No. 20-16820

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al.,

Plaintiffs-Appellees,

v.

SANDRA SUSAN MERRITT,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. No. 3:16-cv-236-WHO
Hon. William H. Orrick

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

STATEMENT OF RELATED CASES AND ADOPTION OF OTHER BRIEFS

Pursuant to 9th Cir. R. 28-2.6, Defendant-Appellant Merritt states that this appeal is related to, and has been consolidated for briefing purposes with, three other appeals now pending in this Court: 20-16068, 20-16070, and 20-16773. All four appeals arise from the same judgment, in the same district court case.

Pursuant to Fed. R. App. P. 28(i), Defendant-Appellant Merritt joins in and adopts the following opening briefs filed in the related appeals on February 26, 2021: Opening Brief of Appellant Troy Newman (20-16068), Opening Brief of Appellant Center for Medical Progress (20-16070), and Opening Brief of Appellant Albin Rhomberg (20-16773).

Date: February 26, 2021

/s Horatio G. Mihet
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JURISDICTIONAL STATEMENT

Plaintiffs filed this action in January 2016, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1367.[1] After a jury verdict in Plaintiffs' favor, the district court entered judgment against Defendants on April 29, 2020 (1-ER-48), and denied Defendants' final post-trial motions on August 19, 2020 (1-ER-2).[2] Defendant-Appellant Merritt timely appealed on September 18, 2020. (26-ER-6919.) This Court has jurisdiction over the final judgment under 28 U.S.C. § 1291.

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[1] Plaintiff-Appellees are Planned Parenthood Federation of America ("PPFA"); Planned Parenthood: Shasta-Diablo, Inc. dba Planned Parenthood Northern California ("PPNorCal"); Planned Parenthood Mar Monte, Inc. ("PPMM"); Planned Parenthood of the Pacific Southwest ("PPPSW"); Planned Parenthood Los Angeles ("PPLA"); Planned Parenthood/Orange and San Bernardino Counties ("PPOSBC"); Planned Parenthood California Central Coast ("PPCCC"); Planned Parenthood Pasadena and San Gabriel Valley, Inc. ("PPPSGV"); Planned Parenthood of the Rocky Mountains ("PPRM"); Planned Parenthood Gulf Coast ("PPGC") and Planned Parenthood Center for Choice ("PPCFC"). Unless otherwise noted or as context requires, these parties are collectively referred to as "Plaintiffs" or "Planned Parenthood."

[2] Defendant-Appellants are the Center for Medical Progress ("CMP"), BioMax Procurement Services ("BioMax"), David Daleiden, Sandra Susan Merritt, Adrian Lopez, Albin Rhomberg, and Troy Newman.

ISSUES PRESENTED

1. Whether the district court should have granted Defendants judgment as a matter of law on the federal and state recording claims because Planned Parenthood failed to present evidence that they intentionally recorded confidential communications.

2. Whether the district court erred by excluding evidence of Defendants' reasonable beliefs about Planned Parenthood's potentially criminal activities, as necessary for Defendants' California eavesdropping defense.

3. Whether the district court committed reversible error by refusing to instruct the jury that Plaintiffs must prove Defendants' intent to record *confidential communications* under California's recording statute.

4. Whether the district court should have granted judgment for Merritt on punitive damages because Planned Parenthood failed to prove with clear and convincing evidence that Merritt acted maliciously and reprehensibly.

5. Whether the district court's permanent injunction against Merritt is overbroad and unwarranted.

STATEMENT OF THE CASE

Planned Parenthood brought this action against Defendants in January 2016, alleging trespass, breach of contract, fraud, and violations of federal and various states' recording laws, California's Unfair Competition Law ("UCL"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). (Dkt. 1). Plaintiffs sought compensatory and punitive damages, and injunctive relief. (*Id.*)

After resolving the parties' cross-motions for summary judgment in August 2019, the district court conducted a five-week trial ending in November 2019. The jury returned a verdict for most Plaintiffs on all claims and awarded them compensatory and punitive damages. (17-ER-4641.)

On April 29, 2020, the district court entered judgment based on the verdict, along with injunctive relief on the UCL claim. (1-ER-48.) Defendants then moved pursuant to Rules 50(b), 59(a), and 59(e) for judgment as a matter of law, for a new trial, and to amend the district court's final judgment. (Dkt. 1080). The court denied Defendants' motion in August 2020. (1-ER-2.) This appeal timely followed.

STATEMENT OF FACTS

A. Misconduct in the Fetal Tissue Transfer Industry.

In 2010, David Daleiden became gripped with exposing misconduct in the fetal tissue industry. (11-ER-2806:16–18.) He was research director for Live Action, a pro-life organization. (11-ER-2806:16–18.) He learned that fetal tissue brokering was a profitable business. (11-ER-2799:5–21.) Federal law makes it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce." 42 U.S.C. § 289g-2(a). The law does not prohibit "reasonable payments associated with the transportation, implantation, processing, preservations, quality control, or storage." 42 U.S.C. § 289g-2(e)(3). Daleiden learned that fetal tissue brokers and abortion providers were profiting off the "reasonable payments" exception by marking up the costs. (11-ER-2800:20–2801:18; 11-ER-2808:2–6.)[3]

[3] As this Court noted, "[w]hile there is reportedly a large international market for the buying and selling of human organs, in the United States, such a market is criminal and the commerce is generally seen as revolting." *Flynn v. Holder*, 684 F.3d 852, 861 (9th Cir. 2012).

Because of minimal government oversight over the fetal tissue industry (22-ER-5944), in 2013 Daleiden founded the Center for Medical Progress ("CMP"), a nonprofit "group of citizen journalists dedicated to monitoring and reporting on medical ethics and advances" (11-ER-2829:6–21), and launched the undercover Human Capital Project to investigate and expose fetal tissue trafficking. (11-ER-2506:7–8.)

B. The *20/20*-Style Undercover Investigation.

In 2000, ABC released a *20/20* news segment shedding light on fetal tissue trafficking. (10-ER-2723:16–21; 22-ER-5913.) A journalist posing as a prospective investor secretly recorded a restaurant conversation with a tissue procurement company owner, using hidden cameras. (22-ER-5913.) The businessowner revealed that his firm bought and sold fetal tissue for profit in violation of federal law. (22-ER-5914.) The segment also detailed incidences of fetal tissue harvesting from a Planned Parenthood clinic in Kansas. (10-ER-2723:22–25.) The broadcast triggered congressional hearings and investigations but resulted in no increased oversight or legislative reform. (22-ER-5917.)

In the same manner, Daleiden resolved to carry out a *20/20*-style hidden camera investigation exposing what he believed was Planned

Parenthood's ongoing fetal tissue trafficking with procurement companies. (5-ER-1104:12–14.) He created an investigatory tissue procurement company ("BioMax"), and sought to engage high-level officials in the abortion industry undercover to document evidence "of how Planned Parenthood participates in the harvesting and trafficking of aborted fetal organs and tissues for profit." (10-ER-2606:2–7.)

Daleiden assembled a team for the undercover investigation. (10-ER-2495:3–13.) As Daleiden explained to Defendant Lopez, the project would entail working as "citizen journalists," and "the whole point would be to gather evidence, gather research, and [] coordinate with law enforcement with said research." (5-ER-1044:14–19.)

In July 2013, Daleiden hired Defendant-Appellant Sandra Susan Merritt as an undercover hidden-camera investigator. (4-ER-918:11–13.) At the time, Merritt was a retired teacher (4-ER-900:6–13) who in the past had volunteered for Live Action making investigatory phone calls to Planned Parenthood clinics (4-ER-894:7–895:5, 903:22–905:10).

Daleiden shared with Merritt the extensive pre-recording evidence he had collected of abortion providers violating federal fetal tissue-trafficking laws, changing abortion procedures without the patient's

consent, and committing medical battery. (4-ER-905:11–20.) Merritt thought all of this "was too horrific in [her] mind to be continued to be covered up" with "no follow-through" from the ABC *20/20* investigation. (4-ER-918:6–10.) Merritt resolved that "the truth needed to be told," (4-ER-918:9–10), so she agreed to play the role of "Susan Tennenbaum," BioMax's "founder and CEO" (4-ER-824:14–17).

Like all undercover hidden-camera investigations, the project's goal was simple: get people to talk. (10-ER-2603:16–17.) Posing as a tissue-procurement company seeking to do business with abortion providers, the investigators had to gain insider credibility, meet decisionmakers, and document admissions of criminal misconduct. (4-ER-8447–11.) As Daleiden explained at trial, "it was an honest reporting project, to report true facts about [Planned Parenthood] to the public." (10-ER-2606:21–22.)

For two years, Merritt posed as Tennenbaum for various assignments in California, Colorado, Texas, and Maryland. (4-ER-831:22–833:14.) With tiny video cameras hidden on their person (4-ER-834:10–12), Merritt and Daleiden conducted interviews at the National Abortion Federation's ("NAF") annual meeting in April 2014 in San

Francisco; at restaurants in Los Angeles and Pasadena in July 2014 and February 2015; and at NAF's April 2015 annual meeting in Baltimore. (4-ER-831:22–833:14.) [4] To ensure compliance with federal and state all-party consent recording laws, the investigators deliberately recorded the interviews in public restaurants and crowded hotel conference spaces, where non-parties to the conversation would be present and expected to overhear. (4-ER-919:3–8). [5]

Through the undercover interviews, Merritt, Daleiden and CMP confirmed their pre-recording beliefs that Planned Parenthood and tissue procurement companies were unethically and illegally harvesting and trafficking in human fetal tissue. (*See* CMP Opening Br. at Statement of Facts.)

C. The Release of the Videos.

In July 2015, after first alerting numerous law enforcement authorities and public officials of its findings (11-ER-3053:3–3054:20),

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[4] Daleiden and co-appellant Adrian Lopez also recorded at PPFA conferences in Florida and Washington, D.C.

[5] For only two encounters in Texas and Colorado, *which are one-party consent states*, Daleiden and Merritt filmed business discussions with Planned Parenthood staff inside two abortion facilities. (4-ER-832:13–24.)

CMP began releasing the results of its undercover investigation to the public. (11-ER-3063.) CMP's goal "was to report on our findings to the public and [] to hopefully generate more pressure for law enforcement and others in positions of authority and official capacity to [] take action, to correct the problems that were documented by the videos." (11-ER-3064:3–8.) The project videos—like the *20/20* investigation—prompted a national outcry, congressional hearings, and even criminal prosecutions. (20-ER-5397; 22-ER-5885; 23-ER-6180.)

D. The Litigation.

Planned Parenthood brought this action in January 2016. After extensive discovery, the parties moved for summary judgment. The district court granted partial summary judgment to Planned Parenthood on the interstate commerce element of its RICO claim, on its claims for Daleiden and BioMax's breach of PPFA Exhibitor Agreement, and on its claims for trespass under Florida, D.C., Texas and Colorado law. (1-ER-272–275.) The court sent the rest of the case to trial.

Planned Parenthood's theory at trial was that Defendants created a criminal enterprise to smear and destroy Planned Parenthood. (3-ER-616:25–617:2.) Defendants acknowledged that one of the project's goals

was to "[d]eliver a major public relations blow to Planned Parenthood" (11-ER-2828:23–13), but that aim was "predicated on the foundational goal of documenting and exposing … actual evidence of crimes within the space of harvesting and trafficking aborted fetal organs and tissues." (11-ER-2828:12–20.)

Before and during trial, the district court issued several evidentiary rulings with major ramifications for the ultimate verdict. One prong of Defendants' defense on the California recording claim (Cal. Penal Code § 632) depended on the statute's critical exception: A party is permitted to secretly record even a confidential communication "for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication" of certain crimes, including "any felony involving violence against the person." Cal. Penal Code § 633.5. Defendants sought to introduce substantial evidence of Daleiden's and Merritt's pre-recording beliefs that Planned Parenthood personnel, including Dr. Nucatola and Dr. Gatter, had participated in illegal fetal tissue procurement. (1-ER-125–126; Dkt. No. 772.) Defendants also sought to introduce evidence that the recordings further confirmed their

beliefs that Planned Parenthood was engaging in unlawful conduct. (1-ER-126.)

Planned Parenthood moved to exclude this evidence on the grounds that it was irrelevant and prejudicial. (1-ER-128–129.) The district court granted Planned Parenthood's motion almost entirely. (1-ER-128–129.) The court ruled that Merritt and Daleiden "may present evidence of what they knew or believed regarding plaintiffs' commission of violent felonies," but "[t]hat knowledge or belief must be based on what Daleiden or Merritt knew *prior to their first surreptitious recording*." (1-ER-125:20–25 (emphasis added.) The court excluded all "[e]vidence regarding what Daleiden or Merritt learned following their first surreptitious recording." (1-ER-125:25–26.)

The jury returned its verdict on November 15, 2019, finding Defendants liable (directly or indirectly through conspiracy) for fraud; violation of RICO; violations of the federal and state recording laws; and punitive damages under the Federal Wiretap Act and Florida and Maryland law. (17-ER-4641.)[6]

[6] Prior to the case going to the jury, the court found Merritt and some other Defendants liable for breach of NAF agreements.

The jury found all Defendants liable, either directly or as conspirators, under the Federal Wiretap Act for each of the 42 recordings presented. (18-ER-4908–4918.) The jury also found Defendants liable for 31 of those same recordings under the relevant California, Florida, and Maryland statutes. (18-ER-4895–4907.)

