No. 70475

IN THE SUPREME COURT OF THE STATE 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.

On certification from the United States District Court for the District of Nevada, No. 2:15-cv-01581-GMN-(CWH)

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYER'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT

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NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The National Association of Criminal Defense Lawyers ("NACDL") has no parent corporation and no publicly held company owns 10% or more of its stock.

The NACDL is represented by Peterson Hope, PLLC.

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INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands, and up to 40,000 attorneys including affiliates' members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is an affiliated organization with representation in the ABA House of Delegates. NACDL is dedicated to advancing the proper, efficient and just administration of justice and files numerous amicus briefs each year in federal and state courts addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

NACDL and its members have strong interests in ensuring that Nevada does not project its decision to criminalize the unilateral recording of a telephone call onto conduct taking place in other States, where such recordings are legal. Buckles claims that a call-center employee located in Arizona or Minnesota becomes a felon under

Nevada law, subject to enormous fines and years in prison, merely by receiving a call from (or placing a call to) a phone number of an individual who is in Nevada and recording the ensuing conversation. It would not matter that the conduct is perfectly legal under the laws of Arizona, Minnesota, and the United States. In other words, because Nevada has chosen a stricter method of regulating telecommunications conduct than other States, that law would follow anyone located in Nevada around the country with every phone call or mouse-click, controlling the conduct of people located thousands of miles away. That result is inconsistent with our federal system.

Conduct in Arizona and Minnesota should not be measured by Nevada's regulatory and criminal standards. NACDL and its members therefore have a significant interest in ensuring that individuals and businesses in other States are not subjected to Nevada's internal law. As this case illustrates, that law turns conduct that is perfectly legal in the jurisdiction where it takes place into a crime simply because the person on the other end of a telephone call happens to be in Nevada. The NACDL submits this brief under NRAP 29.

SUMMARY OF ARGUMENT

Although the question presented is one of statutory interpretation, this Court has held that Nevada law should be interpreted to avoid constitutional infirmity. The interpretation of Nevada law urged by Buckles should be unthinkable in a federal system. States are coordinate sovereigns, paramount within their own borders except as to limited subject matter areas reserved to the federal government. As powerful as they are within their own borders, States do not dictate rules of conduct to be observed in their sister States. To do so would violate the most basic principles of representative government, forcing (for example) Nevadans to submit to laws enacted by a New York government that had no Nevada representation and that Nevadans were utterly powerless to affect. Or, in the present context, Minnesotans would have to tailor their conduct to the preferences of a Nevada Legislature that Minnesotans did not elect and that is not accountable to Minnesotans in any way.

Buckles purports to represent a class of people whose mortgages were serviced by Ditech and who received a phone call from Ditech while they were located in Nevada. *See* Certification Order at 4-5,

Buckles v. Green Tree Servicing, LLC, No. 2:15-cv-01581 (D. Nev. May 25, 2016), ECF No. 40. Buckles alleges that Ditech personnel in Arizona and Minnesota recorded telephone calls between Buckles and its call-centers in Arizona and Minnesota without Buckles' consent. *See id.* There is no dispute that Ditech's recording of those calls complied with Arizona, Minnesota, and United States law, each of which requires only that *one* party to a telecommunication consent to its recording. *See e.g.*, 18 U.S.C. §§ 2511(1)(a), (2)(d)).

Buckles bases his claims on a proposed extension of a Nevada statute to conduct occurring outside Nevada: NRS 200.620(1), which prohibits any party from recording a telephone call without the consent of all parties to the call (except in limited circumstances not relevant here). Notably, Nevada not only imposes civil fines for unilateral recordings, but makes the recordings a Category D felony. NRS 200.690(1)(a). The result is to subject someone who makes a unilateral recording to fines of up to $5,000 per violation and "to imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 4 years." NRS 193.130.

