Case No. 70475

In the Supreme Court of Nevada

DITECH FINANCIAL LLC, f/k/a GREEN TREE SERVICING, LLC, Appellant, *vs.* SANFORD BUCKLES, on behalf of himself and others similarly situated, Respondent.	)

CERTIFIED QUESTION

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This is a statutory interpretation case. The District of Nevada has certified a question over proper application of one of Nevada's wiretap statutes, NRS 200.620. When and where it applies, the statute requires all parties to a telephone call to consent to an "interception," absent a court order. Via statutory cross-reference, NRS 200.620 incorporates the territorial restrictions of NRS 179.46(1) and 179.470(3). Those sections expressly limit the court order authorizing an "interception" to the Nevada county or jurisdiction where the interception is to take place. This confirms the territorial limits of Nevada law.

The question to be answered is whether NRS 200.620 applies extraterritorially to outlaw the "interception" of telephone calls by an out-of-state party who uses equipment outside Nevada to record a call without two-party consent. In *Mclellan v. State*, this Court rejected an argument that NRS 200.620 applied to a call from California to Nevada that was recorded in California. 124 Nev. 263, 267 (2008) (en banc). *Mclellan* followed Washington Supreme Court precedent holding that the lawfulness of an interception is determined by the law of the State where the interception occurred. *Kadoranian v. Bellingham Police*

Dept., 829 P.2d 1061, 1065 & n.16 (Wash. 1992) (en banc), *followed by State v. Fowler*, 139 P.3d 342, 346 (Wash. 2006) (en banc), *followed by Mclellan*, 124 Nev. at 268. This is the rule followed by an overwhelming majority of state and federal courts across the country.

Plaintiff largely ignores the numerous state and federal courts that have embraced the majority, territorial rule. He urges the Court to follow California's outlier decision in *Kearney v. Salomon Smith Barney*, 137 P.3d 914 (Cal. 2006). But *Kearney* involved an altogether different statute. Following *Kearney* here would be inconsistent with both this Court's adoption of the majority rule in *Mclellan* and the distinct Nevada statutory provisions at issue.

Essential to the Court's 2008 holding in *Mclellan* was its conclusion that NRS 200.620 only applies to interceptions within Nevada. The Court chose to follow the majority rule, not the minority rule set by *Kearney* two years earlier. Particularly in light of the intervening decision in *Mclellan*, *Kearney* provides no notice that NRS 200.620 applies outside Nevada to govern interceptions made legally in other States. Indeed, if the Court were to overrule *Mclellan* and follow *Kearney* here, fundamental fairness and rules governing prior precedent

would require the Court to apply the new rule only prospectively. But this Court should avoid the prospectivity question by reaffirming *Mclellan* and holding NRS 200.620 does not apply extraterritorially to interceptions made outside Nevada.

ARGUMENT

1. Plaintiff misreads *Mclellan*.

Plaintiff twists *Mclellan* by claiming it held that "the recording was unlawfully made under NRS 200.620." RAB 17 (with no citation). *Mclellan* said no such thing. There, as here, an interstate call involving a Nevada resident was recorded outside Nevada without the Nevada resident's consent. 124 Nev. at 266. The Nevada resident argued the call was not lawfully recorded "because NRS 200.620 dictates that *all* persons to a communication must consent to interception of wire or oral communication for it to be lawful." *Id.* The Court observed that the applicable California statute "does not require the consent of both parties to the communication to constitute a lawful interception, but rather requires consent by only one party." *Id.* at 267. The Court held, "if the interception was lawfully made in California, it is admissible in Nevada under NRS 48.077, even when the manner of interception

would violate Nevada law had the interception taken place in Nevada." *Id.* (emphasis added).

Plaintiff fails to mention the emphasized qualifier, which confirms that the place of interception controls application of Nevada's statute. Because the interception there did not "take[] place in Nevada," *Mclellan* held it "was lawful at its inception in California because [the parties who recorded it] consented, making it admissible in a Nevada court under NRS 48.077." *Id.* This holding is consistent with the Court's earlier construction of NRS 179.500, which governs the admissibility of calls intercepted within Nevada. In *Amen v. State*, the Court held that NRS 179.500 did not apply because the tapes there "were recorded out of state." 106 Nev. 749, 752 n.1 (1990).[1]

Mclellan's holding is not "*dicta*." RAB 17. A statement is dictum, and thus not controlling, "when it is unnecessary to a determination of the question involved." *St. James Village v. Cunningham*, 125 Nev. 211, 216 (2009) (internal quotation and citation omitted). The Nevada

[1] The Westlaw citation to *Amen* includes a red flag, indicating its overruling was recognized by *Caron v. State*, 128 Nev. 886 (2012). But the Court in *Caron* recognized that a different case, *Floyd v. State*, 118 Nev. 156 (2002), had been overruled by *Grey v. State*, 124 Nev. 110, 117–18 (2008). *See Caron*, 128 Nev. at *3. The decision in *Floyd* merely quoted *Amen* on other grounds. *See Caron*, 128 Nev. at *3; *Floyd*, 118 Nev. at 164 & n.6. *Amen* remains good law, despite the erroneous red flag in Westlaw.

resident in *Mclellan* argued for extraterritorial application of NRS 200.620 to a call recorded in California; rejection of that argument was necessary to the decision. 124 Nev. at 266–67. *Mclellan*'s holding is controlling, dispositive, and persuasive.

