No. 16-461

IN THE

Supreme Court of the United States

TERRY CHRISTENSEN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The New York University[2] Center on the Administration of Criminal Law (the Center) respectfully submits this brief as amicus curiae in support of Mr. Christensen's petition for a writ of certiorari with respect to the second question presented: What is the appropriate standard for determining whether recordings were made "for the purpose of committing a[] criminal or tortious act," 18 U.S.C. § 2511(2)(d)? *See* Pet. iii.

The Center is dedicated to defining and promoting best practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy. The Center aims to assist courts in addressing issues of broad importance to the administration of the criminal justice system, and accordingly files amicus briefs in support of both defendants and the government in criminal matters. The Center targets, among others, cases that raise substantial issues of statutory interpretation. Ambiguous rules prevent both government officials and private

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[1] Both parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae and its counsel has made any monetary contribution to the preparation or submission of this brief.

[2] No part of this brief purports to represent the views, if any, of New York University School of Law, or New York University.

citizens from determining the scope of conduct proscribed by law, and impede just and efficient outcomes in criminal prosecutions.

In this case, the Center is motivated by the important statute and entrenched circuit conflict at the center of the second question raised by Mr. Christensen's petition. Because violations of Title III may give rise to criminal and civil liability in addition to the exclusion of evidence, it is critical that federal and state courts apply the law consistently. The Center believes that this Court's resolution of the decades-long disagreement among the circuits regarding the proper interpretation of § 2511(2)(d) will promote the fair administration of criminal justice.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Recording conversations is very easy these days. Gone are the faceless private investigators of old movies, listening in from nondescript vans with boom mics and reel-to-reel recorders. You don't need to buy a Dictaphone or "wear a wire." All you need is a smartphone. When Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (also known as the Federal Wiretap Act), the notion of a handheld, everyday device that could record anyone at the tap of a screen was decades away. But Congress was prescient enough to realize that technological advances would make it easier and easier for private parties to record conversations, possibly with ill intent, and to address the implications. It did so through § 2511(2)(d) of Title III. That provision prohibits a private individual (that is, someone "not

acting under color of law") who is participating in a conversation from recording it for purposes of committing a crime or tort. Congress imposed criminal and civil liability on the recorder, 18 U.S.C. §§ 2511(4)(a), 2520(a), and mandated suppression of the recording in official proceedings, *id.* § 2515.

Now that nearly everyone effectively carries a voice recorder in their purse or pocket, the statutory scheme is routinely put to work, and the permutations have proved daunting. Consider Bob, a disgruntled engineer at an automobile manufacturer who has been passed over for a promotion one too many times. He plans to get revenge by defecting to a competitor with his company's prized trade secrets. He copies the contents of his work computer onto a flash drive. And for good measure, with a few taps on his smartphone, he starts recording every phone call and conversation he has with his boss, Henry, in order to capture any valuable intelligence that may come up. But his recordings capture another kind of secret, too: Bob and Henry have been part of a scheme to cheat on emissions testing for the better part of a decade. Suppose the emissions scandal comes to light and the recordings are discovered. Can Henry suppress the incriminating recordings in a subsequent fraud prosecution? Can the government prosecute Bob for surreptitiously recording communications with his confederates? Could Henry sue Bob for the same?

It all depends on which court of appeals you ask. Some of the circuits take a straightforward, intent-based approach to determining whether a party intercepted a conversation for the purpose of committing a crime or tort under § 2511(2)(d): Did Bob *intend* to

steal trade secrets? Then the recordings are inadmissible in Henry's prosecution and Bob may be held criminally and civilly liable for making them. But other circuits have adopted a variety of different interpretations of the provision, requiring, for example, that the act of recording be "essential" to a crime or tort, or that the recording is actually put to use by the recorder, or that the unwittingly recorded party is not himself advancing a crime or tort by communicating with the recording party. This conflict is unusually consequential because § 2511(2)(d) is applicable in such wide-ranging contexts. *Infra* § I.A. And the enduring discord on the meaning of this provision threatens to obfuscate Congress's intent in enacting it, as questions about liability and suppression have been resolved inconsistently for decades. *Infra* § I.B.

