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S260391

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEREMIAH SMITH,

Plaintiff and Appellant,

v.

LOANME, INC.,

Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO (CASE NO. E069752)

BRIEF AMICUS CURIAE OF AMERICAN MEDICAL RESPONSE, INC. IN SUPPORT OF RESPONDENT

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INTRODUCTION

The fundamental premise of the Court of Appeal's decision in *Smith v. LoanMe, Inc.*, Case No. E069752, should be affirmed: California Penal Code section 632.7 prohibits only third party eavesdroppers from intentionally recording telephonic communications involving at least one cellular or cordless telephone. The *LoanMe* Court's interpretation of section 632.7 is consistent with the statutory scheme set forth in the Penal Code, but even if the language was subject to ambiguity, the decision should nevertheless be affirmed on other principles of statutory interpretation. This amicus brief seeks to provide guidance to this Court to assist in reaching a ruling on this issue by presenting an additional basis on which to affirm the Court of Appeal's decision—the rule of lenity.

The rule of lenity dictates that, if "a statute defining a crime or punishment is susceptible of two reasonable interpretations," the court will "ordinarily adopt the interpretation that is more favorable to the defendant." (*People v. Arias* (2008) 45 Cal.4th 169, 177; *People v. Canty* (2004) 32 Cal.4th 1266, 1277 ["under the traditional 'rule of lenity,' language in a penal statute that truly is susceptible of more than one reasonable construction in meaning or application ordinarily is construed in the manner that is more favorable to the defendant"], citing *People v. Avery* (2002) 27 Cal.4th 49, 57-58.) However, this Court has restricted the use of the rule, so that it is only a tie-breaker – a rule of construction of last resort – "'if

the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.'" (*Avery, supra*, 27 Cal.4th at pp. 57-58, quoting 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53; accord *Canty*, *supra*, 32 Cal.4th at p. 1277, quoting *Avery*.) This interpretation is what Justice Rushing, sitting by designation in this Court, termed "a relatively narrow view of the rule." (*People v. Whitmer* (2014) 59 Cal.4th 733, 770 (dis. opn. of Rushing, J.).)

This case presents an opportunity for the Court to revisit its precedents and correct them. The "narrow view" of the rule of lenity is inconsistent with the constitutional underpinnings of the rule, which exists to ensure the separation of powers and to give people fair notice of what acts are criminal. Those purposes are not served if lenity applies only in the rare instance where a judge can form no opinion about the Legislature's intent despite analyzing the statutory text, applying other rules of construction, considering earlier authorities including dissents and out-of-state authorities, and combing through the legislative history.

That is what Appellant seeks. He asks this Court to interpret section 632.7's eavesdropping statute to apply to calls where one of the parties records the call, citing, inter alia, conflicting federal district court orders and legislative history materials. However, if section 632.7's meaning can be discerned only by considering any or all of those sources, the rule of lenity should be applied. Those

sources cannot, as they must, give the Court certainty of the Legislature's intent; they instead leave the Court to rely on which interpretation is more probable than the other. This places the Court in a position in which it may overstep its authority by possibly creating new criminal law that the Legislature never intended, thereby violating separation of powers.

Nor can the Court conclude that section 632.7 comports with due process by giving parties like Respondent fair warning that recording calls only between parties violated the statute. Rather than adhere to the fiction that a reasonable person would be aware and consider the sources necessary to interpret the statute in Appellant's favor, the Court should instead apply the rule of lenity and construe the statute in favor of Respondent.

ARGUMENT

A. The Rule Of Lenity Is Rooted In Constitutional Principles.

The rule of lenity directs that "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." (*United States v. Davis* (2019) 139 S.Ct. 2319, 2333.) This long-standing rule originated in England during the late seventeenth and early eighteenth centuries to protect individuals from the expansive imposition of the death penalty (Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity* (1994) 29 Harv. C.R.-C.L. L.Rev. 197, 199-200), and "is 'perhaps not much less old than' the task of statutory 'construction

itself'" (*Davis*, *supra*, 139 S.Ct. at p. 2333, quoting *United States v. Wiltberger* (1820) 18 U.S. (5 Wheat.) 76 (maj. opn. of Marshall, C. J).)