Buckles insists that Nevada may project its regulatory and criminal power beyond its territory and subject the citizens of other states to multiple—and inconsistent—codes of conduct in order to protect the privacy interests of Nevada residents. Yet that argument fails to explain why, according to Buckles' interpretation, the statute should be applied to calls in which the recipient is merely present in Nevada at the time of the call. Buckles wants to partake of the benefits of dealing with businesses and individuals from other States, while carrying with him the protections that Nevada has enacted to regulate conduct within its borders. To the extent that other States choose liberty where Nevada has chosen to regulate, so that those States allow what Nevada forbids, Buckles' solution is simple: Nevada law prevails. Just as British law followed the Union Flag around the world, Nevada law would follow every phone call or mouse-click that touches Nevada or is touched by someone in this State.

Constitutional constraints and sound principles of statutory construction alike compel a different result. The Constitution does not authorize Nevada to enforce its own locally determined policy in every State in the nation. To the contrary, the most fundamental

characteristics of our federal system of government, reflected in both the dormant Commerce Clause and the Due Process Clause, forbid States to reach out and punish out-of-state conduct that is legal where it is undertaken. States are equal and coordinate; some do not become more equal than others, authorized to spread their will throughout the nation, simply by choosing to restrict private conduct more severely than their sister States. The federal government is the authority with power to regulate interstate conduct; a State such as Nevada has no power under the Constitution to dictate how instrumentalities of interstate commerce are used in other States.

In light of these constitutional limitations, this Court should not construe the Nevada Revised Statutes to apply extraterritorially to actions by persons in Arizona or Minnesota using telecommunications facilities in those states. A business that switches on a telephone tape recorder should answer at most to two sovereigns—the federal government and, perhaps, the State where the recording equipment is used—not three or four or fifty sovereigns, depending on who is on the other end of the line. Moreover, the Court should give great weight to the interests of other States in striking their own balance between

privacy and liberty by *permitting* their citizens *freedom* of action with respect to telephone recording. The balance that those states have chosen with respect to conduct within their borders is entitled to at least as much weight as Nevada's decision to restrict and criminalize the same conduct within its borders. The Court should answer the certified question by limiting Nevada's regulatory and criminal prescriptions to conduct within its borders.

ARGUMENT

Buckles asks this Court to permit every person who receives a phone call while in Nevada to impose Nevada regulations and criminal law on out-of-state conduct that was lawful where it occurred. In Buckles' view, Nevada has the power to prescribe rules of conduct for any person in any place, so long as the conduct is tied to someone in Nevada by an instrumentality of interstate commerce such as the telephone network or the Internet. This cannot be. Any such extraterritorial expansion of local prohibitions on primary conduct would conflict with fundamental principles of federalism, contravene the Due Process and Commerce Clauses of the U.S. Constitution (14th

Amend. & art. I, § 8), and distort basic principles of statutory construction.[2]

A. The Court Should Interpret Nevada Law To Avoid Any Conflict With Constitutional Principles.

Although the question certified to this Court is one of statutory interpretation, it necessarily implicates the United States Constitution. Like most States, Nevada has long recognized that, "[w]henever 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). As the United States Supreme Court has expressed this canon of statutory interpretation, "[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). Here, because there is no plain language in the statute requiring extraterritorial application, the Court should adopt an interpretation of NRS 200.620 that limits its application to recordings made within Nevada. As explained below, the

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[2] These concerns about the regulation and criminalization of extraterritorial conduct do not apply to Nevada's control over the rules of evidence in its courtrooms. Thus, NACDL takes no position in this brief on Nevada's rules for admissibility of recorded telephone conversations.

extraterritorial application urged by Buckles conflicts with several constitutional principles and thus should be avoided "if fairly possible" given the text of the statute.

B. Fundamental Principles Of Federalism And Due Process Preclude The Extraterritorial Application Of Nevada Law To The Out-Of-State Conduct At Issue Here.

