

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: 17-13292

AFT MICHIGAN,

Plaintiff,

v.

PROJECT VERITAS, MARISA L. JORGE,

Defendants.

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**AMICUS CURIAE BRIEF OF THE CYBER CIVIL RIGHTS INITIATIVE IN
SUPPORT OF PLAINTIFF AFT MICHIGAN AND THE PLAIN-TEXT
INTERPRETATION OF MICHIGAN'S EAVESDROPPING STATUTES TO
REQUIRE ALL-PARTY CONSENT**

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STATEMENT OF BASIS OF JURISDICTION

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

STATEMENT OF QUESTION PRESENTED

Whether MCL 750.539a et seq. prohibits a party to a conversation from recording the conversation absent the consent of all other participants.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Cyber Civil Rights Initiative (“CCRI”) submits this brief as *amicus curiae* in support of AFT Michigan.¹ CCRI is a nonprofit organization that advocates for technological, social and legal reform to address threats to civil rights in the digital era. Since its founding in 2013, CCRI has worked with legislators, policymakers, courts, tech industry leaders, and law enforcement to protect the privacy and free speech rights of vulnerable communities. CCRI focuses in particular on the nonconsensual use of private, sensitive information, including nonconsensual pornography (the unauthorized disclosure of private, sexually explicit imagery), “doxing” (the release of private information for the purpose of harassment), and intimate surveillance (the use of technology to monitor former or current partners without their consent). CCRI also conducts empirical research on digital privacy violations and provides support to thousands of victims through our 24/7, toll-free Crisis Helpline (the only hotline in the country with specific expertise in

¹ Amicus CCRI certifies that no counsel for a party authored this brief in whole or in part, and no party or any other individual or entity—other than the Amicus Curiae, its members, or its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

nonconsensual pornography), a pro bono legal services referral network, and guidelines for reporting and removing content from social media and other online platforms. CCRI serves as a “trusted flagger” for multiple social media and internet platforms, allowing us to report privacy and other violations on behalf of victims.

The nature of our work means that victims often entrust CCRI with highly sensitive information, including details of their abuse and personally identifying information. It also means that our organization is a frequent target for abusers, hackers, and self-defined “journalists” seeking to access sensitive information for malicious purposes. As a very small nonprofit with a limited budget, we rely on volunteers and interns for our daily operations. We are all too aware of the irreparable harm it would cause the vulnerable individuals who reach out to us for help if an individual infiltrated CCRI for the purpose of accessing and exposing private information relating to victims or advocates. Such exposure would have a devastating chilling effect on victims of sexual exploitation, domestic violence, and other intimate abuses who are already reluctant to reach out for help, as well as on the advocates who already take great personal risk in working in this space. How the Court answers the certified question in this case will have a direct and significant impact on the wellbeing of the victims for whom CCRI advocates in Michigan and on our ability to provide our services.

CCRI is thus in a special position to provide guidance regarding the impact of this Court’s decision on vulnerable communities and on the advocacy organizations that serve them. It is also uniquely situated to offer insight and analysis of privacy

and free speech law. CCRI's Board of Directors consists of prominent legal scholars, legal and technology professionals, and advocates with extensive experience in privacy, technology, and First Amendment issues. These include CCRI's President, Dr. Mary Anne Franks, a professor of law at the University of Miami School of Law, who created the first model criminal statute on nonconsensual pornography, served as Reporter for the 2018 Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act, and helped draft a federal nonconsensual pornography bill introduced in Congress in 2019; Vice President Danielle Keats Citron, a professor of law at the University of Virginia School of Law specializing in information privacy, free expression, and civil rights; and Board member Dr. Ari Ezra Waldman, a professor of law and faculty director for the Center for Law, Innovation and Creativity at Northeastern University School of Law who has published extensively on information privacy, law and society, and the LGBTQ community.

CCRI files this brief to provide this Court with empirical and scholarly expertise regarding the significance of MCL 750.539a *et seq.* for the privacy and free speech rights of vulnerable communities, especially victims of “nonconsensual pornography” and other forms of sexual and intimate partner abuse.

FACTS

Amicus CCRI adopts the statement of facts from Plaintiff AFT Michigan's brief.

INTRODUCTION

In March 2020, widespread stay-at-home orders and social distancing measures issued in the wake of the COVID-19 pandemic triggered a massive and unprecedented migration of essential activities to the internet. As classrooms, workplaces, doctor's offices, and courtrooms became virtual, people began to rely on video conferencing platforms to teach, work, socialize, connect with family, and seek assistance for everything from tax preparation to domestic violence.

Almost immediately, unscrupulous individuals began exploiting this newfound and widespread reliance on technology to communicate sensitive and vital information. The term "zoombombing" soon emerged to describe the hostile interruption by hackers and other uninvited individuals of meetings taking place on video conferencing platforms such as Zoom. Culprits target elementary school classrooms, public lectures, job trainings, dissertation defenses, and therapy sessions with hardcore pornography, graphic violence, and racist invective. Not content with merely disrupting these events, attackers often also record the sessions and post the recordings online, exposing deeply personal information as well as the traumatized reactions of the participants to the public. At the time of this writing, a Google search for "how to record Zoom meetings without permission" returns over six million results, including instructional videos and links to download software for recording on the first page of the results.

In April 2020, *PC Mag* reported on the phenomenon:

On YouTube, the hijackers have uploaded videos of them infiltrating Alcoholics Anonymous and Narcotics Anonymous meetings, which

shows the faces of participants. In the same videos, the Zoom-bombers tell the participants “I love alcohol” during an AA session while drawing a picture of Hitler and Swastikas during the Narcotics Anonymous meeting.²

In the view of Project Veritas, the recording and posting of such videos would not violate MCL 750.539c because they were done by a “participant.” Indeed, early on in the pandemic, Project Veritas founder James O’Keefe personally encouraged students to take advantage of the vulnerabilities created by their new virtual classrooms in order to expose their professors and classmates exactly this way, urging them to “record your prof videos” and send the recordings to his organization.³ In the Defendant’s view, any person, no matter how hostile, deceitful, malicious, or unwelcome, is entitled to record and divulge any conversation, no matter how private or sensitive, so long as he “participates” in the conversation.