Answers are even more critical because the issues are of increasing recurrence and importance. When it enacted Title III, Congress understood that new technologies could threaten personal privacy and become tools for unlawful ends. So it acted to penalize recording for unlawful purposes and to provide recompense for victims. But it also ordered suppression, injecting an extra measure of deterrence—by destroying some of the value of an unlawful recording—and ensuring that the courts would not become complicit in further disclosure and use of illicit recordings. *Infra* § II.A. The ready availability of recording devices in the modern world makes Congress's judgments more salient than ever. *Infra* § II.B.

This case presents an ideal opportunity to announce an authoritative standard regarding the application of § 2511(2)(d). As Mr. Christensen

emphasizes, the outcome of his suppression motion would have been different under the standards employed by several of the other circuits. Pet. 34. Additionally, as the court below recognized, "[t]he main evidence against Christensen consisted of [Pellicano's secret] recordings." Pet. App. 18a. Therefore, resolving the meaning of § 2511(2)(d) will have a direct impact on the outcome of Mr. Christensen's case. Finally, the issue was properly preserved and squarely addressed by the Ninth Circuit. Pet. App. 147a-48a. This Court should grant the petition.

ARGUMENT

I. This Court's Authoritative Interpretation Of § 2511(2)(d) Will Resolve Fundamental, Unsettled Questions Regarding Liability And Exclusion Of Evidence.

Review in this case is necessary to resolve longstanding confusion among the lower courts regarding an important provision of Title III. Under 18 U.S.C. § 2511(2)(d), a participant to a communication ordinarily may record that communication (or give consent to a third party to do so). But Congress drew a line: Recording is not permitted "for the purpose of committing any criminal or tortious act." *Id.* Despite this seemingly straightforward language, the courts of appeals have struggled to apply it consistently. And because the statute both imposes liability and mandates suppression of recordings, confusion as to the appropriate standard under § 2511(2)(d) rears its head in criminal prosecutions, civil suits, and indeed in any proceeding in which a recording could be offered as evidence. It is critical for this Court to step in

and provide a definitive interpretation of a provision that has confounded the lower courts for decades.

A. Discord in application of § 2511(2)(d) sows confusion in several contexts.

This Court should grant review to resolve profound disagreement on the meaning of the phrase "for the purpose of committing any criminal or tortious act," 18 U.S.C. § 2511(2)(d).

1. The First and D.C. Circuits simply ask whether "the primary motivation, or ... a determinative factor in the actor's motivation for intercepting the conversation" was to commit a crime or tort. *United States v. Cassiere*, 4 F.3d 1006, 1021 (1st Cir. 1993) (quoting *United States v. Vest*, 639 F. Supp. 899, 904 (D. Mass. 1986)); *United States v. Dale*, 991 F.2d 819, 841 (D.C. Cir. 1993) (quoting *Vest*, 639 F. Supp. at 904). So, for example, in one oft-cited case, a district court determined that § 2511(2)(d) applied when a defendant recorded a conversation among participants of a bribery scheme in order to ensure that his coconspirators held up their end of the bargain. *Vest*, 639 F. Supp. at 904, 906-07. The Fourth Circuit similarly considers only the purpose for the interception. *United States v. Truglio*, 731 F.2d 1123, 1131 (4th Cir. 1984), *overruled on other grounds by United States v. Burgos*, 94 F.3d 849 (4th Cir. 1996).