2. The majority rule properly determines legality based upon the law of the State where the interception occurs.

In *Mclellan*, this Court adopted the majority, territorial rule that judges the lawfulness of a recording based on the law of the State where the recording was made. 124 Nev. at 267–68. In 2008, when the Court decided *Mclellan*, *Kearney* was nearly two years old. Yet the Court chose not to follow the California Supreme Court's approach. Instead, the Court followed the Washington Supreme Court's decision in *State v. Fowler*, which held that the "validity of a telephone interception" is determined by "the law of the jurisdiction in which the interception—or recording—was made." 139 P.3d 342, 346 (Wash. 2006) (en banc) (reaffirming *Kadoranian v. Bellingham Police Department*, 829 P.2d 1061, 1065 & n.16 (Wash. 1992) (en banc)). This is the majority rule. *Id.* (collecting state and federal cases).

Plaintiff tries to distinguish *Fowler* and *Mclellan* by arguing that the subjective intentions of the out-of-state actor were decisive. RAB 18. But the out-of-state callers in both cases intentionally placed a call to the in-state resident and recorded their conversation without the resident's consent. *Mclellan*, 124 Nev. at 266; *Fowler*, 139 P.3d at 343–44. Nonetheless, both this Court and the Washington court applied the law of the State *where the recording was made* to decide that the recording was legal. *Mclellan*, 124 Nev. at 266–68; *Fowler*, 139 P.3d at 346.

Ditech collected the leading cases following the majority rule in its opening brief. AOB 36–38 & Appendix of Cases. Plaintiff barely discusses any of the decisions, instead asserting (wrongly) that *Kearney* is the only "high court" decision on point. RAB 5, 28. He claims all of the other cases concern only admissibility, not lawfulness *per se*, or address wholly out-of-state conduct. *Id.* at 34–36.

The majority rule is not so narrow. As a leading treatise notes, "restrictions in one state's consent surveillance statute will not be given extraterritorial effect. . . . State restrictions on consent surveillance by private parties likewise will not be given extra-territorial effect." 2 HON.

JAMES G. CARR, ET AL., LAW OF ELECTRONIC SURVEILLANCE § 7:47 (2016). "Thus, a plaintiff who conversed from such a state with a speaker who recorded the conversation in a jurisdiction which permits consent recording should not be able to recover under his home state's civil remedy provision." *Id.* § 8:43 & n.97. "[W]hether a resident of a prohibitory state places or receives the call, it may be recorded lawfully by the other speaker if that speaker's state permits such recording." *Id.* § 7:47 & nn.1–3.

Nevada's Legislature modeled our statutory scheme on the federal Wiretap Act, so this Court follows federal decisions as persuasive authority. *Lane v. Allstate Ins.*, 114 Nev. 1176, 1179 (1998) (plurality). Federal courts uniformly hold the federal Wiretap Act does not apply to recordings made outside the United States. The Second Circuit decided the leading cases, noting the Wiretap Act contains no language or legislative history indicating Congress intended the Act to apply extraterritorially and "makes no provision for obtaining [court] authorizations for a wiretap in a foreign country." *United States v. Toscanino*, 500 F.2d 267, 279–80 (2d Cir. 1974), *overruled on other grounds as noted in In re Terrorist Bombings*, 552 F.3d 157, 167 n.5 (2d

Cir. 2008). Federal courts thus hold the federal Wiretap Act "has no application outside the United States." *Stowe v. Devoy,* 588 F.2d 336, 341 (2d Cir. 1978). *See also United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987); *United States v. Cotroni*, 527 F.2d 708, 711 (2d Cir. 1975).

Cross-border calls do not change the analysis. Congress enacted the Wiretap Act "to regulate interceptions, not communications." *Cotroni*, 527 F.2d at 711. Thus, it does not matter whether the intercepted call crossed the border. "[I]t is not the route followed by foreign communications which determines the application of Title III [of the Wiretap Act]; it is where the interception took place." *Id.*

It is also irrelevant whether the out-of-forum recording involves a citizen of the forum. *Stowe v. Devoy*, 588 F.2d 336, 341 n.11 (2d Cir. 1978). As the Sixth Circuit recently explained, the rule turns only on "where the interception took place." *Huff v. Spaw*, 794 F.3d 543, 547 (6th Cir. 2015) (following *Stowe*). *Accord State v. Nieuwenhuis*, 706 P.2d 1244, 1245–46 (Ariz. 1985).

The same analysis applies here. NRS 200.620 regulates unlawful "interceptions," not confidential communications. Unlike the California

statute in *Kearney*, no element of privacy is involved in the Nevada cause of action, as Plaintiff's complaint admits. App. 2 ("There is no requirement under NRS 200.620 that the communication be confidential."); *compare Kearney*, 137 P.2d at 929 (CAL. PENAL CODE § 632 prohibits the "record[ing]" of "confidential communications"). And like the federal Wiretap Act, Nevada's wiretap statutes do not allow a court to authorize interceptions outside Nevada. *See* NRS 179.460, 179.470 (cross-referenced by NRS 200.620(1)). NRS 200.620 thus does not apply outside Nevada for the same reason federal courts have held the Wiretap Act does not apply outside the United States.