While Project Veritas calls its self-serving, nonsensical reading of 750.539c a “one-party consent” rule, a more accurate term would be a “nonconsensual recording by participant” rule. Defendant seeks to transform the all-party consent rule clearly established in Michigan’s detailed, multi-part eavesdropping statute based on nothing more than an idiosyncratic reading of three words that appear in a single section. It is unfortunate that the Court of Appeals’ confused decision in *Sullivan v.*

² Michael Kan, *Were You Zoom-Bombed? Video of It May Now Be on YouTube, TikTok for All to See*, PC Magazine (Apr. 2, 2020), <https://www.pcmag.com/news/were-you-zoom-bombed-video-of-it-may-now-be-on-youtube-tiktok-for-all-to>.

³ Will Sommar, *Right-Wing Tricksters Want to Discredit Academia by Recording Zoom Classes*, Daily Beast (Mar. 25, 2020), <https://www.thedailybeast.com/right-wing-tricksters-want-to-discredit-academia-by-recording-zoom-classes-during-coronavirus-outbreak>.

Gray has provided Defendant's interpretation with some legal foothold, but this Court now has the opportunity to correct the anomalous and contradictory effects of that ruling. All-party consent is the only rule that provides a harmonious and consistent reading of Michigan's eavesdropping statute as a whole.

The contrary rule would grant participants the right to "unilaterally nullify other participants' expectations of privacy," which this Court has clearly rejected as illegitimate. *Dickerson v. Raphael*, 461 Mich. 851, 601 N.W.2d 108 (1999). Such a rule would have particularly damaging effects on the privacy and free speech rights of vulnerable populations, especially victims of domestic violence and intimate privacy violations. Project Veritas's interpretation of 750.539c conflicts with basic privacy principles, renders Michigan's eavesdropping statute internally inconsistent, and undermines the Michigan criminal law prohibiting nonconsensual pornography. The view that nonconsensual recording is permissible by any participant in a conversation encourages deceitful, exploitative, and coercive invasions of privacy and makes it harder for victims of intimate privacy abuses to seek and obtain help. Whatever the interests at stake for those who have relied on the strained, illogical, and asymmetrical one-party consent interpretation proffered by *Sullivan v. Gray*, they pale in comparison to the present and future harms to privacy and expression unleashed by that view.

STANDARD OF REVIEW

The answer to the certified question turns solely on the interpretation of the eavesdropping statute, which is a question of law that this Court reviews de novo.

See *Foster v. Foster*, 505 Mich. 151, 165, 949 N.W.2d 102 (2020).

ARGUMENT

I. Project Veritas’s Interpretation of 750.539c Conflicts with Basic Privacy Principles, Renders Michigan’s Eavesdropping Statute Internally Inconsistent, and Undermines Michigan’s Nonconsensual Pornography Law

A. Project Veritas’s Interpretation of 750.539c Conflicts with Basic Privacy Principles

The basis of any meaningful conception of privacy is the right of each individual to decide for herself whether to share private information, with whom, and in what manner. Over one-and-a-quarter centuries ago, Samuel Warren and future Supreme Court Justice Louis Brandeis wrote the seminal work on privacy rights and warned that “[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’” Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). Such violations of the right to privacy, they wrote, chill freedom of expression and erode autonomy. They described the right to privacy as an individual’s “right of determining ...to what extent his thoughts, sentiments, and emotions shall be communicated to others.” *Id.* at 198. The right to privacy demands respect not only for the individual’s exclusive

authority in choosing whether to make private expression public at all, but also the individual's power "to fix the limits" of any public exposure to which she agrees. *Id.* at 198–200.

The right to privacy, then, is fundamentally about individual consent and control. Barring issues of minority, incompetence, or powerful countervailing public interests, the right to decide what private information to expose to the public belongs solely to the individual, as does the right to determine the scope of that exposure. Consent to exposure to one audience does not constitute consent to exposure to another audience. Consent to be heard or seen in person does not constitute consent to being recorded. And consent to being recorded does not constitute consent to having that recording distributed to others.

Project Veritas's interpretation of 750.539c directly conflicts with these basic principles of the right to privacy. According to the Defendant, "[t]he plain language" of MCL 750.539a(2) and MCL 750.539c "permit[s] a party to record with strictly his or her own consent, or one-party consent." This reading, which hinges entirely on an idiosyncratic parsing of the phrase "discourse of others" in the definitions section of the Eavesdropping Statute, allows any participant in a conversation to unilaterally decide for all other participants in a private conversation what can be exposed to the public.

Project Veritas relies heavily on the 1982 case *Sullivan v. Gray*, 117 Mich. App. 476, 324 N.W.2d 58, to obliterate not only the aspect of individual consent fundamental to the right to privacy, but also the individual's right to control the

scope of any public exposure. In *Sullivan*, the Court of Appeals effectively equates the consent to be heard by an interlocutor with consent to be recorded by an interlocutor: “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 482.

But it is not true that recordings are “nothing more than a more accurate record of what was said.” As the dissent observed in *Sullivan*, “There is obviously more credence given to a tape recording than a verbal recollection. Further, the recorded conversation is easily edited and the only rebuttal would be another recording.” *Id.* at 485 (Brennan, J., dissenting). And as the Court of Appeals held in 1997:

The risk of repetition does not authorize defendants to secretly listen, broadcast, and tape the private conversation of others. “[I]t is one thing to subject the average citizen to the risk that participants in a conversation with him will subsequently divulge its contents to another, but quite a different matter to foist upon him the risk that unknown third parties may be simultaneously listening in.”

