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.

CERTIFIED QUESTION

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

RESPONDENT'S ANSWERING BRIEF

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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.

A. Sanford Buckles.

B. Attorneys with Kazerouni Law Group, APC and Haines & Krieger, LLC have appeared on behalf of Sanford Buckles.

C. Attorneys with Hyde & Swigart are expected to appear before this Court on behalf of Sanford Buckles.

Dated this 22nd day of December 2016.

By: /s/ Abbas Kazerounian

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Certified Question Presented

This case is before this Court by way of Certified Question from the United States District Court, District of Nevada under Rule 5 of the Nevada Rules of Appellate Procedure. This Court should hold that NRS 200.620 applies to Ditech Financial, LLC *f/k/a* Green Tree Servicing, LLC's ("Ditech") audio recordings of telephone conversations with Sanford Buckles ("Buckles"), a Nevada resident, involving telephone conversations regarding a Nevada property. Ditech is a large company that services mortgages on a significant portion of homes in Nevada and routinely audio records conversations with Nevada consumers, using recording equipment which is located outside of Nevada.

The plain language of the statute, Nevada's strong policy of protecting privacy interests of its residents, a choice-of-law analysis and the only other high court to address this issue, *Kearney*, supports Buckles' position that NRS 200.620 applies to his claims asserted against Ditech.

Statement of the Case

On August 18, 2015, Buckles filed his Complaint, alleging that Ditech violated NRS 200.620 when it audio recorded Buckles' telephone conversations without consent. On November 25, 2015, Ditech filed its pending Motion to Dismiss. In its Motion, Ditech argued that NRS 200.620 does not apply because it used recording equipment located outside Nevada.

On May 9, 2016, the United States District Court directed the parties "to jointly submit a brief which concisely sets forth a question to be certified to the Nevada Supreme Court addressing the application of Nev. Rev. Stat. § 200.620 to Plaintiff's claims." App. 005. On May 25, 2016, the District Court issued its Certification Order. This Court accepted the Certified Question on June 24, 2016 because the "answers may determine the federal case." *See* Order Accepting Certified Questions.

Statement of the Facts

Buckles lives in Nevada. *See* Am. Compl., Appellant's App'x 01, ¶15. Beginning in 2013, the mortgage servicer, Ditech, had numerous telephone conversations with Buckles while Buckles was in Nevada regarding Buckles' home in Nevada. *Id.* at ¶ 16-17. Although not an

element of NRS 200.620, Buckles alleged that during these telephone conversations, Buckles and Ditech discussed highly personal and private information, including financial capabilities. *Id.* at ¶ 16. Ditech did not advise Buckles that Ditech was audio recording the conversations. *Id.* at ¶ 19. Buckles never consented to recording of his telephone conversations. *Id.* at ¶ 18. Ditech admits that it "routinely" records telephone calls with Nevada consumers. Appellant's Brief, p. 41.

Relevant Statutes

Pursuant to NRAP 28(f), a reproduction of the statutes, rules and regulations required for this Court's determination of the issues presented appears in an addendum at the end of this brief.

Summary of Argument

NRS 200.620 applies to Buckles' claims asserted against Ditech. The plain language of NRS 200.620, unlike NRS 48.077, concerning the admissibility of recorded communications, does not contain any location-based limitations and applies to "any person." This Court has previously found NRS 200.620's "plain language" phrase "any person" to support a broad application. *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 969 P.2d 938, 114 Nev. Adv. Rep. 125, 1998 Nev. LEXIS 139 (Nev. 1998). As held in *Lane*, the plain language of the statute supports a broad

application. In any case, Ditech's conduct effectively took place in Nevada and caused harm to people in Nevada. Therefore, a broad application of NRS 200.620 in this case is not required.

Also, NRS 48.077 supports a finding that NRS 200.620 applies to Ditech. NRS 48.077, an evidentiary rule, deems admissible audio recordings "lawfully intercepted under the laws of . . . another jurisdiction." This qualifier would be superfluous if Nevada's recording statutes never applied to recordings made with equipment in other states. NRS 48.077 therefore supports the application of NRS 200.620 in this case.

Similarly, *McLellan v. State* supports application of NRS 200.620 here. 182 P. 3d 106 (Nev. 2008). Before turning to the evidentiary rule NRS 48.077, *McLellan* first held, in *dicta*, that the recording was unlawful under NRS 200.620. Had the communication been lawful, there would be no need to apply the evidentiary rule NRS 48.077 because, of course, lawfully obtained evidence would be admissible, subject to relevant admissibility rules.

Further, this Court has recognized the legislature's extreme reluctance to limit Nevada's all-party consent statute. *Lane*, 114 Nev. at 1180, 969 P.2d at 941. To exempt Ditech, a company which routinely

does business in Nevada, from Nevada's strong all-party consent statute would completely ignore the legislative strong intent in protecting Nevadans from invasions of privacy.

Under the applicable choice-of-law analysis, the Second Restatement's section 152, involving the Right of Privacy, requires that "[i]n an action for an invasion of a right of privacy, the local law of the state *where the invasion occurred* determines the rights and liabilities of the parties." Thus, a choice-of-law analysis provides that Nevada's all-party consent law should be applied in this case.

This Court should be persuaded by the California Supreme Court in *Kearney*, the only other high court to address whether a party may be liable in an all-party consent state for recording conversations using equipment in another state. *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 126, 45 Cal. Rptr. 3d 730, 755-56, 137 P.3d 914, 935-36 (2006). The rationale of *Kearney* applies equally to Nevada: Nevada companies should not be placed at "a competitive disadvantage with their out-of-state counterparts" like Ditech.

Importantly, application of NRS 200.620 in this case is constitutional. Application of Nevada law would be limited to Ditech's surreptitious and/or undisclosed recording of words spoken over the

telephone by Nevada residents while they are in Nevada. "This is a traditional setting in which a state may act to protect the interests of its own residents while in their home state." *Id.*, 39 Cal. 4th at 104, 45 Cal. Rptr. 3d at 737, 137 P.3d at 920. The facts presented did not occur "wholly outside of [Nevada's] borders." *See Id.,* 39 Cal. 4th at 106-07, 45 Cal. Rptr. 3d at 739, 137 P.3d at 922. Accordingly, the application of NRS 200.620 here does not violate the Due Process Clause or the Commerce Clause.

Finally, this Court should not depart from the general rule that its holdings should be applied retroactively. *E.g.*, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538, 111 S. Ct. 2439, 2445 (1991) ("In most decisions of this Court, retroactivity both as to choice of law and as to remedy goes without saying."). Even if this Court considers departing from the general rule of retroactivity, an analysis of the applicable *Breithaupt* standards weigh in favor of retroactive application. *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 35, 867 P.2d 402, 405 (1994). NRS 200.620 is clear on its face and Ditech does not dispute that Nevada's choice-of-law provides that Nevada law applies in this case. A ruling that NRS 200.620 applies in this case would not overrule any precedent and would advance the purpose of NRS 200.620

and NRS 200.690 to protect peoples' privacy and award civil damages to a harmed party. It would also be equitable since Ditech was on notice that Nevada law applies here in light of *Kearney* and Nevada's choice-of-law provision that "*the state where the invasion occurred*" applies to Ditech's routine practice of recording Nevadans' telephone conversations without their consent.

Argument

A. NRS 200.620 applies to telephone recordings made by Ditech, that regularly and secretly recorded telephone conversations with people in Nevada without consent

Application of NRS 200.620 to Ditech's actions is reasonably supported by: (1) the language of the statute, the statutory scheme and cases interpreting the statute, (2) Nevada's choice-of-law analysis providing that Nevada law applies, (3) the California Supreme Court's case in *Kearney* that addressed the same issue before this Court, and (4) Ditech's admitted routine business practice of secretly recording conversations with people in Nevada, on telephone numbers assigned a Nevada area code, regarding Nevada mortgages effectively acting in Nevada and causing harm in Nevada to Nevada residents.

5. The language of NRS 200.620, the statutory scheme, legislative intent, and this Court's past interpretations of the statute support its application in this case

NRS 200.620 applies to Ditech's recordings of people in Nevada as supported by (1) a plain reading of the Statute, (2) the statutory scheme, (3) legislative intent and (4) this Court's interpretation and understanding of NRS 200.620 in *McLellan*.

a. The plain language of NRS 200.620 supports its application in this case

NRS 200.620 states in relevant part:

> 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.

NRS 200.620.

Audio recording telephone conversations is unlawful in Nevada unless one party consents to the recording and there is also an emergency. *Id.* Nevada is well established as a two-party consent state. "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." *McLellan*, 182 P. 3d at 109 (emphasis in original); *see also Lane v. Allstate Ins. Co.*, 969 P. 2d 938, 940 (Nev. 1998) (Single party interception must be judicially pre-approved or judicially ratified where an emergency exists to make preapproval impractical.). Here, no emergency existed and Buckles did not give his consent to Ditech to

record the telephonic communications. Therefore, the only question is whether NRS 200.620 applies to Ditech.