1. *The Federal Structure Of The United States Precludes State Regulation And Criminalization Of Lawful Conduct In Other States.*

The United States Supreme Court has held that it is "[a] basic principle of federalism ... that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). "[E]ach State *alone* can determine what measure of punishment, *if any*, to impose on a defendant who acts within its jurisdiction." *Id.* (emphasis added).

These statements reiterated the Court's consistent rejection, in varying contexts, of efforts by States to apply their local rules of conduct to activities that occur in other States. Thus, juries cannot add punitive damages for conduct that occurred in other States and might be legal there. *See, e.g, BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-573

(1996). States cannot extend their price regulations to prices in neighboring States. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). And a State's restrictive views about permissible conduct do not travel with its citizens, and thereby place citizens of the other 49 States at the mercy of a single State's policy, simply because they do business—or merely communicate—with people located in that State. As the U.S. Supreme Court put it, "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." *State Farm*, 538 U.S. at 421 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975)). The limit on extraterritorial power is not tied to interstate travel. No similar extraterritorial power arises when people located in one State participate in a telephone call with someone in another State or click a link that leads to a server there. State law does not reach across state borders merely because its citizens do.

That is because States are not at liberty to make *national* policy for the benefit of their own citizens, let alone for the benefit of anyone located in the State. Rather, formulating "policy for the entire Nation" is a matter for Congress, and it is—or should be—"clear that no single

State could do so." *BMW*, 517 U.S. at 571. Indeed, "no single State" can "impose its own policy choice" even "on neighboring States." *Id.* States certainly cannot impose their will on another State based only on their connection through communications over interstate telephone lines or the Internet.

In short, no State can "project its legislation into [other States]" *Brown-Forman Distillers Corp v. New York State Liquor Auth.*, 476 U.S. 573, 582-583 (1986) (alteration in original; internal quotation marks omitted). That limit is implicit in the federal structure of the United States Constitution, which makes the federal government supreme over the States, but which cannot countenance any single State's efforts to impose its own norms of conduct on other States as if it shared Article VI supremacy with the federal government. *See* U.S. Const. art. VI. In the Supreme Court's view, "[i]t would be impossible to permit the statutes" of any State "to operate beyond the jurisdiction of that State ... without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution

depends." *State Farm*, 538 U.S. at 421 (quoting *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914)).

This notion of separate spheres of state and federal jurisdiction is so central to the existence of a Republic consisting of coordinate States that few bodies of state government have challenged it by presuming to extend their conduct regulations beyond their own borders. As the U.S. Supreme Court has recognized, the territorial limit on state conduct regulation is "'so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.'" *State Farm*, 538 U.S. at 421 (quoting *New York Life*, 234 U.S. at 161).

The contrary proposition advanced by plaintiffs here is no sounder than it was when the U.S. Supreme Court rejected it in decisions like *State Farm*, *BMW*, or *Healy*. A State cannot export its standards of conduct over the telephone wires, cellular systems, or the Internet any more than it can prescribe rules for conduct taking place in another State "merely because the welfare and health of its own citizens may be affected." *State Farm*, 538 U.S. at 421 (quoting *Bigelow*, 421 U.S. at 824). Nor does the cavalier treatment of these principles of federalism

by the California Supreme Court in *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (2006)—placing California's judgment on a pedestal over the contrary decisions reached by its sister States—justify disregard of the plain federalism jurisprudence of the Supreme Court of the United States. Someone using a telephone in Arizona or Minnesota is free to use whatever technology in whatever manner is allowed by the laws of that State and the United States, regardless of the laws of the jurisdiction in which the individual on the other end of the line happens to be found. Conversely, someone concerned with the privacy of communications with a mortgage provider can choose to borrow from a Nevada lender in order to ensure that the lender's conduct is governed by Nevada's policy choices.