But other circuits supplement this intent-based approach with judicial glosses that yield different outcomes. Under the Ninth Circuit's interpretation, § 2511(2)(d) is satisfied only if the interception or recording is "essential to the actual execution" of the

crime or tort. *United States v. McTiernan*, 695 F.3d 882, 890 (9th Cir. 2012). Indeed, the Ninth Circuit rejected Petitioner's argument for suppression in this case because "Christensen made no specific showing in the district court that [the intercepted] recordings were essential to collecting RICO income or that this was Pellicano's intended use." Pet. App. 147a. In other words, the court determined that even if Pellicano recorded his conversations with Mr. Christensen for the purpose of *facilitating* the collection of fees to fund his criminal enterprise, he could have achieved his ends without the recordings and so did not violate § 2511(2)(d). Similarly, the Ninth Circuit concluded that "the recordings themselves were not essential to any breach of fiduciary duties that Pellicano may have committed." Pet. App. 147a. In contrast, in the First, Fourth, or D.C. Circuits, criminal or tortious intent alone would have been the only finding needed for Mr. Christensen to prevail on his suppression motion.

The Seventh Circuit, meanwhile, holds that "it is the *use* of the interception with intent to harm rather than the fact of interception that is critical to liability" under § 2511(2)(d). *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 960 (7th Cir. 1982) (emphasis added). The Sixth Circuit has explicitly rejected this interpretation, holding that "it is not necessary for liability that the interception be used for a criminal or tortious purpose." *Stockler v. Garratt*, 893 F.2d 856, 859 (6th Cir. 1990). Nor does the Seventh Circuit's rule comport with that of the Second Circuit, where there can be a violation of § 2511(2)(d) so long as the interceptor "*plans* to use the recording to harm the other party" at the moment he initiates the recording. *Caro v.*

Weintraub, 618 F.3d 94, 100 (2d Cir. 2010) (emphasis added).

The Second and Eighth Circuits narrow § 2511(2)(d) in still a different way: "Congress limited the cause of action [in cases implicating § 2511(2)(d)] to instances where one party to the conversation deliberately seeks to harm the other participant through the information intercepted." *Caro*, 618 F.3d at 100; *accord Meredith v. Gavin*, 446 F.2d 794, 799 (8th Cir. 1971). In other words, the recorder's prospective crime or tort must specifically target the unwittingly recorded participant. The Sixth Circuit sees things differently. In *United States v. Underhill*, the court concluded that taping conversations in which illegal bets were placed constituted "intercept[ion] for the purpose of committing a criminal act" because the tapers violated a state law against making a gambling record—a crime without a particular victim. 813 F.2d 105, 110-11 (6th Cir. 1987).

But those *Underhill* defendants who were unwittingly recorded could not get the tapes suppressed under § 2515 for another reason, one that only deepens the conflict among the circuits. For under *Underhill*, members of a conspiracy who were unwittingly intercepted may not avail themselves of § 2515 when the intercepted conversation advances that conspiracy. *Id.* at 112. The First Circuit has referred to such a co-conspirator exception, which only exists in the Sixth Circuit, as "an incorrect construction of the law." *United States v. Vest*, 842 F.2d 1319, 1334 & n.11 (1st Cir. 1988). In short, the conflict among the courts of appeals as to the proper application of § 2511(2)(d) is profound and pervasive.

2. This circuit conflict is also highly consequential. Whether a recording is prohibited under § 2511(2)(d) impacts not only whether it must be suppressed in a prosecution like Petitioner's, *see* 18 U.S.C. § 2515, but potentially also whether the recorder may himself be criminally prosecuted, *see id.* § 2511(4)(a), or held civilly liable, *see id.* § 2520(a). Suppression and civil liability are available not just in federal courts, but in state courts as well. *See, e.g.*, *People v. Otto*, 831 P.2d 1178, 1179-80 (Cal. 1992) (defendants moved to suppress conversations intercepted and recorded by nonparty victim); *Hirschey v. Menlow*, 747 P.2d 402, 403 (Or. Ct. App. 1987) (reviewing civil claim alleging party to a conversation recorded such conversation with a criminal purpose). In fact, a party to "*any* trial, hearing, or other proceeding in or before *any* court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision," 18 U.S.C. § 2515 (emphasis added), may invoke the suppression remedy.