Dickerson v. Raphael, 222 Mich. App. 185, 198–99, 564 N.W.2d 85, 91 (1997) (quoting *United States v. White*, 401 U.S. 745, 777 (1971)), *rev’d in part on other grounds*, 461 Mich. 851, 601 N.W.2d 108 (1999).

The essence of privacy is that each person gets to decide for herself what private information she wishes to share, with whom, and in what way. Privacy is a right to “control [] the flow of personal information in all stages of processing—acquisition, disclosure, and use.” Jerry Kang, *Information Privacy in Cyberspace*

Transactions, 50 STAN. L. REV. 1193, 1209 (1998). Where privacy is threatened, so is human autonomy, dignity, and free expression. “Invasions of privacy demean the individual. . . . When a government degrades its citizens, *or permits them to degrade each other*, however beneficent the specific purpose, it limits opportunities for individual fulfillment and national accomplishment.” R. Clark, CRIME IN AMERICA 287 (1970) (emphasis added) (quoted in *White*, 401 U.S. at 764 (Douglas, J., dissenting)).

B. Project Veritas’s Interpretation of 750.539c Would Undermine the Legislative Objectives of Michigan’s Eavesdropping Statute and Render the Law Internally Inconsistent

“A statute is the solemn and purposeful result of a state acting through its legislature to achieve an effective, operative, nonfutile end.” Norman Singer, SUTHERLAND STATUTORY CONSTRUCTION § 45:12 (7th ed. 2020). So, naturally, “the primary goal of statutory construction is to give effect to the Legislature’s intent.” *People v. Stone*, 463 Mich. 558, 562, 621 N.W.2d 702 (2001). That task “begins with the statute’s language.” *Id.* And when a particular provision under consideration is part of a larger statutory scheme, it cannot be read narrowly or in isolation. Instead, this Court must examine the text and structure of the law as a whole and read all of its provisions in harmony. *See Macomb County Prosecutor v. Murphy*, 464 Mich. 149, 159–60, 627 N.W.2d 247, 253 (2001). An examination of the text and structure of the Michigan’s Eavesdropping Statute makes two things about the Legislature’s intent absolutely clear.

First, the Legislature’s overwhelming focus in the statute is on securing the privacy of the each individual and ensuring that private communications or actions will not be disclosed absent the consent of all parties involved. That objective is set forth in unambiguous terms no fewer than three times in the statute. In the statute’s definitional section, prohibited eavesdropping is construed broadly to overhearing, recording, amplifying, or transmitting private communications “without the permission of *all parties* engaged in the discourse.” MCL 750.539a(2) (emphasis added). One of the statute’s central provisions—and the one at issue in this case—makes it unlawful for “a[n]y person who is present or who is not present during a private conversation” and to willfully use “any device to eavesdrop upon the conversation without the *consent of all parties*.” MCL 750.539c (emphasis added). And another key prohibitory section makes it unlawful to “[i]ninstall, 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.” MCL 750.539d(1)(a) (emphasis added).

Second, the Legislature took care in drafting the statute to ensure that individuals have the right to control *the scope* of their consent to disclosure. The statute broadly prevents the recording and disclosure both of “private conversation[s],” MCL 750.539c, and of the happenings in “private place[s],” MCL 750.539d, absent the consent of all participants. The Court of Appeals in *Dickerson*

distinguished between the expectation that a private conversation may be repeated by a participant as opposed to recording or transmitting that same conversation:

[A]lthough a participant may expect that a conversation will be repeated, it remains private within the meaning of the statutes and may not be overheard, recorded, amplified, or transmitted to others without the consent of all participants. ... The risk of repetition does not authorize defendants to secretly listen, broadcast, and tape the private conversation of others. It is one thing to subject the average citizen to the risk that participants in a conversation with him will subsequently divulge its contents to another, but quite a different matter to foist upon him the risk that unknown third parties may be simultaneously listening in.

222 Mich. App. at 198–99 (internal citations and quotations omitted); *see also Stone*, 463 Mich. at 563 (explaining that both a “private place” and a “private conversation” under the statute are ones “where one may reasonably expect to be safe from casual or hostile intrusion or surveillance”). In other words, the statute’s text and structure recognizes that assuming the risk of being observed by another person in a private encounter is not the same as assuming the risk of being recorded by another person, and assuming the risk of being recorded by another person is not the same as assuming the risk of having that recording distributed to a wider audience.

Taken as a whole, the Eavesdropping Statute clearly requires the consent of all parties to observing or recording private conversations or the sounds and events in private places, and demands respect for the right of the individual to determine the scope of that consent. Moreover, decisions interpreting the statute have recognized that the “[f]undamental rights” of privacy “should not be sacrificed on the altar of advancing technology.” *People v. Stone*, 234 Mich. App. 117, 125, 593 N.W.2d 680, 683 (1999), *aff’d*, 463 Mich. 558, 621 N.W.2d 702 (2001). Instead, those

rights may only be waived by “clear and unequivocal conduct estopping the assertion of the right.” *Id.*

By contrast, Defendant’s reading of MCL 750.539c to allow nonconsensual recording by participants defies the legislative intent of Eavesdropping Statute and renders the law internally incoherent. Defendant’s interpretation rests entirely on an idiosyncratic and blinkered reading of three words in the definitions section of the law: “discourse of others.” MCL 750.539a(2). Defendant insists that— notwithstanding everything else in the Eavesdropping Statute—this isolated phrase means that MCL 750.539c “permit[s] a party to record with strictly his or her own consent” so long as that party is a participant to the conversation.