In April 2020, the district court ruled in favor of Planned Parenthood on its California UCL claim, issued a permanent injunction enjoining Defendants from engaging in trespasses and unlawful recordings against Planned Parenthood, and entered final judgment for Plaintiffs. (1-ER-38.) The court also awarded Planned Parenthood $2,425,084 in damages, including trebled RICO damages and punitive damages. (*Id.*) In August 2020, the court denied Defendants' post-trial motions for judgment as a matter of law, a new trial, and to amend the final judgment. (1-ER-2.) The court subsequently ordered Defendants to pay Planned Parenthood nearly *$14 million* in attorney fees and costs. (Dkt. 1154.)[7]

[7] A separate appeal of the fees and costs judgment is pending in this Court (No. 21-15124).

SUMMARY OF THE ARGUMENT

1. Defendants are entitled to judgment on Planned Parenthood's federal and state recording claims because Plaintiffs failed to show the elements of the offenses. Planned Parenthood was required to prove that Defendants (1) intentionally recorded (2) confidential communications—meaning that they purposefully and secretly recorded people who had objectively reasonable expectations of privacy. The district court posited that evidence of Planned Parenthood officials' subjective impressions about the conversations justified the verdict, but statutes and precedent required more proof than simply the recorded person's version of the story.

2. Defendants are also entitled to judgment on Planned Parenthood's claim under the Federal Wiretap Act. The statute permits a party to a conversation to record unless her purpose is to commit a "criminal or tortious act." 18 U.S.C. § 2511(2)(d). Defendants were parties to each recording, and they did not surreptitiously record Planned Parenthood officials to commit a crime or tort. Their purpose was to document evidence that Planned Parenthood violated federal laws against fetal tissue harvesting. Exposing a federally funded

organization's misconduct is not a "criminal or tortious act." The district court erred holding otherwise.

3. The district court abused its discretion by erroneously excluding highly probative evidence critical to Merritt and Daleiden's defense against the California recording claim. The evidence Defendants sought to present directly proved a necessary element of their defense—the reasonableness of their belief that Planned Parenthood was unlawfully harvesting and trafficking fetal tissue. The district court arbitrarily excluded Defendants' knowledge gained after the first recording and erroneously ruled that this evidence was irrelevant to the subsequent recordings and prejudicial to Planned Parenthood.

4. The district court committed reversible error by refusing to instruct the jury that a plaintiff bringing an eavesdropping claim under Section 632 of California's Invasion of Privacy Act must prove the defendant's intent to record a confidential communication. The court's instruction failed the most basic test of a permissible jury charge—that it accurately covers the issues and fairly states the law— because it said nothing about the inseparable intent-to-record-a-confidential-communication requirement. The district court similarly erred when it

instructed the jury that the corporate Plaintiffs could establish standing and injury through Defendants' intent to record Plaintiff's personnel alone, without the need to show a possessory interest in the recorded communications. These instructional errors were not harmless and thus require reversal.

5. Merritt (and every other Defendant) is entitled to judgment on punitive damages as a matter of law. To obtain punitive damages, Planned Parenthood was required to prove by clear and convincing evidence that Defendants maliciously, willfully, and despicably sought to injure Plaintiffs. Planned Parenthood failed to prove this under the high "clear and convincing evidence" bar. Planned Parenthood also impermissibly predicated its punitive damages case on alleged harm to non-parties after the district court unconstitutionally rejected Defendants' limiting jury instruction.

6. The permanent injunction against Merritt is needless, wrong, and should be vacated. Merritt submitted unrebutted evidence that she is incapable of future undercover investigations because of her age, health, and family responsibilities. The district court erroneously ignored this evidence in favor of its conclusory determination and the jury's

supposedly "*implied*" finding that Merritt "pose[s] a threat of continued criminal conduct."

ARGUMENT

I. Merritt Is Entitled to Judgment as a Matter of Law Because Planned Parenthood Failed to Establish the Requisite Intent and Reasonable Expectation of Privacy for the Federal and State Recording Claims.

A. Standard of Review.

A district court's denial of a renewed motion for judgment as a matter of law is reviewed de novo. *See Martin v. Cal. Dep't of Vet. Affs.*, 560 F.3d 1042, 1046 (9th Cir. 2009). The Court views the "record as a whole," *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002), and will uphold the verdict only if it "is supported by substantial evidence," *First Nat. Mortg. Co. v. Fed. Realty Inv. Tr.*, 631 F.3d 1058, 1067–68 (9th Cir. 2011).

B. Planned Parenthood failed to prove a Federal Wiretap Act violation because Merritt and the other Defendants lacked the necessary intent to commit a crime or tort.

The Federal Wiretap Act prohibits persons from "intentionally intercept[ing]" an "oral communication." 18 U.S.C. § 2511. The Act exempts from liability a "party" to the communication unless that party has an illegal or tortious purpose. *Id.* § 2511(2)(d). Because Merritt (or another Defendant) was always a party to the recorded conversations,

Planned Parenthood was required to prove that the purpose of Defendants' undercover reporting was to commit a crime or tort. *See United States v. McTiernan*, 695 F.3d 882, 888 (9th Cir. 2012). Planned Parenthood failed to meet that burden.

1. Defendants undertook the hidden camera investigation to gather evidence of misconduct, not to commit crimes or torts.

In applying Section 2511(2)(d), this Court has consistently ruled that a defendant does not act with a "criminal or tortious" purpose simply by committing a crime or tort. *See Sussman v. Am. Broad. Companies, Inc.*, 186 F.3d 1200, 1202 (9th Cir. 1999) (plaintiffs produced no evidence of an illegal or tortious purpose when reporter secretly recorded at psychic hotline's office during undercover investigation); *see also Deteresa v. Am Broad. Companies, Inc.*, 121 F.3d 460, 467 n.4 (9th Cir. 1997) (proof of recording without consent "begs the question" of wrongful "purpose"). Here, Defendants submitted (or attempted to submit but were prejudicially denied) painstaking evidence that they did not secretly record Planned Parenthood officials to commit a crime or tort. Instead, the evidence showed that Defendants' purpose for the entire undercover

investigation was to expose illegal activity in the fetal tissue transfer industry. (10-ER-2722:2–5.)[8]

The Seventh Circuit's decision in *Desnick v. American Broadcasting Companies, Inc.,* 44 F.3d 1345 (7th Cir. 1995) (Posner, J.), is squarely on point. There, undercover ABC reporters posing as patients needing eye care visited plaintiffs' clinics, where they secretly recorded interactions with medical staff. ABC then released the recordings in a news segment about intentional misdiagnosis and unnecessary cataract surgery. Plaintiffs sued, alleging trespass, invasion of privacy, and violation of federal and state wiretapping laws. *See* 44 F.3d at 1351.

[8] *See* 4-ER-837:8–11 (Merritt: the goal of the recordings was to uncover evidence of "battery, medical ethics being violated, laws not being followed, partial-birth abortion procedure, changing protocol without a patient's consent in order to profit from the sale of human body parts"); 5-ER-1038:23–1042:16 (Lopez: research led him to the conclusion that there was a market for fetal tissue that had a profit motive, that some babies were born alive before their organs were harvested, and that it was worth going undercover to bring evidence to light and coordinate with law enforcement); 10-ER-2723:10–25 (Daleiden: interest in the investigation started with him seeing congressional testimony and a 20/20 undercover report that documented abuses, fetal tissue trafficking, and whistleblowers in the fetal tissue industry); 5-ER-1238:13–14 (Rhomberg: "the whole intention of the project was to discover the truth, and then inform the public"); 25-ER-6804–6828.

The *Desnick* Court held that committing a tortious act did not necessarily prove a tortious purpose for purposes of the Wiretapping Act. *See id*. The Court found that defendants "did not order the camera-armed testers into the Desnick Eye Center's premises *in order to commit a crime or tort*." *Id*. (emphasis added). "Telling the world the truth about a Medicare fraud is hardly what the framers of the statute could have had in mind in forbidding a person to record his own conversations if he was trying to commit an injurious act." *Id*. at 1353–54.

As with *Desnick*, Daleiden "did not order the camera-armed" Merritt into abortion industry conferences and meetings with Planned Parenthood officials "to commit a crime or tort." 44 F.3d at 1353. Instead, just like ABC's purpose in *Desnick* "was to see whether the Center's physicians would recommend cataract surgery on the testers," *id*. at 1353, Defendants' purpose was to see whether Planned Parenthood officials would disclose evidence of fetal tissue harvesting or trafficking with procurement companies (4-ER-835:4–14.) "Telling the world the truth about [fetal tissue trafficking] is hardly what [Congress] could have had in mind in forbidding a person to record his own conversations if he was trying to commit [a criminal or tortious act]," 44 F.3d at 1353–54.

Another entirely legal purpose that vitiates the intent-to-commit-a-crime element is the intent to preserve a communication to prevent a later distortion of the conversation. *Cf. United States v. Underhill*, 813 F.2d 105, 110 (6th Cir. 1987) (holding that interception is legal when its purpose "is to make or preserve an accurate record of a conversation in order to prevent future distortions by a participant"); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 959 (7th Cir. 1982) (holding that "desire to make an accurate record of a conversation to which you are a party is a lawful purpose" under Federal Wiretap Act). Defendants' well-established intent was to uncover and document evidence of unlawful and unethical activity, activity that Planned Parenthood would undoubtedly have denied.

Because Planned Parenthood failed to satisfy an essential element of its federal wiretapping claim, Defendants were entitled to judgment as a matter of law.

2. "Violating civil RICO" is not a crime or tort under Section 2511(2)(d).

The district court erroneously allowed Planned Parenthood to present the jury with a novel legal theory found nowhere in the law: Defendants are liable under the Federal Wiretap Act because they

recorded for the supposedly illegal purpose of "violat[ing] civil RICO." (1-ER-20:12; 1-ER-216:9–12.)

This Court has held that the Section 2511(2)(d) inquiry is not about "whether the interception itself violated another law" but "whether the *purpose* for the interception—its intended use—was criminal or tortious." *Sussman,*186 F.3d at 1202 (internal quotation marks omitted) (emphasis added). Thus, for liability under Section 2511(2)(d), the recording must have been "done for the purpose of facilitating some further impropriety, such as blackmail." *Id.*

Here, "violating civil RICO" is a legally vacuous concept, not a crime or tort. RICO prohibits certain conduct involving a "pattern of racketeering activity," known as predicate acts. 18 U.S.C. §§ 1962. "Civil RICO" is not a crime itself but a *claim* involving five elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (quoting *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996)). Examples of "predicate acts" include bribery, extortion, and mail fraud. *See* 18 U.S.C. § 1961(1). So, to the

extent that a RICO enterprise is involved, by definition some other criminal act (a "pattern" of such acts, actually) must come in play, and thus the recording's purpose would have to be to commit *those crimes*, not paradoxically to "violate civil RICO." (1-ER-20:12.)

3. Even if "violating civil RICO" were a crime or tort, Planned Parenthood failed to show that the recordings were essential to, or part of, that activity.

The district court concluded that sufficient evidence existed of "defendants' intent to focus on PPFA and its affiliates for their surreptitious recordings in order to put them out of business through the RICO enterprise alleged." (1-ER-20.) But even if a purpose "to violate civil RICO" were susceptible to concrete proof (and it is not), Planned Parenthood needed *but failed* to show that "the recordings were essential" to the alleged racketeering activity, or that violating civil RICO "was [Defendants'] intended use" for the videos. *United States v. Christensen*, 624 F. App'x 466, 475 (9th Cir. 2015).

At trial, Planned Parenthood portrayed Defendants as engaging (or conspiring) in a criminal enterprise of producing and transferring fake IDs. (16-ER-4373:7–4374:13.) Indeed, making and transferring fake IDs were the sole predicate acts that Planned Parenthood alleged. (16-ER-

4416:15–18.) Yet Planned Parenthood presented no evidence that Defendants recorded its personnel *to further the production or transfer of fake IDs*. Instead, the undisputed evidence showed that CMP created the alleged fake IDs *before* the project's undercover video recording phase began. (10-ER-2546:20–2547:4; 4-ER- 821:6–11.)

In short, "[w]here the purpose is not illegal or tortious, … the victims must seek redress elsewhere." *Sussman*, 186 F.3d at 1202–03. Neither Planned Parenthood nor the district court offered any legal basis for concluding that Section 2511(2)(d) could be satisfied by the nebulous purpose of "violating civil RICO." No court has ever used such a vague concept to identify an illegal purpose, and this Court has expressly set a high bar for basing federal wiretapping on RICO violations. *See Christensen,* 624 F. App'x at 475 (requiring a "specific showing that the recordings were essential to collecting illegal RICO income or that this was [the defendant's] intended use").

4. Defunding and bankrupting Planned Parenthood is not "a criminal or tortious purpose."

Planned Parenthood argued at trial that Defendants' true purpose was not to expose fetal tissue trafficking but to "finish off Planned Parenthood and end abortion," "destroy the evil Planned Parenthood

Empire," and "permanently destroy Planned Parenthood's brand." (3-ER-617:5–13.) Although its discussion of the "intent to violate civil RICO" element was cryptic,[9] the district court agreed with Planned Parenthood's narrative and found "sufficient evidence regarding defendants' intent to focus on PPFA and its affiliates for their surreptitious recordings in order to put them out of business through the RICO enterprise alleged." (1-ER-20:15–16.)

