STATE OF MICHIGAN

IN THE SUPREME COURT

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.	Supreme Court No. 162121 USDC-ED: 17-13292

AFT MICHIGAN,

Plaintiff,

v

PROJECT VERITAS, MARISA L. JORGE,

Defendants.
/

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AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 18 MEDIA ORGANIZATIONS IN SUPPORT OF THE TRADITIONAL INTERPRETATION OF MICHIGAN'S EAVESDROPPING STATUTES

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Reporters Committee for Freedom of the Press and 18 other media organizations (collectively, "amici"), by and through undersigned counsel, respectfully submit this brief as amici curiae in support of the traditional interpretation of Michigan Compiled Laws 750.539a and 750.539c (collectively, the "Eavesdropping Statutes" or the "Statutes"). Amici are the Reporters Committee for Freedom of the Press, CBS Broadcasting Inc. on behalf of WWJ-TV/WKBD-TV, The Center for Investigative Reporting (d/b/a Reveal), The E.W. Scripps Company, Fox Television Stations, LLC, Gannett Co., Inc., Graham Media Group, Michigan, Inc. d/b/a WDIV-TV, International Documentary Association, The Media Institute, MediaNews Group Inc., Michigan Association of Broadcasters, Michigan Press Association, MPA - The Association of Magazine Media, National Press Photographers Association, The News Leaders Association, Radio Television Digital News Association, Sinclair Broadcast Group, Inc., Society of Environmental Journalists, and Society of Professional Journalists.[2]

As representatives of the news media, amici have a strong interest in ensuring that journalists and news organizations can report on matters of public concern without fear of criminal or civil liability. The issue presented in this case has potentially broad ramifications for journalists in Michigan who rely on recorded source material. Plaintiff's interpretation of the Statutes would give rise to potential criminal and civil liability for journalists, as well as their sources. The threat of fines or criminal penalties for this type of newsgathering and reporting could cause sources to

[1] No counsel for any parties authored this brief in whole or in part and no party or any other individual or entity made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Full descriptions of the amici are included in the motion that this brief accompanies.

dry up and members of the press to self-censor, thus ultimately depriving the public of key information about matters of significant interest.

STATEMENT OF JURISDICTION

This court has jurisdiction to answer the certified question pursuant to MCR 7.308(A).

STATEMENT OF QUESTION PRESENTED

1. Whether the Eavesdropping Statutes prohibit a party to a conversation from recording the conversation absent the consent of all other participants.

Amici's answer: No.

STATEMENT OF FACTS AND PROCEEDINGS

Amici adopt the Statement of Facts and Proceedings set forth by the Attorney General's brief supporting the Plaintiff's interpretation of the Michigan Eavesdropping Statutes.

INTRODUCTION

Nearly forty years ago, the Michigan Court of Appeals held that the act of "eavesdropping," as defined in MCL 750.539a(2), applies only to those conversations in which the supposed "eavesdropper" is not a participant to the conversation. *Sullivan v Gray*, 117 Mich App 476, 482-483; 324 NW2d 58 (1982). The Statutes define "eavesdrop" as to "overhear, record, amplify or transmit any part of the private discourse *of others* without the permission of all persons engaged in the discourse." MCL 750.539a(2) (emphasis added). Thus, as the Michigan Court of Appeals held, "the statutory language, on its face, unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to 'the private discourse of others.' " *Sullivan*, 117 Mich App at 481.

This Court is now asked to determine whether to affirm *Sullivan*'s holding that the consent of only one party to a conversation is required in order to lawfully record it ("one-party consent") or whether the Eavesdropping Statutes prohibit the recording of a conversation absent the consent of all parties to that conversation ("all-parties consent"). This Court should affirm *Sullivan*'s one-party consent principle for two reasons. First, the doctrine of legislative acquiescence should apply here. In the nearly four decades since *Sullivan* was decided, the Michigan Legislature has not amended the statutory language to legislatively overrule the Court of Appeals' interpretation that "a potential eavesdropper must be a third party not otherwise involved in the conversation." *Id.* (concluding that "[h]ad the Legislature desired to include participants within the definition, the phrase 'of others' might have been excluded or changed to 'of others or with others'") (quoting MCL 750.539a(2)). Indeed, as recently as 2019, the Legislature contemplated updates to the Statutes but, significantly, did not propose any revisions to the "discourse of others" language that formed the foundation of the Court of Appeals' decision in *Sullivan*.