This Court has recognized that the rule of lenity "has constitutional underpinnings." (*Avery, supra*, 27 Cal.4th at p. 57.) Decisions of this Court and the U.S. Supreme Court establish that the rule of lenity serves two critical purposes: (1) to preserve the separation of powers; and (2) to ensure fair notice of conduct violating criminal laws consistent with constitutional due process.

1. Separation of Powers

In his seminal decision on the rule of lenity, Chief Justice Marshall wrote in *Wiltberger*: "The rule that penal laws are to be construed strictly … is founded … on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." (*Wiltberger*, *supra*, 18 U.S. at p. 95.)

The need to apply the rule of lenity to preserve the separation of powers has often been reiterated by the U.S. Supreme Court. (*United States v. Kozminski* (1988) 487 U.S. 931, 952 [rule of lenity is necessary to "maintain the proper balance between Congress, prosecutors, and courts"]; *United States v. Bass* (1971) 404 U.S. 336, 348 ["because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"]; see also *Whitman v. United States* (2014) 574 U.S. 1003, 1005 ["equally

important, [the rule of lenity] vindicates the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts--much less to the administrative bureaucracy"], original emphasis (statement regarding denial of certiorari by Scalia, J., joined by Thomas, J.) Thus, "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." (*Bell v. United States* (1955) 349 U.S. 81, 83.)

Otherwise, we would have a "a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis." (*Kozminski*, *supra*, 487 U.S. at p. 951.) As the U.S. Supreme Court has said about the analogous vagueness doctrine, "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" (*Davis*, *supra*, 139 S.Ct. at p. 2325, quoting *United States v. Hudson* (1812) 11 U.S. (7 Cranch) 32, 34; see *id.* at p. 2333 [recognizing that the same principles underlying the vagueness doctrine serve as the basis for the rule of lenity].)

This Court's rule of lenity jurisprudence has echoed the U.S. Supreme Court's reliance on the separation of powers. "'Application of the rule of lenity . . . strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.'" (*People ex rel Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312-313, quoting *Liparota v. United States* (1985) 471 U.S.

419, 427; *accord Avery*, *supra*, 27 Cal.4th at p. 57 [following *Lungren*].) "'[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.'" (*Avery*, *supra*, 27 Cal.4th at p. 57, quoting *People ex rel Lungren, supra*, 14 Cal.4th at p. 313.)

Justice Scalia, writing for a plurality, put it succinctly: "When interpreting a criminal statute, we do not play the part of a mindreader." (*United States v. Santos* (2008) 553 U.S. 507, 515 (plur. opn. of Scalia, J.).) Interpreting a textually ambiguous statute in the defendant's favor leaves it to the legislative branch to provide more specific language. The rule of lenity, thus, "keeps courts from making criminal law in Congress's stead." (*Ibid.*)

Scholars agree that the rule of lenity protects the separation of powers. "As the branch most directly accountable to the people, only the legislature could validate the surrender of individual freedom necessary to formation of the social contract. The legislature, therefore, was the only legitimate institution for enforcing societal judgments through the penal law." (Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes* (1985) 71 Va. L.Rev. 189, 202; see also Amar, America's Unwritten Constitution: The Precedents and Principles We Live By (2012) p. 427 ["Structurally, this rule has guaranteed that no person may be sent to the gallows or to prison unless both houses of Congress--and especially members

of the lower house, the one most directly accountable to the people--have specifically authorized this grave intrusion upon bodily liberty."]; Eskridge, *Public Values in Statutory Interpretation* (1989) 137 U. Pa. L.Rev. 1007, 1029 [rule of lenity arises out of the constitutional "separation-of-powers value that prosecutors and courts should be unusually cautious in expanding upon legislative prohibitions where the penalty is severe").

In sum, because the Legislature is the proper branch to clarify the scope of criminal statutes, to the extent the text of section 632.7 is ambiguous, the Court should apply the rule of lenity.

2. <u>Due Process</u>

This Court has held that "[c]riminal penalties, because they are particularly serious and opprobrious, merit heightened due process protections for those in jeopardy of being subject to them, including the strict construction of criminal statutes." (*People ex rel Lungren, supra*, 14 Cal.4th at p. 313.) "'Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal[.]'" (*Id.*, quoting *Liparota, supra*, 471 U.S. at p. 427; see also *People ex rel. Green v. Grewal* (2015) 61 Cal.4th 544, 565 ["The rule of lenity exists to ensure that people have adequate notice of the law's requirements."]; *Davis*, *supra*, 139 S.Ct. at p. 2333 ["much like the vagueness doctrine, it is

founded on ‘the tenderness of the law for the rights of individuals’ to fair notice of the law”], quoting *Wiltberger*, *supra*, 18 U.S. at p. 95.)