2. *Due Process Precludes Any State From Criminalizing Conduct That Occurs Out-of-State And Is Legal Where It Occurs.*

The U.S. Supreme Court has repeatedly found that the Due Process Clause forbids States to extend their rules of conduct beyond their borders to impose liability for conduct that is legal where it occurs. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (quoted in *BMW*, 517 U.S. at 573 n.19). In two decisions (*State Farm* and *BMW*) that also rest on fundamental principles of federalism, the Court explained in detail why the Constitution does not countenance efforts to regulate conduct in other States through the back door of tort litigation.

In each case, the Court refused to permit States to award punitive damages—a quasi-criminal sanction—for conduct that was lawful where it occurred. The Court made clear that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," as those sanctions would "infring[e] on the policy choices of other States." *BMW*, 517 U.S. at 572. Under our Constitution, a State simply does not "have a legitimate concern in ... punish[ing] a defendant for unlawful acts committed outside of the State's jurisdiction." *State Farm*, 538 U.S. at 421. That is so even though the conduct may affect the State's residents. Nevada cannot prescribe rules for Arizonans or Minnesotans acting in those States simply because people who receive calls within the State have chosen to do business with out-of-State entities. [3]

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[3] Thus, controlling U.S. Supreme Court authority offers no support

The extraterritorial application of Nevada's statute would violate due process for another reason. The Due Process Clause protects the "expectation of the parties" as to which jurisdiction's laws would apply to claims between them. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985); *cf.* Restatement (Second) Conflict of Laws § 6 cmt. G (2016) ("it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state"). Ditech reasonably conformed the conduct of its Arizona and Minnesota facilities to Arizona and Minnesota law respectively. Buckles cannot explain why Ditech instead should have conformed its conduct to Nevada law (and, presumably, the

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for the California Supreme Court's holding that the Due Process Clause permits individuals to send their home State's laws (or the laws of whichever State they happen to be standing in) through the telephone lines to control out-of-State conduct. *See Kearney*, 137 P.3d at 920. A State's ability to regulate *in*-State activity by an out-of-State actor does not imply similar power to regulate out-of-State conduct. And the fact that conduct may have an effect on people located within a State is not enough of a hook to afford that State power to regulate, let alone criminalize, the out-of-State conduct. Notably, even if *Kearney* were correctly decided, it would not justify the interpretation urged by Buckles here, according to which Nevada would regulate any conduct that affects someone located within the state. The *Kearney* court emphasized that California was projecting its regulatory authority only based on its interest in protecting "California residents while they are in California" and was not purporting to regulate "a defendant's conduct in another state *vis-à-vis another state's residents.*" 137 P.3d at 920.

law of every other State) based on the possibility that the person answering a call may be located in Nevada (or any other State).

Surely Ditech could not reasonably expect that the operation of its facilities in Arizona and Minnesota in conformance with the laws of those States nevertheless would expose it and its employees to criminal sanctions—including enormous fines and possible jail time—based on a provision of the Nevada Revised Statutes. It would be a "due process violation of the most basic sort" to permit another State's substantive law to become the basis for recovery or punishment under that foreign State's unique remedial scheme. *BMW*, 517 U.S. at 573 n.19 (quoting *Bordenkircher*, 434 U.S. at 363). That alone should preclude application of Nevada law to Ditech's Arizona and Minnesota facilities and employees.

3. *Modern Telecommunication Technology And Practices Exacerbate The Due Process Violation.*

When telephone communication was confined to landlines, phone numbers were tied to a specific switch at a specific geographic location. This provided both a physical anchor that connected any communication involving a phone number to a specific place and a

ready method for determining the jurisdiction in which an individual was located while speaking on the telephone. That was the past.

The most recent data available from the federal government shows that almost two thirds of households use only or mostly wireless telephone service. Specifically, "[m]ore than two in every five American homes (45.4%) had only wireless telephones (also known as cellular telephones, cell phones, or mobile phones) during the second half of 2014—an increase of 4.4 percentage points since the second half of 2013." National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2014*, at 1, http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201506.pdf. Moreover, 14.9% of households have both a landline and wireless service but "receive all or almost all calls on cell phones." *Id.* at 3. Thus, for 60.3% of households, any communication will certainly or almost certainly be on a mobile telephone. And that number is only getting higher.

