Case No. 70475

In the Supreme Court of Nevada

DITECH FINANCIAL LLC, f/k/a GREEN TREE SERVICING, LLC,

Appellant,

vs.

SANFORD BUCKLES, on behalf of himself and others similarly situated,

Respondent.

CERTIFIED QUESTION

from the United States District Court, District of Nevada
District Court Case No. 2:15-cv-01581-GMN-CWH

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. Appellant Ditech Financial LLC, formerly known as Green Tree Servicing LLC, is a nongovernmental corporate party which is not publicly traded. On August 31, 2015, Green Tree Servicing LLC and Ditech Mortgage Corporation merged, and Green Tree Servicing LLC's name was changed to Ditech Financial LLC. The members of Ditech Financial LLC are Green Tree Servicing Corp, which is not a publicly traded company, and Walter Management Holding Company, LLC ("WAHC") which is not a public traded company. Green Tree Investment Holdings II, LLC ("GTIH") is the sole member of WAHC and is not publicly traded. Green Tree Credit Solutions, LLC ("GTCS") is the sole member of GTIH and is not publicly traded. Walter Investment Management Corp. is the sole member of GTCS and is publicly traded.

2. Michael R. Brooks and Gregg A. Hubley of Brooks Hubley LLP and Elizabeth A. Hamrick of Bradley Arant Boult Cummings, LLP

represented appellant in the district court and have appeared in this Court.

3. Daniel F. Polsenberg and Joel D. Henriod of Lewis Roca Rothgerber Christie LLP and Michael R. Pennington and Scott Burnett Smith of Bradley Arant Boult Cummins, LLP have appeared before this Court.

These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

DATED this 23rd day of September, 2016.

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INTRODUCTION

This case presents issues of Nevada law certified by the United States District Court for the District of Nevada (Navarro, C.J.) and accepted for review by this Court pursuant to NRAP 5. The certified questions are:

> **Plaintiff's position:** Does NRS 200.620 apply to telephone recordings made by a party outside Nevada, who regularly records telephone conversations with Nevada residents, of telephone conversations with a person in Nevada without that person's consent?
>
> **Defendant's position:** Does NRS 200.620 apply to telephone recordings made by a party outside Nevada who uses equipment outside Nevada to record telephone conversations with a person in Nevada without that person's consent? If so, does that decision apply retroactively, or prospectively only?

The case arises from customer service calls recorded outside Nevada by Defendant Ditech Financial LLC ("Ditech"). Ditech is a lender and servicer of residential mortgages, and it operates call centers in Arizona and Minnesota. Plaintiff Sanford Buckles alleges that

(1) while he was in Nevada, he spoke with Ditech representatives located in Ditech's call centers about a mortgage loan, and (2) Ditech recorded these telephone conversations, without his consent, using equipment located in the Arizona or Minnesota call centers. Buckles claims Ditech violated NRS 200.620 by recording these calls. Buckles seeks to assert this claim on behalf of himself and a putative class of individuals who were also located in Nevada when they spoke with Ditech representatives via telephone and whose telephone calls were also recorded without their consent, using equipment located in Ditech's Arizona or Minnesota call centers. For himself and the putative class, Plaintiff seeks statutory damages of $100 per day (but not less than $1,000 per class member) for all calls recorded by Ditech without consent over the past three years, as well as punitive damages.

Plaintiff's claim turns on whether NRS 200.620—the Nevada penal statute governing telephone recordings—can be applied extraterritorially to routine business practices that are lawful in the state where the practices occurred. Nevada is one of approximately twelve states that require all parties to a telephone call to consent to the recording of a call. By contrast, federal law and the laws of the vast

majority of states permit a recording whenever one party to the call consents. Of particular importance to this case, the laws of Arizona and Minnesota (where Ditech's call centers and recording equipment are located) are among the majority that permit a recording whenever one party to the call consents. Plaintiff thus bases his claim on a novel extension of Nevada's penal law to conduct that occurs outside Nevada and that was legal in the state where the conduct occurred. This Court rejected this theory in *Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008), concluding NRS 200.620 does not apply to a call with a Nevada resident that was legally recorded outside of Nevada. *Id.* at 267-68.

The plain language of Nevada's call-recording statutes, this Court's previous understanding of the limited reach of NRS 200.620 in *Mclellan*, and sound principles of statutory construction all foreclose Plaintiff's claim.

STATEMENT OF THE CASE

Buckles, the husband of a borrower whose loan is serviced by Ditech, filed a putative class action in federal court against Ditech, claiming it violated NRS 200.620 by recording telephone conversations with him and other persons in Nevada in the course of servicing loans.

(App. 2, (Am. Compl. at ¶1, *Buckles v. Green Tree Servicing, LLC*, No. 2:15-cv-01581-GMN (D. Nev. Nov. 7, 2015), ECF No. 13.)) Buckles has defined the class to include "All persons in Nevada whose inbound and outbound telephone conversations were monitored, recorded, and/or eavesdropped upon without their consent by [Ditech] within three years prior to the filing of the original Complaint in this action." *Id.* ¶ 39.

Ditech moved to dismiss the complaint, arguing (1) NRS 200.620 does not govern telephone calls recorded by persons outside Nevada on equipment located outside of Nevada, and (2) the United States Constitution precludes extraterritorial application of NRS 200.620 to telephone recordings made outside of Nevada. *Id.*, (App. 20, 24, (Def. Ditech Financial LLC's Mot. to Dismiss Am. Compl. at 6, 10, *Buckles v. Green Tree Servicing, LLC*, No. 2:15-cv-01581-GMN (D. Nev. Nov. 25, 2015), ECF No. 14)).

The federal district court (Navarro, C.J.) concluded Ditech's motion to dismiss should be granted if NRS 200.620 applies only to recordings made within Nevada. *Id.*, (App. 71, (Certification Order to the Nevada Supreme Court at 6, *Buckles v. Green Tree Servicing, LLC*, No. 2:15-cv-01581-GMN (D. Nev. May 25, 2016), ECF No. 40 (hereafter

"ECF No. 40")). "If the statute applies to telephone recordings made outside Nevada by Ditech, however," the federal court "must decide Ditech's constitutional challenge to the statute under the Due Process Clause and the Dormant Commerce Clause of the United States Constitution." *Id.* "The necessity of reaching these serious constitutional questions depends upon resolution of prior, potentially dispositive, questions of Nevada statutory law." *Id.* The federal court therefore certified the state law questions presented to this Court. *Id.*, (App. 71-72, (at 6–7)).

This Court accepted the certified questions because "the answers may determine the federal case." Order Accepting Certified Questions, Directing Briefing and Directing Submission of Filing Fee at 1.

STATEMENT OF FACTS

Ditech is a lender and servicer of residential mortgage loans secured by properties located in states across the country. Like many companies, Ditech has customer call centers equipped to record telephone calls for purposes of customer service training and quality review. Those call centers are located in Arizona and Minnesota. The

company does not have any customer service operations or telephone recording equipment in Nevada. (App. 69-70, (ECF No. 40 at 4–5)).

Buckles resides in Nevada. He alleges that, in 2013 and 2014, while he was in Nevada, he had "at least five (5) telephone communications" with Ditech representatives located in Ditech's call centers about a mortgage loan on his home and that Ditech recorded these telephone conversations, without his consent. (App. 6, (Am. Compl. ¶¶ 17-19, ECF No. 13)).

RELEVANT NEVADA STATUTES

NRS 200.620(1) outlaws certain unauthorized "interception" of telephone calls. It provides, in relevant part:

> Except as otherwise provided in NRS 179.410 to 179.515, inclusive, 209.419 and 704.195, it is unlawful for any person to intercept or attempt to intercept any wire communication unless:
>
> (a) The interception or attempted interception is made with the prior consent of one of the parties to the communication; and

> (b) An emergency situation exists and it is impractical to obtain a court order as required by NRS 179.410 to 179.515, inclusive, before the interception . . . .