The court erred. An intent to "put [Planned Parenthood] out of business" (1-ER-20:15–16), if true, is simply not an intent to commit a crime or tort. Working to defund Planned Parenthood or shut down its abortion operations is a wholly legal political purpose, just as working to uncover, document, and expose criminal wrongdoing is a wholly legal

[9] At summary judgment, the district court limited its discussion of the criminal intent element to noting that "the RICO claim against defendants survives." (1-ER-216:11–12.) However, PPRM, PPNorCal, PPCCC, PPPSW, and PPCFC all lost their RICO claims on summary judgment for lack of allowable damages. (18-ER-5020–5021.) The court nonetheless allowed them to go forward on their federal recording claims premised on RICO (18-ER-5020–5021), and affirmed the jury's verdict for those plaintiffs on those claims. (1-ER-38.)

journalistic purpose. The district court's contrary conclusion has no basis in law or society's expectations for political advocacy.[10]

The established purpose of the recordings was to make constitutionally protected publications to expose and end criminal activity, spur legislative reform, increase government oversight over human fetal tissue collection and transfer, and influence changes in public policy.[11] Planned Parenthood packaged those entirely legal purposes into a box with past acts of allegedly producing fake IDs, labeled it all a "criminal conspiracy," and used that label to create liability under the Federal Wiretap Act. The district court erroneously adopted Planned Parenthood's theory and allowed it to go to the jury. Whether Defendants' purpose was to use the recordings in published videos to expose Planned Parenthood, or "to finish off Planned Parenthood and end abortion," the recordings were not made for the purpose of committing any crime or tort.

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[10] Indeed, under the district court's reasoning, if Defendants in fact uncovered significant wrongdoing by Planned Parenthood, the recordings would nonetheless be illegal because they harbored the "illegal" intent of putting Planned Parenthood out of business. (1-ER-216:1–2 ("Significantly, an illegal purpose does not have to be the sole purpose of the recording.").)

[11] *See* note 8, *supra*.

C. Planned Parenthood failed to establish that the recorded individuals had reasonable expectations of privacy.

1. Legal principles.

The Federal Wiretap Act, Section 632 of the California Invasion of Privacy Act, and the Florida and Maryland recording statutes, only protect confidential, or private, conversations. Planned Parenthood was required, but failed, to prove that each recorded person had an objectively reasonable expectation of privacy during their recorded conversations, and the district court erred in denying judgment for Defendants.

The Federal Wiretap Act prohibits the intentional recording of "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). "Congress did not enact [the Act] to protect every face-to-face conversation from interception." *Huff v. Spaw*, 794 F.3d 543, 548–49 (6th Cir. 2015). Instead, the statute only protects oral communications made by persons who exhibit a reasonable expectation of privacy. *See United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978).

California Penal Code § 632 is analogous to the Federal Wiretap Act. *Cf. Reynolds v. City & Cty. of San Francisco*, 576 F. App'x 698, 703

(9th Cir. 2014) (plaintiff has no cause of action under Federal Wiretap Act and California Penal Code Section 632 "because he did not have a reasonable expectation of privacy in the conversation"). Section 632 bars the unconsented intentional recording of a "confidential communication." Cal. Penal Code § 632.

A "confidential communication" is "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto." Cal. Penal Code § 632 (c). A communication is *not* "confidential" if it is made "in a public gathering … or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." *Ibid*. A conversation is "confidential" "if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 117 n.7 (2006). The "standard of confidentiality is an objective one defined in terms of reasonableness." *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013).

Florida's wiretap statute provides that "[a]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or used …

shall have a civil cause of action against any person or entity who intercepts, discloses, or uses, or procures any other person or entity to intercept, disclose, or use, such communications....” Fla. Stat. § 934.10(1). “For a conversation to qualify as ‘oral communication,’ the speaker must have an actual subjective expectation of privacy in his oral communication, and society must be prepared to recognize the expectation as reasonable under the circumstances.” *Cohen Bros., LLC v. ME Corp., S.A.*, 872 So. 2d 321, 323–24 (Fla. Dist. Ct. App. 2004) (internal quotation marks omitted). Further, “the expectations of privacy needed to trigger application of the statute *must be exhibited*.” *McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1319 (11th Cir. 2017) (emphasis added).

Lastly, **Maryland**’s wiretap statute, Md. Cts. & Jud. Proc. § 10-402 et seq., is substantially similar to the Federal Wiretap Act. *See Benford v. Am. Broad. Co.*, 649 F. Supp. 9, 10 (D. Md. 1986). Both require that the plaintiff show a reasonable expectation of privacy in an intercepted oral communication. *See Fearnow v. Chesapeake & Potomac Tel. Co. of Maryland*, 104 Md. App. 1 (1995). And both require that defendants acted willfully. *See Benford*, 649 F. Supp. at 10.

2. Factors to determine a reasonable expectation of privacy.

"The existence of a reasonable expectation of privacy, given the circumstances of each case, is a mixed question of law and fact," which is reviewed de novo. *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020). This Court has considered a number of factors to determine whether a person had a reasonable expectation of privacy in their communications, including the "nature of the location where the conversation was seized," *United States v. Gonzalez, Inc.*, 412 F.3d 1102,1116 (9th Cir. 2005); whether the conversation took place out in the open, *see Siripongs v. Calderon*, 35 F.3d 1308, 1320 (9th Cir. 1994); whether the conversation involved business or private matters, *see Med. Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.*, 306 F.3d 806, 814 (9th Cir. 2002); the relationship between the parties, *see Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1125 (9th Cir. 2017); and the presence of other people, *see Reynolds*, 576 F. App'x at 703.

Surveying a range of eavesdropping and wiretap cases, the Fifth Circuit distilled several considerations when evaluating "the subjective expectation of privacy in oral communications in publicly accessible spaces," *Kee v. City of Rowlett*, 247 F.3d 206, 213–15 (5th Cir. 2001);

accord Reynolds v. City & Cty. of San Francisco, No. C 09-00301 MHP, 2009 WL 3569288, at *4 (N.D. Cal. Oct. 30, 2009) (citing the *Kee* factors)), including:

(1) "the volume of the communication or conversation";
(2) "the proximity or potential of other individuals to overhear the conversation";
(3) "the potential for communications to be reported";
(4) "the affirmative actions taken by the speakers to shield their privacy"; and
(5) "the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating."

Kee, 247 F.3d at 213–15.

Applying these factors, Planned Parenthood adduced insufficient evidence to show that the recorded conversations were confidential.

3. Planned Parenthood failed to show that Dr. Nucatola's and Dr. Gatter's lunch meetings with Defendants were confidential.

Nucatola Lunch Meeting. Planned Parenthood failed to prove that Merritt and Daleiden's lunch with Dr. Nucatola in Los Angeles was confidential. Daleiden invited Dr. Nucatola to a restaurant for a business meeting. (8-ER-1914:7–24.) Regardless of whether BioMax and Planned Parenthood were potential future business partners, as Dr. Nucatola thought (8-ER-1921:19–21), Daleiden and Merritt were practically

strangers who Dr. Nucatola first met when she approached the BioMax table at the NAF conference. (8-ER-1902:6–22.)

In no form did Dr. Nucatola convey to Merritt and Daleiden that she expected their conversation to not be disclosed to others; nor did she take any precautions to ensure that their discussion remained confidential. (4-ER-924:24–25; 4-ER-929:11–12.) Just like Dr. Nucatola (8-ER-1919:11), Merritt visibly took notes throughout the meeting, with no objection. Over the course of the roughly three-hour lunch, they freely discussed tissue procurement operations and Planned Parenthood's general practices in fetal tissue donations with no effort to prevent others from overhearing.[12] The conversation took place in an open booth with customers and waitstaff all around. (4-ER-923:13–14.) And as the restaurant became busier, Dr. Nucatola raised the volume of her voice. (4-ER-929:11–12.)

In holding that there was sufficient evidence of a reasonable expectation of privacy for Dr. Nucatola, the district court noted that the

[12] *See also* 12-ER-3094:14–3095:5 (Nucatola, Merritt and Daleiden sat in a booth in the public section of the restaurant, and Daleiden was certain that they could be overheard and feared they might be kicked out for having a graphic conversation in public).

jury heard testimony that she "was seated with her back to the wall, allowing her to see nearby tables, and that she never noticed anyone interested or listening-in to their conversation." (1-ER-22:18–21.) Even setting aside the discrepancies between these conclusions and the actual evidence, Dr. Nucatola's testimony did not establish a reasonable expectation of privacy.

For example, Dr. Nucatola testified that they "talked about how tissue donation works with an affiliate who's participating and what a collaboration would look like." (8-ER-1923:7–9.) She also testified that she shared no "confidential PPFA information" during the conversation. (8-ER-1923:14–15.) She admitted that she did not use a confidential tone or change topics during the discussion, despite people eating at neighboring tables within sight and hearing and despite the presence of waiters who could overhear the conversation. (8-ER-1918:2–10; 8-ER-1921–1922:25; 8-ER-1948:24–25, 8-ER-1964:5–16, 8-ER-1966:21–1969:4; Exs. 5074, 7106). Planned Parenthood therefore could not prove that Dr. Nucatola's conversation with Merritt and Daleiden was "confidential."

Gatter Lunch Meeting. Planned Parenthood likewise presented insufficient evidence that Dr. Gatter and Laurel Felczer had a reasonable

expectation of privacy during their lunch meeting with Merritt and Daleiden. They were virtual strangers. (7-ER-1631:12–14.) The topic of the meeting was a potential fetal tissue partnership between BioMax and Planned Parenthood. (7-ER-1632:24–1633:2; 7-ER-1644:1–6.) They discussed "how good it was to participate in a tissue donation program" (7-ER-1646:24–25) and "the specific logistics of how the tissue could be procured." (7-ER-1647:3–4). They "were all speaking conversationally." (7-ER-1648:5). Waiters frequently came to the table, but Dr. Gatter did not acknowledge them, pause in her conversation, or even lower her voice (7-ER-1686:4–23).

Like Dr. Nucatola, Dr. Gatter gave Merritt and Daleiden no indication that she expected the conversation to remain confidential. (7-ER-1697:8–9.) In fact, Dr. Gatter readily admitted *the opposite*—that she expected the contents of the conversation would be shared with others after the meeting. (7-ER-1674:11–1675:11, 7-ER-1676:13–1678:19.) In short, "[n]o trier of fact could find, judged by an objective standard, that [Dr. Gatter] reasonably expected that their conversation would not be divulged to anyone else." *Wilkins v. Nat'l Broad. Co.*, 71 Cal. App. 4th 1066, 1080 (1999) (refusing to find an actionable intrusion arising from

an NBC hidden camera broadcast of business-only conversations that took place in an outside restaurant patio that wait staff could overhear).

To be sure, public restaurants do not always preclude an expectation of privacy. *See Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1126 (9th Cir. 2017) (observing that "depending on the circumstances, one can harbor an objectively reasonable expectation of privacy in a public location"). But Planned Parenthood presented insufficient evidence that either Dr. Nucatola or Dr. Gatter had an *objectively* reasonable belief that their respective lunchtime conversations were confidential. *Both testified that others could overhear the conversations* (8-ER-1967:20–21 (Dr. Nucatola); 7-ER-1684:12–12 (Dr. Gatter)), and neither exhibited nor communicated to Defendants any expectation of privacy.

4. Even helped by the district court's prejudicial rulings, Planned Parenthood still failed to show that a single recorded conversation at the conferences was confidential.

Despite acknowledging that "[a]ll of the facts and contexts for each recording have to be considered" (1-ER-80:9–10; 2-ER-224:15–16), the district court ultimately affirmed the jury verdict of liability for the recordings at the various conferences under Planned Parenthood's novel

theory that implementing security measures at conferences (*e.g.*, requiring attendees to wear badges and employing door monitors) created a roving, generalized and blanket expectation of privacy for each and every attendee, in each and every communication at the multi-day conferences. (1-ER-21.)

The district court found these measures were "evidence that the purpose of these conferences was to provide a safe and secure space to discuss their occupations" (1-ER-21:9–10), and the measures gave *all* attendees a reasonable expectation that they would not be "surreptitiously recorded or overheard *by those adverse to them*." (1-ER-21:10–11 (emphasis added).) The qualification of "adversity," however, is found nowhere in the recording statutes or any court decision. The district court's blanket affirmation of the verdict for all 34 conference recordings was serious error.[13]

The district court relatedly permitted Planned Parenthood to offer witness testimony about how these measures provided conference

[13] This brief adopts the lettering system the verdict form used to label all 42 recordings at issue alphabetically, "A" through "PP." (18-ER-4908–4916.)

attendees with "an expectation of security and privacy in their interactions with other conference attendees." (1-ER-21:7–9.) Over Defendants' objections, the district court allowed the jury "to rely on" this speculative testimony "to determine subjective expectations, even though each recorded individual did not testify." (1-ER-21:17–89.)

Aside from the district court's prejudicial evidentiary errors, considering the factors outlined above, Planned Parenthood failed to establish that the recorded conversations were "confidential" communications actionable under the federal and state recording statutes.

California. Planned Parenthood presented insufficient evidence that the recorded individuals had a reasonable expectation that they could not be overheard in their conversations with Merritt at the BioMax exhibit booth at the 2014 National Abortion Federation conference (LL). Dr. Deborah Nucatola admitted there were unknown people standing behind her when she talked with Merritt. (8-ER-1906:2–7; Ex. 6124).[14]

[14] "Ex." refers to the video exhibits played at trial. Pursuant to Cir. Rule 27-14, Merritt will be moving for leave to transmit physical copies of the video exhibits, which are unavailable on the district court docket.