Decisions on point from other States (in addition to *Fowler* and *Kadoranian*) apply the same rule to hold their wiretap statutes do not apply to out-of-state interceptions. *See, e.g., State v. Ruggiero*, 35 A.3d 616, 621 (N.H. 2011); *Commonwealth v. Housman*, 986 A.2d 822, 842 (Pa. 2009); *People v. Barrow*, 549 N.E.2d 240, 253–54 (Ill. 1989); *State v. Fleming*, 755 P.2d 725, 727 (Or. Ct. App. 1988).

For example, in *MacNeill Engineering v. Trisport*, the court held the plaintiff failed to plead a viable cause of action against a company that secretly recorded a telephone call outside Massachusetts because

the Massachusetts wiretap act has "no extraterritorial effect." 59 F. Supp. 2d 199, 202 (D. Mass. 1999). *See also Pendell v. AMS/Oil*, 1986 WL 5286 (D. Mass. 1986) (same, also rejecting civil liability claim). Similarly, in *Broughal v. First Wachovia*, the court refused to impose civil liability on a North Carolina bank for recording calls with a Pennsylvania resident because the Pennsylvania wiretap statute "does not apply to legal interception of communications beyond Pennsylvania's borders." 14 Pa. D. & C. 4th 525, 532–33 (Pa. Commw. Ct. 1992).

The majority-rule cases involving admissibility are not distinguishable. RAB 12–15. Admissibility turns on whether the intercepted or recorded evidence was obtained lawfully. Questions of admissibility, like questions of liability, thus turn on the legality of the interception where it took place, as case law makes clear. *See, e.g.*, *Peterson*, 812 F.2d at 492 ("Appellants also argue that the wiretap evidence should be excluded as *violative* of Title III of [the Wiretap Act]. We reject this argument.") (emphasis added); *Stowe*, 588 F.2d at 341 n.12 ("The law of the locality in which the tap exists (and where the interception takes place) governs its *validity*, even though the

intercepted phone conversations traveled in part over the United States communication system.") (emphasis added); *Fleming*, 755 P.2d at 727 ("The recording was made in Oregon *lawfully*, and Washington law simply does not apply.") (emphasis added); *State v. Mayes*, 579 P.2d 999, 1004 (Wash Ct. App. 1978); *Housman*, 986 A.2d at 842; *Vincente*, 688 A.2d at 360–61; *Commonwealth v. Bennett*, 369 A.2d 493, 494 (Pa. Super. Ct. 1976) ("We must conclude that the use in this Commonwealth of information secured through a *valid, legal, properly authorized* wiretap in a foreign jurisdiction is not in contravention of the Pennsylvania anti-wiretapping statutes . . . .") (emphasis added).

Plaintiff cannot escape the analogous federal and state cases refusing to apply statutes extraterritorially to interceptions of cross-border calls. *See*, *e.g.*, *Stowe*, 588 F.2d at 338 (interception in Canada; defendant in New York); *Cotroni*, 527 F.2d at 710 (interception in Canada; defendant in New York); *United States v. Tirinkian*, 502 F. Supp. 620, 622, 627 (D.N.D. 1980) (interceptions in Canada and Austria; defendant in North Dakota), *aff'd*, 686 F.2d 653 (8th Cir. 1982); *MacNeill Eng'g*, 59 F. Supp. 2d at 202 (interception in England; civil plaintiff in Massachusetts); *Pendell*, 1986 WL 5286 at *1 (interception

in Rhode Island; civil plaintiff in Massachusetts); *State v. Eibert*, 2010 WL 5018529, *1, *3 (Ariz. Ct. App. 2010) (interception in Arizona; defendant in New Hampshire); *Broughal*, 14 Pa. D. & C. 4th at 526 (interception in North Carolina; civil plaintiff in Pennsylvania); *Nieuwenhuis*, 706 P.2d at 1245–46 (interception in Canada; defendant in Arizona); *Fleming*, 755 P.2d at 726 (interception in Oregon; defendant in Washington); *Bennett*, 369 A.2d at 493 (interception in New Jersey; defendant in Pennsylvania).

Plaintiff fails to reckon with the weight of authority supporting the majority rule. This Court should reaffirm *Mclellan* and hold NRS 200.620 does not apply to interceptions made outside Nevada.

3. Statutory text shows NRS 200.620 does not apply to out-of-state interceptions.

Ditech's statutory construction shows NRS 200.620 does not apply to "interceptions" outside Nevada. AOB 24–31. Plaintiff's only textual counter-argument is that NRS 200.620 applies to "any person." RAB 9–13. Besides violating the extraterritoriality canon, his argument fails to address all the other statutory text indicating Nevada's statutes are limited to interceptions made within Nevada.