NRS 200.620(1). This Court, in a case involving parties in Nevada using equipment located in Nevada, construed NRS 200.620 as prohibiting the recording of private phone calls without the consent of all parties to the call, subject to certain exceptions.[1] *See Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179–80, 969 P.2d 938, 940 (1998) (plurality).

The statutes define certain terms as follows:

> 1. "Person" includes public officials and law enforcement officers of the State and of a county or municipality or other political subdivision of the State.

[1] The exceptions in NRS 179.410 to NRS 179.515, NRS 209.419, and NRS 704.195 relate to interception authorized by a judge or justice when requested by the attorney general or district attorney for investigations by law enforcement agencies, interception of offenders' communications in jails or prisons, and interception by public utilities concerning emergency or service outage. NRS 179.460, for instance, permits the "Attorney General or the district attorney of any county [to] apply to a Supreme Court justice or to a district judge in the county where the interception is to take place for an order authorizing the interception of wire, electronic or oral communications." If granted, the court may issue an order authorizing the interception by "investigative or law enforcement officers." *Id.*

2. "Wire communication" means the transmission of writing, signs, signals, pictures and sounds of all kind by wire, cable, or other similar connection between the points of origin and reception of such transmission, including all facilities and services incidental to such transmission, which facilities and services include, among other things, the receipt, forwarding and delivering of communications.

NRS 200.610.

"Intercept" means the aural acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device or of any sending or receiving equipment.

NRS 179.430.

"Investigative or law enforcement officer" means any officer of the United States or this State or a political subdivision thereof who is empowered by the law of this state to conduct investigations of or to make arrests for felonies, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

NRS 179.435.

NRS 200.620 is a criminal statute. "A person who willfully and knowingly violates NRS 200.620 . . . : Shall be punished for a category D felony as provided in NRS 193.130." NRS 200.690(1)(a). It also carries quasi-criminal penalties and punitive damages. A civil defendant found "liable to a person whose wire or oral communication is intercepted without his or her consent" is subject to:

> (1) Actual damages or liquidated damages of $100 per day of violation but not less than $1,000, whichever is greater;
>
> (2) Punitive damages; and
>
> (3) His or her costs reasonably incurred in the action, including a reasonable attorney's fee,
>
> all of which may be recovered by civil action.

NRS 200.690(1)(b).

Unlawfully intercepted calls may not be used as evidence in Nevada courts as provided in NRS 179.500 and 179.505. NRS 179.500 provides that "the contents of any intercepted wire, electronic or oral communication or evidence derived therefrom must not be received in

evidence or otherwise disclosed in any trial, hearing or other proceeding in any court of this state unless each party, not less than 10 days before the trial, hearing or proceeding, has been furnished with a copy of the court order and accompanying application under which the interception was authorized and a transcript of any communication intercepted." Any aggrieved person may move to suppress the contents of an unlawfully intercepted communication under NRS 179.505.

The evidentiary rule is qualified by NRS 48.077, which provides that "the contents of any communication *lawfully intercepted under the laws of the United States or of another jurisdiction . . . if the interception took place within that jurisdiction*, and any evidence derived from such a communication, are admissible in any action or proceeding in a court or before an administrative body of this State . . . ." NRS 48.077 (emphasis added).

The full text of all relevant statutes appears in the NRAP 28(f) addendum.

SUMMARY OF ARGUMENT

NRS 200.620 does not extend to the recording of interstate calls when the act of "interception" takes place outside Nevada. This

construction is compelled by *Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008), and necessarily follows from the well-established presumption against extraterritoriality, as well as the rule of lenity and the canon of constitutional avoidance. Under each of these well-settled doctrines, the absence of any explicit indication that NRS § 200.620 was intended to operate beyond Nevada's borders forecloses Plaintiff's claim.

Plaintiff points to nothing indicating the legislature intended to project Nevada law onto conduct of parties in other States. Neither the text of the statute nor its legislative history supports the notion the legislature meant to establish a rule of conduct that would govern outside Nevada. To the contrary, other provisions of Nevada's call-recording law, which must be read together with section 200.620, confirm the legislature intended the statute to extend only to "interceptions" inside Nevada's borders—including, most notably, the provision contemplating that prior approval or ratification of a recording could be obtained from "a district judge in the *county where the interception is to take place*." NRS 179.460(1) (emphasis added).

Further support is found in the Nevada evidence code provision at issue in *Mclellan*, which makes taped conversations admissible in

Nevada if the act of recording was lawful in the jurisdiction where the recording took place. That statute reflects both the legislature's awareness of the cross-border conflicts arising from Nevada's unusually restrictive call-recording law and its conscious decision to accommodate the less-restrictive laws and policies of sister states. Plaintiff's proposed construction, by contrast, would lead to the incongruent result that an interstate phone call with a person in Nevada can be taped and lawfully used as evidence, but the out-of-state party who recorded the call (including out-of-state law enforcement officials) would be subject to criminal punishment and statutory penalties in a Nevada court. There is not a shred of evidence the legislature intended such a startling and aberrant result.

Other Nevada statutes contain specific extraterritoriality language, which confirms the legislature is aware of the background presumptions of extraterritoriality and lenity and knows how to project a Nevada penal statute to nonresidents when that is the legislature's intent. The Nevada Deceptive Trade Practices Act, for instance, prohibits misleading charitable solicitations "made from a location

outside of this State to persons located in this State." NRS 598.1305(4)(b) (emphasis added).

Given the ubiquity of recording interstate phone calls in modern business, as well as the potentially serious affront to comity and due process of displacing a sister state's regulation of domestic business practices and of subjecting a sister state's residents to unanticipated "gotcha" liability in a far-away forum, the Court should not construe NRS 200.620 to apply extraterritorially to actions that were lawful where they occurred. The Court should instead insist any such extension of Nevada law be based on an explicit statement of extraterritorial intent by the legislature. Because NRS 200.620 contains no such expression of intent currently, basic notions of fairness and due process dictate that, at a minimum, any judicial extension of NRS 200.620 be applied prospectively only.

ARGUMENT

I.

THIS COURT SHOULD ANSWER "NO" TO THE PRINCIPAL CERTIFIED QUESTION

In prior cases, this Court has determined NRS 200.620 applies to recording of private phone calls among individuals located in Nevada

using equipment located in Nevada, and that the statute generally prohibits individuals from recording such calls absent the consent of all parties to the call. *Mclellan v. State*, 124 Nev. at 267 & n.5, 182 P.3d at 109 & n.5, *citing Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179–80, 969 P.2d 938, 940 (1998) (plurality). *Mclellan* also made clear NRS 200.620 does not apply to recording an interstate telephone call involving a person in Nevada when the act of recording occurs outside of the State. 124 Nev. at 267–68, 182 P.3d at 109–10.

In *Mclellan*, a party located in California taped a telephone conversation she had with a Nevada resident, using equipment located in California. The Court held the taped conversation was admissible in Nevada courts because the recording was legal in the jurisdiction where it occurred. Significantly, *Mclellan* did not consider the California-based recording of a call with a person in Nevada to itself violate NRS 200.620. Rather, the Court was clear the recording of a call with a person in Nevada would only violate Nevada law "had the *interception* taken place in Nevada." *Mclellan*, 124 Nev. at 267, 182 P.3d at 109 (emphasis added).

This case turns on whether *Mclellan* means what it says—that NRS 200.620 applies only territorially to calls recorded inside Nevada—or whether, despite *Mclellan*, the statute applies extraterritorially to calls with a person in Nevada that are recorded on equipment located outside Nevada.

Mclellan's focus on the location of the "interception"—and its conclusion that an "interception" does not run afoul of NRS 200.620 unless it occurs within the territorial borders of Nevada—was correct and should be reaffirmed. Such a construction of NRS 200.620 follows from the longstanding canon that, unless a contrary intent is made clear, laws are presumed to apply only within the enacting state's boundaries. It also follows from the rule of lenity and the canon of constitutional avoidance, both of which instruct courts to avoid inferring extraterritorial effects from ambiguous language. And it is the only construction faithful to the language, history, and traditional understanding of the limited reach of two-party consent laws still on the books in a minority of states.