Furthermore, more and more "land-line" services are actually provided by Voice Over Internet Protocol ("VoIP") rather than traditional switched access over telephone wires. The Federal

Communications Commission reports that, "[i]n December 2013, there were 85 million end-user switched access lines in service, 48 million interconnected VoIP subscriptions, and 311 million mobile subscriptions in the United States." FCC, Local Telephone Competition: Status as of December 31, 2013, at 1, https://apps.fcc.gov/edocs_public/attachmatch/DOC-329975A1.pdf. Again, the number of "land-lines" that are serviced by VoIP is only growing: "between 2010 and 2013, "interconnected VoIP subscriptions increased at a compound annual growth rate of 15%, mobile telephony subscriptions increased at a compound annual growth rate of 3%, and retail switched access lines declined at 10% a year." *Id.* at 2.

The rapid demise of geographically-associated land-lines also is furthered by number portability, which allows consumers to transfer a number between a traditional switched line, a VoIP provider, and a wireless provider. Thus, even a phone number that originally was assigned as a switched line based on geographic location may now be associated with a wireless telephone or a VoIP service provider.

These modern trends in telecommunication technology and usage matter for the present case because mobile telephone service and, to a

lesser extent, VoIP service are not tied to a specific location. A mobile telephone can place or receive a call from anywhere that service is available. And a VoIP "landline" telephone can be moved from one location to another by moving the equipment that is used to connect to the Internet. Accordingly, it is increasingly difficult to know the physical location of someone on the other end of a phone call (and the physical location where a call is received is increasingly irrelevant to any legitimate government interest).

This means that it is effectively impossible for a company like Ditech to tailor the conduct of its call center facilities to the location of the person on the other end of each call. Specifically, those centers cannot systematically and reliably determine whether the person to whom they are speaking is located in Nevada (certainly not without raising another raft of privacy concerns). Accordingly, if Nevada law applies to any call on which one party is located in Nevada, call centers like Ditech's would have little choice but to comply with Nevada law on every call. That is, of course, unless another State has imposed an even more restrictive regulation, in which case the call center must follow that regulation for all calls.

The end result is that, if this Court adopts Buckles' proposed extension of NRS 200.620(1), then Nevada law will, as a practical matter, regulate *all* recordings of interstate telephone calls, which would necessarily include huge swaths of commercial conduct that has no connection with Nevada whatsoever.

C. The Commerce Clause Precludes Extraterritorial Regulation Of The Use Of An Instrumentality Of Interstate Commerce.

The Commerce Clause provides another constitutional barrier to Buckles' efforts to subject Ditech's out-of-state activity to Nevada standards of conduct. While the Commerce Clause explicitly allocates to Congress the power to regulate interstate commerce, "dormant" Commerce Clause jurisprudence recognizes that this carries with it an implicit preclusion of similar power to the individual States. Any examination of State statutes under the Commerce Clause must take into account "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-336. What Buckles asks this Court to countenance here quite

plainly amounts to "extraterritorial regulation of interstate commerce in violation of the Commerce Clause." *Id.* at 332. According to Buckles, Nevada law should govern commercial communications that originate in Arizona and Minnesota before crossing state lines into Nevada.

1. *Buckles Proposes A Facially Unconstitutional Direct Regulation Of Interstate Commerce.*