NRS 200.620(1) explicitly and by cross-reference limits the statute to the territorial jurisdiction of Nevada. The statute permits "interceptions" if there is (a) "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," in which case (under subsection (3)) the person who has made an interception "shall, within, 72 hours of the interception, make a written application to a justice of the Supreme Court or district judge for ratification of the interception." The "justice of the Supreme Court or district judge," in context, refers to a justice or district judge *in Nevada*. Were there any doubt, NRS 200.620(1)(b) and (3)(b)'s cross-references to "NRS 179.410 to 179.515" remove it. Under those statutes, 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*" (NRS 179.460(1) (emphasis added)), and the judge may "authoriz[e] interception" only "within *the territorial jurisdiction of the court* in which the judge is sitting" (179.470(3) (emphasis added)). *Compare* 18 U.S.C. §§ 2516(1)–(2), 2518(3) (parallel federal provisions).

Nevada's statutes make no provision for obtaining authorization for interceptions outside Nevada. This indicates the statute does not apply extraterritorially to recordings made outside Nevada, as other courts have reasoned. *Cf. Toscanino*, 500 F.2d at 279–80; *State v. Vincente*, 688 A.2d 359, 362–63 (Conn. App. Ct. 1997); *Castillo v. State*, 810 S.W.2d 180, 184 (Tex. Crim. App. 1990); *Pendell*, 1986 WL 5286 at *4.

The evidentiary provisions of Nevada's wiretap statutes also belie Plaintiff's textual argument. Specifically, NRS 48.077 expressly addresses out-of-state interceptions and makes the contents of such a communication admissible in a Nevada court if it was "lawfully intercepted under the laws of the United States or of another jurisdiction." This is a statutory recognition that "interceptions and recordings occur where made." *Kadoranian*, 829 P.2d at 1065, *quoted by Fowler*, 139 P.3d at 346, *followed by Mclellan*, 124 Nev. at 268. On the other hand, NRS 179.500 applies only to in-state interceptions and makes their contents admissible only if "each party, not less than 10 days before the trial, hearing, or other proceeding," has been given a copy of the "court order," the "accompanying application under which

the interception was authorized," and a "transcript of any communication intercepted."

This Court has harmonized NRS 48.077 and NRS 179.500 by applying the territorial restriction to both statutes. *See Mclellan*, 124 Nev. at 267–68 (holding NRS 48.077 applies to out-of-state recordings); *Amen*, 106 Nev. at 752 n.1 (holding NRS 179.500 does not apply to tapes "recorded out of state"). Thus, if a one-party consent recording was permitted under the laws of the state where it was made, it is admissible in a Nevada court under NRS 48.077. But if the recording took place inside Nevada, it is not admissible unless NRS 179.500 has been satisfied.

There is no merit to Plaintiff's argument that the phrase "under the laws of another jurisdiction" in NRS 48.077 somehow indicates that NRS 200.620 applies to recordings made within that other jurisdiction. RAB 15. Contrary to Plaintiff's convoluted argument, the phrase gives no indication that NRS 200.620 applies to out-of-state interceptions. Nor is the phrase "surplusage," as Plaintiff argues. RAB 14. The phrase "lawfully intercepted under the laws of the United States or of another jurisdiction" is the precondition for admissibility of out-of-state

interceptions. In other words, it serves to indicate *both* that lawful out-of-state interceptions are admissible *and* that unlawful out-of-state interceptions are not admissible. And it continues to serve that purpose if NRS 200.620 is limited to interceptions within Nevada.

Plaintiff's argument leads to other absurdities. By his reading, NRS 179.500 would apply to all interceptions by "any person." That would mean a lawful out-of-state interception would be admissible under NRS 48.077 yet not admissible under NRS 179.500. It would mean that a Nevada court could admit a lawful out-of-state recording under NRS 48.077 but nonetheless subject the recorder to criminal prosecution. And it would mean that out-of-state law enforcement, like the California police in *Mclellan*, would have to abide by Nevada law whenever they electronically surveil a suspect across the border or face civil penalties and punitive damages. This Court's interpretation of NRS 200.620 and 179.500 in *Mclellan* and *Amen* avoids these absurdities.

Plaintiff's argument also ignores the statutory definition of "any person." Under NRS 200.610, "[p]erson includes public officials and law enforcement officers *of the State* and of a county or municipality or

other political subdivision *of the State*" (emphasis added). The statutory definition, in context, refutes Plaintiff's argument that NRS 200.620's use of "any person" means it reaches beyond this State's borders. Taken to its extreme, Plaintiff's argument would mean that NRS 200.620 applies to any interception anywhere, even if it had no connection whatsoever to Nevada. The Legislature did not intend such an absurd result. *See Morrison v. Nat'l Australia Bank*, 561 U.S. 247, 255, 262 (2010) (using extraterritoriality canon to confine "any person" language); *American Banana v. United Fruit*, 213 U.S. 347, 357 (1909) (same); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (same); *Union Underwear v. Barnhart*, 50 S.W.3d 188, 191 (Ky. 2001) (same).

When the Legislature intends Nevada statutes to govern conduct beyond the State's borders, it does so expressly. *E.g.*, NRS 598.1305 (proscribing "solicitations which are made from a location within this State and solicitations which are made from a location outside of this State to persons located in the State"). With no extraterritorial intent clearly expressed in NRS 200.620, "it has none." *Morrison*, 561 U.S. at 255.