Against this backdrop, it is perhaps no surprise that the courts of appeals have struggled to interpret § 2511(2)(d) consistently. The various contexts in which the provision arises are bound to present disparate, often cross-cutting considerations and equities. As examined below, what may seem fair or necessary in the context of a suppression motion may well yield unintended consequences when it comes to criminal or civil liability for the person making the recording. This only makes a predictable, workable approach more vital. Because the question whether someone has intercepted a communication "for the purpose of committing any criminal or tortious act"

may appear in countless situations, an authoritative interpretation of the phrase is imperative.

B. The courts of appeals' disagreement over § 2511(2)(d) has significant, practical consequences.

The courts of appeals' inconsistent interpretations of § 2511(2)(d) have significant real-world consequences. To see why, let's return to Bob and Henry. Facing prosecution for the fraudulent emissions scheme, Henry would move to suppress Bob's recordings on the ground that Bob recorded them with the purpose of committing the criminal and tortious act of stealing trade secrets. *See* 18 U.S.C. §§ 1832, 1836(b)(1).

Whether the motion would succeed depends largely on the forum. Under the prevailing rule in the First, Fourth, and D.C. Circuits, it seems clear enough that Henry's § 2515 motion would be granted. Bob's "primary motivation" was to steal trade secrets—i.e., to commit a crime or tort. *Cassiere*, 4 F.3d at 1021; *Dale*, 991 F.2d at 841. Bob could also be prosecuted in those circuits for running afoul of § 2511(2)(d). But what would be the outcome in the Ninth Circuit? Would Bob's conduct satisfy the requirement that the recording be "essential to" committing a crime or tort, *McTiernan*, 695 F.3d at 890? Recall that, along with recording his conversations, Bob stored confidential information on a flash drive. Suppose that all of the important trade secrets were contained on the flash drive, and that the recordings Bob captured on his smartphone contained only minor

details or clarification. Then, it would seem, the recordings merely facilitated Bob's unlawful scheme without being essential to it, much like Pellicano's recordings in this case. So the suppression motion that would succeed in the District of Massachusetts or the District of Columbia would likely fail in the Eastern District of California because Bob's recordings were not really "essential to" stealing his company's trade secrets.

Shift the fact pattern to the Sixth Circuit and the legal analysis is different. In the Sixth Circuit, unlike in the Ninth, Henry would not have to worry about showing that Bob's recordings were essential to Bob's intended wrongdoing. Nevertheless, the suppression motion under § 2515 would probably fail because of the Sixth Circuit's unique coconspirator rule. The conversations between Bob and Henry advanced their plan to cheat on emissions testing. "As a member of the conspiracy" to commit fraud, Henry thus would have "waived his right of privacy in communications made in furtherance of the purposes of the conspiracy." *Underhill*, 813 F.2d at 112. So the *result* in the Sixth Circuit would align with the one in the Ninth, albeit on different grounds. But change one of the facts—say, that Bob collected a crucial trade secret through his recording—and the Ninth Circuit's essentiality requirement is satisfied, shifting that court (but not the Sixth Circuit) into the suppression column.

The conflict goes even further. Suppose that Bob intended to steal his company's trade secrets when he began his recording project, but Henry revealed no

valuable proprietary information at all. The recordings therefore never actually resulted in the misappropriation of any trade secrets. *See* 18 U.S.C. § 1839(3)(B) (clarifying that trade secrets must have "independent economic value"). In the Seventh Circuit, "it is the use of the interception with intent to harm rather than the fact of interception that is critical." *By-Prod Corp.*, 668 F.2d at 960. So notwithstanding Bob's intent to commit a tort, Henry's suppression motion would fail if he were tried under the Seventh Circuit's idiosyncratic rule, and perhaps under other circuits' approaches as well, depending on the various particulars discussed above. But the motion would almost certainly succeed under the First, Fourth, and D.C. Circuits' intent-based approach, where state of mind is all that matters.