The U.S. Supreme Court has explained that the rule of lenity is not just “a convenient maxim of statutory construction. Rather it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.” (*Dunn v. United States* (1979) 442 U.S. 100, 112; *Santos*, *supra*, 553 U.S. at p. 514 [rule of lenity “vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed”] (plur. opn. of Scalia, J.).) The rule protects those subject to criminal laws and “minimize[s] the risk of selective or arbitrary enforcement. . . .” (*Kosminski*, *supra*, 487 U.S. at p. 952.) Consequently, “courts must decline to impose punishment for actions that are not ‘plainly and unmistakably’ proscribed.” (*Dunn, supra*, 442 U.S. at pp. 112-113; see also *United States v. R.L.C.* (1992) 503 U.S. 291, 308-309 [“‘[A] fair warning,’ . . . ‘should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.’”] (conc. opn. of Scalia, J.), quoting *McBoyle v. United States* (1931) 283 U.S. 25, 27; *United States v. Bass* (1971) 404 U.S. 336, 348 [same].)

As they do in recognizing that the rule of lenity derives from the separation of powers, scholars also recognize that the rule of lenity arises out of constitutional due process. (Eskridge, *supra*, 137 U. Pa. L.Rev. at p. 1029 ["The rule of lenity rests upon the due process value that government should not punish people who have no reasonable notice that their activities are criminally culpable, as well as the separation-of-powers value that prosecutors and courts should be unusually cautious in expanding upon legislative prohibitions where the penalty is severe."]; Romantz, *Reconstructing the Rule of Lenity* (2018) 40 Cardozo L.Rev. 523, 524 ["[L]enity preserves the constitutional right of fair warning found in due process."]; Krishnakumar, *Longstanding Agency Interpretations* (2015) 83 Fordham L.Rev. 1823, 1868, fn. 208 [describing the rule of lenity as a "due-process based canon"].) The U.S. Supreme Court's lenity jurisprudence has "usually justified its decisions on familiar grounds of legislative supremacy and fair warning, both constitutional mandates." (Response, *The Appellate Rule of Lenity* (2018) 131 Harv. L.Rev. F. 179, 194-195.)

Accordingly, to comport with constitutional due process, if this Court finds the text of section 632.7 ambiguous, it should apply the rule of lenity so defendants have fair notice of the criminal conduct that the statute prohibits.

B. <u>This Court Has Recognized A Narrow Rule Of Lenity.</u>

This Court has "repeatedly stated that when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant." (*Avery*, *supra*, 27 Cal.4th at p. 57; *People v. Baker* (1968) 69 Cal.2d 44, 46 ["In construing a criminal statute, a defendant 'must be given the benefit of every reasonable doubt as to whether the statute was applicable to him.'"], quoting *In re Zerbe* (1964) 60 Cal.2d 666, 668.)

This rule applies with equal force when a statute imposes both civil and criminal penalties, like Penal Code section 632.7. (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1154 ["[when] the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage"], quoting *Crandon v. United States* (1990) 494 U.S. 152, 158; see also *Leocal v. Ashcroft* (2004) 543 U.S. 1, 11, fn. 8 [although issue arose in deportation proceeding, because the controlling statute "has both criminal and noncriminal applications[,]" rule of lenity applied]; *United States v. Thompson/Center Arms Co*. (1992) 504 U.S. 505, 517-518 [applying rule of lenity in tax case because statute had "criminal applications"] (plur. opn. of Souter, J.).) That must be the case, because the same violation of section 632.7 can give rise to both civil and criminal sanction. The same words of

the statute cannot give rise to one interpretation in civil actions and a different one in criminal proceedings. (See, e.g., *FCC v. ABC* (1954) 347 U.S. 284, 296 [explaining that lenity must be applied even in a civil case because "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice"].)