The plain language of the statute supports its application to the facts of this case. NRS 200.620 does not contain any location-based limitations. In fact, the Statute applies to "any person." This Court has previously found NRS 200.620's "plain language" phrase "any person" to support a broad application. *Id.*, 114 Nev. at 969 P.2d at 114 Nev. Adv. Rep. 125, 1998 Nev. LEXIS 139 ("The plain language of this section fails to support the argument that the statute does not prohibit taping one's own telephone conversations: The statute applies to "any person," without exceptions for private parties."); *see also Abel v. Planning & Zoning Comm'n*, 297 Conn. 414, 432-33, 998 A.2d 1149, 1161-62 (2010) ("We conclude, therefore that the phrase 'any person' in § 8-8(a)(1) includes persons who own land in another state."). As held in *Lane*, the plain language of the statute supports a broad application. Consequently, the plain language, absent any location-based limitations and the term "any person," supports its application in this case.

Indeed, this Court has consistently held that the phrase "any person" is to be applied broadly. *E.g.*, *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 394, 135 P.3d 220, 226 (2006)

("'[P]erson' is modified by 'any,' which does not limit 'person,' but demonstrates the Legislature's intent to provide a broad right to sue."); *W. Sur. Co. v. ADCO Credit, Inc.*, 127 Nev. 100, 104, 251 P.3d 714, 716-17 (2011) ("Therefore, based on the plain language of the phrase "any person" as used in NRS 482.345(6), we conclude that its meaning is *clear and unambiguous*, and includes corporate entities such as ADCO.") (emphasis added); *Igbinovia v. State*, 111 Nev. 699, 709-10, 895 P.2d 1304, 1310-11 (1995) ("In this statute, the legislature chose to accord broad authority to the district court judge to order restitution not only to 'victims,' but to any person or persons named in the order.'"); *see also Valentine v. Nebuad, Inc.*, 804 F. Supp. 2d 1022, 1024 (N.D. Cal. 2011) (the "statutes expressly allow an action to be brought by 'any person' or by an 'owner or lessee' without imposing any residency requirements."). The language "any person" should therefore be applied to Ditech.

The cases presented by Ditech that decline to apply the language "any person" to wholly out-of-state conduct are inapplicable in this case because the conduct here involves communications with people located in Nevada. *See Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001) (involving conduct wholly outside of Kentucky so Kentucky law did not apply). Here, Ditech reached into Nevada, routinely does

business in Nevada and routinely records conversations with people in Nevada. Ditech effectively and intentionally acted in Nevada, as more fully discussed below. Thus, the words "any person" applies to Ditech under the circumstances.

Importantly, in applying the statute to Ditech's actions, it is not necessary to apply the words "any person" particularly broadly. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) ("The words 'any person or persons,' are broad enough to comprehend every human being"). Ditech's unlawful recordings in this case effectively took place inside Nevada. The language "any person," therefore applies to Ditech's actions when it purposefully and routinely recorded communications with people in Nevada. Thus, applying NRS 200.620 in this case does not require an unreasonably broad application.

Finally, what is missing from the language in the statute also speaks volumes as to its intended scope and applicability. Unlike NRS 48.077, dealing with *admissibility* of recorded communications, NRS 200.620 which addresses *liability* does not contain any jurisdictional limitations. *Compare* NRS 48.077 ("the contents of any communication lawfully intercepted under the laws of . . . another jurisdiction" are admissible "if the interception took place within that jurisdiction") *with*

NRS 200.620 (containing no jurisdictional limitations). The Legislature specifically and intentionally chose to apply jurisdictional limits to the *admissibility* of such recordings in a way that it did not when creating *liability* for such recordings in NRS 200.620. In sum, the plain language of the statute supports application of NRS 200.620 to the facts of this case.

b. The statutory scheme in connection with admissibility and liability for recording telephonic communications supports application of NRS 200.620 in this case

Like in other states, the legislature enacted different standards for the admissibility of recorded conversations and liability stemming from recorded conversations.

> NRS 48.077 allows the admission of "the contents of any communication lawfully intercepted under the laws of . . . another jurisdiction . . . if the interception took place within that jurisdiction. Thus, if the interception was lawfully made in California, it is admissible in Nevada under NRS 48.077.

McLellan at 109.

Admissibility of recorded communications depends on the location where the interception took place. NRS 48.077; *see also* NRS 179 (judicial authorization for interceptions in law enforcement

investigations, including "murder, kidnapping, robbery, extortion, bribery, escape"). This makes sense, as it would be unduly burdensome to require law enforcement to travel to the location of every person in a conversation for judicial authorization to secretly record conversations. Similarly, when it comes to admissibility, the legislature chose to allow such recordings if "lawfully intercepted under the laws of . . . another jurisdiction" if intercepted in that jurisdiction. NRS 48.077 thus allows recordings from law enforcement in other states to be admitted in Nevada, if lawfully recorded in the other state. *See McLellan* at 109.

That audio recordings are *admissible* if "lawfully intercepted under the laws of . . . another jurisdiction" does not mean the audio recordings by Ditech were *permissible* under Nevada law. NRS 48.077.

Indeed, the language in NRS 48.077 supports a finding that NRS 200.620 applies to Ditech, even if the recording equipment was located outside Nevada. If all recordings are governed strictly by the laws of the state in which the physical recording equipment is located—as Ditech suggests—the language "lawfully intercepted under the laws of . . . another jurisdiction" would be superfluous and unnecessary. The Legislature saw fit to specifically use the language "under the laws of . . . another jurisdiction," showing its understanding that Nevada's

recording statutes may, at least in some cases, apply to "interception[s that] took place within that [other] jurisdiction." The statutory scheme therefore supports NRS 200.620's application in this case even if the physical recording equipment was located in another jurisdiction.

c. Legislative intent

The limited relevant legislative history available relating to Nevada's recording statutes supports a strong intent by the Legislature to protect Nevadan's interest in privacy and to apply Nevada's all-party consent recording statutes broadly.

In *Lane*, this Court discussed the legislature's intent relating to Nevada's all-party consent recording statute. 114 Nev. at 1180, 969 P. 2d at 941 (finding important that even though a bill allowing one-party consent for law enforcement pursuing investigations, "[t]his failure to pass [the bill] speaks eloquently of the legislative intent to prohibit the unauthorized interception of wire communication") (citing Hearing on S.B. 449 Before the Assembly Judiciary Committee, 61st Leg. 4 (1981)). As recognized in *Lane*, the legislature was extremely reluctant to limit Nevada's all-party consent statute—even for law enforcement purposes. To exempt a company such as Ditech that routinely does business in Nevada from Nevada's strong all-party consent statute would be to

completely ignore the strong legislative intent in protecting Nevadans from invasions of privacy.

Nevada has a strong policy of protecting Nevadans' privacy rights. For example, in Nevada, unlike other states, the *content* of communications gathered via unlawful interceptions is not admissible at trial, even if cited from the witness's independent memory. *See Rupley v. State*, 93 Nev. 60, 62, 560 P.2d 146, 147 (1977); NRS 179.505 (providing for a motion to suppress *the contents* of any illegally intercepted wire or oral communications); NRS 179.420 (defining contents as "any information concerning the identity of the parties to such communication or the existence, substance, purport or meaning of that communication."). Ditech should not be allowed to undermine Nevada's strict public policies when it routinely and intentionally reaches into Nevada to conduct business in Nevada.

The legislative intent therefore supports application of NRS 200.620 to this case, especially given Nevada's strong public policy of protecting Nevadan's privacy interests, including privacy interests in their telephonic communications.

d. This Court's finding in *McLellan* supports a finding that NRS 200.620 applies in this case

Although not on point, *McLellan* supports application of NRS 200.620 to Ditech's practice of audio recording telephone conversations with Nevada residents. 124 Nev. at 267, 182 P.3d at 109. *McLellan* was a criminal case involving the admissibility of a telephone communication with a person in Nevada where the telephone conversation was audio recorded without the Nevada resident's consent. The communication was recorded by California law enforcement using equipment located in California, and the California law enforcement did not intend to use the recording in Nevada. This Court found that the recording was lawful under California law and, therefore, was admissible under NRS 48.077.

Importantly, before turning to the evidentiary rule NRS 48.077, *McLellan* first held, in *dicta*, that the recording was unlawfully made under NRS 200.620. Had the communication been lawful under NRS 200.620, there would have been no need to apply the evidentiary rule NRS 48.077 since, of course, lawfully obtained evidence would be admissible, subject to relevant admissibility rules.

McLellan's reliance on the evidentiary rule to find the recording admissible shows that this Court understood that NRS 200.620 may

apply to recordings of people in Nevada even when the recording equipment is located outside Nevada.