Finally, consider that the Second and Eighth Circuits confine liability under § 2511(2)(d) "to instances where the recording party intends to use the recording to harm or injure a recorded party, such as to blackmail, threaten or publicly embarrass the recorded party." *United States v. Jiau*, 734 F.3d 147, 152 (2d Cir. 2013); *Meredith*, 446 F.2d at 799 ("[T]he sort of conduct contemplated was an interception by a party to a conversation with an intent to use that interception against the non-consenting party in some harmful way and in a manner in which the offending party had no right to proceed."). Here, the recorded party was Henry. But the company, not Henry, was the rightful owner of any trade secret, and therefore the company, not Henry, would be the victim of any theft. So the recordings might not be suppressed in the Second and Eighth Circuits either, but again for a different reason than in the Ninth, Sixth, or Seventh

Circuits. And again, a small factual permutation—for example, that Bob's plan all along was to use the recordings to blackmail Henry regarding the emissions conspiracy—could change the result under the Second and Eighth Circuits' rule, but nowhere else.

What makes all this particularly vexing is the fact that § 2511(2)(d) arises in a variety of circumstances that implicate different policy considerations. For example, while it may seem intolerable that Henry should be allowed to suppress a recording in which he discusses his own wrongdoing, a narrower standard for suppression would also mean a narrower one for liability, diminishing the statute's deterrent effect on the act of recording with ill intent. The opposite is also true. In *Cassiere*, 4 F.3d at 1021, and *Dale*, 991 F.2d at 840-42, the First and D.C. Circuits adopted the "primary motivation or determinative factor" test in the context of defendants' motions to suppress recordings. As shown above, this test is more likely to lead to suppression than that of several other circuits. *E.g.*, *McTiernan*, 695 F.3d at 890 (developing "essential to" test in response to a § 2515 suppression motion). But the side effect of this broad approach to § 2511(2)(d) is that more interceptors are exposed to criminal and civil liability; Bob is more likely to be prosecuted for violating the prohibition on illegal recording (and his affirmative defense under § 2511(2)(d) more likely to fail) under the First, Fourth, and D.C. Circuits' rule than under the narrower interpretations advocated by, for example, the Second, Eighth, and Seventh Circuits. In fact, those three courts adopted their narrow interpretations of § 2511(2)(d) in civil suits in which plaintiffs sued interceptors under § 2520. *See Caro*, 618 F.3d at 95-96, 99; *By-Prod Corp.*, 668 F.2d at 960;

Meredith, 446 F.2d at 796. In those cases, unlike in *Cassiere* and *Dale*, the courts were forced to grapple with how a proposed interpretation of § 2511(2)(d) would impact those making the recording rather than those being recorded.

This case presents an opportunity for the Court to resolve this deep, entrenched conflict in the lower courts, and announce a clear-eyed approach to § 2511(2)(d) that works across all contexts.

II. Section 2511(2)(d)'s Bar On Private Recording For Unlawful Purposes Advances Important Public Interests And Arises Frequently In Litigation.

Review in this case is all the more warranted because the scope of Title III's prohibition on recording for unlawful purposes is an important and recurring issue in both federal and state courts. Congress understood when it enacted Title III that technological advances would make it increasingly easy for individuals to record their unsuspecting interlocutors for unlawful ends. It was troubled enough to cover all bases. It imposed criminal and civil liability to penalize wrongdoers and provide recompense to victims. And it mandated suppression of the resulting recordings not only to destroy any value in the recording to the wrongdoer, but also to avoid judicial complicity in further disclosure and use. In an age in which practically everyone carries a smartphone that can act as a voice recorder, questions about how to enforce Congress's Title III framework arise with increasing frequency. Courts and litigants need answers.

A. Title III's bar on private recording for an unlawful purpose protects privacy interests and promotes the integrity of the courts.

The legislative record underlying Title III is extensive, and it provides an unusually clear window into congressional intent.