Because there is nothing indicating the legislature intended to project Nevada's unusually restrictive call-recording law onto the

conduct of parties in other states, the Court should hold NRS 200.620 imposes only a territorial rule and does not apply to customer service calls legally recorded in Arizona and Minnesota on equipment located in those states.

A. The Court Should Not Assume The Legislature, By Its Silence, Intended To Reach Recordings Made Outside Nevada

This case raises a question of statutory interpretation: whether NRS 200.620 reaches conduct—the "interception" of a phone call—occurring, not in Nevada, but within the confines of a sister state. Even assuming Nevada has the authority under the U.S. Constitution to criminalize routine business practices most other states expressly permit (which, as Judge Navarro found, presents "serious" questions), "whether [the legislature] has in fact exercised that authority . . . is a matter of statutory construction." *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (hereafter "*Aramco*"). In such a case, the analysis begins with the well-established presumption against extraterritoriality.

1. Unless there is an affirmative indication otherwise, NRS 200.620 is presumptively limited to conduct within Nevada

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Australia Bank*, 561 U.S. 247, 255 (2010) (internal quotation and citation omitted); *see also Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."); *see generally* SCALIA & GARNER, READING LAW 268–72 (2012) (Canon No. 43).

The presumption is routinely applied to state legislation. *See*, *e.g.*, *Risinger v. SOC LLC*, 936 F. Supp. 2d 1235, 1250 (D. Nev. 2013) (applying "the general presumption against the extraterritoriality" to Nevada Wage and Hour Law); *Abel v. Planning & Zoning Comm'n*, 998 A.2d 1149, 1157 (Conn. 2010) (applying presumption "when application of the statute would regulate out-of-state conduct or property"); *Avery v. State Farm Mutual Auto. Ins. Co.*, 835 N.E.2d 801, 852 (Ill. 2005) (noting "long-standing rule of construction in Illinois which holds that a 'statute is without extraterritorial effect unless a clear intent in this

respect appears from the express provisions of the statute'"); *Union Underwear Co., Inc. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001) ("We begin our analysis with the well-established presumption against extraterritorial operation of statutes. That is, unless a contrary intent appears within the language of the statute, we presume that the statute is meant to apply only within the territorial boundaries of the Commonwealth.").

The extraterritoriality canon "rests on the perception that [a legislature] ordinarily legislates with respect to domestic, not foreign matters." *Morrison*, 561 U.S. at 255. It also "serves to protect against unintended clashes" with laws of other jurisdictions which could result in "discord." *Aramco*, 499 U.S. at 248; *see also Union Underwear*, 50 S.W.3d at 190 (noting purpose of canon is "to protect against unintended clashes of the laws of the Commonwealth with the laws of our sister states"). And the incidental connection with someone in Nevada whose call is recorded elsewhere does not alter the analysis. The "presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case." *Morrison*, 561 U.S. at 266.

Thus, "unless there is the affirmative intention of the [legislature] clearly expressed" to give a statute extraterritorial reach, courts "must presume it is primarily concerned with domestic conditions." *Id.* In other words, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

In construing a statute, Congress and state legislatures are assumed to "legislate[] against the backdrop of the presumption against extraterritoriality." *Aramco*, 499 U.S. at 248.

2. Because NRS 200.620 is a penal statute, the rule of lenity requires clear and unambiguous intent to regulate out-of-state conduct

The fact that NRS 200.620 sets forth a standard of conduct punishable as a criminal offense both makes it "appropriate to apply the rule of lenity in resolving any ambiguity in the scope of the statute's coverage," *Crandon v. United States*, 494 U.S. 152 158 (1990), and "strengthens the presumption" that the Legislature did not intend to criminalize acts undertaken in another state. *Sandberg*, 248 U.S. at 196.

The rule of lenity "demands that ambiguities in criminal statues be liberally interpreted in the accused's favor," and it applies both "to

interpretations of the substantive ambit of criminal prohibitions" and "to the penalties they impose." *State v. Lucero*, 127 Nev. 92, 99, 249 P.3d 1226, 1230-1231 (2011) (internal quotations and citations omitted). "[T]his 'time-honored interpretive guideline' serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon*, 494 U.S. at 158.

The rule thus requires the Court to strictly construe penal statutes, like NRS 200.620, that provide for quasi-criminal penalties enforceable in a civil action. *Orr Ditch & Water v. Justice Court of Reno*, 64 Nev. 138, 163, 178 P.2d 558, 570 (1947); *State v. Wheeler*, 23 Nev. 143, 44 P. 430, 432 (1896); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see generally* READING LAW 296–302 (Canon No. 49).

Because NRS 200.620 provides for a single standard of conduct with both civil and criminal penalties, it is up to the legislature to clearly express an intent, if it so chooses, to criminalize or penalize conduct outside Nevada. *See State v. Elsbury*, 63 Nev. 463, 471, 175 P.2d 430, 434 (1946) ("It is a general rule of statutory construction that penal statutes are not to be extended by inference or implication").

3. The Court should avoid constitutional doubt by reaffirming NRS 200.620 does not to regulate extraterritorial conduct that is lawful where it occurs

A third and final bedrock principle of statutory interpretation—the canon of constitutional avoidance—also compels a construction that limits NRS 200.620's operation to conduct within the State. "Whenever possible, we must interpret statutes so as to avoid conflicts with the federal or state constitutions." *Mangarella v. State*, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001) (citation omitted). This canon has a long pedigree and "remains in full force today." *State v. Castenada*, 126 Nev. 478, 481, 245 P.3d 550, 553 (2010).

"[A] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991); *see also Knox v. Rossi*, 25 Nev. 96, 57 P. 179, 179 (1899) (adopting narrowing construction of federal statute given "grave doubts whether it is within the constitutional authority of congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states") (*quoting Carpenter v. Snelling*, 97 Mass. 452, 458 (1867)).

As Judge Navarro found, the statutory construction urged by Plaintiff would raise "serious constitutional questions." (App. 71, (ECF No. 40 at 6)). Under the Due Process Clause, "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408, 421 (2003). The Commerce Clause likewise "precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982).

If NRS 200.620 applies to calls Ditech recorded legally in Arizona and Minnesota, and imposes punitive damages for such conduct via NRS 200.690, it would raise a serious Due Process problem under *State Farm* as well as a grave Dormant Commerce Clause problem, both of which the federal district court would have to resolve. Judge Navarro certified these questions to avoid "these serious constitutional questions," if possible. (App. 71, (ECF No 40 at 6)). This Court should adopt a construction of NRS 200.620 that avoids the serious

constitutional issues that would arise from criminalizing or penalizing conduct that is legal in the states where it occurred.

The only other requirement for the avoidance canon to apply is that the statute must be reasonably susceptible to two constructions. *Ford v. State*, 127 Nev. 608, 619, 262 P.3d 1123, 1130 (2011). That requirement is met here because the text of NRS 200.620, like virtually any state law imposing a rule of conduct, is naturally read as applying only to parties and conduct within the State.

B. The Text of Nevada's Wiretapping Laws Belies Any Extraterritorial Intent

On its face, NRS 200.620 contains nothing affirmatively indicating it applies to the recording of a conversation by a person in another state using equipment located in that state. Other related provisions, which must be read *in pari materia*, strongly suggest it does not. So, too, does the fact that other Nevada statutes contain what NRS 200.620 and the statutory provisions related to it lack: a clear statement of extraterritorial application. There is nothing in either the text of NRS 200.620, in the text of other Nevada statutes cross-referenced in 200.620, or in the text of other Nevada statutes dealing with the same

subject matter, sufficient to defeat the presumption against extra-territoriality.