4. The extraterritoriality canon confines NRS 200.620 to in-state interceptions.

Plaintiff cannot dodge the extraterritoriality canon simply because a Nevada resident was on the recorded call. RAB 37–39. The extraterritoriality issue does not even arise unless there is at least *some* connection to the forum. The U.S. Supreme Court rejected Plaintiff's exact argument in *Morrison*. There, the issue concerned the application of U.S. securities laws to foreign transactions. The plaintiffs tried to avoid the extraterritorial canon, claiming they sought "no more than domestic application" of federal securities laws to a Florida company and its executives. 561 U.S. at 266. The Court rejected that gambit, observing that extraterritoriality rarely arises in a case that "lacks *all* contact with the territory" of the forum: "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.*

All the extraterritoriality cases Ditech cites involve some in-forum connection. This includes the leading case of *EEOC v. Aramco*, 499 U.S. 244, 247 (1991), where the Title VII plaintiff had been hired in Houston and was an American citizen employed in a foreign country. *See also*

Smith v. United States, 507 U.S. 197, 199 (1993) (plaintiff was contract employee with American agency); *Foley Bros. v. Filardo*, 336 U.S. 281, 282, 291 (1949) (American plaintiff under contract with U.S.-domiciled company); *Sandberg v. McDonald*, 248 U.S. 185, 191 (1918) (maritime case over labor performed in port at Mobile, Alabama); *Rinsinger v. SOC*, 936 F. Supp. 2d 1235, 1239–40, 1249 (D. Nev. 2013) (plaintiff trained in Nevada; Nevada-headquartered defendant); *Judkins v. St. Joseph's College*, 483 F. Supp. 2d 60, 63, 65 (D. Me. 2007) (Maine defendant); *Avery v. State Farm Mut. Auto. Ins.*, 835 N.E.2d 801, 815, 839 (Ill. 2005) (Illinois named plaintiff; Illinois-headquartered defendant); *Union Underwear*, 50 S.W.3d at 189–90 (Kentucky-headquartered defendant). The mere existence of *some* connection to the forum cannot counter the force of the extraterritoriality canon. *Morrison*, 561 U.S. at 266.

Plaintiff cannot create a false conflict by using "any person" to transform an out-of-state recording into an in-state one. RAB 3–4, 11–12. The extraterritoriality canon was designed to prevent this feint. *See Morrison*, 561 U.S. at 266; *American Banana*, 213 U.S. at 357; *Palmer*, 16 U.S. at 631. The canon avoids conflicts of law; Plaintiff's argument

creates them. *See RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090, 2107 (2016) ("Although a risk of conflict between the American statute and a foreign law is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex."). The canon "protect[s] against unintended clashes" between a forum State's law and "the laws of our sister states." *Union Underwear*, 50 S.W.2d at 190.

5. Comity requires this Court to respect the sovereignty of other States that permit recording with one-party consent.

Confining NRS 200.620 to interceptions that occur within Nevada avoids outlawing conduct that is legal in a "sister state." *Bennett*, 369 A.2d at 494–95; *Housman*, 986 A.2d at 842; *Vincente*, 688 A.2d at 363. Arizona and Minnesota, like most States, permit recording with one-party consent. If Nevada's two-party-consent statute were extended to recordings made legally in Arizona or Minnesota, it would foist Nevada's policy preference on its sister State. The "general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *American Banana*, 213 U.S. at 356. For another State to treat the actor

"according to its own notions rather than those of the place where he did the acts" would not only "be unjust" but would also "interfere[] with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *Id.* Comity defuses such tensions.

Extraterritorial application of NRS 200.620 would criminalize otherwise legal out-of-state conduct without notice given modern-day telecommunications and mobility. AOB 42. For example, Ditech could unwittingly violate the law if it records a call from one of its Minnesota customers on a mobile phone from a Las Vegas casino. The hypothetical is not far-fetched, as Plaintiff claims. RAB 41–42. It is based on Plaintiff's complaint, which seeks to impose civil penalties and punitive damages against Ditech for recording both "inbound and outbound telephone conversations" with "[a]ll persons in Nevada." App. 10. Plaintiff has not limited the scope of his class action to Nevada citizens. To avoid outlawing conduct that is legal in the State where the recording occurs, this Court should respect the principles of comity and apply *Mclellan*'s territorial rule.

6. The rule of lenity requires a territorial application of NRS 200.620.

Plaintiff tries to dodge the rule of lenity by divorcing NRS 200.620's civil penalties from its criminal punishment. RAB 48–50. But the rule of lenity is not so fickle: "It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation." *United States v. Thompson/Ctr. Arms*, 504 U.S. 508, 518 n.10 (1992) (plurality).

This Court applies the rule of lenity and strictly construes penal statutes that impose both criminal punishment and civil penalties. *Orr Ditch & Water v. Justice Court of Reno*, 64 Nev. 138, 163–64 (1947). Violation of NRS 200.620 constitutes a felony and gives rise to civil penalties as well as punitive damages (NRS 200.690(1)(a)–(b)), so the rule of lenity applies. Moreover, the cause of action created by NRS 200.690 was not known at common law, so it must be "strictly construed" to outlaw only recordings made inside Nevada. *Orr Ditch*, 64 Nev. at 164. *Accord Broughal*, 14 Pa. D. & C. 4th at 530–31. Even assuming *Kearney* raised any doubt about whether this Court and the majority rule followed in *Mclellan* were right, that ambiguity must be

read in Ditech's favor. *State v. Lucero*, 127 Nev. 92, 99 (2011); *Mangarella v. State*, 117 Nev. 130, 134 (2001); *State v. Elsbury*, 63 Nev. 463, 471 (1946).