In *Avery*, this Court sought to reconcile the rule of lenity with Penal Code section 4, which purports to reject the rule that "penal statutes are to be strictly construed."[1] (*Avery, supra*, 27 Cal.4th at p. 58.) Acknowledging "some tension" between the rule of lenity and section 4, the Court held that the rule of lenity would apply only after all other attempts to resolve statutory ambiguity failed. (*Ibid.*)

It held that the rule of lenity applies when: (1) a court can only "guess" at the Legislature's intent; and (2) "'two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable.'" (*Id.* at pp. 57-58, quoting *People v. Jones* (1988) 46 Cal.3d 585, 599.) Under this narrow interpretation, the rule of lenity is not considered until after the court considers the statutory text, legislative history, and applies other rules of construction. (See, e.g., *People v. Soto*

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[1] Pen. Code section 4 states: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

(2018) 4 Cal.5th 968, 974-980 [rejecting rule of lenity because Legislature's intent could be discerned from text, the Court's precedent, legislative history of statute and predecessor statute, the concurring and dissenting opinion in a prior case, and other precedents]; *People v. Wade* (2016) 63 Cal.4th 137, 140-147 [holding rule of lenity did not apply because Court could discern the Legislature's intent from the former version of the statute, decisions of the Court of Appeal, out-of-state authorities, the legislative history; and statutes employing similar language].)

The U.S. Supreme Court has used language similar to the "narrow view" outlined in *Avery*. (*R.L.C., supra*, 503 U.S. at pp. 305-306 [declining to apply rule of lenity unless an ambiguity remained "*after* resort to 'the language and structure [of the statute], legislative history, and motivating policies' of the statute"], quoting *Moskal v. United States* (1990) 498 U.S. 103, 108.)

However, in the recently decided *Davis* decision, Justice Gorsuch applied the rule of lenity to foreclose an argument that the U.S. Supreme Court should employ the doctrine of constitutional avoidance to interpret a statute. (*Davis, supra*, 139 S.Ct. at p. 2333.) Although most of the analysis addressed the doctrine that criminal statutes cannot be too vague – a doctrine predicated on the same constitutional principles as the rule of lenity (*ibid.*) – the Court applied the rule of lenity without relegating it to a tie-breaker. The case involved a statute that imposes penalties for furnishing a gun used in a "crime of violence," which was

defined as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." (*Id.* at pp. 2323-2324, quoting 18 U.S.C. § 924(c)(3)(B).) Finding that clause unconstitutionally vague, the government argued that the Court should apply the rule of constitutional avoidance to interpret the statute so that it did not violate the Constitution. (*Id.* at pp. 2323-2333.) The Court refused, finding that argument would offend "due process and separation-of-powers principles" and "sit uneasily with the rule of lenity[,]" which is founded on those principles. (*Id.* at p. 2333 [holding that "it's *impossible* to say that Congress surely intended" the result of using constitutional avoidance "or that the law gave [defendants] fair warning" that the law "would apply to their conduct"].) That would not be possible if the rule of lenity applies as a tie-breaker only if all other rules of construction fail to resolve an ambiguity. Indeed, the dissent accuses the majority of disregarding the narrow view that renders the rule of lenity a tool of last resort. (*Id*. at pp. 2351-2352 (dis. opn. of Kavanaugh, J.).)

Davis is merely the most recent case to reject the relegation of the rule of lenity to tie-breaker status. Justice Thurgood Marshall, writing for the U.S. Supreme Court, held "[e]ven were the statutory language . . . ambiguous, longstanding principles of lenity. . . preclude our resolution of the ambiguity against [the criminal defendant] on the basis of general declarations of policy in the

statute and legislative history." (*Hughey v. United States* (1990) 495 U.S. 411, 422.) And as Justice Scalia explained, leaving the rule of lenity to be nothing more than a tie-breaker "does not venerate the important values the old rule serves." (*R.L.C.*, *supra*, 503 U.S. at p. 308 (conc. opn. of Scalia, J.).)

Thus, the U.S. Supreme Court's authority is in conflict about the role of the rule of lenity in statutory interpretation with the recent *Davis* decision refusing to adopt the "narrow view" of the rule of lenity. Just as *Davis* recognized that the rule of lenity must be applied to preserve the separation of powers and due process, this Court should do the same.