Finally, *McLellan's* at length discussion of the Washington Supreme Court case *State v. Fowler* further supports application of NRS 200.620 in this case. 157 Wn.2d 387, 139 P.3d 342 (Wash. 2006). In *Fowler*, the court stressed the intentions of the out-of-state actor in finding the secret recordings admissible in Washington. In reliance thereon, *McLellan* found it important that the California law enforcement had no intention to use the recorded conversations in Nevada or to prosecute the defendant in Nevada. Here, however, Ditech, a foreign corporation that services numerous Nevada mortgages, intentionally called Buckles, a Nevada resident, on a Nevada number, regarding a Nevada mortgage. Unlike the law enforcement in *McLellan* and *Fowler*, Ditech specifically directed its activities toward Nevada and people in Nevada. Therefore, a finding that NRS 200.620 applies to Ditech is in line with *McLellan*. A ruling that Ditech's actions violated NRS 200.620 would be consistent with the plain language of NRS 200.620, the legislative intent and the *McLellan* holding.

6. A choice-of-law analysis provides that Nevada law applies in this case

Nevada law should be applied in this case. In 2006, this Court adopted the Second Restatement's Conflict of Laws' most significant relationship test in its choice-of-law analysis. *GMC v. Eighth Judicial Dist. Court of Nev.*, 122 Nev. 466, 474, 134 P.3d 111, 116-17 (2006). *GMC* concluded that the most significant relationship test of Section 6 of the Second Restatement governs a choice-of-law analysis, "unless another, more specific section . . . applies." *Id.*, 122 Nev. at 468, 473, 134 P.3d at 113, 116.

> The Second Restatement's most significant relationship test begins with a general principle, contained in section 145: the rights and liabilities of parties with respect to an issue in tort are governed by the local law of the state that, "with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."

Id., 122 Nev. at 474, 134 P.3d at 116-17; Restatement (Second) of Choice of Laws § 145.

Before looking to Section 6, the court will first look to whether "another, more specific section . . . applies." *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 46, 223 P.3d 332, 335 (2010) (A Nevada "court

should not apply the section 6 factors until it has determined whether a 'more specific section' of the Second Restatement applies."). Here, a more specific statutory section applies: § 152 involving the Right of Privacy. Section 152 states:

> In an action for an invasion of a right of privacy, the local law of the state where the invasion occurred determines the rights and liabilities of the parties, except as stated in § 153, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 152 (emphasis added).

Thus, Section 152 applies—and Nevada law applies—unless (a) § 153 applies or (b) "some other state has a more significant relationship under the principles stated in § 6."

Section 153 does not apply here since this case does not involve aggregate communications. Section 153 states in relevant part:

> The rights and liabilities that arise from matter that invades a plaintiff's right of privacy and is contained in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which . . . has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

Id. at § 153.

This case does not involve aggregate communications as described in Section 153, which means Section 152 applies "unless some other state has a more significant relationship under the principles stated in § 6." *Id.* at § 152.

Section 6 identifies the following principles:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied. These principles are not intended to be exclusive and no one principle is weighed more heavily than another.

Id. at § 6; *GMC*, 122 Nev. at 474, 134 P.3d at 116-17. Applying the Section 6 factors, Nevada has the most significant relationship to the occurrences in this case.

(a) Needs of the interstate system

This factor is inconclusive since applying NRS 200.620 to this case neither promotes nor hinders the needs of the interstate system.

> As made clear by the terms of [the all-party consent statute], this provision does not absolutely preclude a party to a telephone conversation from recording the conversation, but rather simply prohibits such a party from secretly or surreptitiously recording the conversation, that is, from recording the conversation without first informing all parties to the conversation that the conversation is being recorded. If, after being so advised, another party does not wish to participate in the conversation, he or she simply may decline to continue the communication. A business that adequately advises all parties to a telephone call, at the outset of the conversation, of its intent to record the call would not violate the provision.

Kearney, 39 Cal. 4th at 117-18, 45 Cal. Rptr. 3d at 749, 137 P.3d at 930 (applying California's "so-called governmental interest analysis in resolving choice-of-law issues").

Applying NRS 200.620 to recordings using equipment outside Nevada simply requires out-of-state companies to advise people in Nevada that the conversation is being recorded. Such a requirement "is not likely to have any great interstate repercussions nor have any discernible effect on commercial intercourse between the States of" Nevada and Arizona and Minnesota. *See Becker v. Comput. Sciences*

Corp., 541 F. Supp. 694, 704-05 (S.D. Tex. 1982) ("[T]his factor is inconclusive and of no assistance in indicating which jurisdiction's law should apply."). This factor is therefore inconclusive because applying NRS 200.620 to this case neither promotes nor hinders the needs of the interstate system.

(b) The relevant policies of the forum

It cannot be disputed, as discussed above, that Nevada has a strong interest in protecting Nevadans from invasion of privacy and upholding its all-party consent statute, NRS 200.620. Indeed, Ditech acknowledges Nevada's unusually strong privacy policies in enacting an all-party consent statute. Thus, this factor weighs in favor of applying Nevada law.

(c) The relevant policies of other states

The "relevant policies of other states" factor weighs in favor of applying Nevada law. Ditech claims it recorded Buckles' conversations using equipment in Arizona and Minnesota. Arizona's and Minnesota's one-party consent statutes, although not as strict as Nevada's all-party consent law, are similarly aimed at protecting people from nonconsensual interceptions. The purpose of Nevada's, Arizona's and Minnesota's statutes are to protect peoples' privacy. It follows then that

Arizona and Minnesota's have no interest in this case since this case does not involve any Arizona or Minnesota residents whose privacy has been invaded.

Arizona and Minnesota may have an interest in applying their laws since the conduct complained of in this case involves some conduct in those states. *See Kearney*, 39 Cal. 4th at 123, 45 Cal. Rptr. 3d at 753, 137 P.3d at 933 ("Because the conduct of SSB that is at issue in this case involves activity that its employees engaged in within Georgia, we believe that Georgia possesses a legitimate interest in having its law applied in this setting."). Although Arizona and Minnesota may have some interest in applying their statutes to this case, the purpose of all states' recording statutes is the protection of privacy. This case involves people in Nevada whose privacy were violated and, therefore, Nevada has the strongest interest in applying its laws to the claims against Ditech.

(d) The protection of justified expectations,

Nevada consumers have a reasonable expectation that a call is not being recorded when a business does not disclose at the outset of the call that the call is being recorded. *See Kearney*, 39 Cal. 4th at 98, 45 Cal. Rptr. 3d at 733, 137 P.3d at 917 ("[I]f a Georgia business disclosed at the

outset of a call made to or received from a California customer that the call was being recorded, the parties to the call would not have a reasonable expectation that the call is not being recorded."). Buckles had a justified expectation that his calls were not being recorded.

Ditech did not have a reasonable expectation that Nevada law would not apply. *See Becker*, 541 F. Supp. at 705 ("This reliance is undeniably justified as plaintiff was located in Texas when the subject recordings were made."). First, as discussed above, the choice-of-law analysis is clear that Nevada law applies. Next, it is likely that discovery will reveal that Ditech should have known it was required to inform Nevada consumers that the telephone calls are being recorded and that it would be liable in a Nevada court. *See Kearney*, 39 Cal. 4th at 106 n.3, 45 Cal. Rptr. 3d at 738, 137 P.3d at 921 ("SSB, however, fails to point to anything in NASD rule 3010 that would preclude a firm that is subject to this rule from informing an existing or potential client, at the outset of a conversation, that the telephone call is being recorded for business purposes."). Indeed, if Ditech was also conducting business in California, Ditech, after *Kearney*, is required to inform California customers that the call is being recorded. Moreover, ignorance of the law is not a defense and Ditech's so-called expectation that Nevada's law

would not apply when it calls people in Nevada is unjustified and unreasonable. This factor therefore weighs in favor of applying Nevada law.

(e) The basic policies underlying the particular field of law

This factor weighs in favor of applying Nevada law because Nevada's laws best achieves the basic policy underlying the relevant issue—the protection of rights to privacy. As the court in *Becker* found,

> [T]he basic policy behind the Texas and California statutes is similar; the protection of rights to privacy of its citizens. The significant difference between the two statutes is that unlike its Texas counterpart, the California statute affords greater protection to its citizens by prohibiting the unauthorized eavesdropping on confidential communications by an electronic amplifying or recording device, where all of the parties to the communication do not consent. Thus, it is evident that the law of California best achieves the basic policy underlying the relevant issue, i.e., the protection of rights to privacy. Accordingly, this factor supports defendant's argument that California law should be applied.

Becker, 541 F. Supp. at 706. The basic policies underlying the particular field of law is the invasion of privacy. Since Nevada's stricter law best achieves this policy objective, this factor weighs in favor of applying Nevada law.