1. NRS 200.620's plain language does not provide an affirmative indication of extraterritorial application

NRS 200.620, by its terms, does not specify it applies to calls recorded outside Nevada. It provides only that "it is unlawful for any person to intercept or attempt to intercept any wire communication . . ." and then goes on to set forth certain exceptions. If "an emergency situation exists and it is impractical to obtain a court order as required by NRS 179.410 to 179.515, inclusive, before the interception . . .," then one-party consent coupled with later ratification by a court is permitted. NRS 200.620(1)(b). The "court order" requirement referenced in NRS 200.620(1)(b) is found in NRS 179.460, which permits the Attorney General or the district attorney of any county to apply to "a district judge *in the county where the interception is to take* place for an order authorizing the interception of wire, electronic or oral communications." NRS 179.460(1) (emphasis added).

In opposing Ditech's motion to dismiss, Plaintiff relied heavily on a purported plain-language argument, claiming the language "any

person" in 200.620, if read literally, is sufficiently broad to include persons in another state. That language, however, is just the kind of general language that "falls short of demonstrating the affirmative [legislative] intent required" to extend the statute beyond the jurisdiction's territorial borders. *Aramco*, 499 U.S. at 249; *see also Morrison*, 561 U.S. at 264 ("At most, the Solicitor General's proposed inference is possible; but possible interpretations of statutory language do not override the presumption against extraterritoriality."); *Judkins v. St. Joseph's College of Maine*, 483 F. Supp. 2d 60, 66 (D. Me. 2007) ("[T]he application of broad and general terms is insufficient to overcome the presumption against extraterritorial application.").

In a variety of contexts, courts have held the "any person" language and similarly broad terms do not speak directly and unambiguously to the question of extraterritoriality and thus cannot overcome the presumption. *See, e.g.*, *Union Underwear*, 50 S.W.3d at 191 ("Under the presumption against extraterritorial application, the use of the terms 'any' or 'all' to persons covered by the legislation does not imply that the enacting legislature intended that the legislation be applied extraterritorially."). Indeed, no less an authority than Chief

Justice John Marshall made this very point when confronted with a penal statute using broad "any person" language. *See United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.) (holding that "[t]he words 'any person or persons,' are broad enough to comprehend every human being" but, absent an apparent contrary intent, must be read as "limited to cases within the jurisdiction of the state").

NRS 200.620 does not provide any express indication of an extraterritorial application. Nor do the criminal penalties and civil cause-of-action provisions of NRS 200.690. Thus, under all three interpretive canons that guide the Court's analysis, the statute should be confined to govern only recordings made within Nevada.

2. Related provisions in the Nevada wiretapping statutes undermine Plaintiff's interpretation

A territorial construction of NRS 200.620 is buttressed by other provisions of Nevada's wiretapping law and, in particular, the "court order" provision cross-referenced in NRS 200.620, as well as NRS 48.077, the Nevada evidentiary rule at issue in *Mclellan*. Like NRS 200.620, these other provisions show the focus is on the commission of an *act*—"interception"—and the *location* where that act occurs. In

determining the meaning of NRS 200.620, this Court will read all the Nevada statutes governing telephone recordings *in pari materia*. *State Farm v. Comm'r of Ins.*, 114 Nev. 535, 541, 958 P.2d 733, 736-737 (1998).

NRS 179.460(1), as noted, requires an application for approval or ratification of a recording to be made to a Nevada district judge "in the county where *the interception* is to take place." Similarly, NRS 179.470(3), which governs wiretap applications, permits an ex parte order "authorizing *interception* of wire, electronic or oral communications *within the territorial jurisdiction* of the court in which the judge is sitting." It also requires disclosure of the "identity of the investigative or law enforcement officer making the application," which must be an "officer of the United States or this State or a political subdivision of this State." NRS 179.435.

These provisions make sense if the recording prohibition is restricted to "interceptions" occurring within Nevada. But it would be impossible to meet the court-order requirement imposed by 200.620(1)(b) if the statutory prohibition were read as extending to recordings made outside Nevada. Such out-of-state recordings would

always be unlawful, with no practical means and thus no opportunity of obtaining prior court approval or ratification in a Nevada county "where the interception is to take place." Given these other statutes and the statutory anomalies created by Plaintiff's construction, the presumption against extraterritoriality, "far from being overcome here, is doubly fortified by the language of [the] statute." *Smith v. United States*, 507 U.S. 197, 204 (1993) (quoting *United States v. Spelar*, 338 U.S. 217, 222 (1949)).

Nevada's evidentiary rules governing telephone recordings likewise look to the place where the recording was made to determine admissibility. A telephone call recorded legally in another state, when "*the interception* took place within that jurisdiction," is "admissible in any action or proceeding in a court or before an administrative body of this State." NRS 48.077 (emphasis added). Under NRS 179.500, however, a telephone call "must not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court of this state" unless each party is given a copy of the application, the court order, and a transcript of the recording at least 10 days before trial. NRS 179.500.

This Court must read these statutes "in harmony." *State Div. of Ins. v. State Farm*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000). And the only way to harmonize NRS 48.077 and NRS 179.500 is to apply the traditional territorial restriction to both statutes. That way, if the recording was permitted under the laws of the state where the interception took place, it is admissible in a Nevada court under NRS 48.077. But if the recording took place in Nevada, it is not admissible unless the requirements of NRS 179.500 are satisfied, including timely disclosure of the application and court order.

Perhaps of even greater significance is that the evidentiary rule shows the legislature was aware of the problems arising from Nevada's unusually restrictive call-recording law and made a deliberate choice to accommodate the different laws and policies of sister states. Plaintiff's contrary interpretation would lead to a serious incongruence—an interstate conversation with a person in Nevada could be taped and used as evidence in a Nevada court under NRS 48.077, but the out-of-state party who recorded the call, including out-of-state law enforcement officials, would be subject to criminal punishment and

statutory penalties in Nevada under NRS 200.620. There is no reason to think the legislature intended such an aberrant construction.

3. Express extraterritoriality language in other Nevada statutes confirms the significance of its absence in NRS 200.620

It is apparent the Nevada legislature is aware of the presumption against extraterritoriality and knows how to overcome it. For example, the legislature expressly provided for extraterritorial application of the Deceptive Trade Practices Act in NRS 598.1305, which prohibits misleading or deceptive solicitations by charitable organizations or nonprofits, expressly specifying the statute extends to both "solicitations which are made from a location within this State *and solicitations which are made from a location outside of this State to persons located in the State*." Other provisions likewise expressly apply to persons in other states. *See, e.g.*, NRS 394.351 (prohibiting certain instruction or education, or the offering, advertising or solicitation of such instruction or education, within the State "whether the person is located within *or outside this State*") (emphasis added).

That there is no comparable express provision for extraterritorial application of NRS 200.620 is a strong indication the statute was not

intended to operate beyond Nevada's borders. *See Union Underwear*, 50 S.W.3d at 190-91; *Judkins*, 483 F. Supp. 2d at 66.

C. Legislative History Underscores That NRS 200.620 Does Not Cover Interceptions Outside Nevada

Plaintiff can point to no evidence the legislature thought it was outlawing conduct taking place in other states, even though one would expect such a weighty decision to have been discussed and generated controversy. What little relevant legislative history there is regarding NRS 200.620 reinforces the statute's territorial limit.

The 1981 Legislature considered Senate Bill No. 449, an amendment to the statute that would have allowed one-party consent for all telephone recordings. The bill was requested by Nevada law enforcement. Hearings before the Assembly Judiciary Committee revealed that Nevada's two-party consent requirement was inconsistent with federal law and the law of a majority of states, all of which allow one-party consent. *See* Hearing on S.B. 449 Before the Assembly Judiciary Committee, 61st Leg. 4 (1981).