C. **This Court's Narrow Rule Of Lenity Cannot Be Reconciled With The Rule's Constitutional Purposes.**

This "narrow view" renders the rule of lenity virtually incapable of serving its constitutional purposes—preserving the separation of powers and ensuring due process through fair notice. At minimum, it suffers two significant flaws that warrant this Court's reconsideration of the "narrow view."

First, the "narrow view" risks criminal sanction against defendants when a court can never be certain that it is enforcing the Legislature's intent and adheres to a fiction that the public has "fair warning" of criminal conduct despite the need for courts to resort to extensive aids-in-interpretation. *People v. Wade* (2016) 63 Cal.4th 137, illustrates this flaw. There, this Court interpreted Penal Code section 25850, subdivision (a), which provides: "A person is guilty of carrying a loaded

firearm when the person carries a loaded firearm on the person[.]" The decision turned on the meaning of "on the person" and whether it applied to the defendant carrying a backpack that held a gun. (*Id.* at pp. 140-141.) To interpret that language, this Court examined the former version of the statute, decisions of the Court of Appeal, out-of-state authorities, the legislative history, and provisions of California law employing similar language. (*Id.* at pp. 140-147.) Based on that, this Court concluded that the Legislature intended carrying a gun in a backpack to be "on the person." (*Ibid.*) It dismisses the rule of lenity in a single paragraph, holding it irrelevant because the Court employed other means of discerning the Legislature's intent. (*Id.* at p. 147.)

Similarly, this Court in *Soto* had to resort to numerous sources to discern the Legislature's intent to interpret whether voluntary intoxication could preclude a finding that a defendant had the necessary "abandoned and malignant heart" to support a finding of the malice for murder. (*Soto*, *supra*, 4 Cal.5th at pp. 974-980.) It acknowledged that the plain language of the statute provided no clue to its meaning and conceded that the defendant's reading of the statute was "facially plausible." (*Id*. at p. 975.)

Where, as here, interpreting a statute requires the analysis of so many sources, including non-controlling authorities, how is it possible to be certain that the courts did not overstep their authority by creating a new criminal law? How

can we be certain that such results do not have the judiciary imputing to the Legislature "an undeclared will." (*Bell*, *supra*, 349 U.S. at p. 83.) In such instances, a court is little more than a "mindreader," unable to know if it is adding judicially-created law, or ruling as the Legislature intended. (*Santos*, *supra*, 553 U.S. at p. 515 (plur. opn. of Scalia, J.).) Because the possible result is criminal sanction, that job is purely for the Legislature, not the judiciary. (*Bass*, *supra*, 404 U.S. at 348; *Bell*, *supra*, 349 U.S. at p. 83.) Instead, in cases like *Wade* and *Soto*, judges impermissibly "develop the standards for imposing criminal punishment on a case-by-case basis." (*Kozminski*, *supra*, 487 U.S. at p. 951.)

Perhaps more importantly, when a court turns on sources such as out-of-state cases, legislative history, or previous dissenting opinions, it is hard to say a defendant received a fair warning that conduct was criminal. As Justice Scalia argued, the "narrow view" of the rule of lenity does not serve the constitutional purposes of fair warning and the separation of powers. (*Santos*, *supra*, 553 U.S. at p. 514 (plur. opn. of Scalia, J.); *R.L.C.*, *supra*, 503 U.S. at pp. 308-310 (conc. opn. of Scalia, J.).) Resorting to sources like legislative history requires courts to engage in supposition that should never result in criminal penalties:

> [N]o matter how "authoritative" the history may be—even if it is that veritable Rosetta Stone of legislative archaeology, a crystal clear Committee Report—one can never be sure that the legislators who voted for the text of the bill were aware of it. The only thing that was authoritatively adopted *for sure* was the text of the enactment; the rest is *necessarily* speculation.

(*R.L.C.*, *supra*, 503 U.S. at p. 309 (conc. opn. of Scalia, J.), original emphasis.) Fair warning "descends to needless farce when the public is charged even with knowledge of Committee Reports." (*Ibid*.)

Second, the "narrow view" is flawed because it is imprecise. How much stronger does one interpretation of the statute have to be for a court to no longer be engaging in guesswork? Are statutes only in "relative equipoise" when a court thinks two interpretations are equally reasonable? Are they still in "relative equipoise" when the probably changes to 60%/40%? Chief Justice Marshall warned that "probability is not a guide which a court, in construing a penal statute, can safely take." (*Wiltberger*, *supra*, 18 U.S. at p. 105.) Yet that is precisely the test the "narrow view" creates.