Similarly, Planned Parenthood presented insufficient evidence that Dr. Drummond-Hay had a reasonable expectation of privacy (MM). Dr. Drummond-Hay admits, and video clips confirm, that she discussed fetal specimens in a crowded room without lowering her voice even when people were next to her, including a security guard, a waiter, a woman, and a child walking within earshot. (6-ER-1505:16–1506:7, 6-ER-1507:18–25, 6-ER-1508:24–1509:16, 6-ER-1514:7–20; Exs. 5395-1–5, 7.)

Washington, D.C. At the Planned Parenthood National Meeting in D.C. (six recordings, A–F), only Jen Castle testified about her expectation of privacy; no other recorded persons testified about their expectation of privacy while speaking to Daleiden or Lopez at the BioMax exhibit table. Melaney Linton's recording (Ex. 5972-A) was admitted through Jeffrey Palmer of PPGC; and the recordings of Carolyn Westhoff (Ex. 6007-A), Kristin Flood (Ex. 6012-A), Janet Fils-Aime, and Anne-Marie Grewer (both Ex. 6009-A), were admitted through Brandon Minow. The jury was shown very short clips *played without audio*. (8-ER-2097:6–24; 14-ER-3555:21–3558:18.)

For Castle, the undisputed evidence shows the conversation took place in crowded areas with many people around who admittedly could overhear. (9-ER-2399:9–2401:9; Ex. 6010-A).)

Maryland. Defendants were found liable on nine counts of illegal recording in Maryland (L–T), at the 2015 NAF meeting, based on four recordings: one of Dr. Nucatola (L), one of VanDerhei and Castle (M–N), and two of T. Nguyen, Dr. Schutt-Aine, and, apparently, Krugler (O–T). Dr. Nucatola admitted that she spoke with Defendants at the NAF 2015 conference in a crowded, noisy room. (8-ER-1927:21–1928:25; Ex. 6129.) Castle likewise acknowledged other people crowded the mezzanine area where she and VanDerhei spoke to Daleiden. (9-ER-2405: 6–9; Exs. 5679 & 5975-A.) She admitted that she never asked Defendants not to repeat her words to others. (9-ER-2405:20–24.)

Planned Parenthood also offered insufficient evidence that Dr. Schutt-Aine and Nguyen had reasonable expectations of privacy in their conversation with Lopez. (Krugler's name was never mentioned during the trial.) In the video that Plaintiffs introduced, Dr. Schutt-Aine and Nguyen discussed fetal tissue donation and abortion procedures with Lopez in a crowded room. (5-ER-1066:16–20.) They expressed no

expectation of confidentiality; in fact, they "were both visibly drunk" and "kind of loud about it." (5-ER-1068:9–10; Ex. 5749.)

Florida. The district court affirmed liability on six counts of unlawful recording at the 2014 PPFA Forum conference in Florida: two of Dr. Nucatola and one each of Shea, Dr. Gatter, Dr. Siegfried, and Dr. Ginde. (U–Z). Planned Parenthood presented insufficient evidence that any of the recorded conversations were confidential or private. Dr. Nucatola had no reasonable expectation of privacy in her recorded conversation (U) at an outdoor poolside reception. Lopez, who was part of the conversation, testified that *hundreds* of people were at the reception, and 10 to 15 people were close "enough to have to speak over." (5-ER-1063:14–1064:36; Ex. 5218-2.)[15]

Dr. Nucatola did not testify about her second encounter with Defendants at an indoor reception at the Forum 2014 (V), and thus no evidence exists of her subjective expectation of privacy. As for Dr. Gatter, she admitted that many people were nearby during this same

[15] In this same video, Dr. Nucatola introduced a woman named "Karen." PPFA tendered no evidence that this person was Karen Shea (W), but if it was, Shea also had no basis for an expectation of privacy, nor did she testify to such.

conversation (X), including a group of people directly behind her. (7-ER-1701:2–4.) She also admitted that she took no precautions to avoid being overheard and that she had no expectation that the conversation would remain between the parties to the conversation. (7-ER-1701:17–1702:15; Ex. 6021.)

Planned Parenthood presented no evidence that Dr. Siegfried had an objectively reasonable expectation of privacy in her conversation with Defendants at the same noisy, crowded poolside reception. Dr. Siegfried did not testify, so no evidence of her subjective expectation of privacy exists. Instead, the district court admitted a short, "maybe ten seconds" video clip played *without audio* through PPCCC CEO Jenna Tosh, *who was not even present at the reception or the conference*. (4-ER-745:1–746:16; 4-ER-752:21–24; Ex. 1590.)

Similarly, Planned Parenthood tendered no evidence that Dr. Ginde had a reasonable subjective or objective expectation of privacy during her conversation with Defendants at the BioMax booth. (Z) Dr. Ginde did not testify, and the jury only viewed a short clip played without sound. (13-ER-3387:4–17; Ex. 5960-A.)

Ten more recordings were taken in Florida at PPFA's 2014 MeDC conference—two of Gupta, two of Dr. Nucatola, and one each of Vanderhei, Dr. Gatter, Dr. Russo, Smith, Dr. Moran and Dr. Nguyen. (AA–JJ). Gupta admitted that others were in earshot of the first conversation (AA) and that she made no indication, explicit or implicit, that she expected confidentiality. (10-ER-2427:1–20, 10-ER-2429:8–2430:7; Ex. 6004-B.) As to the second recording (BB), *Gupta explicitly denied that she participated in a confidential conversation with Daleiden*, as she took a seat several feet away from him at a crowded luncheon. (10-ER-2437:22–2438:11; Ex. 6121.)

Dr. Nucatola did not testify about her expectation of privacy at the BioMax exhibit booth at the MeDC conference in Orlando. She testified only about one encounter with Defendants at the MeDC meeting, as opposed to the two listed on the verdict form (CC, DD) for which the jury found liability and the lower court confirmed. (8-ER-1926:3–1927:20; Ex. 6126.)

Vanderhei's conversation with Daleiden at the BioMax booth (EE) was so loud that Lisa David overheard it from another booth. (12-ER-3100:13–3101:18; Ex. 6126.) Smith's conversation (HH) with Daleiden

took place at the same location (Ex. 5966-A), as did Dr. Moran and Dr. Nguyen's conversation. (II, JJ) (Ex. 6116.) Dr. Moran testified that he perceived he was in a confidential environment simply because he believed he was with like-minded people. (6-ER-1413:4–1414:2.) Dr. Nguyen did not testify, and Plaintiffs adduced no evidence about his expectation of privacy.

Dr. Gatter's conversation (FF) with Daleiden and Lopez took place in a crowded, poolside area. (7-ER-1696:19–1284:9.) Dr. Gatter admitted that she neither requested confidentiality nor expected the conversation to remain between the parties to it. (7-ER-1696:19–1697:9.) She also admitted others were present, including wait staff and other conference attendees. (7-ER-1656:11–12; Ex. 6107.)

Dr. Russo's conversation with Daleiden and Lopez took place at a crowded luncheon with waitstaff present, in a raised volume, at a table with strangers. (7-ER-1797:4–1798:19; 7-ER-1830:20–1831:25; Ex. 6121.) Dr. Russo did not testify, and Plaintiffs adduced no evidence of her subjective expectation of privacy.

In sum, despite the district court's blanket adoption of Planned Parenthood's novel *en masse* expectation of privacy standard, Plaintiffs

failed to show that any of the recorded conversations were confidential under the federal and state recording statutes.

D. The district court failed to properly instruct the jury that recorded persons must have "exhibited" an expectation of privacy, and Planned Parenthood failed to meet this evidentiary requirement.

To prevail under the federal and Florida wiretap statutes, the recorded person must have *exhibited* an expectation of privacy. *See* 18 U.S.C. § 2510(2) (protecting only an "oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"); *McDonough*, 862 F.3d at 1319 (noting that because the Florida Legislature "did not want expectations of privacy to count that remained unexpressed," it consequently "imposed a simple requirement that the expectation be 'exhibited'").[16] Thus, "the expectations of privacy needed

[16] The Federal Wiretap Act's legislative history directs courts to consider "oral communications" in light of the constitutional standards Justice Harlan expressed in his concurrence in *Katz v. United States,* 389 U.S. 347 (1967). *See* S.Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2178. To demonstrate a reasonable expectation of privacy, "[t]here is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Courts

to trigger application of the statute must be exhibited; in other words they must be 'shown externally' or 'demonstrated.'" *McDonough*, 862 F.3d at 1319.

Defendants proposed two jury instructions (18-ER-5067 & 18-ER-5072) on the exhibition requirement. The district court refused both and issued no instruction. (1-ER-108; 1-ER-7017.) This is prejudicial error. *See Dang v. Cross*, 422 F.3d 800, 804 (9th Cir. 2005) ("Jury instructions must … correctly state the law."). This Court should review de novo, *see Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992), and reverse.

Beyond the instructional error, Planned Parenthood failed to show that any recorded person exhibited a reasonable expectation of privacy. As discussed above, neither Dr. Nucatola nor Dr. Gatter "set ground rules" for the conversation, such as "suggest[ing] that the meeting was confidential or 'off the record'" or "prohibit[ing] note taking or

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have consistently adopted this framework in federal wiretap cases. *See, e.g.*, *United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978); *Kee v. City of Rowlett*, 247 F.3d 206, 211–12 (5th Cir. 2001); *Huff v. Spaw*, 794 F.3d 543, 548–49 (6th Cir. 2015); *United States v. Turner*, 209 F.3d 1198, 1200 (10th Cir. 2000); *United States v. McKinnon*, 985 F.2d 525, 527 (11th Cir. 1993).

recordings." *McDonough*, 862 F.3d at 1319. And contrary to the district court's conclusion (1-ER-22:20–21), whether a person like Dr. Nucatola "had an *internal belief* in an expectation of privacy" is "irrelevant." *Huff*, 794 F.3d at 549. Instead, the question is whether the recorded person externally "*exhibited* an actual (subjective) expectation of privacy." *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (emphasis added). The undisputed evidence shows that neither Dr. Nucatola nor Dr. Gatter, nor any other recorded "person," exhibited such an expectation.

Circumventing the "exhibition" requirement, the district court found that witnesses "plausibly testified" that the security measures at the Planned Parenthood conferences "gave them an expectation of security and privacy in their interactions with other conference attendees." (1-ER-21:10–11.) But whether these witnesses would not expect "to be surreptitiously recorded or overheard by those adverse to them" is not enough. (1-ER-21:10–11.) Federal and Florida law only protects *speakers* who exhibit an expectation of privacy. *See McIntyre*, 582 F.2d at 1223. Non-recorded random attendees "bearing conference badges" and non-recorded "door monitors" that Planned Parenthood employed are not *speakers* under the Act. (1-ER-21:6). Instead, the

recorded conversations with conference attendees—strangers from around the country who exhibited no intention to keep *their words* private—were held in plain view. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). All these communications, though taking place at a restricted-access conference, were "conversations in the open" and were not "protected against being overheard" simply by badges and door monitors. *Ibid*. This Court should reverse.

E. The district court erroneously instructed the jury that Planned Parenthood had standing under the wiretapping statutes based only on Defendants' intent to record.

The district court's instruction on Planned Parenthood's corporate standing was legally erroneous, confusing, and prejudicial to Defendants. The court instructed the jury that the various Plaintiff *corporations* could prove a violation of the recording statutes if an employee or contractor "is recorded discussing internal matters of the corporation *or* if the defendant targeted her for recording because she could disclose information about the corporation's internal matters." (16-ER-4318:8–11 (emphasis added); 27-ER-7118.) Defendants objected to the second prong because no case law supports corporate standing on a recording claim

based merely on Defendants' intent. (18-ER-5062; 18-ER-5065; 15-ER-4200:18–4201:7; 15-ER-4251:2–7.)

The court's instruction was erroneous as a matter of law and should be reviewed de novo. *See Smoot v. United Transp. Union*, 246 F.3d 633, 639 (6th Cir. 2001) (whether a corporation has standing under the Federal Wiretap Act is a question of law reviewed de novo). The recording statutes grant standing to those "person[s] *whose*" communication is intercepted. 18 U.S.C. § 2520(a) (emphasis added); Fla. Stat. 934.10(1) (emphasis added); Md. Cts. & Jud. Proc. § 10-410(a) (emphasis added). Therefore, a corporation must establish that it has a "possessory interest" in the communications. *See Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1357 (S.D. Fla. 2005) (quoting *Hatchigian v. Int'l Bhd. of Elec. Workers, Local Union No. 98*, No. CIV.A. 87-7131, 1988 WL 100780, at *1 (E.D. Pa. Sept. 27, 1988); *see also Smoot*, 246 F.3d at 640.

In *Pitts Sales*, plaintiff was allowed to bring claims based only on four recordings that "contained conversations regarding Plaintiff's business." 383 F.Supp.2d at 135. Nine other recordings "were either incomprehensible or did not involve Plaintiff's business matters" and thus did not support the plaintiff's recording claims. *Id.* Here, by

contrast, the district court rejected the statutory requirement of a possessory interest in the communication and instead instructed that corporate standing could be based solely on the Defendants' intent, regardless of the content of the communications. (16-ER-4318:8–11.)