The district attorneys who testified in favor of the bill explained that, under existing law without the proposed amendment, "the physical act of recording controls which jurisdiction applies to the

situation." *Id.* at 5. Thus, "[i]f there is a conversation between a Nevadan and a Californian," it "would be admissible in Nevada if the Californian did the recording and brought it to Nevada," but if "the Nevadan recorded the call, it would be inadmissible and would be a felony." *Id.* at 6.

Although the one-party consent amendment was not adopted, this history shows support for and an understanding of the limited territorial scope of the call-recording statute more than three decades ago. Even then, officials charged with law enforcement stated their belief that the one-party consent rules of other states apply to recordings made outside Nevada, while the strict criminal penalties for violating NRS 200.620 apply only when the recording takes place in Nevada. There is no indication anyone disagreed with this understanding.

D. *Mclellan's* Understanding of the Limited Reach of NRS 200.620 Forecloses Plaintiff's Claim

Consistent with the statutory text and tools of construction discussed above, this Court previously held NRS 200.620 does not apply to telephone recordings made outside Nevada. *Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008), turned on application of NRS 200.620

and NRS 48.077 to recordings made in California (which permitted the recordings with only one party's consent) of interstate telephone calls between a pedophile in Nevada and a minor in California. California sheriff's investigators arranged the wiretapped call after the girl admitted to her counselor that Mclellan (her former stepfather) had sexually abused her. *Id.* at 266, 182 P.3d at 108. The call was made from her aunt and uncle's house in Mission Viejo, California, to Mclellan in Nevada. *Id.* "To comply with California's wiretap law, [the girl] and her guardians consented to police taping the phone call." *Id.* The call was recorded in California. *Id.* It was admitted at Mclellan's trial in Nevada, where he was convicted of more than three dozen counts of sexual assault. *Id.* at 265–66, 108.

On appeal, Mclellan challenged admission of the telephone call under NRS 200.620, claiming he was in Nevada and did not consent when the call was recorded. *See id.* at 266, 182 P.3d at 109 ("Mclellan argues that the tape of the intercepted phone call was inadmissible because NRS 200.620 dictates that *all* parties to a communication must consent to the interception of wire or oral communication for it to be

lawful, and therefore admissible at trial."). This Court rejected this reading of NRS 200.620 and affirmed. *Id.* at 268, 110.

The Court's decision in *Mclellan* adopts a territorial rule based on where the "interception" of a telephone call takes place. "Interception" is statutorily defined as "the aural acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device or of any sending or receiving equipment." NRS 179.30. The Court, accordingly, framed the issue as "whether evidence lawfully seized by California law enforcement under California law is admissible in a Nevada court, when such an interception would be unlawful in Nevada and therefore inadmissible." *Id.*

The Court explained that Nevada law requires either dual consent or the consent of one party plus an emergency with judicial ratification within 72 hours. *Id.* at 267, 109 & nn. 5–6 (citing *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179-80, 969 P.2d 938, 940-41 (1998), and NRS 200.620). The court contrasted this with California law, which "requires consent by only one party." *Id.* at 267, 182 P.3d at 109. The Court then cited NRS 48.077, which allows admission in Nevada of a

"communication lawfully intercepted under the laws of the United States or of another jurisdiction . . . if the interception took place within that jurisdiction." *Id.* Recognizing NRS 48.077 turns on the legality of the recording where it was made, the Court observed that "if the interception was lawfully made in California, it is admissible in Nevada under NRS 48.077 even when the manner of interception would violate Nevada law *had the interception taken place in Nevada*." *Id.* (emphasis added). The interception there "was lawful at its inception in California because [the girl] and her guardians consented." *Id.* The Court thus held it was "admissible in a Nevada court under NRS 48.077." *Id.*

The Court in *Mclellan* observed that other states apply a territorial rule under similar statutes and followed the Washington Supreme Court's lead in a similar case. 124 Nev. at 268 & n.9, 182 P.3d at 109 (citing *Fowler v. State*, 139 P.3d 342 (Wash. 2006) (en banc)). In *Fowler*, conversations were recorded by a caller in Oregon (a one-party consent state) on equipment located in Oregon. 139 P.3d at 343. The calls were admitted against the defendant in Washington, a two-party consent state. *Id.* The Washington Supreme Court held it was bound by the territorial rule announced in an earlier civil case, *Kadoranian v.*

Bellingham Police Dept., 829 P.2d 1061 (Wash. 1992) (en banc). In *Kadoranian*, the court had held that "[i]nterceptions and recordings occur where made." *Id.* at 186, 1065. In so holding, *Kadoranian* adopted "the view that courts generally determine the validity of a telephone interception by looking to the law of the jurisdiction in which the interception—or the recording—is made." *Fowler*, 139 P.3d at 346 (citing *Kadoranian*, 829 P.2d at 1065, n.16 (collecting cases)). Applying its territorial rule from *Kadoranian*, the court in *Fowler* held the telephone calls were lawfully "recorded in Oregon with the consent of one of the parties to the call" and thus were admissible in Washington. *Fowler*, 139 P.3d at 347. In *Mclellan*, this Court was persuaded the Washington Supreme Court had applied the correct territorial rule. 124 Nev. at 268, 182 P.3d at 109.

E. The Weight of Authority Is Against Plaintiff's Position

Like Nevada and Washington, an overwhelming majority of courts across the country apply the territorial rule in this context. The majority rule decides the legality of telephone recording according to the law of the state where the recording is made. *E.g.*, *Huff v. Spaw*, 794 F.3d 543, 547 (6th Cir. 2015) ("The relevant location is not where the

[plaintiff's] conversations took place, but where [the defendant] used a device to acquire the contents of those conversations.") (following *United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987) (Kennedy, J.)); *Stowe v. Devoy*, 588 F.2d 336, 341 n.12 (2d Cir. 1978) ("The law of the locality in which the tap exists (and where the interception takes place) governs its validity, even though the intercepted phone conversations traveled in part over the United States communication system."); *State v. Fleming*, 755 P.2d 725, 727 (Or. 1988) ("The recording was made in Oregon lawfully, and Washington law simply does not apply.").

These decisions recognize the majority rule prevents the friction that would otherwise arise if a strict two-party consent law were applied to calls recorded legally in a one-party consent state. *E.g.* *Commonwealth v. Houseman*, 986 A.2d 822, 842 (Pa. 2009) ("Although Pennsylvania has an interest in preventing its citizens from being tape-recorded without proper consent, we cannot control our sister states' otherwise legal undertakings."); *State v. Vincente*, 688 A.2d 359, 362–63 (Conn. App. Ct. 1997) ("It is clear that the Connecticut wiretapping statutes are designed to regulate the interception of wire communications within the state of Connecticut, and not to regulate the

method that a sister state or the federal government may employ in regulating the interception of wire communications under their respective jurisdictions."). A list of the leading state and federal cases applying the territorial rule is appended to the end of this brief.

Buckles relies on the minority rule. He cites the California Supreme Court's decision in *Kearney v. Salomon Smith Barney, Inc.*, which held California law applies to telephone calls with California residents that were recorded legally in Georgia. *Id.* at 137 P.3d 914, 931 (Cal. 2006). That decision rests not on statutory text but on the judicially discerned "purpose" to protect privacy. *Id.* at 137 P.3d at 930. The approach taken in *Kearney* should not be followed for several reasons—though it is worth noting here (and discussed in greater detail below) that even *Kearney* recognized its interpretation was novel and could not be applied retroactively. *Id.* at 137 P.3d at 938.