Defendant’s position is an object lesson in how *not* to read a statute. “[T]o read the law as a whole, it must, in fact, be read as a whole.” *Mayor of City of Lansing v. Mich. Pub. Serv. Comm’n*, 470 Mich. 154, 168, 680 N.W.2d 840 (2004), *overruled in part on other grounds, Petersen v. Magna Corp.*, 484 Mich. 300, 773 N.W.2d 564 (2009). One cannot, as Defendant does here, “remove words and provisions from their context, infuse these words and provisions with meanings that are independent of such context, and then reimpart these context-free meanings back into the law.” *Id.*; *see also People v. Feeley*, 499 Mich. 429, 435, 885 N.W.2d 223, 226 (2016)

The damage that Defendant’s interpretation does to the overall scheme of the Eavesdropping Statute is palpable. Not only does it defy the most basic and clearly articulated objectives of the law, but it generates results under the law that are

nonsensical and internally inconsistent. Indeed, the court in *Sullivan v. Gray* itself acknowledged that interpreting “discourse of others” as it does means establishing not a one-party consent rule as such, but a participant consent rule. When applied to MCL 750.539c, this leads to the incongruous result that a person is permitted to record conversations in which he participates but cannot ask a third party to do the same, even though the privacy interests at issue are indistinguishable.

And the anomalies don’t stop there – even more absurd and privacy-destroying results obtain when the participant consent rule is applied to other sections of the eavesdropping statute, in particular MCL 750.539d, which deals with both audio and visual recording in private places. If, as Defendant maintains, a party is permitted to record without consent any conversation in which he participates, then there is no intelligible reason why he should not also be able to install or use a recording device to do so in a private place.

This was the very argument pursued by the defendant in *Lewis v. LeGrow*, who claimed that secretly videotaping his sexual encounters with multiple women did not violate 750.539d “because he was present and only videotaped what he could also see.” 258 Mich. App. 175, 189, 670 N.W.2d 675, 685 (2003). The Court of Appeals soundly rejected this argument, affirming that individual’s expectation of privacy cannot be overridden by a participant:

There is a vast difference between knowingly exposing oneself to one's partner during consensual sex and having that intimate event secretly photographed, and thus, “captured and preserved for all time.” ... Just as “a participant [in a private conversation] may not unilaterally nullify other participants' expectations of privacy by secretly

broadcasting the conversation,” defendant may not unilaterally nullify his sexual partners' expectations of privacy by clandestinely videotaping them.

Id. at 189.

At the same time, however, the Court of Appeals reiterated its holding in *Sullivan v. Gray*, asserting that the defendant did not violate 750.539c because he did not record “the discourse of others.” But it is nonsensical to read 750.539c as bestowing the right of nonconsensual recording on a participant in a private conversation but maintain that 750.539d rejects such a right to a participant in a private place. *Cf. Stone*, 463 Mich. at 563 (holding that the protections under the statute for occurrences in a “private place” and those for a “private conversation” are the same in that both protect an individual where she “may reasonably expect to be safe from casual or hostile intrusion or surveillance”). If the Court of Appeals had extended the “nonconsensual recording by a participant” rule that it applied to 750.539c to 750.539d, then the defendant in *LeGrow* would have prevailed. The fact that it declined to do so illustrates the incoherence of its interpretation of 750.539c.

The Court of Appeals should have taken *Lewis v. LeGrow* as an opportunity to correct its earlier misinterpretation of the right to privacy with regard to 750.539c. The certified question in this case, whether MCL 750.539a et seq. “prohibits a party to a conversation from recording the conversation absent the consent of all other participants,” provides this Court with the opportunity to clarify this issue for the eavesdropping statute as a whole.

C. Project Veritas’s Interpretation of 750.539c Undermines Other Attempts to Protect the Privacy of Michigan Residents, Including Its Nonconsensual Pornography Law

Lewis v. LeGrow involved what would today be referred to as “nonconsensual pornography” or “revenge porn.” Such unauthorized disclosure of private, sexually explicit images has increasingly become a tool of domestic abuse, causing immediate, devastating, and often irreparable harm. Abusers distribute these images and videos through emails, text messages, social media, and websites, often directly targeting the victim’s family, workplace, and friends. The exposure of sensitive and private intimate images, which can quickly dominate an internet search of the victim’s name, wreaks havoc on victims’ personal, professional, educational, and family life, leading to depression, loss of employment, anxiety, and even suicide. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350-52 (2014).

A rule that permits a participant in an encounter to record other parties without consent not only undermines the integrity and effectiveness of Michigan’s Eavesdropping Statute, but also directly contradicts efforts by the Michigan legislature to address the devastating harms caused by nonconsensual pornography.

MCL 750.145e prohibits the intentional dissemination of sexually explicit visual material when the defendant acts with intent to threaten, coerce, or intimidate⁴ and if all of the following conditions apply:

- (a) the depicted person is over 18 years of age;
- (b) the depicted person is identifiable from the sexually explicit visual material or information displayed in connection with the material supplied by the disseminator;
- (c) the material was obtained under circumstances in which a reasonable person would know or understand the material was to remain private; and
- (d) the person knew or reasonably should have known that the depicted person did not consent to the dissemination of the sexually explicit material.

The view propounded by Project Veritas, that participants in an encounter are permitted to record other participants without consent, dramatically undercuts the force of laws such as MCL 750.145e. In many nonconsensual pornography cases, the perpetrator himself appears in the material along with the victim. The participant consent rule provides ammunition for defendants to argue that a reasonable person would not have known that the material was to remain private as required by (c), and/or that the depicted person did not consent as required by

⁴ The motive requirements make MCL 750.145e an extremely narrow statute that provides very limited protections for victims of nonconsensual pornography. Empirical research by the Cyber Civil Rights Initiative reveals that the majority of nonconsensual pornography perpetrators do not act with the intent to threaten, coerce, or intimidate, but are instead motivated by a host of other impulses: greed, desire for notoriety, entertainment, social standing, etc. This restrictive motive requirement may help explain why nonconsensual pornography cases are frequently prosecuted using other provisions, including provisions of the Eavesdropping Statute.