Unsurprisingly, Planned Parenthood capitalized on the court's erroneous "either/or" instruction, strategically showing the jury numerous *muted* clips of employees being recorded and *completely masking the contents of the conversations*. (4-ER-745:3–6 ("I'm going to show maybe ten seconds of this video. We're not interested in the content of what was said.") (*playing muted video*); 8-ER-2097:6–24 (Ex. 5972-A (A) (Linton)); 13-ER-3555:21–3558:18 (Ex. 6007-A (B) (Westhoff), Ex. 6012-A (D) (Flood), Ex. 6009-A (E) (Fils-Aime) & (F) (Grewer)); 13-ER-3387:4–17 (Ex. 5960-A (Z) Ginde)) (*all played without sound*). Other clips were played *without sound* and with only a vague description of the contents. (8-ER-2078:12–16 (conversation with Nguyen (O–P) and Dr. Schutt-Aine (Q–R) concerning "sensitive matters regarding abortion procedures").)

And in its closing, Planned Parenthood strategically focused solely on Defendants' intent while excluding the actual contents of the recorded

communications. (16-ER-4382:23–4383:14.) As a result, the jury found Defendants liable for recordings the contents of which were never disclosed and for (muted) "communications" in which Planned Parenthood adduced no evidence of a possessory interest. (*Compare Pitts Sales*, 383 F.Supp.2d at 135 (no standing demonstrated for "incomprehensible" communications).)

None of those videos demonstrated that Planned Parenthood's "business matters" were discussed. *Pitts Sales*, 383 F. Supp. 2d at 1358. Yet the jury found Defendants liable for all these recordings despite having no proof that Plaintiffs had a possessory interest in the conversations. And in the few conference recordings which the jury was allowed to hear the contents of the conversation (9-ER-2391:15–2393:24 (Ex. 5975-A (M) (Castle) and (N) (Vanderhei)) (conversation about messaging surrounding fetal tissue donation), it is likely that it found for Planned Parenthood not because of any possessory interest but because of the district court's erroneous "intent" instruction. The erroneous jury instruction warrants reversal.

F. PPNorCal was not recorded and therefore lacks standing to bring its recording claim.

PPNorCal lacked standing to bring a federal or California recording claim. PPNorCal's sole recording claim is based on the recording of Dr. Drummond-Hay at the 2014 NAF meeting in San Francisco. (18-ER-4895.) But Dr. Drummond-Hay was not PPNorCal's employee but a per-abortion independent contractor. (6-ER-1498:8–14.) Dr. Drummond-Hay testified that *she attended the conference as an individual NAF member, not as PPNorCal's employee, representative, or agent*. (6-ER-1523:23–1524:18, 1525:19–1526:1, 1526:2–5.) Defendants did not target her for recording because they believed she could disclose information about Planned Parenthood's internal matters. On the contrary, Dr. Drummond-Hay approached the BioMax booth and initiated the allegedly private conversation. (6-ER-1501:23–1502:12; Ex. 6117.)

Because Defendants did not record Dr. Drummond-Hay in her capacity as a corporate employee or contractor, PPNorCal showed no possessory interest in the communication, suffered no injury from the recording, and therefore lacked standing to bring its claim.

II. The District Court's Erroneous Evidentiary Exclusions Related to Defendants' Cal. Penal Code § 633.5 Defense Necessitate a New Trial.

A. Standard of Review.

A district court's exclusion of evidence typically is reviewed for abuse of discretion. *See United States v. 4.85 Acres of Land*, 546 F.3d 613, 617 (9th Cir. 2008). But "[a] district court's decision to exclude evidence of a particular defense is reviewed de novo." *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010).

B. The district court erroneously excluded critical evidence about Merritt and Daleiden's reasonable belief regarding Planned Parenthood's criminal activities.

To encourage discovery and disclosure of criminal activity, the California Invasion of Privacy Act permits a party to record *even a confidential communication* "for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of … any felony involving violence against the person." Cal. Penal Code § 633.5. Partial-birth abortion and fetal dismemberment arguably constitute a felony involving violence against the person. *E.g.*, 18 U.S.C. § 1531(a) (criminalizing partial-birth abortion). Thus, Defendants could lawfully record the conversations even if they had been

confidential (which they were not) "to obtain evidence reasonably believed to relate to such crimes." 82 Cal. Op. Att'y Gen. 148, 1999 WL 566799 (1999). Indeed, the California Supreme Court has noted that Section 633.5 exempts from Section 632 "an unconsented recording made with the requisite reasonable belief although the recording fails to capture the anticipated evidence." *Lubetzky v. State Bar*, 54 Cal. 3d 308, 321 (1991).

Defendants sought to introduce evidence showing that their recordings in California were fully justified under Section 633.5. In a series of erroneous rulings, the district court excluded this evidence.

1. The district court arbitrarily excluded evidence of Defendants' reasonable beliefs about Planned Parenthood's activities after the first recording.

Merritt and Daleiden recorded in California in three different venues over a ten-month period. (4-ER-831:22–833:14.) During that time, their research and investigative findings (including the hidden camera interviews themselves) affirmed and further confirmed their belief that Planned Parenthood was engaged in fetal tissue harvesting and trafficking.

For example, Defendants had retained Dr. Forrest Smith, a

prominent abortion provider, to review their undercover footage, including footage of Drs. Nucatola and Gatter, and he concluded (and advised them) that the doctors had discussed harvesting organs from born-alive infants. (1-ER-134.) Defendants sought to introduce the provider's testimony at trial, but the district court granted Planned Parenthood's motion to exclude it. (1-ER-134.)

Instead, the district court ruled that Merritt and Daleiden could present "evidence of what they knew or believed regarding plaintiffs' commission of violent felonies" *only* "*prior* to their first surreptitious recording" in California back in March 2014 (1-ER-125:22–25) and excluded all expert corroboration. (1-ER-126, 133–35.) The court summarily decided that Merritt and Daleiden could not rely on "[e]vidence regarding what [they] learned following their first surreptitious recording" for their Section 633.5 defense. (1-ER-125:25–26.) Thus, despite acknowledging that "[a]ll of the facts and the contexts for each recording have to be considered" (1-ER-80:9–10.), the district court limited Defendants' "reasonable belief"—and thus their entire Section 633.5 defense—to a single point in time. The district court's prejudicial ruling has no basis in law.

Defendants repeatedly requested reconsideration. (*See, e.g.*, Dkt. No. 836 (Tr. of Pre-Trial Proceedings) at 64 ("I want to make sure the record is clear with regard to our objection; that it really shouldn't be limited to the first recording, what they knew, because their base of knowledge continued for each separate recording for which they are being held liable."), 68–69 (pointing out that the court in a related criminal proceeding had allowed earlier California recordings to serve as evidence of Defendants' reasonable beliefs at the time of later recordings).) Defendants' pleas, and the court's rejection, culminated thus:

> **MR. JONNA:** Your Honor, you're sending us -- you're sending us into a battle without any armor, without our -- without any weapons. That's basically what's going on here, in our view.
>
> **THE COURT:** Mr. Jonna, that may be your view. And I may be wrong. I may have drawn the lines in the wrong places. I -- I freely admit that I make mistakes all the time. But this is the line that I think is the appropriate line, given the case that the plaintiffs have brought, and given the defenses that are now available to your clients.

(4-ER-976:7–16.)

The district court admitted that it "may be wrong" (*id.*) but it

refused to reconsider its position, and, without legal basis, incorporated its erroneous exclusion of critical evidence into its rulings on the parties' pre-trial motions (1-ER-125), during trial (4-ER-976) and the jury instructions (1-ER-107). Contra *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 652 F.3d 999, 1004 (9th Cir. 2011) ("[A]fter-acquired evidence 'may shed light' on the objective reasonableness of a [person's] actions at the time.")

2. The district court further erred in denying the relevance of Defendants' Section 633.5 evidence.

The question at the heart of Defendants' Section 633.5 defense was whether Merritt and Daleiden's belief that Planned Parenthood was illegally harvesting and trafficking fetal tissue was reasonable. And as the district court concluded, that question was for the jury to decide. (2-ER-125.) It follows, then, that Defendants should have been permitted to fully present their beliefs, reasons, and supporting evidence to the jury for a complete determination. *Cf. United States v. Powell*, 955 F.2d 1206, 1212 (9th Cir. 1991) (holding it was for jury to decide whether Defendants acted reasonably for good faith defense). Consequently, by erroneously excluding Defendants' proffered Section 633.5 evidence, the district court prevented the jury from learning about:

- Expert testimony identifying the wrongdoing revealed in the videos;
- CMP's investigative findings of tissue procurement organizations;
- Planned Parenthood's abortion procedures, methods, and techniques; and
- Expert forensic accountant's opinion on Planned Parenthood's costs associated with their fetal tissue donation practices under 14 U.S.C. § 289-(g)2.

(2-ER-128–129.)

Had the jury been allowed to consider these facts, it could and would likely have found that Merritt and Daleiden "had objectively reasonable grounds for believing the recording[s] would result in evidence of a felony involving violence." *In re Trever P.*, 14 Cal. App. 5th 486, 495 (2017). Excluding that relevant evidence was thus prejudicial error, and at a minimum Defendants are entitled to a new trial.

The district court characterized this critical evidence as simply being part of the "raging debates whether the videos show illegal conduct, whether 4 of 59 Planned Parenthood affiliates profited from selling fetal tissue, whether there have been any live births during abortion procedures at Planned Parenthood affiliates, and how government entities have responded to the HCP disclosures." (2-ER-124:28–125:3.)

The court concluded that "[t]hose debates are barely, if at all, relevant to the causes of action that will be tried to the jury." (2-ER-125:3–4.)

Even if the evidence was "barely" relevant, the district court still abused its discretion in excluding it. "The exclusion of relevant evidence pursuant to Rule 403 is an extraordinary remedy to be used sparingly." *Gametech Int'l Inc. v. Trend Gaming Sys., L.L.C.*, 232 F. App'x 676, 678 (9th Cir. 2007) (internal quotation marks omitted) (quoting *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995)). "Under the terms of the rule, the danger of prejudice must not merely outweigh the probative value of the evidence, but *substantially outweigh it*." *Id.* (emphasis added). That high standard is not met here.

For example, Defendants should have been permitted to present evidence that during their lunch meeting, Dr. Nucatola admitted that abortion providers alter abortion procedures to obtain more intact—and thus more valuable—organs and tissues. Yet the district court rejected this highly relevant admission, characterizing Dr. Nucatola's statement as merely "plaintiffs' staff members expressing interest or theoretical ability to engage in conduct that defendants contend is illegal (but plaintiffs contend is not)." (2-ER-126:12–13.) The district court offered no

justification for its exclusion outside of a conclusory Rule 403 remark. (2-ER-126.) Because the question of the reasonableness of Defendants' beliefs about Planned Parenthood's actions was a "fact … of consequence in determining the action" and Dr. Nucatola's concession "ha[d] [a] tendency to make [that] fact more or less probable than it would be without the evidence," the excluded evidence plainly was relevant. Fed. R. Evid. 401.

3. Excluding Defendants' Section 633.5 evidence was highly prejudicial.

Prejudice exists where, as here, the trial court's erroneous evidentiary exclusions "more probably than not ... tainted the verdict." *See Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688 (9th Cir. 2001). The exclusion of Defendants' ongoing and expanding knowledge based on the project's investigative findings was highly prejudicial. *Cf. United States v. Saenz*, 179 F.3d 686, 689 (9th Cir. 1999) (holding that exclusion of evidence of defendants' knowledge was not harmless error because error prevented defendant from supporting his defense).

Merritt and Daleiden's purpose for the recordings rested on an objectively reasonable belief that Planned Parenthood was engaged in unlawful fetal tissue harvesting and trafficking. Excluding evidence of

Planned Parenthood's policies, procedures, and conduct, including Dr. Nucatola's on-camera admission, gave Plaintiffs an unfair litigation advantage. The evidence Merritt and Daleiden sought to tender—that Planned Parenthood illegally harvested and trafficked fetal tissue—directly proved a necessary element of their Section 633.5 defense. That is, that Defendants' purpose for the recordings was "obtaining evidence reasonably believed to relate to the commission by another party to the communication" of "felon[ies] involving violence against the person." Cal. Penal Code § 633.5. It was unfairly prejudicial for the district court to prevent Defendants from establishing an essential element of their defense.

III. The District Court's Jury Instructions on the California Recording Claim Unfairly and Inadequately Covered the Issues, Misstated the Law, and Misled the Jury.

A. Standard of Review

This Court typically reviews the district court's jury instructions for abuse of discretion. *See Dang v. Cross*, 422 F.3d 800, 804 (9th Cir. 2005). But "whether a jury instruction misstates the elements that must be proved at trial is a question of law that is reviewed de novo." *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992).

B. The district court erroneously refused to instruct the jury that Planned Parenthood must prove Defendants intended to record confidential communications.

Over Defendants' objections (19-ER-5064), and contrary to law, the district court resolved that California Penal Code Section 632 does *not* require Planned Parenthood to prove Defendants' intent to record confidential communications. Instead, the court instructed the jury that Planned Parenthood merely needed to prove that Defendants "intentionally recorded one of the plaintiffs' employees or contractors by using an electronic device." (16-ER-4311:1–3.) Section 632 plainly requires actual intent to record a *confidential communication*. The verdict cannot stand.

1. A necessary element of Section 632 is an intent to record a confidential communication.

Similar to the Federal Wiretap Act, Section 632 prohibits only the *intentional* recording of a *confidential communication*. *See* Cal. Penal Code § 632(a). Intentionality is met "if the person using the recording equipment does so with the *purpose or desire* of recording *a confidential conversation*, or with the *knowledge to a substantial certainty* that his use of the equipment will result in the recordation of *a confidential*

conversation." *People v. Superior Court of Los Angeles Cty. (Smith)*, 70 Cal. 2d 123, 134 (1969) ("*Smith*") (emphasis added).