First, *Kearney* conflicts with this Court's decision in *Mclellan*, which held telephone recording violates Nevada law only when "the interception take[s] place in Nevada." 124 Nev. at 267, 182 P.3d at 109. Second, the California court failed to recognize that "recording" was the focus of its statute and thus did not give weight to where the recording

takes place. Third, the court dodged the rule of lenity by improperly divorcing California's civil remedies from the criminal penalties in the same statute. *See* 137 P.3d at 928 & n.6. Fourth, *Kearney* fails to reckon with the long line of cases in the majority like *Mclellan*, *Fowler* and *Kadoranian*, which apply the territorial rule. Instead, the court simply announced, *ipse dixit*, that one who records a telephone call outside California *effectively* records the call within California: "A person who secretly and intentionally records a conversation from outside the state effectively acts within California in the same way a person effectively acts within the state by, for example, intentionally shooting a person in California from across the California-Nevada border." *Id.* at 137 P.3d at 931. The analogy is inapt; an essential element of murder is obviously death, which occurred in California, whereas the only element here, an "interception," was complete upon its commission where it occurred. In any case, the mere existence of adverse effects in one state, produced by conduct in another, says nothing about the legislature's *intent* to give its statute extraterritorial application to the out-of-state conduct.

F. Comity Weighs Against Construing NRS 200.620 To Apply To Out-of-State Conduct

The "focus" of NRS 200.620 is unauthorized "interception" of "any wire communication." The act of interception must occur in a particular place. *See* NRS 179.30 ("Intercept" means "the aural acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device or of any sending or receiving equipment."). Ditech only intercepts calls in Arizona and Minnesota, where it is legal to so with one party's consent; it did not intercept any calls in Nevada.

Adopting the territorial rule avoids interference with the internal affairs of other states, such as Arizona and Minnesota here, that permit recording within their territorial jurisdiction with one-party consent. It keeps Nevada's policy preference confined to this State and minimizes tension with other states that make one-party-consent recordings legal. Nevada is one of only a handful of states requiring two-party consent for legal telephone recordings. If companies like Ditech could be held criminally liable for violating NRS 200.620 by recording calls in Arizona and Minnesota, then the stricter law of the few would dethrone the rest. *See Morrison*, 561 U.S. at 269–70; *see also Union Underwear*, 50 S.W.3d

at 190 ("Imposing the policy choice by the Commonwealth on the employment practices of our sister states should be done with great prudence and caution out of respect for the sovereignty of other states, and to avoid running afoul of the Commerce Clause of the United States Constitution.").

Because NRS 200.620's text does not clearly and unambiguously extend its reach beyond Nevada's borders, it applies only to domestic interception of telephone calls, not interception outside the State.

G. The Territorial Rule Of *Mclellan* Is The Better, More Workable Rule

The territorial rule is the more workable rule and better accords with settled expectations. Adopting an extraterritorial rule would require overruling *Mclellan*. Rejection of the defendant's NRS 200.620 argument was essential to the Court's holding there. *See Mclellan*, 124 Nev. at 266–67, 182 P.3d at 108. *Mclellan*'s territorial rule is thus controlling. Doubtless the decision has been relied upon by countless companies like Ditech that routinely record interstate business calls with Nevada customers.

Plaintiff's contrary interpretation is staggering in its breadth and consequences, especially given the interstate nature of telecommuni-

cations combined with modern-day mobility. Under Buckles' proposed interpretation, any company, no matter where located, would be liable—unwittingly—if it recorded a call with a person who happened to be in Nevada. Whether or not that person was a Nevada resident, as long as someone in Nevada placed or received the call, an out-of-state business that failed to obtain consent would violate Nevada law and could be subject to potentially annihilating class-action damages, including claims for punitive damages. Avoiding liability would be costly if not impossible, effectively requiring out-of-state businesses to ascertain the location of every single caller or obtaining advance consent from every person with whom it has a telephone conversation, even if the person has no apparent connection to Nevada.

Ditech, for example, could be subject to damages if it recorded a call with one of its Minnesota customers who happened to be in a hotel room in Reno. Or an Arizona divorcee who can legally record her calls at home would commit a felony if she recorded her ex-husband threatening her from a Las Vegas casino. Such a rule is unworkable and would set terrible precedent.

The better rule is the territorial one. Under such a rule, anyone desiring to record a call knows and can control where the act of recording occurs and can ensure compliance with the laws of that jurisdiction, including laws that require consent or court approval. Such a rule confines NRS 200.620 to recordings made within Nevada, where a district judge has the authority to issue the "court order" required by NRS 179.460. It harmonizes the out-of-state evidentiary rule of NRS 48.077 with the in-state exclusionary rule of NRS 179.500. It comports with canons of statutory construction. It does not criminalize or penalize out-of-state commercial conduct that is legal where it occurs. It is the majority rule, embraced by states like Washington in *Kandoranian* and *Fowler*. And it avoids infringing the sovereignty of sister states such as Arizona and Minnesota, which permit Ditech to record calls within their borders with one-party consent.

The Court should therefore reaffirm *Mclellan* and hold NRS 200.620 does not apply extraterritorially to calls recorded legally outside Nevada in the jurisdictions where the recordings took place.

II.

IF THE COURT CONSTRUES NRS 200.620 EXTRATERRITORIALLY, IT SHOULD APPLY THAT NEW INTERPRETATION PROSPECTIVELY ONLY

If the Court were to apply NRS 200.620 to conduct taking place in other states despite *Mclellan*, the Court should apply that new interpretation prospectively only. All of the factors relevant to assessing this question, *see Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 35, 867 P.2d 402, 405 (1994) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971)), support prospective-only application.

First, interpreting NRS 200.620 to apply extraterritorially would "overrul[e] clear past precedent on which litigants may have relied." *Breithaupt*, 110 Nev. at 35, 867 P.2d at 405. This Court in *Mclellan* expressly rejected the argument NRS 200.620 governs whenever a party to the call is inside Nevada and does not consent to recording. 124 Nev. at 266, 182 P.3d at 108–09. Reaching the opposite result in this case would require the Court to overrule *Mclellan*. As the Court has explained, "[t]he overruling of a judicial construction of a statute generally will not be given retroactive effect." *Breithaupt*, 110 Nev. at

36, 867 P.2d at 406; *see also Nevis v. Fidelity New York*, 104 Nev. 576, 579, 763 P.2d 345, 347 (1988) (giving prospective effect to decision overruling precedent).

Even assuming *Mclellan* did not adopt a territorial rule for NRS 200.620, applying a new extraterritorial rule in this case would not be proper because existing law did not "clearly foreshadow[]" such a result. *Breithaupt*, 110 Nev. at 35, 867 P.2d at 405. In *In re Discipline of Schaefer*, this Court applied its interpretation of a professional-conduct rule prospectively only given "the absence of guidance from this court" and "the existence of conflicting authority from other jurisdictions." 117 Nev. 496, 501, 513, 25 P.3d 191 (2001). Similarly, in *Gier v. Ninth Judicial District Court*, the Court applied its new interpretation of a statute prospectively only because the statute was silent on the issue and "could be interpreted differently by reasonable people." 106 Nev. 208, 789 P.2d 1245, 1248 (1990); *see also Griffin v. State*, 122 Nev. 737, 743, 137 P.3d 1165, 1169 (2006); *Ziglinski v. Farmers Ins.*, 93 Nev. 21, 24, 558 P.2d 1147, 1148 (1977).

The same logic applies here. NRS 200.620 is silent as to whether it applies extraterritoriality. At the time of the challenged conduct,

Mclellan held that NRS 200.620 applies only if "the interception take[s] place" in Nevada, but not if "the interception take[s] place" elsewhere. 124 Nev. at 267, 182 P.3d at 109. The legislative history from S.B. 449 in 1981 reflects the accepted view that NRS 200.620 only applies territorially, and law from a majority of other jurisdictions supported this interpretation. Because Ditech "could have reasonably concluded that [NRS 200.620] did not apply" extraterritorially, any different interpretation should apply prospectively only. *See Schaefer*, 117 Nev. at 512, 25 P.3d at 202.

Second, retrospective operation would not further NRS 200.620's purposes. *Breithaupt*, 867 P.2d at 405. Ditech cannot go back in time and comply with the new standard. As this Court has recognized, retroactive application in such circumstances makes no sense. *See Breithaupt*, 110 Nev. at 36, 867 P.2d at 406 (explaining retrospective application would "do[] nothing to promote the [insurance statute's] objectives" since insurers "do not have the opportunity to comply retroactively with a new and more demanding standard").