(d). If a person can unilaterally override the expectations and consent of all other parties in a conversation, as Project Veritas claims, then it stands to reason that a person can do the same with regard to the expectations and consent of other parties in a sexual interaction. This will further undermine the already limited protections available to Michigan residents against abuses such as nonconsensual pornography.

II. Project Veritas’s Interpretation of MCL 750.539c Encourages Deceitful, Coercive, and Exploitative Invasions of Privacy and Makes it Harder for Victims of Domestic Violence and Sexual Abuse to Seek and Obtain Help.

Proponents of “one party consent” rules who claim that allowing secret recordings by participants serves the public interest and benefits domestic violence victims ignore the massive role that surveillance plays in domestic violence and sexual abuse, as well as in the harassment and intimidation of unpopular, controversial, or otherwise vulnerable individuals and organizations. Endorsing the legitimacy of nonconsensual recording by participants will encourage deceitful, coercive, and exploitative invasions of privacy that will hurt vulnerable groups such as domestic violence victims the most, as well as make it harder for advocates to provide services to those groups.

These issues will only become more pronounced as surveillance technology becomes increasingly sophisticated, affordable, and pervasive. Most Americans now carry in their pockets cell phones capable of surreptitiously recording private conversations and uploading those conversations to the internet for immediate dissemination. Videoconferencing, text messaging, and other applications allow for

intimate moments—intended to remain private in the context of their disclosure—to be secretly saved or recorded by participants without the knowledge of other parties to the disclosure. Surveillance culture has negative impacts on society as a whole, including chilling free expression, undermining trust, and stifling creativity, but it places particularly heavy burdens on groups such as women, minorities, and the poor. *See* Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425 (2017).

A. Project Veritas’s Interpretation of 750.539c Encourages Deceitful, Coercive, and Exploitative Invasions of Privacy That Will Disproportionately Harm Domestic Violence Victims and Other Vulnerable Groups

Intimate partner violence has become increasingly intertwined with intimate surveillance. Abusers often encourage their victims to trust and confide in them, and then use the information they obtain through this manipulation to coerce, threaten, and destroy their victims. In justifying their actions, these abusers espouse the same view as that of Project Veritas: that one participant in an encounter has the right to record another participant without consent, and then use those recordings as they see fit.

United States v. Petrovic provides an instructive example of the kind of destructive, irreparable harm wreaked by such a view. Jovica Petrovic frequently photographed and recorded intimate moments with his partner, M.B., over the course of their relationship, often without her consent or knowledge. M.B. confided in Petrovic about the sexual abuse she had experienced as a child, her struggle with suicidal thoughts, and her fears about her fitness as a mother. After discovering

that Petrovic had been having an affair with a woman and gotten her pregnant, M.B. attempted suicide by slitting her wrists in Petrovic's home. Petrovic took pictures of the pool of blood on the floor left by the attempt after M.B. was taken to the hospital. On several occasions, Petrovic secretly filmed M.B. when they were having sex.

After M.B. informed Petrovic that she was leaving him, Petrovic told her about these secret recordings and that he had also saved all of her text messages to him. Petrovic threatened to publish this information online if M.B. did not agree to stay in the relationship. After M.B. failed to acquiesce, Petrovic began an intense campaign of harassment and abuse against M.B, mailing dozens of postcards to people in M.B.'s community, including her family members, co-workers, and local businesses that featured a barely-dressed M.B. accompanied by epithets such as "whore." The postcards directed recipients to a website that Petrovic had created, where he offered twenty to thirty thousand pages of material about M.B., including links to dozens of images and videos of M.B. naked and engaged in sex acts. Petrovic included links to pictures of M.B.'s children (not fathered by Petrovic) as well as M.B.'s intimate text messages, the picture of the pool of blood left by M.B.'s suicide attempt, as well as M.B.'s contact information and the social security numbers of her children. Petrovic also sent several packages containing enlarged photographs of M.B. engaged in sexual acts to M.B.'s employer and family members. One of these packages was opened and viewed by M.B.' seven-year-old son. *United*

States v. Petrovic, 701 F.3d 849 (8th Cir. 2012); *see also* Nicholas Phillips, *Sext Fiend*, RIVERFRONT TIMES (Apr. 18, 2013), <https://perma.cc/4QL3-AWU7>.

Domestic violence is disturbingly prevalent in our society. In Michigan, a 24-hour survey conducted by The National Network to End Domestic Violence (NNEDV) in cooperation with 98% of the identified domestic violence programs in Michigan found that those programs served 3,204 victims in a single day. Additionally, those organizations answered 494 hotline calls, which averages about 21 calls per hour. NNEDV, *14th Annual Domestic Violence Counts Report: Michigan Summary*, https://nnedv.org/wp-content/uploads/2020/03/Library_Census_2019_-MI.pdf. Approximately 36.1% of Michigan women and 25.8% of Michigan men experience intimate partner violence and, in 2019, 57,018 domestic violence incidents were reported to Michigan police. National Coalition Against Domestic Violence, *Domestic Violence in Michigan*, https://assets.speakcdn.com/assets/2497/ncadv_michigan_fact_sheet_2020.pdf.