"When a state statute directly regulates ... interstate commerce," the U.S. Supreme Court has "generally struck down the statute without further inquiry." *Brown-Forman*, 476 U.S. at 579. "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. The extended application of Nevada's regulatory and criminal laws that Buckles proposes does not only create "extraterritorial effects" (*Brown-Forman*, 476 U.S. at 581)—although extraterritorial effects are sufficient to invalidate many state regulations. *See id.*; *Healy*, 491 U.S. at 331-339. As Buckles would apply it here, NRS 200.620(1) would also "directly regulate[]" out-of-state conduct undertaken as part of interstate commercial activity. Specifically, persons using interstate telecommunications facilities in Arizona and Minnesota would be directly regulated by Nevada and could not rely on the legality of their

conduct under federal law and the law of the State in which they were located. That "attempt to regulate interstate conduct occurring outside [Nevada's] borders" amounts to "a per se violation of the Commerce Clause." *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999); *see also, e.g., American Beverage Ass'n v. Snyder*, 735 F.3d 362, 373-76 (6th Cir. 2013) (Michigan's "unique mark" bottle deposit law impermissibly allowed Michigan to regulate bottling practices outside of state); *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667-68 (7th Cir. 2010) ("To allow Indiana to apply its law against title loans when its residents transact in a different state that has a different law would be arbitrarily to exalt the public policy of one state over that of another.").

2. *The Threat Of Inconsistent Regulation Would Further Invalidate Extraterritorial Application Of Nevada's Standards To Ditech's Conduct.*

The Commerce Clause specifically "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 337. That principle is clearly implicated here, where both Arizona and Minnesota allow the very act that Nevada has chosen to forbid. Although Nevada

has a legitimate interest in protecting the privacy of its citizens, privacy is a right that Nevada and other States must balance against other interests and rights. Each State legitimately may reach different conclusions about how to strike that balance. As the U.S. Supreme Court has explained:

> No one doubts that a State may protect its citizens by prohibiting deceptive trade practices .... But the States need not, and in fact do not, provide such protection in a uniform manner. ... The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.

BMW, 517 U.S. at 568-70; *accord In re Brown-Forman /Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules.").

This is an actual rather than merely hypothetical concern. For example, in the present context, the federal government and most States have struck the balance between privacy, liberty, and transparency differently than Nevada. The divergence among sovereigns also holds true with respect to many other areas involving privacy. *Cf.* Daniel Solove, *Access and Aggregation: Public Records,*

Privacy, and The Constitution, 86 Minn. L. Rev. 1137 (2002) (describing the constant tension between the right to privacy and desire for transparency in the public sector); Electronic Privacy Information Center, *Privacy Laws by State*, http://www.epic.org/privacy/consumer/states.html (listing various areas in which States have enacted regulations related to privacy).

As a consequence, if each State's privacy laws reached out to govern out-of-state conduct using the means of interstate commerce whenever that conduct touched someone within the state, it would result in exactly the type of paralysis through inconsistent and overlapping regulation that the Commerce Clause was intended to prevent.

3. *Using Interstate Telecommunications Networks To Project State-Law Authority Into Other States Would Turn Settled Notions Of The Federal-State Allocation Of Power Upside Down.*

Commerce Clause concerns are heightened when one State bases the extraterritorial projection of its laws on its citizens' use of interstate telecommunications networks. Few aspects of American life are more quintessentially federal than the interstate telephone network. The historical foundations for that phenomenon date back to the invention

of the telegraph. The U.S. Supreme Court almost immediately recognized that the Commerce Clause bars any single State from regulating interstate telegraph communications, and eventually developed rules that allowed regulation only if it was confined to conduct entirely within the regulating State. *See generally* James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 Vanderbilt L. Rev. 1095, 1120-1121 (1999) (noting that limited regulations on in-state delivery of telegraph messages eventually passed constitutional muster).

Following similar principles, the regulation of the telephone system long has been divided into two spheres. First, in-state calls are largely (indeed, in the absence of specific congressional action like that in the 1996 Telecommunications Act, exclusively) a matter for the States. Second, interstate long distance communications are regulated exclusively by the federal government. *See, e.g.*, *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1931) (recognizing that state taxation and regulation can only reach intrastate aspects of telephone service because of the need to recognize "competent governmental authority in each field of regulation," *i.e.*, federal authority for interstate service,

state authority for intrastate service); *see also* 47 U.S.C. §§ 151, 152(a) (giving Federal Communications Commission exclusive jurisdiction over interstate telephone service).[4]

For Nevada to make the out-of-state use of interstate telephone equipment the *basis* for extending its regulatory and criminal authority beyond its borders would turn this long-standing, constitutionally based division of authority on its head. Whatever authority Nevada may have to regulate the use of instrumentalities of interstate commerce exclusively within its borders, it cannot use the very interstate character of those instrumentalities as a justification for projecting its own standards into the jurisdiction of its sister States.