(f) Certainty, predictability and uniformity of result

As discussed, the only high court to address whether a party may be liable in an all-party consent state for secretly recorded conversations using equipment in another state is the California Supreme Court in *Kearney*. This Court should follow *Kearney* to ensure "certainty, predictability and uniformity" in these cases. Moreover, applying Nevada law advances certainty, predictability and uniformity since companies conducting business in Nevada ought to know that Nevada law applies to business directed toward and conducted in Nevada. Applying Nevada law to this case also avoids unfair disadvantages to Nevada businesses that are required to follow Nevada law. Consequently, this factor weighs in favor of applying Nevada law in this case, just as *Kearney* applied California law.

(g) Ease in Determination and Application of the Law to be Applied

This factor strongly supports the application of Nevada law. This case involves a Nevada plaintiff and a purported class of people in Nevada, brought in a Nevada federal court and currently before the Nevada Supreme Court. *See Becker*, 541 F. Supp. at 706 (considering this factor important in applying the law of the forum state). Thus, this

factor easily favors applying Nevada law in this case.

In sum, the Section 6 factors favor applying Nevada law. Since § 6 does not favor applying another state's laws, § 152 must apply. Therefore, the laws of the state "*where the invasion occurred*" — Nevada —must be applied.

7. This Court should follow the California Supreme Court case, *Kearney*, the only on-point case from any other state's Supreme Court

The only high court to address whether a party may be *liable* in an all-party consent state for secretly recording conversations using equipment in another state is the California Supreme Court in *Kearney*, decided in 2006.

Kearney involved practically identical facts to this case, where a company routinely reached into California, a two-party consent state, and secretly recorded conversations with people in California using recording equipment located in Georgia, a one-party consent state. This Court should follow the lengthy and persuasive findings in *Kearney*.

a. This Court should follow the persuasive findings of the California Supreme Court in *Kearney*

Like this case, *Kearney* involved an out-of-state company that routinely reached into the all-party consent state and secretly recorded conversations with people using recording equipment located in a one-party consent state. This Court should follow the lengthy and persuasive findings in *Kearney*.

As explained in *Kearney,* an all-party consent state has a more than sufficient basis to apply its laws to foreign companies that reach into a state to conduct business:

> Moreover, if [California's all-party consent statute] . . . could not be applied effectively to out-of-state companies but only to California companies, the unequal application of the law very well might place local companies at a competitive disadvantage with their out-of-state counterparts. To the extent out-of-state companies may utilize such undisclosed recording to further their economic interests—perhaps in selectively disclosing recordings when disclosure serves the company's interest, but not volunteering the recordings' existence (or quickly destroying them) when they would be detrimental to the company—California companies that are required to comply with California law would be disadvantaged. By contrast, application of [California's all-party consent statute] to all companies in their dealings with California residents would treat each company equally with regard to California's concern for the privacy of the state's consumers.

> In sum, we conclude that the failure to apply California law in the present context would result in a significant impairment of California's interests.

Kearney, 39 Cal. 4th at 126, 45 Cal. Rptr. 3d at 755-56, 137 P.3d at 935-36; *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 101, 105 Cal. Rptr. 3d 378, 403, 225 P.3d 516, 537 (2010) (affirming *Kearney*).

Here, Nevada companies should not be placed at "a competitive disadvantage with their out-of-state counterparts" like Ditech. Further, Nevada consumers reasonably expect their telephone conversations will not be audio recorded by companies without their knowledge. Ditech should not be able to benefit from Nevada and Nevada consumers and not be susceptible to Nevada law.

Ditech's argument that *Kearney* was a "novel" decision does not refute *Kearney's* reasoning. Additionally, *Kearney* was decided in 2006 and has since been reaffirmed by the California Supreme Court. *E.g.*, *Id.*; *see also Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377, 1399, 133 Cal. Rptr. 3d 450, 465 (2011) (finding insufficient the defendant's argument that it notified consumers in the first call only that "*This* call" may be recorded; applying *Kearney* broadly); *Flanagan v. Flanagan*, 27 Cal. 4th 766, 117 Cal. Rptr. 2d 574, 41 P.3d 575 (2002) (discussing at

length California's strong public policy in protecting people's privacy and California's all-party consent statute).

Applying Nevada law in this case would not be to make a "judicial discerned purpose of privacy," as Ditech argues. As discussed above, the Nevada legislature and this Court has made Nevada's strong interest in protecting Nevadan's privacy interest amply clear.

Furthermore, *Kearney* was correct that a choice-of-law analysis must be applied where part of the conduct occurred in different states. Nevada does not apply the law of the state where the interception took place, as Ditech argues. Rather, as detailed at length above, Nevada applies the Second Restatement and applies the law of the state "*where the invasion occurred*."

Ditech's argument that *Kearney* failed to follow the long line of cases in *Fowler* and *McLellan*. Those cases involve the question of admissibility. *Kearney* properly rejected the defendant in that cases's similar arguments:

> Although SSB apparently assumes that the amendment in question was intended to deal with the type of factual setting at issue in the present case, in our view it is more likely that the proposed amendment was intended to cover a situation in which the entire secretly recorded communication (telephone call or other) occurred outside of California, and in which a

> party in a lawsuit in California thereafter sought to introduce the recording of the communication into evidence in the California proceeding. There is nothing in the letter—or in any of the appropriately considered legislative history—indicating that Speaker Unruh (or, more importantly, the Legislature as a whole) believed the originally enacted version of section 632 would not apply to a telephone conversation in which an out-of-state participant secretly recorded what was said by a California party while within California.

Kearney, 39 Cal. 4th at 120 n.13, 45 Cal. Rptr. 3d at 751, 137 P.3d at 931 (emphases added). *Kearney* specifically distinguished the admissibility issue from the liability issue:

> To avoid any misunderstanding regarding the scope of our ruling, we note that this case does not present the question whether secret recordings that were made prior to this decision would or would not be admissible in a judicial or other proceeding, and we express no opinion on that question.

Id., 39 Cal. 4th at 131 n.18, 45 Cal. Rptr. 3d at 759, 137 P.3d at 939 (emphasis added).

Finally, *Kearney* correctly compared a "person who secretly and intentionally records such a conversation from outside the state" to a person who intentionally shoots "a person in California from across the California-Nevada border." *Id.*, 39 Cal. 4th 95, at 45 Cal. Rptr. 3d at 750, 137 P.3d at 931. Ditech argues that *Kearney's* comparison is invalid since in murder an "essential element is death" whereas here the

only element is "interception." Ditech is incorrect since the essential purpose and aim for NRS 200.620 is the protection of privacy. Ditech ignores of the applicable choice of law analysis that provides that the applicable law in this case is "where the invasion occurred."

Kearney provides a workable framework where companies that purposefully direct their calls toward an all-party consent state must disclose to the consumer that the call is being recorded. To hold otherwise would deprive consumers of their reasonable expectation that the call is not being recorded and unfairly disadvantage local businesses that are required to follow Nevada law. On the other hand, the foreign company needs only to advise the customer that "this call is being recorded for company purposes," or something similar, which would not substantially interfere with any company's legitimate interest. This Court should, therefore, follow the rationale in *Kearney* and rule that NRS 200 applies to Ditech's actions.

b. Cases involving the questions of admissibility of recordings made out-of-state are not applicable to the issue of liability in this case

As discussed above at length, the Legislature enacted different standards for admissibility and liability. Although Ditech looks to its

purported "weight of authority," the cases relied upon by Ditech all involve questions of admissibility and are not relevant here. *See United States v. Peterson*, 812 F.2d 486, 489 (9th Cir. 1987) (involving admissibility of interceptions in a criminal drug-related case); *Stowe v. Devoy*, 588 F.2d 336, 341 (2d Cir. 1978) (criminal case involving the admissibility of recorded interceptions); *State v. Fleming*, 91 Or. App. 394, 399, 755 P.2d 725, 727 (1988) (involving the admissibility of a recorded telephone conversation); *State v. Mayes*, 20 Wash. App. 184, 193, 579 P.2d 999, 1005 (1978) (criminal case involving the admissibility of recordings made by police officers); *Commonwealth v. Housman*, 604 Pa. 596, 631, 986 A.2d 822, 842 (2009) (same); *State v. Vincente*, 44 Conn. App. 249, 256, 688 A.2d 359, 363 (1997) (motion to suppress evidence). These cases all involve the question of admissibility and are not relevant to issue in this case.

This Court should follow the directly on-point decision in *Kearney*, in holding that Ditech violated NRS 200.620 when it routinely reached into Nevada and audio recorded conversations with Nevada residents concerning their Nevada mortgages.

8. NRS 200.620, as applied in this case, protects people in Nevada and does not raise an extraterritorial question

No genuine question of extraterritorial application exists in this case because Buckles seeks redress for harm caused by Ditech in Nevada to people in Nevada. As noted in *Kearney*,

> The privacy interest protected by the statute is no less directly and immediately invaded when a communication within California is secretly and contemporaneously recorded from outside the state than when this action occurs within the state. A person who secretly and intentionally records such 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.