Surveillance is increasingly employed by abusers as a means of controlling their victims and facilitating further acts of domestic violence. In a survey conducted by NNEDV, 97% of domestic violence programs reported that abusers use technology to stalk, harass, and control victims. NNEDV, *Recognizing and Combating Technology-Facilitated Abuse*, https://nnedv.org/latest_update/combating-technology-facilitated-abuse/. The NNEDV notes that abusers commonly use cell phones for spying, eavesdropping, and recording. NNEDV, *Technology-Facilitated Stalking: What You Need to Know*,

https://nnedv.org/latest_update/technology-facilitated-stalking/#. Abusers also make use of “stalkerware” software, which enables monitoring without the victim’s consent in order to facilitate intimate partner surveillance, harassment, abuse, and stalking. See Coalition Against Stalkerware, *What is Stalkerware?*, <https://stopstalkerware.org/what-is-stalkerware>.

As CCRI Vice-President Danielle Keats Citron writes,

Domestic abusers and stalkers are increasingly turning to surveillance software to terrorize victims. A Bureau of Justice Statistics study conducted in 2006 estimated that 25,000 people are stalked via GPS annually. That number surely understates the problem given the increasing adoption of cell phones and availability of stalking apps. ... The National Network to End Domestic Violence found that 71% of domestic abusers monitor survivors' computer activities, and 54% of abusers tracked survivors' cell phones with stalking apps. According to a 2012 survey of 750 victim services agencies, 75% of domestic violence survivors experience tracking of their location through their cell phones or a GPS device. A 2014 study sponsored by Digital Trust found that more than 50% of abusive partners used spyware or some other form of electronic surveillance to stalk victims. The overall number of stalking victims is significant and growing; in 2009, the Bureau of Justice Statistics estimated that over 3.4 million individuals are stalked annually; in 2014, the Department of Justice's Bea Hanson testified that 6.6 million people are stalked annually.

Danielle Keats Citron, *Spying Inc.*, 72 WASH. & LEE L. REV. 1243, 1251 (2015)

Abusers often make audio and visual recordings to maintain control and blackmail victims. NNEDV/WomensLaw.org, *Abuse Using Technology: Recording*, <https://www.womenslaw.org/about-abuse/abuse-using-technology/all#node-68655>;

Cynthia Southworth et al., *Intimate Partner Violence, Technology, and Stalking*, 13 VIOLENCE AGAINST WOMEN 842, 849 (2015)

<https://ipvtechbib.randhome.io/pdf/southworth2007.pdf>. In fact, 46% of victims of

cyberstalking report that their stalker used hidden cameras to monitor their actions. Karen Baum, et al., Bureau of Justice Statistics, *Stalking Victims in the United States* (2009), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=1211>.

Because intimate partner violence is by definition perpetrated someone close to the victim, the abuser is often a “participant” in the conversation and events captured by surveillance. In the view of Project Veritas, that fact renders abusers’ one-sided “consent” to recording legitimate. The perversity of this view is particularly highlighted in sexual surveillance and nonconsensual pornography.

In the case of nonconsensual pornography, abusers often threaten to disclose intimate images when victims try to leave the relationship or report the abuse to law enforcement. See Jack Simpson, *Revenge Porn: What is it and how widespread is the problem?*, THE INDEPENDENT (July 4, 2014), <https://www.independent.co.uk/news/uk/home-news/what-is-revenge-porn-9580251.html>; Annmarie Chiarini, *I was a victim of revenge porn*, THE GUARDIAN (Nov. 19, 2013), <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>. Abusers use the threat of disclosure to keep their partners under their control and disseminate the images or videos once their partners find the courage to leave. See Citron & Franks, *Criminalizing Revenge Porn*, *supra*, at 351. NNEDV’s survey of domestic violence programs found that 55% of programs reported that the survivors they work with had abusers post sexually explicit images of them online without consent. NNEDV, *Glimpse from the Field*, <https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/54e3d1b6e4b085>

00fcb455a0/1424216502058/NNEDV_Glimpse+From+the+Field+-+2014.pdf. For example, one organization reported difficulties arising from work with a 14-year-old girl whose abusive boyfriend created fake Facebook accounts and posted naked pictures of her after inviting all of her friends and family to connect. *Id.*

Victims of nonconsensual pornography often consensually share intimate images with the implied or express understanding that such images would remain confidential. Citron & Franks, *Criminalizing Revenge Porn*, supra, at 354. Victims shared their explicit images or allowed the intimate photos to be taken only because their partners assured them that the explicit images would be kept confidential. *Id.* That is, nonconsensual pornography is frequently a violation of the depicted person's right to set her own limits as to the scope of consent given for recording.

While the nonconsensual recording and distribution of sexually explicit material is often conducted by someone the victims knows and trusts, nonconsensual pornography is also perpetrated by other "participants": sex traffickers who use compromising images to keep unwilling individuals in the sex trade; rapists who record attacks to discourage victims from reporting assaults; medical professionals and nursing home workers who post nude photos of vulnerable patients to social media as a form of entertainment. *See* Mary Anne Franks, "Revenge Porn" Reform: A View from the Front Lines, 69 Fla. L. Rev. 1251, 1258 (2017). Men's rights activists with large platforms encourage their followers to record their sexual encounters with women without consent to avoid accusations of rape. *See* Roosh Valizadeh, *Men Should Start Recoding Sex With A Hidden Camera*,

Return of Kings (Dec. 14, 2015), <https://www.returnofkings.com/75201/men-should-start-recording-sex-with-a-hidden-camera>.

Sexual surveillance is an increasingly common phenomenon. A 2017 CCRI study found that 1 in 8 participants had been the victims of or threatened with nonconsensual pornography. See Asia A. Eaton et al., *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration, A Summary Report 12* (2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>. As many as 10,000 websites feature “revenge porn,”⁵ some dedicated solely to this content. These easily accessible, largely anonymous platforms connect profit-driven purveyors with voyeuristic consumers. These sites frequently display personal information about the victims (*e.g.*, name, age, address, employer, email address, and links to social media profiles) alongside the images, making it easy for strangers to threaten and harass victims. See Citron & Franks, *Criminalizing Revenge Porn*, *supra*, at 350–51.