The implications for Internet commerce also are substantial. If someone can bring an out-of-state individual or business within the sphere of Nevada regulatory and criminal law merely by stepping into

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[4] In the early days of the technology, telephone service was "a primarily local activity," so that "the volume of interstate long-distance calling was relatively insignificant." Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions—A Product of Evolutionary Development*, in A Legislative History of the Communications Act of 1934, at 25 (Max Paglin, ed. 1989). States do not seem to have tried to regulate interstate service in any meaningful way. Indeed, when Congress first asserted exclusive federal authority over interstate service in 1910, few states had more than rudimentary regulatory regimes even for local service. *Id.* at 29.

Nevada when taking a phone call from that individual or business, then surely anyone using the Internet to undertake any type of communication or transaction with someone in Nevada also could be subjected to Nevada regulation and criminal prosecution for out-of-state conduct related to the transaction. Yet, as federal courts of appeal have recognized in rejecting efforts to impose local norms on out-of-state Internet users, any such extension of Nevada law to "regulate interstate conduct occurring outside [Nevada's] borders" would be "a per se violation of the Commerce Clause." See *ACLU v. Johnson*, 194 F.3d at 1161 (invalidating New Mexico's attempt to restrict the distribution of material that, by New Mexico standards, might be harmful to minors); *American Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (invalidating Vermont "harmful to minors" Internet content regulation, and observing that any effort by one State to "project[] its legislation into other States and *directly regulate[]* commerce" in those States would "present[] a *per se* violation of the dormant Commerce Clause (internal quotation marks omitted)).

That a website, like a telephone number, may be accessed by anyone in any State does not subject the technology used for the website

(or the website operator's conduct in operating the site itself) to 50 States' regulations. On the contrary, like the interstate telephone system, the Internet requires a "cohesive national scheme of regulation so that users are reasonably able to determine their obligations." *ACLU v. Johnson*, 194 F.3d at 1162 (quoting *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997)).

Moreover, what is sauce for the goose is sauce for the gander: other States could impose their conduct regulation on Nevada businesses using interstate telecommunications to deal with citizens of those States. While Nevada currently may have greater restrictions on the private conduct at issue here than other jurisdictions, that situation is fluid (and may vary for issues other than the recording of telephone calls). Different States embark on their own regulatory initiatives without any concern for, or accountability to, Nevada interests—many of which depend in large part on commerce conducted over the telephone or over the Internet. This Court should not invite such reciprocal extraterritorial regulation by approving Buckles' efforts here.

D. Congress Has Occupied The Field Of Privacy Regulation Of Interstate Telecommunications.

The extraterritorial projection of Nevada law to regulate the recording of telephone conversations is constitutionally infirm for yet another reason: the standard of conduct itself is preempted under the Supremacy Clause. Not only has Congress acted to exercise its exclusive power to regulate interstate telecommunications generally, it has specifically acted to set a nationwide standard of conduct respecting the recording of telephone calls. *See* 18 U.S.C. §§ 2510-2520 (originally enacted as Pub. L. No. 90-351, §§ 801-802 (June 19, 1968) 82 Stat. 197, 211-223). Under that law, any party to a telephone conversation may record it (unless the recording is part of a criminal or tortious scheme). *See id.* § 2511(c)-(d).

Congress made crystal clear *in the terms of the statute itself* that its whole purpose in enacting this legislation was "to prevent the obstruction of interstate commerce" and "to define *on a uniform basis* the circumstances and conditions under which the interception of wire and oral communications may be authorized." Pub. L. No. 90-351, § 801(b), 82 Stat. 197, 211 (emphasis added). Further, there is no

savings clause in the federal statute that might preserve contrary state standards of conduct.