As this Court recognized in *Gelbard v. United States*, "the protection of privacy was an overriding congressional concern" in crafting Title III. 408 U.S. 41, 48 (1972). Initially, though, that concern appeared to extend only to eavesdropping—to recordings made by someone listening in to someone else's conversation. As it came out of committee, the draft bill that would become Title III proscribed that sort of unauthorized recording, but contained no prohibition on recording conversations in which the person recording is a participant. S. Rep. No. 90-1097 (1968), at 93-94, 175-76, *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2182, 2236; *see Meredith*, 446 F.2d at 797 & n.4.

Congress ultimately expanded the bill's purview, as § 2511(2)(d) reflects. The pertinent amendment was submitted by Senator Hart, who viewed the blanket exception for private-participant recording as a "gaping hole." 114 Cong. Rec. 14,682, 14,694 (1968). He noted that "as [recording] techniques become more sophisticated still," the possibility that private participants might use recordings for nefarious ends would be "of very great concern." *Id.* So his proposed amendment barred recordings "with an unlawful motive"; recordings made by participants would be allowed

only when motivated by "a legitimate desire to protect … from later distortions or other unlawful or injurious uses by the other party" or to thwart "criminal activity." *Id.* Hart's amendment was adopted, *id.* at 14,695, and Congress enacted the provision as such.

As explained above, Congress reinforced its choice with the full set of Title III remedies. A private party who had unlawful motives when making a recording with an unsuspecting conversation partner could be prosecuted for it, or made to compensate her victim for any harms caused by the surreptitious intrusion. 18 U.S.C. §§ 2511(4)(a), 2520(a). That stands to reason. Given Congress's solicitude for privacy interests and its understanding that new technologies could pose a threat, one would have expected it to impose liability directly upon the Bobs of the world, who might use recording technology as a tool for ill.

But perhaps more telling when it comes to the depth of Congress's convictions is that it extended the suppression remedy to the resulting recordings, without even a hint of an exception. As a matter of plain text, a recording made with a criminal or tortious purpose is inadmissible "in *any* trial, hearing, or other proceeding." *Id.* § 2515 (emphasis added). Whether in a civil or a criminal proceeding, no matter who the parties happen to be or who offers it as evidence, Bob's recording cannot come into the courtroom.

A majority of courts have applied Title III's sweeping suppression remedy as written. *See United States v. Crabtree*, 565 F.3d 887, 889-92 (4th Cir. 2009); *In re Grand Jury*, 111 F.3d 1066, 1079 (3d Cir. 1997); *United States v. Vest*, 813 F.2d 477, 481 (1st

Cir. 1987). One common justification is deterrence. Refusing to admit a recording in court deprives the recording of its value as a tool for extortion. As the Fourth Circuit explained, "If vengeful employees know that their recordings cannot be used to send their employer to jail, they would be less inclined to illegally record the boss's conversations." *Crabtree*, 565 F.3d at 891. So, at least in instances where potential introduction into evidence might give an illicit recorder leverage over the victim, it makes sense to suppress.

There is, however, an even more fundamental justification, as this Court recognized in *Gelbard*: "[T]he evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.'" 408 U.S. at 51 (quoting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801(b), 82 Stat. 197, 211). Congress, in other words, did not want courts to "become partners to illegal conduct." *Id.* This concern is not just theoretical, for "Title III prohibits not just the wrongful *interception* of communications, but the *disclosure* of improperly intercepted communications." *Crabtree*, 565 F.3d at 890 (emphasis in original). Congress crafted § 2511(2)(d) to ensure that courts would not themselves perpetuate unlawful invasions of privacy. Section 2511(2)(d) thus goes not only to crucial personal privacy interests, but also to the very integrity of our adjudicative system.