Third, applying a new interpretation retroactively "could produce substantial inequitable results." *Id.* at 35, 867 P.2d at 405. It would be

"highly inequitable" to subject defendants like Ditech to "potentially large liabilities"—including punitive damages—"for failing to meet a standard pronounced years after the fact." *Id.*

Applying a new extraterritorial rule in this case would raise serious federal and state due process questions. *See* U.S. Const. amend. XIV; Nev. Const. art. 1, § 8, cl. 5. Due process requires parties be given fair warning of forbidden conduct, *Bouie v. City of Columbia*, 378 U.S. 347, 359 (1964), particularly conduct that is subject to criminal or quasi-criminal sanctions such as punitive damages. *See, e.g.*, *F.C.C. v. Fox*, 132 S. Ct. 2307, 2317–20 (2012) (holding that broadcasters were not given constitutionally sufficient notice of prohibited conduct); *Marks v. United States*, 430 U.S. 188, 196 (1977) (defendants "had no fair warning that their products might be subjected to the new standards"); *Rabe v. Washington*, 405 U.S. 313, 315 (1972) (law did not give "fair notice that [the] conduct [wa]s proscribed").

This Court has also recognized the due process limits on applying judicial interpretations retroactively in criminal and civil cases. *See Schaefer*, 117 Nev. at 513, 25 P.3d at 203 (due process concerns compelled court to make interpretation of attorney-conduct rule

prospective only); *Stevens v. Warden*, 114 Nev. 1217, 1221–22, 969 P.2d 945, 948–49 (1998) (holding that retroactive application of judicial interpretation would violate due process). The federal court that certified questions to this Court in this case likewise noted the "serious" Due Process and Commerce Clause questions it would have to address if this Court were to apply NRS 200.620 extraterritorially. The Court should avoid requiring the federal district court to decide these difficult constitutional issues.

Finally, although the California Supreme Court in *Kearney* interpreted its statute to apply extraterritorially, the court gave its interpretation only prospective effect. *See,*137 P.3d at 914. As the court explained, at the time of the challenged conduct, "a business entity reasonably might have been uncertain as to which state's law was applicable and reasonably might have relied upon the law of the state in which its employee was located." *Id*. at 137 P.3d at 938. Moreover, "the few lower court decisions" addressing the issue "had reached differing conclusions," and "the deterrent value of . . . a potential monetary recovery [under the statute] cannot affect conduct that already has occurred." *Id* at 137 P.3d at 938.

For these same reasons, should the Court adopt an extraterritorial rule, it should apply that new rule prospectively only. The case for prospective application is even stronger here, given neither the text of Nevada's call recording statutes nor any decision of this Court or the Court of Appeals has even hinted that NRS 200.620 applies to out-of-state conduct, and *Mclellan* held just the opposite. No notice cannot be fair notice. Ditech cannot be forced to pay penalties and punitive damages for violating a standard announced here years after the recordings were made. *See State Farm*, 538 U.S. at 417; *BMW v. Gore*, 517 U.S. 559, 572–74 (1996).

CONCLUSION

The terms of the relevant statutes reveal that NRS 200.620 does not apply to telephone recordings made outside Nevada. *Mclellan* so holds and should be reaffirmed. If there were any doubt, sound principles of statutory construction require confining the statute within the State's borders, with no extraterritorial reach to outlaw conduct that is legal in the state where a recording is made. To hold otherwise would impose Nevada's policy preference for two-party consent on other states without fair notice or their consent.

Should the Court nevertheless decide to apply NRS 200.620 extraterritorially, such an abrupt change in the law must be applied prospectively only.

DATED this 23rd day of September, 2016.

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APPENDIX OF CASES

State Cases:

Broughal v. First Wachovia Corp.,
14 Pa. D. & C. 4th 525, 532–33 (Pa. Commw. Ct. 1992)

Commonwealth v. Bennett, 369 A.2d 493, 494–95 (Pa. Super. Ct. 1976)

Commonwealth v. Houseman, 986 A.2d 822, 842 (Pa. 2009)

Frick v. State, 634 P.2d 738, 740 (Okla. Crim. App. 1981)

Kadoranian v. Bellingham Police Dept.,
829 P.2d 1061, 1065 (Wash. 1992) (en banc)

People v. Barrow, 549 N.E.2d 240, 253–54 (Ill. 1989)

State v. Fleming, 755 P.2d 725, 727 (Or. Ct. App. 1988)

State v. Fowler, 139 P.3d 342, 347 (Wash. 2006) (en banc)

State v. Mayes, 579 P.2d 999, 1005 (Wash Ct. App. 1978)

State v. Nieuwenhuis, 706 P.2d 1244, 1245–46 (Ariz. 1985)

State v. Ruggiero, 35 A.3d 616, 621 (N.H. 2011)

State v. Vincente, 688 A.2d 359, 362–63 (Conn. App. Ct. 1997)

Federal Cases:

Huff v. Spaw, 794 F.3d 543, 547 (6th Cir. 2015)

MacNeill Eng'g Co. v. Trisport, Ltd.,
59 F. Supp. 2d 199, 202 (D. Mass. 1999)

Stowe v. Devoy, 588 F.2d 336, 341 & n.12 (2d Cir. 1978)

United States v. Bennett, 538 F. Supp. 1045, 1047 (D.P.R. 1982)

United States v. Cotroni, 527 F.2d 708, 711 (2d Cir. 1975)

United States v. Peterson, 812 F.2d 486, 492 (9th Cir. 1987)

United States v. Tirinkian, 502 F. Supp. 620, 627 (D.N.D. 1980)

NRAP 28(f) ADDENDUM

N.R.S. 48.077

48.077. Contents of lawfully intercepted communications

Except as limited by this section, in addition to the matters made admissible by NRS 179.465, the contents of any communication lawfully intercepted under the laws of the United States or of another jurisdiction before, on or after July 1, 1981, if the interception took place within that jurisdiction, and any evidence derived from such a communication, are admissible in any action or proceeding in a court or before an administrative body of this State, including, without limitation, the Nevada Gaming Commission and the State Gaming Control Board. Matter otherwise privileged does not lose its privileged character by reason of any interception.

N.R.S. 179.430

179.430. "Intercept" defined

"Intercept" means the aural acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device or of any sending or receiving equipment.

N.R.S. 179.460

179.460. Circumstances in which interception of communications may be authorized; immunity.

1. The Attorney General or the district attorney of any county may apply to a Supreme Court justice or to a district judge in the county

where the interception is to take place for an order authorizing the interception of wire, electronic or oral communications, and the judge may, in accordance with NRS 179.470 to 179.515, inclusive, grant an order authorizing the interception of wire, electronic or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when the interception may provide evidence of the commission of murder, kidnapping, robbery, extortion, bribery, escape of an offender in the custody of the Department of Corrections, destruction of public property by explosives, a sexual offense against a child, sex trafficking, a violation of NRS 200.463, 200.464 or 200.465, trafficking in persons in violation of NRS 200.467 or 200.468 or the commission of any offense which is made a felony by the provisions of chapter 453 or 454 of NRS.

2. A provider of electronic communication service or a public utility, an officer, employee or agent thereof or another person associated with the provider of electronic communication service or public utility who, pursuant to an order issued pursuant to subsection 1, provides information or otherwise assists an investigative or law enforcement officer in the interception of a wire, electronic or oral communication is immune from any liability relating to any interception made pursuant to the order.

3. As used in this section, "sexual offense against a child" includes any act upon a child constituting:

(a) Incest pursuant to NRS 201.180;

(b) Lewdness with a child pursuant to NRS 201.230;

(c) Sado-masochistic abuse pursuant to NRS 201.262;

(d) Sexual assault pursuant to NRS 200.366;

(e) Statutory sexual seduction pursuant to NRS 200.368;

(f) Open or gross lewdness pursuant to NRS 201.210; or

(g) Luring a child or a person with mental illness pursuant to NRS 201.560, if punished as a felony.