Indeed, given Congress's effort to promulgate a uniform national standard of conduct, state statutes that purport to more strictly regulate the same *interstate* conduct would be preempted even if Congress had not occupied the field. Those statutes would be preempted because they conflict with the federal enactment, since the State would forbid conduct that Congress, in its judgment, decided to permit.[5] *See generally Geier v. American Honda Motor Co.*, 529 U.S. 861, 873-874 (2000).

Proper regard for the Supremacy Clause, U.S. Const. art VI, means that any application of NRS 200.620(1) to interstate conduct would be preempted.

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[5] Thus, the California Supreme Court was again off-base in citing various authorities holding that federal law did not preempt the application of State wiretapping or privacy law to purely *in*-State conduct. *See Kearney*, 137 P.3d at 921. Those cases noted that Congress intended to allow States to more strictly regulate conduct within their own borders. But not one of those authorities addressed a State's effort to apply its own telephone privacy law to conduct taking place in another jurisdiction and linked to the forum state only by an interstate telephone line.

E. Any Extraterritorial Extension Of NRS 200.620 Should Be Prospective Only.

Even if the Court were to hold that NRS 200.620 applies to any telephone call in which one participant is located in Nevada, it should confine that interpretation to prospective cases. That would respect the interest of Arizona and Minnesota in ensuring that persons located within their jurisdictions are not surprised with liability under the law of another State despite full compliance with the laws of Arizona and Minnesota. It also would be fair to Ditech, which reasonably acted in conformity with the laws of the States in which its facilities were located and had no settled basis in Nevada statutory or case law to believe that it also must comply with NRS 200.620 whenever the person on the other end of the line was located in Nevada.

Notably, when the Supreme Court of California interpreted California's telephone-recording statute to apply extraterritorially, it limited any monetary penalty based on that interpretation to prospective cases and declined to allow any recovery against the Georgia defendant in the case before the court. The court noted that "Georgia has a legitimate interest in ensuring that individuals and businesses who act in Georgia with the reasonable expectation that

Georgia law applies to their conduct are not thereafter unexpectedly and unforeseeably subjected to liability for such actions." *Kearney*, 137 P.3d at 937. It also acknowledged that "prior to our resolution of the issues in this case 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 938. Finally, the court recognized that, because the primary purpose of the statute was to govern conduct rather than compensate an injured plaintiff, California's interests would not be materially compromised by limiting the present plaintiff to an injunction against future violations of the California statute. *Id.*

Applying a novel extraterritorial interpretation of the statute to future cases also would be consistent with the rule of lenity, which requires ambiguities in criminal statutes to be interpreted in favor of those facing prosecution. *See, e.g.*, *Moore v. State*, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006). Although plaintiff is attempting to enforce a private right of action, NRS 200.620 is a criminal law and the damages plaintiff is seeking, both fines and punitive damages, are quasi-criminal in nature. Accordingly, the rule of lenity—and basic fairness to

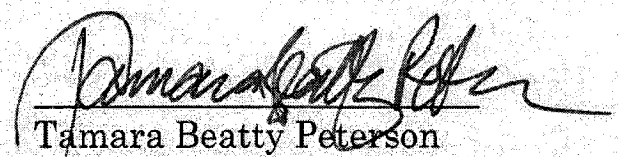
Ditech—compels the conclusion that any expansion of Nevada monetary penalties to conduct that took place in, and fully complied with the laws of, another State should be limited to future parties that have the benefit of this Court's guidance.

CONCLUSION

The Court should answer the certified question by clarifying that NRS 200.620(1) does not apply to recordings made by a party outside of Nevada.

September 30, 2016

Respectfully submitted.



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

I further certify that this brief complies with the type-volume limitations of NRAP 29(e) and 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 6,437 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of September, 2016.

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