Thus, contrary to the court's instruction, Section 632 "does not isolate the actor's intent from the object to which it is directed, namely the confidential communication; the two are inextricably bound together." *Smith*, 70 Cal. 2d at 133; *accord Montantes v. Inventure Foods*, No. CV-14-1128-MWF RZX, 2014 WL 3305578, at *8 (C.D. Cal. July 2, 2014) (observing that "'intentionally' in Section 632 syntactically attaches to the entire actus reus phrase: 'intentionally ... eavesdrops upon or records the confidential communication'").

2. The district court's instruction was prejudicial error.

This Court has "stressed that '[j]ury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading.'" *Dang*, 422 F.3d at 804 (quoting *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002)). "[P]rejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered." *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) (internal quotation marks and citations omitted).

By refusing to deliver Defendants' charge on intent, the district court mis-instructed the jury. *Cf. Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009) (a district court "commits error when it rejects proposed jury instructions that are properly supported by the law and the evidence"). Unlike Defendants' proffered instruction, which would have instructed the jury consistent with Section 632's purpose and scope (19-ER-5063), the district court's instruction charged the jury on a mere intent to record:

> **Violation of California Penal Code §632**
>
> …
>
> To prove a violation, Plaintiffs must show that a Defendant did all of the following:
>
> 1. That the Defendant *intentionally recorded one of Plaintiffs' employees* or contractors by using an electronic device;
> 2. That the person recorded had a reasonable expectation that the conversation was not being overheard or recorded; and
> 3. That the Defendant did not have the consent of all parties to the conversation to record it.
>
> …

(1-ER-106.)

This instruction did not require intentionality in recording confidential communications and permitted a verdict for Planned Parenthood irrespective of the conversation between Defendants and Plaintiffs' personnel. That was prejudicial error, because the purpose of

California's eavesdropping statute is not to "punish a person who intends to make a recording but *only a person who intends to make a recording of a confidential communication*." *Smith*, 70 Cal. 2d at 133 (emphasis added). The court's prejudicial error is reversible. *Cf. Marich v. MGM/UA Telecomm., Inc.*, 113 Cal. App. 4th 415, 421–22 (2003) (overturning Section 632 conviction because the jury instructions omitted the proper definition of "intentional").

3. The district court's error was not harmless.

"An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless." *Caballero*, 956 F.2d at 206. Here, "it is more probably than not" that the district court's error was prejudicial, not harmless. *Ibid*. At the outset, the given instructions reflect the district court's fundamental misunderstanding of Section 632. (14-ER-3619:9–11 ("With Penal Code Section 632, I think that that requires the plaintiff to prove that the defendant knew that he or she would record, not violate the law.").) This Court has previously recognized that when the trial court erroneously adds or removes an element to a plaintiff's burden of proof, it is "unlikely that the error would be harmless." *Caballero,* 956 F.2d at 207. Here, the instruction

disconnects intentionality from the act of recording a confidential communication, and it removes the word "confidential" from the elements altogether.

Prejudice is also more likely than not to result if nothing in the jury's verdict shows "that the result would have been the same without the error." *Caballero,* 956 F.2d at 207. The district court never explained to the jury what the word "intentionally" meant even though it was a critical element of the offense and a "pivotal word[] on the jury verdict form." *Clem*, 566 F.3d at 1183. Because the jury never understood that "intent" and "confidential communication" are "inextricably bound together," *Smith*, 70 Cal. 2d at 134, the verdict would not have been the same without the error.

Finally, a properly instructed jury could easily have found that Defendants had no intent to record confidential communications. Indeed, Planned Parenthood presented no evidence that Defendants *intended* that the conversations they recorded in California, at public restaurants, and in the exhibit hall of a large conference, be confidential. Nor did Plaintiffs even show that Defendants knew to a substantial certainty that the recordings would capture confidential communications.

The Court should remand this case for a new trial.

IV. Merritt Is Entitled to Judgment or A New Trial on Punitive Damages.

A. Standard of Review.

This Court reviews the district court's award of punitive damages for abuse of discretion, and it reviews evidentiary sufficiency of the award for substantial evidence. *See Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002).

B. Planned Parenthood failed to provide clear and convincing evidence of malice or intentional misconduct to support liability for punitive damages.

The district court erroneously concluded that Planned Parenthood was entitled to punitive damages on its federal, Maryland, and Florida recording claims. (1-ER-14–16.) Punitive damages under the Federal Wiretap Act require Plaintiffs to "show that defendants acted wantonly, recklessly, or maliciously." *Jacobson v. Rose*, 592 F.2d 515, 520 (9th Cir. 1978). Similarly, the jury may not award punitive damages under the Maryland wiretapping statute unless Plaintiffs prove that Defendants acted with "actual malice." *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460 (1992). And to recover under Florida law, Plaintiffs must prove that

Defendants are "personally guilty of intentional misconduct or gross negligence." Fla. Stat. § 768.72 (2).

Moreover, to impose punitive liability, Planned Parenthood was required to make its evidentiary showing with *clear and convincing evidence*. *E.g.*, *Le Marc's Mgmt. Corp. v. Valentin*, 349 Md. 645, 653 (1998) (holding that punitive damages "may only be awarded if the plaintiff proves, by clear and convincing evidence, that the defendant had the requisite mens rea, *i.e.,* actual knowledge, to support such an award"); Fla. Stat. § 768.725 ("In all civil actions, the plaintiff must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages."). "Clear and convincing" evidence must be "so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind." *In re Angelia P.*, 28 Cal. 3d 908, 919 (1981) (internal quotation marks omitted). Planned Parenthood failed to meet this heavy evidentiary burden.

1. The punitive award cannot be justified because Planned Parenthood failed to prove actual malice.

Planned Parenthood presented no evidence, much less "clear and convincing" evidence, that Defendants carried out the hidden camera investigation with actual malice or recklessness. Nothing in the record

could show that Merritt "acted with intent to cause injury" or that her "conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another." (27-ER-7120:22–16.). As discussed above, the nature and circumstances surrounding the recordings were far from "despicable." For example, none of the tapings took place in a private home (*see Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971)), in a hospital room (*see Berthiaume's Estate v. Pratt*, 365 A.2d 792, 795 (Me. 1976)), or in any other place traditionally associated with a legitimate expectation of privacy (*see People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615, 634–35 (1995) (citing cases)). Nor did Merritt "intrude into the personal lives, intimate relationships, or any other private affairs" of the interviewees such as Dr. Gatter and Dr. Nucatola. *Wilkins*, 71 Cal. App. 4th at 1078. Instead, in all states with all-party consent laws, Merritt recorded in places of public accommodations where others were nearby and could overhear, including restaurants and conference centers.

To overcome their evidentiary deficiencies, Plaintiffs resorted to magnifying certain defendants' (but noticeably not Merritt's) strong political and moral opposition to Planned Parenthood. As a result, the

jury's sense of outrage was based not on the violation of the federal and state recording laws but on Defendants' subjective desires to "finish off Planned Parenthood and end abortion," (3-ER-617:5–6 (Newman)); to "destroy the evil Planned Parenthood Empire," (3-ER-617:7–8 (Rhomberg)), and to "permanently destroy Planned Parenthood's brand" and "prompt defunding" (3-ER-617:9–11 (Daleiden)). Although these statements may be offensive to some, and perhaps even raise an inference of ill feelings toward Planned Parenthood, they do not evince the malicious conduct that generates the type of "outrage frequently associated with crime," as necessary for putative liability. *Pacific Gas & Electric Co. v. Superior Court*, 235 Cal. Rptr. 3d 228, 236 (Ct. App. 2018). In short, Planned Parenthood failed to adduce any evidence—let alone clear and convincing evidence—of an evil motive.

By contrast, Defendants presented undisputed evidence that the "primary and overriding purpose" of CMP's hidden camera investigation—the subject of this suit—was "to gather and document evidence of how Planned Parenthood participates in the harvesting and trafficking of aborted fetal organs and tissue for profit." (10-ER-2606:3–7.) The project was not a "reckless" crusade or a "smear campaign" but a

standard undercover journalistic investigation (false identities, pretextual scenarios, surreptitious recording) inspired by the *20/20* news segment on fetal tissue transfer and other hidden-camera news stories.

2. Defendants' allegedly "fraudulent" undercover activities are not sufficiently egregious to warrant punitive damages.

To be sure, in some cases a jury may award punitive damages for fraud. This is not one of those cases. Merritt's putative liability does not depend on whether she is ultimately liable for fraudulent conduct. Instead, the critical issue is whether, at the time the recordings took place, Merritt recorded the conversations with the express intent of committing fraud to "depriv[e] [Planned Parenthood] of property or legal rights or otherwise causing injury." Cal. Civ. Code § 3294. This Court has noted that "a false statement" made to enter a place "cannot on its face be characterized as made to effect a fraud." *Wasden v. Animal Legal Def. Fund*, 878 F.3d 1184, 1194 (9th Cir. 2018). Even if Merritt's actions were fraudulent (which they were not), they are not sufficiently despicable to give rise to punitive liability. *Cf. Desnick*, 44 F.3d at 1354 ("Investigative journalists well known for ruthlessness promise to wear kid gloves. They

break their promise, as any person of normal sophistication would expect.")

C. The district court erred in allowing the jury to award punitive damages based on alleged harm to others.

It is unconstitutional for a punitive damages award "to punish a defendant for injury that it inflicts upon nonparties," as doing so "would add a near standardless dimension to the punitive damages equation," in violation of due process. *Philip Morris USAWilliams*, 549 U.S. 346, 353–54 (2007). The district court rightly acknowledged that "courts must provide defendants the ability to object and seek relief from the risk that a jury might punish it [sic] for its harm to others, through instructions or other rulings," (1-ER-17:2–4 (citing *Philip Morris*, 549 U.S. at 357)), but it erroneously held that "Defendants here did not seek such relief" (*id.* at 5 (citing *Sony BMG Music Entm't. v. Tenenbaum*, 660 F.3d 487, 506 n.20 (1st Cir. 2011)). That is manifestly wrong. Defendants *did expressly* seek such relief, by requesting this harm-to-others jury instruction:

> Punitive damages may not be used to punish a defendant[] for the impact of his, her, or its alleged misconduct on persons other than the Plaintiff.

(18-ER-5082.) The district court rejected it. (27-ER-7120–7121.) Defendants further expressly objected to Planned Parenthood's proposed

punitive-damages instruction—which the court substantially adopted—"for omitting language regarding damage to third parties." (18-ER-5089.)

A harm-to-others instruction was particularly critical here, because although *Plaintiffs are all corporate entities*, the district court allowed numerous individuals (whether affiliated with a Plaintiff or not) to testify about their *personal* mental and emotional state, and *personal* thoughts and fears, after viewing, or being made aware of, CMP's published videos. (4-ER-731:17–24; 4-ER-735:12–736:10; 4-ER-762:4–17; 6-ER-1403:20–1405:9, 6-ER-1494:15–1495:8; 7-ER-1662:17–1663:19; 8-ER-2173:6–15; 9-ER-2230:20–2231:5; 9-ER-2241:1–15.) During closing argument, Planned Parenthood expressly based its punitive damages argument on the emotional impact that CMP's videos allegedly had upon numerous *non-party* individuals. (16-ER-4421:21–4422:20 ("When I stand here and I ask you to award those punitive damages, I think of [non-party] Dr. Nucatola…. Her life changed forever on July 14th, 2015, when … defendants released a video of her…. [T]hey robbed her of her sense of security and safety, privacy and trust.").) This allowed Planned Parenthood to transform—in the jurors' view—a case about supposedly recouping alleged *corporate* economic losses into a case about punishing

Defendants for inflicting *personal*, emotional harms *on non-party individuals*. Without an instruction making it clear to the jury that it cannot award punitive damages based on alleged harm to others, the court unconstitutionally permitted the jury to make just such an award.

The punitive-damages award should be reversed.

V. The District Court Abused Its Discretion in Issuing a Needless Permanent Injunction against Merritt.

A. Standard of Review

The decision to grant a permanent injunction is reviewed for abuse of discretion. *See Ariz. Dream Act Coal. v. Brew*er, 855 F.3d 957, 965 (9th Cir. 2017). The Court will reverse if the district court "[mis]identified and [mis]applied the correct legal rule" or made a factual finding "that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013).

B. The district court relied on insufficient evidence to impose a needless gag order against Merritt.

The district court abused its discretion in permanently enjoining Merritt. Irrespective of the court's decision as to any other Defendant, the record does not support the court's conclusion that Merritt "pose[s] a threat of continued criminal conduct." (1-ER-85:10–11.)

Planned Parenthood cannot pursue an injunction based on allegations of "past wrongs" alone. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). Instead, it must demonstrate "a sufficient likelihood that [it] will again be wronged *in a similar way*." *Id.* at 111 (emphasis added). There must be a "*real* and *immediate* threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (emphasis added).

Here, Merritt is a retired grandmother with long term disability, and her work for the Human Capital Project years ago was a once-only job. (4-ER-899:24–900:20.) Merritt submitted an unrebutted declaration that she has no ability to participate in any more undercover investigations because of her advanced age, poor health and family responsibilities. (Dkt. 667-1 ¶¶ 5–6.)

Ignoring this evidence, the district court in conclusory fashion cited "the evidence regarding Merritt's history, prior activities, and post-HCP activities as well as her testimony on the stand" as the justification for enjoining her. (1-ER-81:12–13.) The court did not identify what "evidence" it had in mind, nor explain why an injunction against Merritt *is necessary* to remedy Plaintiffs' alleged harms.