N.R.S. 179.470

179.470. Application for order authorizing interception of communications; prerequisites to issuance of order

1. Each application for an order authorizing the interception of a wire, electronic or oral communication must be made in writing upon oath or affirmation to a justice of the Supreme Court or district judge and must state the applicant's authority to make such application. Each application must include the following information:

(a) The identity of the investigative or law enforcement officer making the application, and the officer authorizing the application.

(b) A full and complete statement of the facts and circumstances relied upon by the applicant to justify the applicant's belief that an order should be issued, including:

(1) Details as to the particular offense that is being, has been or is about to be committed.

(2) A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, the facilities to be used and the means by which such interception is to be made.

(3) A particular description of the type of communications sought to be intercepted.

(4) The identity of the person, if known, who is committing, has committed or is about to commit an offense and whose communications are to be intercepted.

(c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter.

(e) A full and complete statement of the facts concerning all previous applications known to the person authorizing and making the application made to any judge for authorization to intercept wire, electronic or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application.

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

2. The judge may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. Oral testimony must be reduced to writing.

3. Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing interception of wire, electronic or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that:

(a) There is probable cause for belief that a person is committing, has committed or is about to commit an offense for which interception is authorized by NRS 179.460.

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception.

(c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or appear to be too dangerous.

(d) There is probable cause for belief that the facilities from which, or the place where, the wire, electronic or oral communications are to be intercepted are being used or are about to be used by such person in connection with the commission of such offense or are leased to, listed in the name of, or commonly used by such person.

4. The judge may accept a facsimile or electronic copy of the signature of any person required to give an oath or affirmation as part of an application submitted pursuant to this section as an original signature to the application.

N.R.S. 179.500

179.500. Contents of intercepted communications inadmissible in evidence unless transcript provided to parties before trial

The contents of any intercepted wire, electronic or oral communication or evidence derived therefrom must not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court of this state unless each party, not less than 10 days before the trial, hearing or proceeding, has been furnished with a copy of the court order and accompanying application under which the interception was authorized and a transcript of any communications intercepted. Such 10-day period may be waived by the judge if the judge finds that it was not possible to furnish the party with such information 10 days before the trial, hearing or proceeding and that the party will not be prejudiced by the delay in receiving such information.

N.R.S. 179.505

179.505. Motion to suppress

1. Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency or other authority of this State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that:

(a) The communication was unlawfully intercepted.

(b) The order of authorization under which it was intercepted is insufficient on its face.

(c) The interception was not made in conformity with the order of authorization.

(d) The period of the order and any extension had expired

2. Such a motion must be made before the trial, hearing or proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire, electronic or oral communication, or evidence derived therefrom, must be treated as having been obtained in violation of NRS 179.410 to 179.515, inclusive. The judge, upon the filing of such motion by the aggrieved person, may in the judge's discretion make available to the aggrieved person or the aggrieved person's counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice.

N.R.S. 200.610

200.610. Definitions

1. "Person" includes public officials and law enforcement officers of the State and of a county or municipality or other political subdivision of the State.

2. "Wire communication" means the transmission of writing, signs, signals, pictures and sounds of all kinds by wire, cable, or other similar connection between the points of origin and reception of such transmission, including all facilities and services incidental to such transmission, which facilities and services include, among other things, the receipt, forwarding and delivering of communications.

3. "Radio communication" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by radio or other wireless methods, including all facilities and services incidental to such transmission, which facilities and services include, among other things, the receipt, forwarding and delivering of communications. The term does not include the transmission of writing, signs, signals, pictures and sounds broadcast by amateurs or public or municipal agencies of the State of Nevada, or by others for the use of the general public.

N.R.S. 200.620

200.620. Interception and attempted interception of wire communication prohibited; exceptions

1. Except as otherwise provided in NRS 179.410 to 179.515, inclusive, 209.419 and 704.195, it is unlawful for any person to intercept or attempt to intercept any wire communication unless:

(a) The interception or attempted interception is made with the prior consent of one of the parties to the communication; and

(b) An emergency situation exists and it is impractical to obtain a court order as required by NRS 179.410 to 179.515, inclusive, before the interception, in which event the interception is subject to the requirements of subsection 3. If the application for ratification is denied, any use or disclosure of the information so intercepted is unlawful, and the person who made the interception shall notify the sender and the receiver of the communication that:

(1) The communication was intercepted; and

(2) Upon application to the court, ratification of the interception was denied.

2. This section does not apply to any person, or to the officers, employees or agents of any person, engaged in the business of providing service and facilities for wire communication where the interception or attempted interception is to construct, maintain, conduct or operate the service or facilities of that person.

3. Any person who has made an interception in an emergency situation as provided in paragraph (b) of subsection 1 shall, within 72 hours of the interception, make a written application to a justice of the Supreme Court or district judge for ratification of the interception. The interception must not be ratified unless the applicant shows that:

(a) An emergency situation existed and it was impractical to obtain a court order before the interception; and

(b) Except for the absence of a court order, the interception met the requirements of NRS 179.410 to 179.515, inclusive.

4. NRS 200.610 to 200.690, inclusive, do not prohibit the recording, and NRS 179.410 to 179.515, inclusive, do not prohibit the reception in evidence, of conversations on wire communications installed in the office of an official law enforcement or fire-fighting agency, or a public utility, if the equipment used for the recording is installed in a facility for wire communications or on a telephone with a number listed in a directory, on which emergency calls or requests by a person for response by the law enforcement or fire-fighting agency or public utility are likely to be received. In addition, those sections do not prohibit the recording or reception in evidence of conversations initiated by the law

enforcement or fire-fighting agency or public utility from such a facility or telephone in connection with responding to the original call or request, if the agency or public utility informs the other party that the conversation is being recorded.

N.R.S. 200.630

200.630. Disclosure of existence, content or substance of wire or radio communication prohibited; exceptions

1. Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not disclose the existence, content, substance, purport, effect or meaning of any wire or radio communication to any person unless authorized to do so by either the sender or receiver.

2. This section does not apply to any person, or the officers, employees or agents of any person, engaged in furnishing service or facilities for wire or radio communication where the disclosure is made:

(a) For the purpose of construction, maintenance, conduct or operation of the service or facilities of such a person;

(b) To the intended receiver or his or her agent or attorney;

(c) In response to a subpoena issued by a court of competent jurisdiction; or

(d) On written demand of other lawful authority.

N.R.S. 200.640

200.640. Unauthorized connection with facilities prohibited

Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 200.620, a person shall not make any connection, either physically or by induction, with the wire or radio communication facilities of any person engaged in the business of providing service and facilities for communication unless the connection is authorized by the person providing the service and facilities.

N.R.S. 200.650

200.650. Unauthorized, surreptitious intrusion of privacy by listening device prohibited

Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

N.R.S. 200.690

200.690. Penalties

1. A person who willfully and knowingly violates NRS 200.620 to 200.650, inclusive:

(a) Shall be punished for a category D felony as provided in NRS 193.130.

(b) Is liable to a person whose wire or oral communication is intercepted without his or her consent for:

(1) Actual damages or liquidated damages of $100 per day of violation but not less than $1,000, whichever is greater;

(2) Punitive damages; and

(3) His or her costs reasonably incurred in the action, including a reasonable attorney's fee, all of which may be recovered by civil action.

2. A good faith reliance by a public utility on a written request for interception by one party to a conversation is a complete defense to any civil or criminal action brought against the public utility on account of the interception.

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because this brief has been prepared using Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief exceeds the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 9,347 words.

3. I certify that I have read this brief, and to my knowledge, it is not frivolous or interposed for any improper purpose. This brief complies with all applicable rules of appellate procedure, including NRAP 28(e).

I understand that if it does not, I may be subject to sanctions.

DATED this 23rd day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I submitted the foregoing "Appellant's Opening Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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