7. <u>There are no constitutional questions presented.</u>

Plaintiff has improperly briefed the merits of Ditech's constitutional defenses. RAB 50–55. Chief Judge Navarro expressly reserved jurisdiction to decide the constitutional issues. *See* App. 71. This Court has jurisdiction to answer only the questions certified.

8. The Court should refuse to follow <u>the minority of one created by *Kearney*.</u>

Plaintiff's almost exclusive reliance on California's minority rule in *Kearney v. Salomon Smith Barney*, 137 P.3d 914 (Cal. 2006), is misplaced. RAB 28–33.

First, *Kearney* was decided in 2006 but has garnered no support since. It is a minority of one. It was in place in 2008, when this Court decided *Mclellan*, but the Court instead chose to follow the Washington Supreme Court and the majority rule. 124 Nev. at 268. The leading treatise on the law of electronic surveillance justly criticizes *Kearney*'s minority rule. According to Judge Carr, the minority rule places "persons in jurisdictions, which are a majority of the states, that permit

one party consent recording at an unjustified risk of being subjected to suits in states which restrict such recording." 2 CARR, LAW OF ELECTRONIC SURVEILLANCE § 8:43 & n.98 (citing *Kearney*).

Second, *Kearney* is based on a very different statute. Section 632 of the California Penal Code subjects any person to criminal prosecution and civil penalties for "intentionally and without the consent of all parties to a confidential communication" using "an electronic amplifying or recording device to eavesdrop upon or record the confidential communication." In construing § 632 to apply to recordings made outside California, the California Supreme Court relied on language in § 631(a), a companion wiretapping provision, which applies to any person who attempts to learn the content of any communication "while the same *is in transit . . . or is being sent from, or received at any place within this state.*" *Kearney*, 137 P.3d at 930 (emphasis in original). The court reasoned that "[n]othing . . . suggests that the related provisions of section 632 should not similarly apply to protect against the secret recording of any confidential communication that is sent from or received at any place within California." *Id.* Nevada's wiretapping statutes contain nothing resembling this language.

Further, the California statute outlaws "eavesdropping" on "confidential" communications, in contrast to NRS 200.620's regulation of the act of "interception," without regard to confidentiality. Unlike NRS 200.620, California Penal Code § 632 is a privacy statute. *See* CAL. PENAL CODE § 630. It protects "confidential communication[s]" that are "carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto." *Id.* § 632(c). Against this backdrop, *Kearney* reasoned that § 632 was intended "to protect the privacy of confidential communications of California residents *while they are in California.*" 137 P.3d at 931. And in holding that § 632 applied extraterritorially to recordings made in Georgia, the Court emphasized that "*a crucial element*—the confidential communication by the California resident—occurred in California." 137 P.3d at 931 (emphasis added).

Unlike California law, NRS 200.620 imposes liability based on the act of "interception" alone, without regard to any expectation of privacy. Plaintiff admits this in his complaint. App. 12 ("NRS 200.620 is violated the moment the recording is made without the consent of all parties thereto."). A confidential communication is not a required element of

NRS 200.620. Rather, a violation of Nevada's statute, as Plaintiff concedes, has only one critical element: the act of interception. The interception here occurred not in Nevada but in Arizona or Minnesota, where recording with one party's consent is legal. This Court should not extend NRS 200.620 to criminalize or penalize conduct that occurred outside Nevada and that was legal where it occurred.

Nevada's statutory protection of privacy interests is not found in NRS 200.620 but in a separate statute, NRS 200.650. Unlike California's statute, NRS 200.650 authorizes one-party consent to a third-person "eavesdropping" or "recording" that individual's "private conversation" with another. The text of NRS 200.650 and its one-party consent rule are inconsistent with the California eavesdropping statute applied in *Kearney*. Of course, NRS 200.650 does not apply to recordings made outside Nevada any more than NRS 200.620 does. But if NRS 200.620 were held to apply to recordings outside Nevada, then NRS 200.650 would also. That would give Ditech a complete statutory defense to this lawsuit because NRS 200.650 authorizes recording with one party's consent. *See Sharpe v. State*, 350 P.3d 388 (Nev. 2015) (applying NRS 200.650).

Plaintiff's complaint does not allege that his customer service conversations with Ditech were intended to be kept private from others within Ditech. Nor could he. The entire purpose of customer service interactions is to ensure the company answers the question or solves the problem that precipitated the call. *See Smith v. Associated Bureaus*, 532 N.E.2d 301, 305 (Ill. Ct. App. 1988) (holding customer service call was not private under Illinois eavesdropping statute); *Bender v. Board of Fire & Police Comm'rs*, 539 N.E.2d 234, (Ill. Ct. App. 1989), *followed by People v. Herrington*, 645 N.E.2d 957, 958–59 (Ill. 1994). The customer on such a call (be it incoming or outbound) obviously does not expect others within Ditech to remain ignorant of the information exchanged in the call. Plaintiff's paean to privacy is inapt.