This Court should vacate the injunction. Merritt's past conduct alone is insufficient to support a claim for injunctive relief. *See Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1253 (9th Cir. 1984) ("Past wrongs are not enough for the grant of an injunction."). An injunction against Merritt is improper because Planned Parenthood failed to show that she poses *any* threat, let alone a "real and immediate" threat, *O'Shea* 414 U.S. at 496, of future harm. *Cf. Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 1005 (9th Cir. 2020) ("[A]n injunction will only issue if the wrongs are ongoing or likely to recur.").

Planned Parenthood alleges injury from Merritt's participation in a hidden camera investigation, which she carried out *between six and eight years ago* (2013–2015), when her age, health and family obligations did not preclude her as they do now. (Dkt. 667-1 ¶¶ 5–6.) There is simply no real, immediate threat that Planned Parenthood will suffer the same alleged harm, "in a similar way," from Merritt. *Lyons*, 461 U.S. at 103. This Court should therefore vacate the injunction against Merritt.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and alternatively the case remanded for a new trial.

Date: February 26, 2021

Respectfully submitted,

/s Horatio G. Mihet

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CERTIFICATE OF COMPLIANCE

I am the attorney for appellant in this case. This brief contains 13,742 words**,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

Date: February 26, 2021

/s Horatio G. Mihet
Horatio G. Mihet

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Sandra Susan Merritt

Addendum

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 15. Miscellaneous Crimes
Chapter 1.5. Invasion of Privacy (Refs & Annos)

West's Ann.Cal.Penal Code § 632

§ 632. Eavesdropping on or recording confidential communications

Effective: January 1, 2017
Currentness

(a) A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000) per violation, by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(b) For the purposes of this section, “person” means an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication.

(c) For the purposes of this section, “confidential communication” means any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) Except as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section is not admissible in any judicial, administrative, legislative, or other proceeding.

(e) This section does not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees, or agents thereof, if the acts otherwise prohibited by this section are for the purpose of construction, maintenance, conduct, or operation of the services and facilities of the public utility, (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

Credits

(Added by Stats.1967, c. 1509, p. 3585, § 1. Amended by Stats.1976, c. 1139, p. 5134, § 258, operative July 1, 1977; Stats.1985, c. 909, § 2.5; Stats.1990, c. 696 (A.B.3457), § 3; Stats.1992, c. 298 (A.B.2465), § 3; Stats.1994, c. 1010 (S.B.2053), § 194; Stats.2016, c. 855 (A.B.1671), § 1, eff. Jan. 1, 2017.)

West's Ann. Cal. Penal Code § 632, CA PENAL § 632
Current with urgency legislation through Ch. 9 of 2021 Reg.Sess

End of Document

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 15. Miscellaneous Crimes
Chapter 1.5. Invasion of Privacy (Refs & Annos)

West's Ann.Cal.Penal Code § 633.5

§ 633.5. Recording communications relating to commission of extortion, kidnapping, bribery, felony involving violence against the person, including human trafficking, or violation of Section 653m, or domestic violence

Effective: January 1, 2018
Currentness

Sections 631, 632, 632.5, 632.6, and 632.7 do not prohibit one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, as defined in Section 236.1, or a violation of Section 653m, or domestic violence as defined in Section 13700. Sections 631, 632, 632.5, 632.6, and 632.7 do not render any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, as defined in Section 236.1, a violation of Section 653m, or domestic violence as defined in Section 13700, or any crime in connection therewith.

Credits

(Added by Stats.1967, c. 1509, p. 3586, § 1. Amended by Stats.1985, c. 909, § 5; Stats.1990, c. 696 (A.B.3457), § 6; Stats.1992, c. 298 (A.B.2465), § 9; Stats.2016, c. 855 (A.B.1671), § 3, eff. Jan. 1, 2017; Stats.2017, c. 191 (A.B.413), § 1, eff. Jan. 1, 2018.)

West's Ann. Cal. Penal Code § 633.5, CA PENAL § 633.5
Current with urgency legislation through Ch. 9 of 2021 Reg.Sess

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 119. Wire and Electronic Communications Interception and Interception of Oral Communications (Refs & Annos)

18 U.S.C.A. § 2511

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

Effective: November 16, 2018
Currentness

(1) Except as otherwise specifically provided in this chapter any person who--

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any

business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with--

(A) a court order directing such assistance or a court order pursuant to section 704 of the Foreign Intelligence Surveillance Act of 1978 signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter.

(iii) If a certification under subparagraph (ii)(B) for assistance to obtain foreign intelligence information is based on statutory authority, the certification shall identify the specific statutory provision and shall certify that the statutory requirements have been met.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47

of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person--

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted--

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which--

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter--

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if--

(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

(II) the person acting under color of law is lawfully engaged in an investigation;

(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and

(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.

(j) It shall not be unlawful under this chapter for a provider of electronic communication service to the public or remote computing service to intercept or disclose the contents of a wire or electronic communication in response to an order from a foreign government that is subject to an executive agreement that the Attorney General has determined and certified to Congress satisfies section 2523.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication--

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted--

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

[**(c)** Redesignated (b)]

(5)(a)(i) If the communication is--

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection--

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

CREDIT(S)

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213; amended Pub.L. 91-358, Title II, § 211(a), July 29, 1970, 84 Stat. 654; Pub.L. 95-511, Title II, § 201(a) to (c), Oct. 25, 1978, 92 Stat. 1796, 1797; Pub.L. 98-549, § 6(b)(2), Oct. 30, 1984, 98 Stat. 2804; Pub.L. 99-508, Title I, §§ 101(b), (c)(1), (5), (6), (d), (f), 102, Oct. 21, 1986, 100 Stat. 1849 to 1853; Pub.L. 103-322, Title XXXII, § 320901, Title XXXIII, § 330016(1)(G), Sept. 13, 1994, 108 Stat. 2123, 2147; Pub.L.

103-414, Title II, §§ 202(b), 204, 205, Oct. 25, 1994, 108 Stat. 4290, 4291; Pub.L. 104-294, Title VI, § 604(b)(42), Oct. 11, 1996, 110 Stat. 3509; Pub.L. 107-56, Title II, §§ 204, 217(2), Oct. 26, 2001, 115 Stat. 281, 291; Pub.L. 107-296, Title XXII, § 2207(h)(2), (j)(1), formerly Title II, § 225(h)(2), (j)(1), Nov. 25, 2002, 116 Stat. 2158; renumbered § 2207(h)(2), (j)(1), Pub.L. 115-278, § 2(g)(2)(I), Nov. 16, 2018, 132 Stat. 4178; amended Pub.L. 110-261, Title I, §§ 101(c)(1), 102(c)(1), July 10, 2008, 122 Stat. 2459; Pub.L. 115-141, Div. V, § 104(1)(A), Mar. 23, 2018, 132 Stat. 1216.)

18 U.S.C.A. § 2511, 18 USCA § 2511
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

West's Florida Statutes Annotated
Title XLVII. Criminal Procedure and Corrections (Chapters 900-999) (Refs & Annos)
Chapter 934. Security of Communications; Surveillance (Refs & Annos)

West's F.S.A. § 934.03

934.03. Interception and disclosure of wire, oral, or electronic communications prohibited

Effective: July 1, 2015
Currentness

(1) Except as otherwise specifically provided in this chapter, any person who:

(a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;

(b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication;

(c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication intercepted by means authorized by subparagraph (2)(a)2., paragraph (2)(b), paragraph (2)(c), s. 934.07, or s. 934.09 when that person knows or has reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, has obtained or received the information in connection with a criminal investigation, and intends to improperly obstruct, impede, or interfere with a duly authorized criminal investigation;

shall be punished as provided in subsection (4).

(2)(a) 1. It is lawful under this section and ss. 934.04-934.09 for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his or her employment while engaged in any activity which is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

2. Notwithstanding any other law, a provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person, may provide information, facilities, or technical assistance to a person authorized by law to intercept wire, oral, or electronic communications if such provider, or an officer, employee, or agent thereof, or landlord, custodian, or other person, has been provided with:

a. A court order directing such assistance signed by the authorizing judge; or

b. A certification in writing by a person specified in s. 934.09(7) that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required, setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required.

3. A provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person may not disclose the existence of any interception or the device used to accomplish the interception with respect to which the person has been furnished an order under this section and ss. 934.04-934.09, except as may otherwise be required by legal process and then only after prior notice to the Governor, the Attorney General, the statewide prosecutor, or a state attorney, as may be appropriate. Any such disclosure renders such person liable for the civil damages provided under s. 934.10, and such person may be prosecuted under s. 934.43. An action may not be brought against any provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person for providing information, facilities, or assistance in accordance with the terms of a court order under this section and ss. 934.04-934.09.

(b) It is lawful under this section and ss. 934.04-934.09 for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his or her employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. chapter 5, to intercept a wire, oral, or electronic communication transmitted by radio or to disclose or use the information thereby obtained.

(c) It is lawful under this section and ss. 934.04-934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

(d) It is lawful under this section and ss. 934.04-934.09 for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.

(e) It is unlawful to intercept any wire, oral, or electronic communication for the purpose of committing any criminal act.

(f) It is lawful under this section and ss. 934.04-934.09 for an employee of a telephone company to intercept a wire communication for the sole purpose of tracing the origin of such communication when the interception is requested by the recipient of the communication and the recipient alleges that the communication is obscene, harassing, or threatening in nature. The individual

conducting the interception shall notify local police authorities within 48 hours after the time of the interception.

(g) It is lawful under this section and ss. 934.04-934.09 for an employee of:

1. An ambulance service licensed pursuant to s. 401.25, a fire station employing firefighters as defined by s. 633.102, a public utility, a law enforcement agency as defined by s. 934.02(10), or any other entity with published emergency telephone numbers;

2. An agency operating an emergency telephone number "911" system established pursuant to s. 365.171; or

3. The central abuse hotline operated pursuant to s. 39.201

to intercept and record incoming wire communications; however, such employee may intercept and record incoming wire communications on designated "911" telephone numbers and published nonemergency telephone numbers staffed by trained dispatchers at public safety answering points only. It is also lawful for such employee to intercept and record outgoing wire communications to the numbers from which such incoming wire communications were placed when necessary to obtain information required to provide the emergency services being requested. For the purpose of this paragraph, the term "public utility" has the same meaning as provided in s. 366.02 and includes a person, partnership, association, or corporation now or hereafter owning or operating equipment or facilities in the state for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation.

(h) It shall not be unlawful under this section and ss. 934.04-934.09 for any person:

1. To intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public.

2. To intercept any radio communication which is transmitted:

a. By any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

b. By any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including any police or fire communications system, readily accessible to the general public;

c. By a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

d. By any marine or aeronautical communications system.

3. To engage in any conduct which:

a. Is prohibited by s. 633 of the Communications Act of 1934; [1] or

b. Is excepted from the application of s. 705(a) [2] of the Communications Act of 1934 by s. 705(b) [3] of that act.

4. To intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station of consumer electronic equipment to the extent necessary to identify the source of such interference.

5. To intercept, if such person is another user of the same frequency, any radio communication that is not scrambled or encrypted made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system.

6. To intercept a satellite transmission that is not scrambled or encrypted and that is transmitted:

a. To a broadcasting station for purposes of retransmission to the general public; or

b. As an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls, when such interception is not for the purposes of direct or indirect commercial advantage or private financial gain.

7. To intercept and privately view a private satellite video communication that is not scrambled or encrypted or to intercept a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted, if such interception is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain.

(i) It shall not be unlawful under this section and ss. 934.04-934.09:

1. To use a pen register or a trap and trace device as authorized under ss. 934.31-934.34 or under federal law; or

2. For a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of such service.

(j) It is not unlawful under this section and ss. 934.04-934.09 for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser which are transmitted to, through, or from a protected computer if:

1. The owner or operator of the protected computer authorizes the interception of the communications of the computer trespasser;

2. The person acting under color of law is lawfully engaged in an investigation;

3. The person acting under color of law has reasonable grounds to believe that the contents of the communications of the computer trespasser will be relevant to the investigation; and

4. The interception does not acquire communications other than those transmitted to, through, or from the computer trespasser.

(k) It is lawful under this section and ss. 934.04-934.09 for a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.

(3)(a) Except as provided in paragraph (b), a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication:

1. As otherwise authorized in paragraph (2)(a) or s. 934.08;

2. With the lawful consent of the originator or any addressee or intended recipient of such communication;

3. To a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

4. Which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b), whoever violates subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 934.41.

(b) If the offense is a first offense under paragraph (a) and is not for any tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

and the wire or electronic communication with respect to which the offense under paragraph (a) was committed is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then:

1. If the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication, or a paging service communication, and the conduct is not that described in subparagraph (2)(h)7., the person committing the offense is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

2. If the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication, or a paging service communication, the person committing the offense is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Credits

Laws 1969, c. 69-17, § 3; Laws 1971, c. 71-136, § 1163; Laws 1974, c. 74-249, §§ 2, 3; Laws 1977, c. 77-104, § 249; Laws 1978, c. 78-376, § 1; Laws 1979, c. 79-164, § 187; Laws 1980, c. 80-27, § 2; Laws 1987, c. 87-301, § 1; Laws 1988, c. 88-184, § 2; Laws 1989, c. 89-269, § 2. Amended by Laws 1997, c. 97-102, § 1582, eff. July 1, 1997; Laws 1999, c. 99-168, § 18, eff. July 1, 1999; Laws 2000, c. 2000-369, §§ 7, 9, eff. June 26, 2000; Laws 2002, c. 2002-72, § 2, eff. April 22, 2002; Laws 2010, c. 2010-117, § 30, eff. July 1, 2010; Laws 2013, c. 2013-183, § 154, eff. July 1, 2013; Laws 2015, c. 2015-82, § 1, eff. July 1, 2015.