Kearney, 39 Cal. 4th at 119, 45 Cal. Rptr. 3d at 750, 137 P.3d at 931 (citing *State v. Hall* 114 N.C. 909, 19 S.E. 602, 602–606 (1894) ("These cases, however, are but instances of crimes which <u>are considered by the law to have been committed within our territory</u>, and in no wise conflict with the general [extraterritorial] principle.") (emphasis added)).

For the same reasons, the cases cited by Ditech that involve events *wholly* outside the jurisdiction are simply not applicable here. *See Mayes*, 20 Wash. App. at 193, 579 P.2d at 1005 (involving the

admissibility of evidence, where the interceptions had "no effect in this state"); *Housman*, 604 Pa. at 631, 986 A.2d at 842 (finding, in an admissibility case, that "no Pennsylvania state interest would be advanced in analyzing the legality of the tape recording under Pennsylvania law because it did not occur in Pennsylvania, and none of our police officers participated in appellant's questioning"). Due to the fact that Ditech effectively engaged in conduct within Nevada, intentionally and routinely causing harm in Nevada, (a) no exterritorial principles apply and (b) the rule of comity is not implicated.

a. Extraterritorial principles do not apply in this case since Ditech acted within Nevada when it routinely placed calls to people in Nevada

This Court is not presented with an extraterritorial application of Nevada law because a crucial aspect of the events — the invasion of privacy that NRS 200.620 is designed to prevent — occurred in Nevada.

> Interpreting that statute to apply to a person who, while outside California, secretly records what a California resident is saying in a confidential communication *while he or she is within California*, however, cannot accurately be characterized as an unauthorized *extraterritorial* application of the statute, but more reasonably is viewed as an instance of applying the statute to a multistate event in which a

> crucial element—the confidential communication by the California resident—occurred *in California.*

Kearney, 39 Cal. 4th 95 at 119 (emphasis in original).

NRS 200.620 should reasonably apply to Ditech, a company that for its own business purposes, routinely and intentionally recorded conversations with people in Nevada without those persons' knowledge or consent. Ditech is a major servicer of mortgages in Nevada that routinely recorded conversations of people in Nevada. Ditech's actions cannot be compared to cases that applied extraterritorial principles where the relevant actions took place wholly outside of the jurisdiction.

> This is not a case in which California would be applying its law in order to alter a defendant's conduct in another state *vis-à-vis another state's residents*. Instead, application of California law would be limited to the defendant's surreptitious or undisclosed recording of words spoken over the telephone by California residents while they are in California. This is a traditional setting in which a state may act to protect the interests of its own residents while in their home state.

Kearney, 39 Cal. 4th at 104 (emphases in original; citations omitted) (distinguishing *Bmw of N. Am. v. Gore*, 517 U.S. 559, 573, 116 S. Ct. 1589, 1597 (1996).

Ditech is incorrect to compare numerous cases where the relevant events took place *wholly* outside of the state or jurisdiction. *See Union Underwear*, 50 S.W.3d at 190 (involving conduct wholly outside Kentucky—the only connection to Kentucky was that the employer had its headquarters there—so Kentucky law did not apply); *Risinger v. SOC LLC*, 936 F. Supp. 2d 1235, 1250 (D. Nev. 2013) (where "outside of a brief training stint in Nevada, SOC employed Risinger exclusively in Iraq"); *Abel*, 297 Conn. at 432-33, 998 A.2d at 1161-62 (recognizing that some "courts have concluded, however, that there is no presumption that statutes that provide remedies or benefits are not for the benefit of persons outside the state's territorial jurisdiction"); *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 187, 296 Ill. Dec. 448, 501, 835 N.E. 2d 801, 854 (2005) (finding the "overwhelming majority of circumstances" occurred outside the state); *Smith v. United States*, 507 U.S. 197, 198, 113 S. Ct. 1178, 1180 (1993) (involving a claim brought in the United States under the Federal Tort Claims Act over the death of a carpenter working in Antarctica); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 273, 130 S. Ct. 2869, 2888 (2010) ("This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred

outside the United States."); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246, 111 S. Ct. 1227, 1229 (1991) (involving a United States employer who employed a Lebanon-born United States citizen in Saudi Arabia); *Sandberg v. McDonald*, 248 U.S. 185, 191, 39 S. Ct. 84, 84 (1918) (involving "a British ship," and "certain advances at Liverpool[, England]"); *Judkins v. St. Joseph's Coll. of Me.*, 483 F. Supp. 2d 60, 65 (D. Me. 2007) (employment discrimination case brought in Maine where "[a]ny discrimination against Plaintiff occurred in the Cayman Islands, not Maine").

The cases relied on by Ditech, applying extraterritorial principles in cases wholly outside the applicable jurisdiction, are not relevant here because a primary circumstance—the invasion of Buckles' privacy—occurred in Nevada. No extraterritorial principles are implicated and Section 152 of the Second Restatement should apply. Nevada's all-party consent statute applies in this case since that is "where the invasion occurred."

b. The Rule of Comity is not implicated where Nevada enforces its laws over conduct within Nevada

The rule of comity is not implicated because there is no extraterritorial issue in this case.

> Because there can be no question but that the principal purpose of section 632 is to protect the privacy of confidential communications of California residents while they are in California, we believe it is clear that section 632 was intended, and reasonably must be interpreted, to apply in this setting. Unlike the conduct at issue in the cases cited by [the defendant], here [the defendant]'s employees allegedly acted to record conversations that were occurring contemporaneously in California.

Kearney, 39 Cal. 4th at 119-20 (citations omitted). Just like the defendant in *Kearney*, Ditech relies on cases involving circumstances wholly outside of the relevant jurisdiction.

Furthermore, Ditech is incorrect that if NRS 200.620 is applied in this case then "the stricter law of the few would dethrone the rest." Ditech is a massive company doing a significant amount of business in Nevada. Requiring Ditech to notify Nevada consumers, when it reaches into Nevada, that their conversations are being recorded does not offend any notation of comity, courtesy or consideration to sister states. Just as Ditech's employees would be required to advise California consumers that their calls were being recorded—under *Kearney*—Ditech should have trained their employees to inform people in Nevada that their conversations were being recorded.

Ditech's concern for the "countless companies like Ditech that routinely record interstate business calls with Nevada customers" is unreasonable. NRS 200.620 does not prohibit recording telephone conversations with people in Nevada. It only prohibits *secret* audio recordings of people in Nevada. Ditech should have simply informed Buckles that his calls were being recorded.

Finally, Ditech's arguments about "modern day mobility" and that people may "unwittingly" become liable by recording conversations with people in Nevada are misplaced. Liability under NRS 200.690 applies only when the defendant violated the statute "willfully and knowingly." Second, this case does not involve a "one off" call to somebody who did not know the other party was in Nevada. Ditech raises pure hypotheticals and ignores the actual facts of this case. Ditech does not dispute "routinely" reaching out to Nevada consumers regarding Nevada mortgages. Ditech is not expected to accomplish some herculean task; it was required simply to inform consumers that their conversations were being recorded. After such advisement, "[the consumer] simply may decline to continue the communication. A business that adequately advises all parties to a telephone call, at the outset of the conversation, of its intent to record the call would not violate the provision." *Kearney*,

39 Cal. 4th at 117-18.

In applying NRS 200.620 to this case, it does not follow that a party would be liable in every hypothetical scenario imagined such as those posited by Ditech. For example, in Ditech's hypothetical about "one of its Minnesota customers who happened to be in a hotel room in Reno" the court would need to determine issues of standing, personal jurisdiction and whether the statute was intended to protect a non-Nevada resident. The court would also need to conduct a choice-of-law analysis, including Minnesota's interest in applying its laws, the Minnesota customer's reasonable expectation of privacy when briefly in Reno and Ditech's expectation that Minnesota law applies, among many other issues. For this reason, the hypothetical is purely speculative and raises many unanswered questions. In this case, Ditech's routine and intentional reaching out to Nevada consumers leaves no questions unanswered. Nevada law should apply.

Similarly, Ditech's hypothetical about the "Arizona divorcee" who "would commit a felony if she recorded her ex-husband threatening her from a Las Vegas casino," in addition to raising multiple unrelated criminal law issues, cannot be resolved without first addressing many other facts not presented in the hypothetical.

This Court should therefore find that NRS 200.620 applies to the facts in this case were Ditech routinely and intentionally called people in Nevada on Nevada phones about Nevada properties.

B. This Court should decline to rule on NRS 200.620's application in criminal cases and other hypothetical scenarios not presented

This is a civil case and this Court should follow its long standing tradition of declining to rule on hypothetical scenarios not in controversy. As *Kearney* found,

> the issue presented here is whether plaintiffs may maintain a civil cause of action for damages and/or injunctive relief under section 637.2 on the basis of the facts alleged in the complaint, and in resolving that issue there is no need to determine whether penal sanctions properly could or should be imposed under these circumstances. In accordance with traditional notions of judicial restraint, we believe it is appropriate and prudent to wait until we are faced with an instance in which a prosecutor has chosen to charge a criminal offense on the basis of such conduct before addressing the legal issues that might be raised in such a prosecution.