Finally, *Kearney*'s fiction that an out-of-state call "effectively" occurs in-state (137 P.3d at 931) is inconsistent with Nevada law. The same could have been said in *Mclellan* about the child's call from California to her abuser in Nevada, but this Court held otherwise. 124 Nev. at 266–68. *Kearney's* analogy to a cross-border shooting is a false analogy. *See* RAB 32–33. The flaw in the logic is that, in a cross-border shooting case, although the bullet is fired out of state, an essential

element (death) occurs in the forum state. Here, by contrast, the "interception" (in the language of NRS 200.620) is the only element of the claim. Plaintiff admits that liability under NRS 200.620 applies at the "moment the recording is made," regardless of its content. App. 12, 2. Thus, "no 'bullet' has been fired" into Nevada here. *Kolikof v. Samuelson*, 488 F. Supp. 881, 883 (D. Mass. 1980) (rejecting cross-border shooting analogy in civil recording case). Because the interception occurred in another State, Nevada law does not apply.

9. <u>There is no conflict of laws issue before the Court.</u>

Plaintiff has improperly raised a conflict of laws question that is not before the Court. RAB 19–28.

The federal court did not certify any conflicts issue to this Court. The certified question asks only whether NRS 200.620 applies to out-of-state recordings and, if so, whether that interpretation should apply prospectively only. App. 73. The federal court did not ask this Court to render any opinion about choice of law in the event NRS 200.620 applies to interceptions outside Nevada. Thus, any conflict of laws issue is not ripe.

There is another problem with Plaintiff's effort to lure this Court into a choice-of-law analysis. Plaintiff waited to raise this issue for the first time in his merits brief. *See* App. 34–56; Respondent's App. 7–17. Plaintiff has waived the issue. Moreover, were the Court to address the conflicts issue, it would not be "determinative" of any issue pending before the federal court. *See* NEV. R. APP. P. 5(a); *Orion Portfolio Servs. v. County of Clark*, 126 Nev. 397, 400 (2010); *Volvo Cars v. Ricci*, 122 Nev. 746, 750–51 (2006). Ditech's motion to dismiss turns on whether NRS 200.620 applies at all to the conduct alleged in Plaintiff's complaint. If NRS 200.620 does not apply, there is no conflict and Ditech's motion to dismiss "is due to be granted." App. 71. *See Fleming*, 755 P.2d at 727 ("There is . . . no need to use a choice of laws analysis. The recording was made in Oregon lawfully, and Washington law simply does not apply.").

If this Court determines Nevada's statute applies, however, there are a number of issues that must be resolved in federal court thereafter, including any conflict of laws. Plaintiff's attempt to have this Court, not the federal court, decide the conflicts issue in his favor—when it has not

been certified and is not ripe—is improper. The Court should not venture beyond the questions certified. [2]

[2] If the federal court were to address the conflicts issue, Arizona or Minnesota law would apply. Nevada's conflicts of law rules apply the most "specific section" of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS. *Dictor v. Creative Mgmt. Servs.*, 126 Nev. 41, 46 (2010). Plaintiff argues § 152 is the most specific section. Assuming that is correct (even though NRS 200.620 is not a privacy statute), § 152 applies the law of the State "where the invasion occurred." Because NRS 200.620 proscribes "interception," that is the invasion, so the law of the State where the interception or recording occurred applies. A number of cases in the majority have so concluded. *See Ball v. Ehlig*, 70 Pa. D. & C. 4th 160, (Pa. Com. Pl. 2005), *aff'd*, 889 A.2d 107 (Pa. Super. Ct. 2005) (Table), (applying law of the State where recording occurred); *Larrison v. Larrison*, 750 A.2d 895, 898–99 (Pa. Super Ct. 2000); *State v. Jones*, 873 P.2d 122, 131–32 (Idaho 1994) (same); *United States v. Gerena*, 667 F. Supp. 911, 913–27 (D. Conn. 1987) (same); *Pendell*, 1986 WL 5286, at *4 (same). Plaintiff mistakenly relies on *Becker v. Computer Sciences*, 541 F. Supp. 694 (S.D. Tex. 1982). RAB 22–28. *Becker* applied Texas law to recordings made in Texas (a one-party consent State), so that decision supports Ditech, not Plaintiff. *See* 541 F. Supp. at 703–06. Section 163 also specifically exempts Ditech from liability under Nevada law because Ditech's conduct was legal where the recordings were made. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 163 cmt.a. *See also id.* § 145 cmt.e (giving "particular weight" to "the place where the defendant's conduct occurred" when the primary purpose of the claim "is to deter or punish misconduct" or when "the conduct was required or privileged by the local law of the state where it took place."). Under these circumstances, "it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state." *Id.* § 6 cmt.g, *followed by Ball*, 70 Pa. D. & C. 4th at 169, *Gerena*, 667 F. Supp. at 914–15 n.6, 918, and *Becker*, 541 F. Supp. at 705.

10. If the Court overrules *Mclellan* and applies NRS 200.620 extraterritorially, it should apply that new interpretation only prospectively.