Footnotes

1 1. 47 U.S.C.A. § 553.
2 2. 47 U.S.C.A. § 605(a).
3 3. 47 U.S.C.A. § 605(b).

West's F. S. A. § 934.03, FL ST § 934.03
Current through Chapter 184 (End) of the 2020 Second Regular Session of the Twenty-Sixth Legislature

West's Annotated Code of Maryland
Courts and Judicial Proceedings
Title 10. Evidence (Refs & Annos)
Subtitle 4. Wiretapping and Electronic Surveillance (Refs & Annos)

MD Code, Courts and Judicial Proceedings, § 10-402

§ 10-402. Interceptions, procurements, disclosures, or use of communications in violation of subtitle prohibited

Effective: October 1, 2019
Currentness

In general

(a) Except as otherwise specifically provided in this subtitle it is unlawful for any person to:

(1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(2) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or

(3) Willfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle.

Violation as felony subject to imprisonment

(b) Any person who violates subsection (a) of this section is guilty of a felony and is subject to imprisonment for not more than 5 years or a fine of not more than $10,000, or both.

Authorized interceptions, procurements, disclosures, or use of communications

(c)(1)(i) It is lawful under this subtitle for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communications service to the public may not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) 1. It is lawful under this subtitle for a provider of wire or electronic communication service, its officers, employees, and agents, landlords, custodians or other persons to provide information, facilities, or technical assistance to persons authorized by federal or State law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, if the provider, its officers, employees, or agents, landlord, custodian, or other specified person has been provided with a court order signed by the authorizing judge directing the provision of information, facilities, or technical assistance.

2. The order shall set forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specify the information, facilities, or technical assistance required. A provider of wire or electronic communication service, its officers, employees, or agents, or landlord, custodian, or other specified person may not disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the judge who granted the order, if appropriate, or the State's Attorney of the county where the device was used. Any such disclosure shall render the person liable for compensatory damages. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order under this subtitle.

(2)(i) This paragraph applies to an interception in which:

1. The investigative or law enforcement officer or other person is a party to the communication; or

2. One of the parties to the communication has given prior consent to the interception.

(ii) It is lawful under this subtitle for an investigative or law enforcement officer acting in a criminal investigation or any other person acting at the prior direction and under the supervision of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication in order to provide evidence:

1. Of the commission of:

A. Murder;

B. Kidnapping;

C. Rape;

D. A sexual offense in the first or second degree;

E. Child abuse in the first or second degree;

F. Child pornography under § 11-207, § 11-208, or § 11-208.1 of the Criminal Law Article;

G. Gambling;

H. Robbery under § 3-402 or § 3-403 of the Criminal Law Article;

I. A felony under Title 6, Subtitle 1 of the Criminal Law Article;

J. Bribery;

K. Extortion;

L. Dealing in a controlled dangerous substance, including a violation of § 5-617 or § 5-619 of the Criminal Law Article;

M. A fraudulent insurance act, as defined in Title 27, Subtitle 4 of the Insurance Article;

N. An offense relating to destructive devices under § 4-503 of the Criminal Law Article;

O. A human trafficking offense under Title 3, Subtitle 11 of the Criminal Law Article;

P. Sexual solicitation of a minor under § 3-324 of the Criminal Law Article;

Q. An offense relating to obstructing justice under § 9-302, § 9-303, or § 9-305 of the Criminal Law Article;

R. Sexual abuse of a minor under § 3-602 of the Criminal Law Article;

S. A theft scheme or continuing course of conduct under § 7-103(f) of the Criminal Law Article involving an aggregate value of property or services of at least $10,000;

T. Abuse or neglect of a vulnerable adult under § 3-604 or § 3-605 of the Criminal Law Article;

U. An offense relating to Medicaid fraud under §§ 8-509 through 8-515 of the Criminal Law Article;

V. An offense involving a firearm under § 5-134, § 5-136, § 5-138, § 5-140, § 5-141, or § 5-144 of the Public Safety Article; or

W. A conspiracy or solicitation to commit an offense listed in items A through V of this item; or

2. If:

A. A person has created a barricade situation; and

B. Probable cause exists for the investigative or law enforcement officer to believe a hostage or hostages may be involved.

(3) It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State.

(4)(i) It is lawful under this subtitle for a law enforcement officer in the course of the officer's regular duty to intercept an oral communication if:

1. The law enforcement officer initially lawfully detained a vehicle during a criminal investigation or for a traffic violation;

2. The law enforcement officer is a party to the oral communication;

3. The law enforcement officer has been identified as a law enforcement officer to the other parties to the oral communication prior to any interception;

4. The law enforcement officer informs all other parties to the communication of the interception at the beginning of the communication; and

5. The oral interception is being made as part of a video tape recording.

(ii) If all of the requirements of subparagraph (i) of this paragraph are met, an interception is lawful even if a person becomes a party to the communication following:

1. The identification required under subparagraph (i)3 of this paragraph; or

2. The informing of the parties required under subparagraph (i)4 of this paragraph.

(5) It is lawful under this subtitle for an officer, employee, or agent of a governmental emergency communications center to intercept a wire, oral, or electronic communication where the officer, agent, or employee is a party to a conversation concerning an emergency.

(6)(i) It is lawful under this subtitle for law enforcement personnel to utilize body wires to intercept oral communications in the course of a criminal investigation if there is reasonable cause to believe that a law enforcement officer's safety may be in jeopardy.

(ii) Communications intercepted under this paragraph may not be recorded, and may not be used against the defendant in a criminal proceeding.

(7) It is lawful under this subtitle for a person:

(i) To intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public;

(ii) To intercept any radio communication that is transmitted:

1. By any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

2. By any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

3. By a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

4. By any marine or aeronautical communications system;

(iii) To intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of the interference; or

(iv) For other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of the system, if the communication is not scrambled or encrypted.

(8) It is lawful under this subtitle:

(i) To use a pen register or trap and trace device as defined under § 10-4B-01 of this title; or

(ii) For a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of the service.

(9) It is lawful under this subtitle for a person to intercept a wire or electronic communication in the course of a law enforcement investigation of possible telephone solicitation theft if:

(i) The person is an investigative or law enforcement officer or is acting under the direction of an investigative or law enforcement officer; and

(ii) The person is a party to the communication and participates in the communication through the use of a telephone instrument.

(10) It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication in the course of a law enforcement investigation in order to provide evidence of the commission of vehicle theft if:

(i) The person is an investigative or law enforcement officer or is acting under the direction of an investigative or law enforcement officer; and

(ii) The device through which the interception is made has been placed within a vehicle by or at the direction of law enforcement personnel under circumstances in which it is thought that vehicle theft may occur.

(11)(i) 1. In this paragraph the following words have the meanings indicated.

2. "Body-worn digital recording device" means a device worn on the person of a law enforcement officer that is capable of recording video and intercepting oral communications.

3. "Electronic control device" has the meaning stated in § 4-109 of the Criminal Law Article.

(ii) It is lawful under this subtitle for a law enforcement officer in the course of the officer's regular duty to intercept an oral communication with a body-worn digital recording device or an electronic control device capable of recording video and oral communications if:

1. The law enforcement officer is in uniform or prominently displaying the officer's badge or other insignia;

2. The law enforcement officer is making reasonable efforts to conform to standards in accordance with § 3-511 of the Public Safety Article for the use of body-worn digital recording devices or electronic control devices capable of recording video and oral communications;

3. The law enforcement officer is a party to the oral communication;

4. Law enforcement notifies, as soon as is practicable, the individual that the individual is being recorded, unless it is unsafe, impractical, or impossible to do so; and

5. The oral interception is being made as part of a videotape or digital recording.

(iii) Failure to notify under subparagraph (ii)4 of this paragraph does not affect the admissibility in court of the recording if the failure to notify involved an individual who joined a discussion in progress for which proper notification was previously given.

Intentional disclosure of contents of communication prohibited

(d)(1) Except as provided in paragraph (2) of this subsection, a person or entity providing an electronic communication service to the public may not intentionally divulge the contents of any communication (other than one to the person or entity providing the service, or an agent of the person or entity) while in transmission on that service to any person or entity other than an addressee or intended recipient of the communication or an agent of the addressee or intended recipient.

(2) A person or entity providing electronic communication service to the public may divulge the contents of a communication:

(i) As otherwise authorized by federal or State law;

(ii) To a person employed or authorized, or whose facilities are used, to forward the communication to its destination; or

(iii) That were inadvertently obtained by the service provider and that appear to pertain to the commission of a crime, if the divulgence is made to a law enforcement agency.

Fines or penalties for violation of subsection (f)

(e)(1) Except as provided in paragraph (2) of this subsection or in subsection (f) of this section, a person who violates subsection (d) of this section is subject to a fine of not more than $10,000 or imprisonment for not more than 5 years, or both.

(2) If an offense is a first offense under paragraph (1) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense occurred is a radio communication that is not scrambled or encrypted, and:

(i) The communication is not the radio portion of a cellular telephone communication, a public land mobile radio service communication, or a paging service communication, the offender is subject to a fine of not more than $1,000 or imprisonment for not more than 1 year, or both; or

(ii) The communication is the radio portion of a cellular telephone communication, a public land mobile radio service communication, or a paging service communication, the offender is subject to a fine of not more than $500.

(3) Unless the conduct is for the purpose of direct or indirect commercial advantage or private financial gain, conduct which would otherwise be an offense under this subsection is not an offense under this subsection if the conduct consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted:

(i) To a broadcasting station for purposes of retransmission to the general public; or

(ii) As an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls.

Persons subject to suits by the federal government or State

(f)(1) A person who engages in conduct in violation of this subtitle is subject to suit by the federal government or by the State in a court of competent jurisdiction, if the communication is:

(i) A private satellite video communication that is not scrambled or encrypted and the conduct in violation of this subtitle is the private viewing of that communication, and is not for a

tortious or illegal purpose, or for purposes of direct or indirect commercial advantage, or private commercial gain; or

(ii) A radio communication that is transmitted on frequencies allocated under Subpart D of Part 74 of the Rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this subtitle is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain.

(2)(i) The State is entitled to appropriate injunctive relief in an action under this subsection if the violation is the person's first offense under subsection (e)(1) of this section and the person has not been found liable in a prior civil action under § 10-410 of this subtitle.

(ii) In an action under this subsection, if the violation is a second or subsequent offense under subsection (e)(1) of this section or if the person has been found liable in a prior civil action under § 10-410 of this subtitle, the person is subject to a mandatory civil fine of not less than $500.

(3) The court may use any means within its authority to enforce an injunction issued under paragraph (2)(i) of this subsection, and shall impose a civil fine of not less than $500 for each violation of an injunction issued under paragraph (2)(i) of this subsection.

Credits

Added by Acts 1977, c. 692, § 3, eff. July 1, 1977. Amended by Acts 1978, c. 339; Acts 1984, c. 442; Acts 1985, c. 509; Acts 1986, c. 660; Acts 1986, c. 743; Acts 1988, c. 607; Acts 1989, c. 5, § 1; Acts 1989, c. 527; Acts 1992, c. 140; Acts 1994, c. 105, § 1, eff. Oct. 1, 1994; Acts 1997, c. 70, § 4, eff. Oct. 1, 1997; Acts 1997, c. 343, § 1, eff. Oct. 1, 1997; Acts 1998, c. 493, § 1, eff. Oct. 1, 1998; Acts 1998, c. 524, § 1, eff. Oct. 1, 1998; Acts 1998, c. 733, § 3, eff. Oct. 1, 1998; Acts 2000, c. 288, § 1, eff. Oct. 1, 2000; Acts 2002, c. 107, § 1, eff. Oct. 1, 2002; Acts 2002, c. 213, § 6, eff. Oct. 1, 2002; Acts 2004, c. 285, § 1, eff. Oct. 1, 2004; Acts 2004, c. 539, § 1, eff. Oct. 1, 2004; Acts 2005, c. 25, § 1, eff. April 12, 2005; Acts 2005, c. 421, § 1, eff. Oct. 1, 2005; Acts 2005, c. 491, § 1, eff. Oct. 1, 2005; Acts 2006, c. 44, § 6, eff. April 8, 2006; Acts 2006, c. 300, § 1, eff. Oct. 1, 2006; Acts 2011, c. 54, § 1, eff. Oct. 1, 2011; Acts 2011, c. 55, § 1, eff. Oct. 1, 2011; Acts 2012, c. 369, § 1, eff. Oct. 1, 2012; Acts 2013, c. 38, § 1, eff. Oct. 1, 2013; Acts 2013, c. 39, § 1, eff. Oct. 1, 2013; Acts 2015, c. 22, § 5; Acts 2015, c. 128, § 1, eff. May 12, 2015; Acts 2015, c. 129, § 1, eff. May 12, 2015; Acts 2018, c. 145, § 1, eff. June 1, 2018; Acts 2019, c. 21, § 2, eff. Oct. 1, 2019; Acts 2019, c. 22, § 2, eff. Oct. 1, 2019; Acts 2019, c. 521, § 1, eff. Oct. 1, 2019.

Formerly Art. 35, §§ 93, 99.

MD Code, Courts and Judicial Proceedings, § 10-402, MD CTS & JUD PRO § 10-402
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