Kearney, 39 Cal. 4th at 116 n.6, 45 Cal. Rptr. 3d at 747, 137 P.3d at 928 (emphases added). In light of the fact that this is a civil action and the arguments of Buckles above, this Court should (1) refrain from determining any application of NRS 200.620 in criminal cases and (2)

not apply the Rule of lenity.

1. This Court should decline to rule on hypothetical criminal law cases in this civil action

This Court should refrain from determining criminal law related implications in its ruling because any criminal application of NRS 200.620 (1) would not "be determinative" of the Federal case, (2) are raised hypothetically only, (3) are issues that are not "in controversy" under judicial standing principles and (4) raises constitutional issues that are not "necessary to a determination of the case." In other words, the application of NRS 200.620 in criminal cases is simply not relevant here and need not be addressed.

First, any decision in criminal law would not "be determinative" of the Federal case.

> The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or of the District of Columbia, a United States District Court, or a United States Bankruptcy Court when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state <u>which may be determinative of the cause then pending in the certifying court</u> and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of this state.

NRAP 5(a) (emphasis added); *e.g.*, *Weinstein v. Fox (In re Fox)*, 302 P.3d 1137, 1139 (Nev. 2013) ("[I]n determining whether to exercise its discretion to consider certified questions, this court looks to whether the answers may 'be determinative' of part of the federal case, there is no controlling Nevada precedent, and the answer will help settle important questions of law.") (quotation marks and brackets omitted); *see generally Volvo Cars of N. Am., Inc. v. Ricci*, *122 Nev. 746, 137 P.3d 1161* (discussing NRAP 5(a) at length and declining to answer the certified question because "it would not 'be determinative' of any part of the case"). Here, this Court specifically accepted the Certified Question because the "answers may determine the federal case"—a civil action. *See* Order Accepting Certified Questions, Jun. 24, 2016; *see also* Certification Order, dated May 25, 2016, p. 2. Therefore, this Court should refrain from deciding NRS 200.620's application in criminal cases since such a determination would not "be determinative" of the Federal case.

Second, this Court should decline to rule on any hypothetical criminal cases. This Court has consistently declined to consider issues on a hypothetical basis. *E.g.*, *Leventhal v. Black & LoBello*, 305 P.3d 907, 910 n.6 (Nev. 2013) (question of whether a division of property in a

divorce case is an affirmative recovery to which a lien may attach was not fairly presented, and "we decline to examine it on a hypothetical basis."); *Resnick*, 104 Nev. at 66, 752 P.2d at 233 (finding appellant's "argument is based on a purely hypothetical premise that we decline to consider" since appellant had not yet, in fact, been deprived of property or liberty). Buckles brought this case to challenge Ditech's actions in a civil context only. This Court to should decline to determine hypothetical criminal law issues.

Third, any criminal law related issues raised by Ditech and in NACDL's amicus brief are not in controversy. "[L]itigated matters must present an existing controversy, not merely the prospect of a future problem." *E.g.*, *Leavitt v. Siems*, 330 P.3d 1, 3 n.1 (Nev. 2014) (quoting *Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988) (appellants lacked standing to challenge statute's constitutionality in absence of any personally suffered injury)) (quotation marks omitted); *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011) ("Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief.") (citing *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) ("[L]itigated matters must present an existing controversy, not merely the prospect of a

future problem.")); *see also Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948) (recognizing that a declaration may be unavailable when the damage "is merely apprehended or feared"). Buckles' civil action does not raise any issues relating to criminal law and this Court does not need to determine any criminal law "not in controversy" in deciding this case.

Lastly, this Court should refrain from determining any unnecessary constitutional issues.

> This court has a 'long history of requiring an actual justiciable controversy as a predicate to judicial relief.' In cases for declaratory relief and where constitutional matters arise, this court has required plaintiffs to meet increased jurisdictional standing requirements.

Stockmeier, 122 Nev. at 393, 135 P.3d at 225-26 (citations omitted).

It is not necessary to determine any constitutional issues regarding NRS 200.620's application to criminal law. "[A] constitutional question will not be determined unless clearly involved, and a decision thereon is necessary to a determination of the case." *Plunkett*, 62 Nev. at 270-71, 149 P.2d at 104 (citing *State ex rel. Adams v. Allen*, 55 Nev. 346, 347, 34 P.2d 1074, 1075 (1934)); *see also Gebers v. State*, 118 Nev. 500, 506 n.11, 50 P.3d 1092, 1095 (2002) ("[T]his court will not consider constitutional issues which are not necessary to the determination of an appeal.") (quoting *Hollis v. State*, 96 Nev. 207, 210, 606 P.2d 534, 536

(1980)); *Spears v. Spears*, 95 Nev. 416, 417, 596 P.2d 210, 211 (1979) (A reviewing court is "not authorized to enter into a determination of the constitutionality of a statute on a supposed or hypothetical case which might arise thereunder."). Again, this case is a civil action. Constitutional issues involving the statute's application to criminal law are not at issue and, of course, are not "necessary to a determination of the case."

2. The Rule of Lenity does not apply in this civil action

As this is a civil case, the Rule of Lenity does not apply. The rule requires strict construction of a criminal statute to ensure that individuals have proper notice of conduct which is deemed criminal. *See generally State v. Webster*, 102 Nev. 450, 455, 726 P.2d 831, 834 (1986) (declining to apply the rule where there was no "potential for arbitrary law enforcement"). Furthermore, the legislature's allowance of punitive damages in civil cases does not automatically create a criminal or quasi-criminal nexus. *See, e.g., State v. Eighth Judicial Dist. Court*, 306 P.3d 369, 382 (Nev. 2013) (applying a two-part test to determine whether a given statute imposes a "punishment"); *accord Orr Ditch & Water Co. v. Justice Court of Reno Twp.*, 64 Nev. 138, 163, 178 P.2d 558, 570 (1947) (construing strictly a mining-safety statute that provided for a "penalty"

and "fine"). Thus, because this is a civil action, the rule does not apply.

The Rule of Lenity does not apply merely because the statute creating civil liability also imposes criminal punishment. *See*, *e.g.*, *State v. Wheeler*, 23 Nev. 143, 148, 44 P. 430, 430 (1896) ("It has sometimes been said that revenue laws are not penal, but however that may be with statutes imposing taxes generally, which are to be collected by the means ordinarily resorted to for the collection of taxes, any statute which imposes pecuniary penalty, fine, and imprisonment for a failure to pay the tax, shall certainly be classed as a penal statute, and subject to a strict construction."). As seen in *Wheeler*, this analysis must be made in the context as applied. Here, although NRS 200.690 both imposes criminal punishment and civil liability, before this Court is NRS 200.620's application in civil cases *only*.

Furthermore, there is no ambiguity in applying Nevada law in this case, as discussed above at length under Nevada's choice-of-law analysis. *State v. Lucero*, 127 Nev. 92, 99, 249 P.3d 1226, 1230 (2011) ("Because ambiguity is the cornerstone of the rule of lenity, the rule only applies when other statutory interpretation methods, including the plain language, legislative history, reason, and public policy, have failed to resolve a penal statute's ambiguity."). Still, this is not a criminal case

so the rule of lenity does not apply.

In sum, this Court should refrain from deciding criminal law issues and not apply the Rule of Lenity to this civil action.

C. Application of NRS 200.620 in this case is Constitutional

Application of NRS 200.620 to Ditech, a large company that routinely and secretly recorded telephone conversations with people in Nevada is constitutional because (1) does not violate the Due Process clause, (2) does not violate the Commerce Clause and (3) does not raise any constitutional doubt.

1. NRS 200.620, as applied in this case, would not violation the Due Process Clause

In applying NRS 200.620 to Ditech's actions here, the federal due process clause would not be violated. Significantly, the arguments raised by Ditech were analyzed and rejected in *Kearney:*

> [C]ontrary to SSB's strenuous argument, the application of California law in the setting of this case clearly would not exceed the constitutional limits imposed by the federal due process clause on a state's legislative jurisdiction, by seeking to impose California law on activities conducted outside of California as to which California has no legitimate or sufficient state interest. The present legal proceedings are based upon defendant business entity's alleged policy and practice of recording telephone calls of *California* clients, while the clients are *in California*, without the clients'

> knowledge or consent. California clearly has an interest—in protecting the privacy of telephone conversations of California residents while they are in California—sufficient to permit this state, as a constitutional matter, to exercise legislative jurisdiction over such activity.