Plaintiff cannot exclude prospectivity from the certified questions. RAB 56. Ditech sought dismissal in federal court based on *Mclellan*. The federal court did not have the authority to reconsider *Mclellan*, so there was no basis to ask *that court* to make any new interpretation of Nevada law prospective only. *See* App. 59–62. The prospectivity issue only arose after the federal court invited the parties to propose certified questions to this Court. Ditech then asked the federal court to certify the prospectivity issue. Respondent's App. 15. The federal court certified it, despite Plaintiff's waiver argument. *See id.* at 16. And this Court accepted the prospectivity question. *See* App. 73; Order in No. 70475 (Nev. June 24, 2016). Because the prospectivity question was certified to and accepted by this Court, the Court has the "power to answer" it. NEV. R. APP. P. 5(a).

This Court need not even reach the prospectivity issue, however. The Court should instead reaffirm *Mclellan* under the "doctrine of *stare decisis*." *Miller v. Burk*, 124 Nev. 579, 597 (2008). *Stare decisis* applies with extra force to "opinions construing statutes." *Lauritzen v. Casady*,

70 Nev. 136, 139 (1953) (citing *Jensen v. Reno Central Trades & Labor Council*, 28 Nev. 269 (1951)). *Accord Halliburton Co. v. Erica P. John Fund*, 134 S. Ct. 2398, 2411 (2014); *Neal v. United States*, 516 U.S. 284, 295 (1996). Despite having many opportunities, the Legislature has not made any changes to NRS 200.620 since *Mclellan*. There is no reason to abandon *Mclellan* now.

If, however, the Court overrules *Mclellan* and holds that NRS 200.620 applies extraterritorially, then each *Chevron Oil* factor would weigh against retroactive application. *Chevron Oil v. Huson*, 404 U.S. 97, 106 (1971).

First, giving NRS 200.620 extraterritorial reach would establish a new rule of law. This Court's opinion in *Mclellan* rejected the argument that NRS 200.620 applies extraterritorially. As Plaintiff acknowledges (RAB 60), this Court has repeatedly given prospective-only effect to decisions overruling existing case law. *See*, *e.g.*, *Griffin v. State*, 122 Nev. 737, 744 (2006); *Nevis v. Fidelity*, 104 Nev. 576, 579 (1988); *Ziglinski v. Farmers Ins. Grp.*, 93 Nev. 23, 24 (1977). At a minimum, *Mclellan* allowed Ditech to reasonably believe that NRS 200.620 applied only to interceptions made inside Nevada.

Second, retroactive application would not "protect peoples' privacy." RAB 60. Again, NRS 200.620 is not a privacy statute. And retroactive application can do nothing to protect privacy here even if it were an element of the statute. As *Kearney* itself explained in prospectively applying its new interpretation of California law, Ditech cannot go back in time and comply with the new standard. 137 P.3d at 938.

Finally, retroactive application would be inequitable. *Kearney* says nothing about Nevada's statute. Nevada has not ceded any part of its sovereignty to California; no California court has authority to announce Nevada's law. Moreover, this Court's *Mclellan* decision in 2008 did not follow *Kearney* but joined the majority instead. The mere fact that a California court adopted Plaintiff's theory under a very different California law did not put Ditech on notice that this Court would reinterpret or overrule its own decision in *Mclellan* and adopt the minority rule for NRS 200.620. If anything, *Kearney* reasonably reassured Ditech that, if this Court ever were to overrule *Mclellan* and apply NRS 200.620 extraterritorially, it would apply that new

interpretation prospectively only, just as the California court did in *Kearney*. 137 P.3d at 937–39.

Plaintiff does not contest application of the *Chevron Oil* factors under this Court's recent opinions in *MDC Restaurants v. The Eighth Judicial District Court*, 383 P.3d 262 (Nev. 2016), and *Nevada Yellow Cab Corp. v. The Eighth Judicial District Court*, 383 P.3d 246 (Nev. 2016). Nor could he. The case for prospectivity here is far stronger. As the Court explained in *Nevada Yellow Cab*, certain scenarios "justify use of the equitable factors," including "the paradigm case" where "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." 383 P.3d at 251 n.5 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991)).

This is such a "paradigm case." Ditech justifiably believed its interceptions were legal where they occurred. *Mclellan* reinforced that belief. Moreover, unlike the purely civil and remedial claims in *MDC Restaurants* and *Nevada Yellow Cab*, Plaintiff seeks to impose quasi-criminal penalties and to recover punitive damages under NRS 200.620. Because retroactive application of penal rules implicates significant

due-process concerns, this Court has given prospective-only effect to judicial interpretations of quasi-criminal sanctions, *see In re Discipline of Schaefer*, 117 Nev. 496, 501 (2001), just as it has to criminal sanctions, *Griffin v. State*, 122 Nev. 737, 743 (2006). Retroactive application of a new rule here would subject Ditech to quasi-criminal penalties and punitive damages for violating a standard first announced years after its challenged conduct. That would be fundamentally unfair.

CONCLUSION

For these reasons and those stated in its opening brief, Ditech asks the Court to reaffirm *Mclellan* and hold NRS 200.620 does not apply (or, at a minimum, does not apply retroactively) to telephone recordings made outside Nevada.

DATED this 13th day of March, 2017.

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CERTIFICATE OF COMPLIANCE

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

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 7,000 words.

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

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

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