As noted above, Michigan recognized the harm of nonconsensual pornography by criminalizing it in 2016. MCL 750.145e. Like the 47 other U.S. jurisdictions that have criminalized this abuse, Michigan recognizes that consenting to being recorded nude or engaged in sexual activity is not the same thing as consenting to having that recording distributed, regardless of whether the distributor was also a participant in the recorded activity. But the “participant consent” view propounded by Project Veritas directly contradicts this understanding.

⁵ This figure is based on takedown requests made available to CCRI.

Domestic violence, nonconsensual pornography, and other forms of digital abuse disproportionately impact women and minority groups. CCRI's research shows that women are more likely to be victims of this abuse, while men are more likely to be perpetrators. See Eaton et al., *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration*, supra at 12, 15. For over a decade, Working to Halt Online Abuse ("WHOA") collected information from cyber harassment victims, which showed that of the 3,787 individuals reporting cyber harassment to the organization from 2000 to 2012, nearly two-thirds were female. Working to Halt Online Abuse (WHOA), *Comparison Statistics 2000-2012*, <http://www.haltabuse.org/resources/stats/Cumulative2000-2012.pdf>.

Further, marginalized groups experience harms arising from privacy violations more acutely. Research suggests that sexual minorities are more vulnerable to cyber harassment, nonconsensual pornography, and other abuses. Citron & Franks, *Criminalizing Revenge Porn*, supra, at 354. In fact, narrow interpretations of privacy torts in particular operate disproportionately to prevent claims by marginalized groups such as sexual, ethnic, or religious minorities. Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2069–74 (2018).

The harms associated with privacy abuses that would be encouraged under a participant consent interpretation are significant. Victims of domestic and online abuse suffer physical, emotional, financial and social harms. Victims commonly struggle with anxiety, panic attacks, anorexia nervosa and depression resulting

from online harassment following the disclosure of nonconsensual pornography, which grows more severe over time. Citron & Franks, *Criminalizing Revenge Porn*, supra, at 351. According to a study conducted by CCRI, over 80% of nonconsensual pornography victims experienced severe emotional distress and anxiety. *Id.* Often, the harms associated with distribution of intimate images online grow exponentially through the disclosure of personal information about the victim. Nearly half of victims report that their name a social media profiles appear next to the images and 20% report their email addresses, telephone numbers appear next to the images, increasing the risk of offline stalking and physical attack. *Id.* at 350–51.

The unauthorized disclosure of images causes immediate, devastating, and often irreparable harm because, within days or even minutes, these images can dominate an internet search of the victim’s name as the images are posted online. *Id.* at 352. The private images are sent without consent from the victim through emails, text messages, and mobile applications, often directly targeting the victim’s family, workplace, and friends. *Id.* at 350. The exposure of sensitive and private intimate images wreaks havoc on victims’ personal, professional, educational, and family life. *Id.* at 350–52.

B. Project Veritas’s Interpretation of § 750.539c Makes It Harder for Victims of Domestic Violence and Sexual Abuse To Seek and Obtain Help.

Many victims of intimate partner violence and sexual abuse are reluctant to contact law enforcement due to fears about retaliation and further exposure of private information. In a National Domestic Violence Hotline survey of callers

regarding law enforcement responses, 51% of callers had not called police and, of those, 61% had not called the police for privacy reasons. NNEDV Safety Net Project & The Police Foundation, *How Law Enforcement Agencies Releasing Open Data Can Protect Victim Privacy & Safety*, <https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/5876a8322e69cf7c9ba1a215/1484171315884/PDI+for+Law+Enforcement+-+Final.pdf>. Many survivors reported that they would not call the police because law enforcement fails to investigate domestic violence cases appropriately, resulting in the victim being threatened with arrest rather than the abuser. TK Logan & Roberta Valente, *Who Will help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses*, <https://www.thehotline.org/wp-content/uploads/media/2020/09/NDVH-2015-Law-Enforcement-Survey-Report-2.pdf>. Of those surveyed, 44% were concerned that involving law enforcement would result in retaliation from the abuser. *Id.* Disturbingly, two-thirds of respondents that had contacted the police previously said they are somewhat or extremely afraid to call the police in the future. *Id.* Of those responding, 80% said they were afraid the police would not believe them or would do nothing and 51% were afraid the police would make things worse. *Id.*

Reluctance to report to law enforcement make the services provided by domestic violence shelters, rape crisis centers, and other advocacy and assistance organizations specializing in sexual abuse all the more vital. But these are precisely

the kinds of organizations that are vulnerable to infiltration and harassment by malicious actors.

Project Veritas is notorious for politically-motivated “sting” operations involving deceptively edited videos containing private information of individuals and organizations obtained through fraudulent misrepresentation and surreptitious surveillance. If this Court endorses Defendant’s self-serving interpretation of MCL 750.539c, it will further embolden not only Project Veritas, but other malicious actors seeking to attack and denigrate individuals and organizations engaged in sensitive or controversial work. These include many vulnerable communities, including politically unpopular groups, individuals struggling with addiction, and advocacy organizations serving women and minorities.

The Cyber Civil Rights Initiative and its board members have been targeted and threatened by hackers, abusers, and individuals falsely claiming to be journalists. Individuals who seek assistance from CCRI frequently entrust our organization with extremely sensitive information, including private, sexually explicit images and personally identifying details. Our organization, like domestic violence shelters, rape crisis centers, and substance abuse support centers, serves particularly vulnerable communities with heightened privacy concerns. Infiltration of such organizations inflicts incalculable, irreparable damage on these communities. Private information such as naked photos, home addresses, and details of psychological treatment is not information that can meaningfully be removed from public view once exposed. If victims cannot trust that their

information will be protected from exposure, they will be even less likely to seek assistance. “Sting” attacks also often invade the privacy of staff members, discouraging individuals from becoming or remaining in advocacy positions.