Kearney, 39 Cal. 4th at 104, 45 Cal. Rptr. 3d at 737, 137 P.3d at 920 (emphases in original; citations omitted). Application of Nevada law would be limited to the defendant's surreptitious recording of conversations over the telephone by Nevada residents while they were in Nevada. *Id.* "This is a traditional setting in which a state may act to protect the interests of its own residents while in their home state." *Id.* (citing *Watson v. Employers Liability Corp.,* 348 U.S. 66, 72, 99 L. Ed. 74, 75 S. Ct. 166 (1954) ("[T]his Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states")).

Kearney and *Watson* and the "series of cases" involving multistate transactions should be followed, as opposed to the cases relied on by Ditech, dealing with transactions wholly outside of the forum jurisdiction. *See Bmw*, 517 U.S. at 573, 116 S. Ct. at 1597 (a State "does

not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the State] or its residents"); *Avery*, 216 Ill. 2d at 187, 296 Ill. Dec. at 501, 835 N.E.2d at 854 (the "overwhelming majority of circumstances" occurred outside the state); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427, 123 S. Ct. 1513, 1525 (2003) (the plaintiffs' "inability to direct us to testimony demonstrating harm to the people of Utah . . . indicates that the adverse effect on the State's general population was in fact minor"); *Hendricks v. Ford Motor Co.*, No. 4:12cv71, 2012 U.S. Dist. LEXIS 139293, at *15 (E.D. Tex. Sep. 27, 2012) ("In *Campbell*, however, fundamental to the Supreme Court's decision was that fact that the out-of-state conduct bore no relation to the plaintiff's harm."); *accord Crouch v. Teledyne Cont'l Motors, Inc.*, No. 10-00072-KD-N, 2011 U.S. Dist. LEXIS 44002, at *16 (S.D. Ala. Apr. 21, 2011) ("even if [the defendant] did not conduct any activity in Kentucky there is still a 'sufficient nexus' . . . between its alleged out-of-state conduct and the harm which came to Plaintiffs."). Here, NRS 200.620 should be applied to protect peoples' privacy *in Nevada* and it therefore does not violate the Due Process Clause. Application of Nevada law in this case is therefore constitutional.

2. NRS 200.620, as applied in this case, would also not violation the Commerce Clause

Furthermore, application of NRS 200.620 in this case does not violate the Commerce Clause. Ditech's suggestion that application of NRS 200.620 in this case would violate the Commerce Clause was similarly rejected in *Kearney*, and for good reason. As *Kearney* correctly found, the facts presented did not occur "wholly outside of [California's] borders." *Kearney*, 39 Cal. 4th at 106-07, 45 Cal. Rptr. 3d at 739, 137 P. 3d at 922 (distinguishing *Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S. Ct. 2491, 2499 (1989) (finding statute violative of the commerce clause because of the inevitable effect that the statute would have on the prices charged by the entity in its sales to residents in other states)). Here, application of the Nevada law would affect only a business' undisclosed recording of telephone conversations with consumers in Nevada and would not compel any action or conduct of the business with regard to conversations with non-Nevada consumers. *See Kearney,* 39 Cal. 4th at 107, 45 Cal. Rptr. 3d at 739, 137 P.3d at 922. Accordingly, the application of NRS 200.620 in this case does not violate the Commerce Clause.

For these reasons, the cases relied on by Ditech are inapplicable since applying NRS 200.60 in this case would not compel any action or conduct with regard to conversations with non-Nevada consumers. The *Healy* case relied on by Ditech is inapplicable since the occurrences here did not take place "wholly outside [Nevada's] borders." *Healy*, 491 U.S. at 336, 109 S. Ct. at 2499; *Kearney*, 137 P.3d at 739. Similarly, *Edgar v. MITE Corp.* does not apply since that case involved a statute that "directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois." 457 U.S. 624, 641, 102 S. Ct. 2629, 2640 (1982). Thus, as in *Kearney*, applying NRS 200.620 in this case would not affect any action or conduct with regard to conversations with non-Nevada consumers and, therefore, does not violate the Commerce Clause.

3. NRS 200.620, as applied in this case, does not raise constitutional doubt

In holding that NRS 200.620 applies here, this Court does not need to construe NRS 200.620 in any way to avoid unconstitutionality. The cases relied on by Ditech involving constitutional vagueness are therefore distinguishable and not applicable here. *Accord Ford v. State*, 127 Nev. 608, 619, 262 P.3d 1123, 1130 (2011) (finding in criminal

prostitution case where differing constructions could be applied to a statute, "that construction should be adopted which will save the statute"); *Mangarella v. State*, 117 Nev. 130, 136, 17 P.3d 989, 993 (2001) (interpreting statute "as allowing a valid assertion of the privilege against self-incrimination"); *State v. Castaneda*, 126 Nev. 478, 483, 245 P.3d 550, 554 (2010) (in criminal case, interpreting NRS 201.220(1) so it "is not unconstitutionally vague"); *see also Rust v. Sullivan*, 500 U.S. 173, 183, 111 S. Ct. 1759, 1767 (1991) (in case involving a criminal abortion law, "[t]he fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid"). NRS 200.620 is a well-established all-party consent statute. Ditech knowingly reached into Nevada and recorded telephone conversations with people in Nevada, caused harm to people in Nevada and effectively acted within Nevada. The statute at issue is not unconstitutionally vague.

Therefore, application of NRS 200.620 to Ditech's actions, in routinely and secretly recording telephone conversations with people in Nevada, is constitutional.

D. Should this Court rule that NRS 200.620 applies in this case, the ruling should be retroactive

Should this Court rule that NRS 200.620 applies in this case, the ruling should be given retroactive effect because (1) this Court should apply the general rule of retroactive effect of rulings in civil cases, (2) Ditech fails to meet the standard for applying a ruling prospectively, and (3) applying the ruling retroactively complies with due process. As an initial matter, however, this Court should not consider this issue in the first instance since Ditech raises this issue now for the first time.

1. The issue raised by Ditech for the first time should not be considered

This Court should decline to consider whether its ruling will be applied retroactively because Ditech did not "raise [the] issue in the district court." *E.g.*, *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 261 (Nev. 2012) (citing *Kahn*, 127 Nev. at 217 n.6, 252 P.3d at 697) (declining to consider issue not raised in the district court). This Court has a long tradition of declining to consider issued not briefed in the trial court. *See Id.*

This principle applies equally when the case is presented by way of a Certified Question. *E.g.*, *In re Crescent Beach Ass'n*, 126 Vt. 448, 453,

236 A.2d 497, 500 (1967) ("We are confined strictly to the question certified and such other questions are not for consideration. A question raised for the first time in Supreme Court is not for consideration."); *Jane Doe 175 v. Columbia Heights Sch. Dist.*, 842 N.W.2d 38, 43-44 (Minn. Ct. App. 2014) ("In fact, the [Minnesota] supreme court caselaw demonstrates that the preservation requirement applies equally to appeals raising certified questions.") (citations omitted).

In briefing its motion to dismiss in the United States District Court, Ditech failed to raise the issue of whether NRS 200.620, as applied to Ditech in this case, should apply prospectively only. Therefore, this Court should not consider Ditech's arguments raised for the first time in its briefing before this Court, for Ditech has effectively forfeited such argument on appeal.

2. The general rule of retroactivity should apply

The general rule is that a holding in a civil action applies retroactively. *E.g.*, *James B. Beam*, 501 U.S. at 538, 111 S. Ct. at 2445 ("In most decisions of this Court, retroactivity both as to choice of law and as to remedy goes without saying."). This Court should not depart from the general rule that its holding should be applied retroactively.

> It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct.

Id., 501 U.S. at 534, 111 S. Ct. at 2443; *Thurmond v. Presidential Limousine*, No. 2:15-cv-01066-MMD-PAL, 2016 U.S. Dist. LEXIS 19056, at *9 (D. Nev. Feb. 17, 2016) (discussing whether the *Breithaupt* factors must be applied in the first instance). This Court is presented here with a dispute over the application of a statute, like in many other cases, and the general rule of retroactivity should apply. The general rule should apply because no cause of nonretroactivity is present to be entertained

3. The *Breithaupt* factors weigh in favor of retroactive application

In considering applying a holding retroactively or prospectively,

> courts have considered three factors: (1) "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) the court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation;" and (3) courts consider whether retroactive application "could produce substantial inequitable results.

Breithaupt, 110 Nev. at 35, 867 P.2d at 405 (noting that "[t]he overruling of a judicial construction of a statute generally will not be given retroactive effect"). Here, even if this Court considers departing from the general rule of retroactivity, the applicable standards do not weigh in favor of prospective application of its ruling.

a. In applying NRS 200.620 to this case, this Court would not create a "new principle of law"

If this Court applies NRS 200.620 to the present case, it would not be announcing any "new principle of law." *Breithaupt*, 110 Nev. at 35, 867 P.2d at 405; *see generally Clem v. State*, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003) ("The Supreme Court did not announce new law in *Fiore*; it merely held that, consistent with the 'Court's precedents,' *Fiore* could not be convicted without proof of each element of a crime beyond a reasonable doubt."). As discussed at length above, applying NRS 200.620 in this case in consistent with the plain language, legislative intent and the statutes and cases relating to the admissibility of such recordings, including *McLellan*. Thus, no "new principle of law" would be announced and no case overruled.