The Court should reject *Avery* and the "narrow view" of lenity, recognizing that it cannot be reconciled with the separation of powers and due process considerations underlying the rule of lenity. The "narrow view" is inconsistent with the original principles espoused by Chief Justice Marshall in *Wiltberger*. Leaving the rule of lenity as the last step of statutory construction defeats its very purpose – to prevent courts from imposing criminal sanctions that the Legislature has not clearly adopted and to ensure the public had fair warning of what conduct is criminal.

Instead of the "narrow view," the Court should apply the rule of lenity earlier in the statutory construction hierarchy. Given the "fair warning" requirement of due process, the obvious time to apply the rule is after a court determines that the statutory text is ambiguous. That is the only way to be sure that the public has been told "in language that the common world will understand, of what the law intends to do if a certain line is passed." (*R.L.C.*, *supra*, 503 U.S. at pp. 308-309 (conc. opn. of Scalia, J.).) If the Court is unwilling to apply the rule so early in the hierarchy, it should at least apply the rule of lenity before resorting to sources the public almost certainly would not review, e.g., out-of-state authority, dissenting opinions in earlier cases, and legislative history. That is the only way to protect the due process rights of criminal defendants and the separation of powers.

D. Under The Rule Of Lenity, Penal Code Section 632.7 Applies Only To Third-Party Eavesdroppers.

Appellant's argument that section 632.7 gives rise to a claim for recording between parties to a call relies on: (1) federal district court orders, which appear to be in conflict (compare AOB 31-35 with RB 34-36); (2) the statutory framework that, at a minimum, supports both parties' interpretation (compare AOB 35-38 with RB 20-26;)[2] (3) the Legislature's amendments of section 632.7 after the federal

[2] *Amicus* maintains that Respondent's interpretation of the statutory framework is far stronger than Appellant's. Its interpretation is the only one that interprets the word "receives" in a manner that is consistent with Penal Code sections 632.5 and 632.6. (RB 21-24.)

cases were decided (AOB 38-40); and (4) the legislative history materials such as letters from the sponsor and the Legislative Counsel (AOB 40-42).

If section 632.7's meaning cannot be discerned without considering any or all of those sources, the Court should apply the rule of lenity. Those sources cannot give the Court certainty of the Legislature's intent, leaving it to rely on which interpretation is more probable than the other. This places the Court in the position of possibly creating new law that the Legislature never intended, thereby violating separation of powers.

Nor can the Court conclude that section 632.7 gave parties like Respondent fair warning that recording calls only between parties violated the statute. Rather than adhere to the fiction that a reasonable person would be aware and consider the sources necessary to interpret the statute in Appellant's favor, the Court should instead apply the rule of lenity and construe the statute in favor of Respondent.

CONCLUSION

For all of the reasons stated above, amicus curiae American Medical Response, Inc. respectfully requests that the Court affirm the ruling of the Court of Appeal and hold that Penal Code section 632.7 applies only to third-party eavesdroppers.

Dated: July 21, 2020

AKIN GUMP STRAUSS HAUER & FELD LLP

By /s/ *Rex S. Heinke*
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ATTORNEYS FOR AMICUS CURIAE AMERICAN MEDICAL RESPONSE, INC.

CERTIFICATE OF COMPLIANCE

This brief consists of 4,640 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: July 21, 2020

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Proof of Service by Mail

[C.C.P. § 1013(c)]

I, Tatiana Thomas, declare as follows:

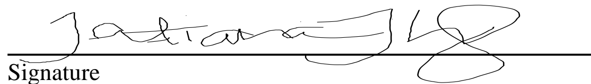
I am employed in the County of Los Angeles, State of California, and over the age of eighteen years. I am not a party to the within action. I am employed by Akin Gump Strauss Hauer & Feld LLP, and my business address is 1999 Avenue of the Stars, Suite 600, Los Angeles, California 90067. I enclosed the documents in a sealed envelope or package addressed to the respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

On July 21, 2020 I served the within document entitled: BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS/APPELLANTS on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

See Attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 21, 2020 at Los Angeles, California.

Tatiana Thomas
[Print name of person executing]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