Endorsing Project Veritas’s view that mere participation in an interaction – no matter how fraudulent, deceitful, hostile, or manipulative – confers the right to nonconsensually record that interaction would have a particularly devastating impact on domestic violence and sexual abuse survivors and their advocates.

III. Any Legitimate Interests of Those Who Have Relied on *Sullivan v. Gray*’s Participant Consent Rule Pale In Comparison to the Present and Future Harms Inflicted By That Rule

Whatever the legitimate interests at stake for those who have relied on the strained, illogical, and asymmetrical one-party consent interpretation proffered by *Sullivan v. Gray*, they pale in comparison to the present and future harms to privacy and expression unleashed by that view. Most of the justifications offered to support the one-party consent rule are already covered by existing exceptions or are based on erroneous beliefs. The remaining category of legitimate justifications to eschew all-party consent is very narrow and is best addressed by explicit legislative exception.

While Project Veritas, the Attorney General Team Supporting Defendant’s Interpretation of Michigan’s Eavesdropping Statutes, and the Michigan Coalition to End Domestic and Sexual Violence (MCEDSV) all assert that one-party consent is essential to the protection of domestic violence victims, none can point to a single Michigan case in which all-party consent would have jeopardized the desired

outcome. Instead, they rely on law review articles critiquing the laws of other states, speculation about the value of one-party consent to domestic violence cases, and cases that fall within existing exceptions for law enforcement.

Amicus MCEDSV asserts that “It is not uncommon for victims of domestic violence—with the encourage of law enforcement—to record the threats that are made against them” and that “the prosecution will often rely on the recordings by a victim of abuse of her boyfriend’s threats in domestic violence cases and in sexual assault cases.” But MCL 750.539g(a) provides an exception for eavesdropping or surveillance by a peace officer of the state or federal government “or the officer’s agent.” Victims of domestic violence, after reporting the offense to police, should be construed as informants and agents of an officer for the limited purpose of gathering evidence of ongoing abuse under the statue. In fact, all-party consent would not limit law enforcement activities because Michigan’s eavesdropping statutes contemplate a specific exception for surveillance in the performance of law enforcement duties. *See* MCL 750.539g (“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”); *See also Stone*, 234 Mich. App. at 124. All-party consent benefits law enforcement activities by prohibiting all surreptitious recording in private areas without consent, which establishes a bright-line rule supporting other privacy-focused legislation like MCL 750.145e and ensures avenues of criminal prosecution for abusers.

The single case cited by MCEDSV that would not be covered under the law enforcement exception is *In re Cox*, which did not involve the consent of any party to the conversation. In that case and other cases where the Eavesdropping Statute was found to be violated, the courts have held that the statute does not require suppression of evidence obtained in violation of the Eavesdropping Statute. “The audiotape recording was obtained by respondent's boyfriend, who hid a recording device in respondent's house. While it appears that respondent's boyfriend obtained the recording in violation of MCL 750.539d, the statute does not prohibit the admission of the recording into evidence.” *In re Cox*, No. 284599, 2008 WL 4367537, at *1 (Mich. Ct. App. Sept. 25, 2008). Likewise, in *People v. Horton*, the Court of Appeals “reject[ed] defendant's claim that the Michigan eavesdropping statute, MCL 750.539a *et seq.*, required suppression of the recorded phone calls because the victim, as a party to the conversation, was not an eavesdropper within the meaning of the statute. ...while the Michigan eavesdropping statute provides for criminal penalties and civil remedies, it makes no allowance for suppression. See MCL 750.539e and MCL 750.539f. *People v. Horton*, No. 290009, 2010 WL 624888, at *7 (Mich. Ct. App. Feb. 23, 2010) (internal citations omitted)

Finally, many of the arguments in favor of one-party consent reflect the erroneous belief, expressed in *Sullivan v. Gray*, that “[a] recording made by a participant is nothing more than a more accurate record of what was said.” Truth is a far more complex question than merely what one participant hears or sees. It is both naïve and dangerous to assume that audiovisual recordings, especially when

obtained surreptitiously under false pretenses, unambiguously provide the truth of any event or are necessarily superior to other evidence. Research has shown that the point of view of a recording greatly affects viewers' perception of the events recorded. See Rachel L. Bailey et al., *Camera Point-of-View Exacerbates Racial Bias in Viewers of Police Use of Force Videos*, J. OF COMM. (2021). Observers' own presumptions, biases, and experiences heavily influence how they perceive recorded events. A recording that may seem to one person to clearly depict a sexual assault may be perceived by another as a consensual encounter. See, e.g., Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838, 841 (2009). In addition, it is easier than ever to intentionally edit and manipulate recordings to create misleading or entirely false impressions of what has been said or done. See, e.g., Meg Kelly & Sarah Cahlan, *Four viral videos falsely suggest 'voter fraud' led to Biden's victory*, WASHINGTON POST (Nov. 12, 2020), <https://www.washingtonpost.com/politics/2020/11/12/four-viral-videos-falsely-suggest-voter-fraud-led-bidens-victory/>.

To be sure, scholars and advocates have convincingly argued that all-party consent states should make exceptions for the recording domestic violence and similar unlawful conduct. It would be unreasonable, however, to turn this narrow exception into the rule of privacy affecting not only the entire eavesdropping statute, but also other Michigan laws protecting privacy. This narrow category of exception should be treated as exactly that – an exception – and not as justification for nullifying the clear privacy protections of Michigan law.

CONCLUSION

For the foregoing reasons, the Cyber Civil Rights Initiative respectfully requests that this Court answer the Amended Certified Question in the affirmative and interpret MCL 750.539a *et seq.* to prohibit a party to a conversation from recording the conversation absent the consent of all other participants.

Respectfully submitted,

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