B. Smartphones make Congress's concerns more salient than ever.

Congress's interests in enacting § 2511(2)(d) are more salient now than ever. Congress understood that technological progress might one day make private recording widespread. In 1968, this was perhaps more of an inkling. Ordinary individuals were not known to "wear a wire"; boom mics and Dictaphones were not household staples. When Congress set out to update Title III in 1986, though, it was the dawn of modern computer technology. The very purpose of the bill was "to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." S. Rep. No. 99-541, at 1 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 3555, 3555. "These tremendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques[,] … making it possible for … private parties to intercept personal or proprietary communications of others …." *Id.* at 3, *as reprinted in* 1986 U.S.C.C.A.N. at 3557.

But still, at the time only schemers with means had the equipment and expertise necessary to record a conversation for unlawful purposes. Flip through the older cases in which § 2511(2)(d) came up, and most will involve elaborate plotlines and sensational characters. *E.g.*, *Thomas v. Pearl*, 998 F.2d 447, 449 (7th Cir. 1993) (college basketball coach given a "tape recorder with a telephone attachment" to record a recruit revealing a recruiting violation); *Traficant v.*

Comm'r, 884 F.2d 258, 260-61 (6th Cir. 1989) (organized crime faction recorded conversation with corrupt public official whose loyalties may have been to rival faction); *Truglio*, 731 F.2d at 1125-27 (owner of a house of prostitution taped conversations between himself and manager); *Stockler*, 893 F.2d at 857-58 (attorney advised former client to "conceal a tape recorder on his person" during meeting with a debtor soon to go bankrupt).

Not anymore—the day Congress envisioned has arrived. Anyone with a smartphone can easily and secretly record every phone or in-person conversation that you have with them. On Apple's iPhone, for example, one can use the preloaded "Voice Memos" app, or download a third-party app that automatically records phone calls, like "Call Recorder FREE," http://tinyurl.com/CallRecorderFree. Little surprise, then, that the instances of allegedly illicit recording coming before the courts are increasingly frequent[3]—and often more mundane—since everyone began carrying around devices that can make voice recordings. *E.g.*, *Caro*, 618 F.3d at 96 (two brothers used an iPhone to record a family dispute regarding a will); *Haw. Reg'l Council of Carpenters v. Yoshimura*, No. 16-198 ACK-KSC, 2016 WL 4745169, at *1-2 (D. Haw. Sept. 12, 2016) (union employee recorded conversations allegedly for purposes of breaching fiduciary duty); *Angelo v. Moriarty*, No. 15 C 8065, 2016 WL 640525, at *2 (N.D. Ill. Feb. 18, 2016) (board member of Fraternal

[3] Westlaw's database contains 449 cases citing § 2511(2)(d) since its enactment in 1968. Over 51% of those cases were decided in 2000 or later, and over 32% were decided in the decade since the first Apple iPhone was released.

Order of Police chapter "surreptitiously recorded" a meeting and posted it to YouTube); *Ragasa v. Cty. of Kaua'i*, No. 14-309 DKW-BMK, 2016 WL 543118, at *1-11, *25-28 (D. Haw. Feb. 8, 2016) (lifeguard recorded various conversations related to disciplinary actions, conduct of other lifeguards, and supervisor's responses to complaints). This is not to say the more sensational cases have abated—not at all. *E.g.*, *United States v. Yaitsky*, 196 F. App'x 202 (4th Cir. 2006) (murder-for-hire plot thwarted when a would-be conspirator taped conversations with the plan's mastermind and provided them to police); *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-cv-236-WHO, 2016 WL 5946858, at *1-2 (N.D. Cal. Sept. 30, 2016) (defendants allegedly set up fake company to gain access to Planned Parenthood facilities, secretly taped conversations, then released edited footage on YouTube).

Put simply, the smartphone makes it exceedingly easy to secretly record other people. Cases implicating § 2511(2)(d)'s bar on private-participant recordings for unlawful purposes will continue to arise with great frequency, and courts need a uniform, practicable framework for resolving them. Only this Court can supply it.

CONCLUSION

For the foregoing reasons, amicus curiae urges this Court to grant the petition for certiorari as to the second question presented by Mr. Christensen's petition.

Respectfully submitted,

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