of the mid-20th Century. In 1966 PA 319 the Legislature went well beyond the failed common law definition and remedies for eavesdropping, and did not merely codify them.

C. A Domestic Violence Exception Should Be Created By The Legislature, Not A Court.

The Attorney General Team Supporting the Defendants urges that MCL 750.539c be construed to require 1-party consent because it "is not uncommon for victims of domestic violence – with the encourage[ment] of law enforcement – to record the threats that are made against them."

Brief at 15; *see also id* at 18-20.

In so arguing the Brief fails to provide the Court with a full analysis of all the relevant issues and asks this Court to displace the Legislature.

First, any victim's recording while working with law enforcement would be subject to the law enforcement exception because the victim would be an "agent" of law enforcement. *See* MCL 750.539g(a). That removes a large number of victims from any risk under MCL 750.539c. Indeed, it's arguable that *every time* a domestic violence victim gives a surreptitious audio recording to law enforcement, they are acting as agents of local enforcement.

Second, a victim's recording made under circumstances not creating a reasonable expectation of privacy would not be subject to MCL 750.539c either. *See, e g, Dickerson, supra*.

Finally, law enforcement has discretion in enforcing MCL 750.539c and it is difficult to imagine a prosecutor enforcing it against a domestic violence victim.

The proper place to weigh and resolve these issues of domestic violence and eavesdropping is the Legislature not this Court:

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: The responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature's, not the judiciary's. [Terrien v Zwit, 467 Mich 56, 67; 648 N.W.2d 602 (2002) (quotation marks and citation omitted).]

In re Mardigian Estate, 502 Mich 154, 170; 917 NW2d 325 (2018).

For clarity, the Legislature should add an exception to the list in MCL 750.539g for secret recording by domestic violence victims of their abusers without all-party consent. That would be an appropriate, tailored remedy for the issue raised by the Attorney General Team Supporting the Defendants, protecting those victims while not jeopardizing the rights of several million innocent

Michigan citizens to be protected from secret eavesdropping. The rights of both groups can be protected in this way rather than pitted against each other and sacrificing the rights of one group to protect the other.

CONCLUSION AND RELIEF SOUGHT

For the reasons indicated, the text, legislative history, contemporaneous interpretation, and purposes of 1966 PA 319's eavesdropping ban as well as sound public policy support its prohibition on a party to a private conversation recording the conversation without the consent of all other participants. *Amici curiae* urge the Court to uphold the statute's all-party consent requirement.

Respectfully submitted,

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