For these reasons, the cases relied on by Ditech do not apply in that they all involve a "new principle of law." *See Nevis v. Fid. N. Y., F.A.*, 104 Nev. 576, 579, 763 P.2d 345, 347 (1988) (overruling judicial precedent); *Gier v. Ninth Judicial Dist. Court*, 106 Nev. 208, 212, 789 P. 2d 1245, 1248 (1990) (announcing "an altogether new rule"); *Griffin v. State*, 122 Nev. 737, 739, 137 P.3d 1165, 1166 (2006) (overuling precedent in a criminal case); *Ziglinski v. Farmers Ins. Grp.*, 93 Nev. 23, 24, 558 P.2d 1147, 1148 (1977) (overturning precedent); *see also In re Discipline of Schaefer*, 117 Nev. 496, 513, 25 P.3d 191, 203 (2001) (finding unique circumstances in an attorney discipline case to apply ruling prospectively). Here, no such clear precedent would be overruled in applying NRS 200.620 in this case and the general rule of retroactive application applies. This factor does not support diversion from the general rule of retroactivity.

b. Retroactivity would advance the purpose of NRS 200.620

The next factor, whether the purpose of NRS 200.620 would be advanced, weighs in favor of retroactivity. As discussed, the purpose of NRS 200.620 is to protect peoples' privacy. The Legislature provided a specific remedy, in NRS 200.690, for such invasions of privacy through money damages. This case is distinguishable from *Breithaupt* where

retroactive application of the new rule regarding insurance coverage would not advance the purpose of that statute, i.e., to give people notice regarding their insurance options. 110 Nev. at 33, 867 P.2d at 404. Buckles' injuries could be remedied through damages to make him whole. The purpose of the statute would be advanced through retroactive application so this factor weighs in favor of retroactivity.

c. Equity weighs in favor of retroactive application of the ruling

The final factor also weighs in favor of retroactive application because Ditech reasonably should have anticipated and known that Nevada law applied when it recorded conversations with people in Nevada. *Kearney*, 39 Cal. 4th at 129, 45 Cal. Rptr. 3d at 758, 137 P.3d at 937 ("To be sure, one legitimately might maintain that SSB reasonably should have anticipated that its recording of a telephone conversation with a California client when the client is in California would be governed by California law."). Equity weighs in favor of this Court giving retroactive effect to its ruling since Ditech knew or reasonably should have known that Nevada law applies.

Additionally, post-*Kearney*, "out-of-state companies that do business in [the state] now are on notice that, with regard to future

conduct, they are subject to" the state's law. *Kearney*, 39 Cal. 4th at 130, 45 Cal. Rptr. 3d at 759, 137 P.3d at 938. Since *Kearney*, decided in 2006, companies can no longer claim they believe their actions of recording out-of-state consumers' telephone conversations are governed solely by the law of the state where the recording equipment is located. *Kearney* effectively put Ditech on notice that other states' recording laws may apply when Ditech reaches into those states—including Nevada—and records telephone conversations with people in those states. It is therefore not inequitable to hold Ditech responsible under Nevada law when the only other high court to address this issue has ruled that the law of the consumers' state applies.

Nevada applies the Second Restatement in its choice-of-law analysis and under Section 152 Ditech was on notice that the law of "the state where the invasion occurred" applies. Restatement (Second) of Conflict of Laws § 152. Thus, the final factor weighs in favor of retroactivity since Ditech knew or reasonably should have anticipated that Nevada law applied when it recorded conversations with people in Nevada.

4. Retroactive application of this Court's ruling would satisfy due process

Finally, applying the ruling in this case retroactively would not violate due process. Generally, there is no due process issue in retroactively applying a civil ruling and, in fact, retroactivity is the general rule. *E.g.*, *James B. Beam*, 501 U.S. at 538, 111 S. Ct. at 2445 ("In most decisions of this Court, retroactivity both as to choice of law and as to remedy goes without saying."). Ditech's reliance of several unique cases, mostly involving criminal law, are distinguishable. *See Bouie v. Columbia*, 378 U.S. 347, 351, 84 S. Ct. 1697, 1701 (1964) (involving criminal statute that was unconstitutionally vague); *Marks v. United States*, 430 U.S. 188, 188, 97 S. Ct. 990, 991 (1977) (retroactivity implicated the ex post facto clause because "there can be little doubt" that the new test "expanded criminal liability"); *Rabe v. Washington*, 405 U.S. 313, 313, 92 S. Ct. 993, 993 (1972) (applying new standard in criminal case); *Stevens v. Warden, Nev. State Prison*, 114 Nev. 1217, 1218, 969 P.2d 945, 946 (1998) (unforeseeably overruling criminal law precedent); *see also FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2310 (2012) (involving a new rule issued after the networks had already broadcasted the content). This is a civil action and this Court's ruling,

applying NRS 200.620 to the facts in this case would not be novel or unprecedented. No previous standard would be overruled.

Ditech knew or reasonably should have anticipated that Nevada law applies. Nevada's "wiretap law" and NRS 200.620 date back to 1957, before the Nevada legislature amended the statutes in 1973. *See Lane*, 114 Nev. 1176, 1179, 969 P.2d 938, 940. The Second Restatement of Conflict of Laws was compiled in 1971, revised between 1984 and 1988 and adopted in Nevada in 2006. *GMC*, 122 Nev. 466, 474, 134 P.3d 111, 116-17. *Kearney* was decided in 2006. Buckles filed his Complaint in 2015 when Ditech knew or should have known that it was not allowed to record telephone conversations with Nevada consumers and that Nevada law applies.

Therefore, due process does not bar civil damages in this case. Ditech should have reasonably anticipated Nevada law applies when it routinely does business in Nevada, services mortgages on Nevada properties and records telephone conversations with people in Nevada on Nevada telephones.

Conclusion

NRS 200.620 applies to Ditech even if its recording equipment is not in Nevada. The plain language of NRS 200.620 applies to "any person" and the Nevada legislature and Nevada courts are extremely reluctant to limit Nevada's all-party consent statute.

Under the applicable choice-of-law analysis Nevada law applies here. Nevada's choice-of-law provision requires that "the local law of the state *where the invasion occurred* determines the rights and liabilities of the parties." Nevada's all-party consent law applies in this case.

Furthermore, this Court should be persuaded by the California Supreme Court in *Kearney*, the only other high court to address whether a party may be liable in an all-party consent state for secretly recording conversations using equipment in another state. The rationale of *Kearney* applies equally to Nevada: Nevada companies should not be placed at a competitive disadvantage with their out-of-state counterparts" and Nevada consumers should be afforded their reasonable expectation of privacy.

Application of NRS 200.620 in this case is constitutional since it would be limited to Ditech's recordings of conversations over the telephone with Nevada residents while they are in Nevada. Courts have

repeatedly found a state's laws application of its laws in similar multi-state transactions to not violate the Due Process Clause or the Commerce Clause. Finally, this Court should not depart from the general rule that its holding in a civil case should be applied retroactively.

Therefore, this Court should hold that NRS 200.620 applies to Ditech in this case.

DATED this 22nd day of December 2016.

Respectfully submitted,

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NRAP 28(f) Addendum

NRS 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.

NRS 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.

NRS 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 Nevada Gaming Control Board. Matter otherwise privileged under this title does not lose its privileged character by reason of any interception.

NRS 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.

NRS 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.

Second Restatement of Choice of Laws

Restatement (Second) of Choice of Laws § 6 - Choice-Of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Choice of Laws § 145 - The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Choice of Laws § 152 - Right of Privacy

In an action for an invasion of a right of privacy, the local law of the state where the invasion occurred determines the rights and liabilities of the parties, except as stated in § 153, unless, with respect to the

particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Choice of Laws § 153 - Multistate Invasion of Privacy

The rights and liabilities that arise from matter that invades a plaintiff's right of privacy and is contained in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6. This will usually be the state where the plaintiff was domiciled at the time if the matter complained of was published in that state.

Certificate of Compliance

1. I certify that this brief complies with the formatting, typeface, and typestyle requirements of NRAP 32(a)(4)-(6) because this brief has been prepared using the word processing software, Pages, with proportionally spaced typeface in 14-point, double spaces Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because the brief, as computed under NRAP 32(a)(7)(C), contains 13,545 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).

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

DATED this 22nd day of December 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed and served on all participants appearing in this case the foregoing Respondent's Answering Brief with the Clerk of the Court of the Supreme Court of Nevada by using the Court's electronic filing system on December 22, 2016.

I further certify that the foregoing was served on the following participants in this case via U.S. Mail:

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