Second, the "one-party consent" interpretation of the Statutes serves vital First Amendment interests. The news media plays a "special and constitutionally recognized role . . . in informing and educating the public." *First Nat'l Bank of Boston v Bellotti*, 435 US 765, 781 (1978). In fulfilling that role, journalists may rely on recordings provided by whistleblowers and other sources—recordings sometimes made without the consent of all parties to the conversation—in order to inform the public about matters of public concern, including institutional abuse and misconduct. See, e.g., Sarah Cwiek, *"Horrible" nursing home abuse caught on hidden camera*, Michigan Radio (Mar 5, 2018), https://perma.cc/HR46-5K6S. Were this Court to reject the Court of Appeals' long-accepted interpretation of the Eavesdropping Statutes in favor of Plaintiff's interpretation—namely, that the Eavesdropping Statutes prohibit recording a conversation without the consent of *all parties* to the conversation—it would subject journalists, as well as their sources, to potential civil and criminal liability for newsgathering and reporting that has brought matters of substantial public concern to light. The resulting chilling effect would imperil the ability of the news media in Michigan to keep the public informed about matters of public interest.

For these reasons, amici urge the Court to hold that the Eavesdropping Statutes do not prohibit a party to a conversation from recording that conversation without the consent of all other participants.

ARGUMENT

I. The doctrine of legislative acquiescence supports the traditional interpretation of the Eavesdropping Statutes.

The doctrine of legislative acquiescence "is founded on the notion that decisions that have not been legislatively overturned are tacitly approved by the Legislature." *Grimes v Mich Dep't of Trans*, 475 Mich 72, 84; 715 NW2d 275 (2006). In the intervening decades since *Sullivan* was

decided, the Michigan Legislature has completed more than 38 sessions. See MICH CONST, art IV, sec 13. At no point during that time has the Legislature made any effort to amend the Eavesdropping Statutes to legislatively overturn *Sullivan*.

Nor has the Michigan Law Revision Commission—whose purpose is to examine "judicial decisions for the purpose of discovering defects and anachronisms in the law and recommend[] needed reforms," MCL 4.1403(1)(a)—identified *Sullivan* as problematic. As a commission created "specifically to aid [the Legislature] in . . . identifying conflicts in the law" the absence of such a finding over the course of close to four decades serves as a particularly strong indicator that *Sullivan*'s interpretation of the Statutes is consistent with legislative intent. See *Apsey v Mem'l Hosp*, 477 Mich 120, 136; 730 NW2d 695 (2007) (Kelly, J., concurring) ("Given the specialized function of the Michigan Law Revision Commission . . . its report is a particularly useful tool in discerning legislative intent.").

It cannot be said that the Legislature has not overturned *Sullivan* because of mere inattention to the Eavesdropping Statutes. As recently as December 2019, the Legislature contemplated modernizing Section 750.539a by adding "remotely access[ing]" discourse as a possible method of eavesdropping. See SB 688, 100th Leg, Reg Sess (Mich 2019). Significantly, while considering revisions to the Statutes, the Legislature did not propose any amendment to the "discourse of others" language that formed the basis of the Court of Appeals' decision in *Sullivan*. *Id.* Thus, even when the Legislature was actively considering amendments to Section 750.539a, it chose to leave the statutory language requiring only one-party consent intact.

Michigan administrative bodies have similarly adhered to *Sullivan*'s one-party consent interpretation in issuing administrative opinions. See, e.g., *Keego Harbor*, Case No. C10A-008, 28 MPER P 24, 102 (Mich Emp't Relations Comm'n, Sep 11, 2014) (finding that a police officer's

recording of a disciplinary interview between the officer and his police chief without the police chief's knowledge was admissible evidence); Op No. 6369, 86 Mich Op Att'y Gen 298, 1986 Mich AG LEXIS 44 at *25 (1986) (finding that a doctor could secretly record a telephone conversation with a patient's next of kin); Op No. 6100, 82 Mich Op Att'y Gen 741, 743 (1982) (finding the parent of a student with a disability had the right to record an individualized educational planning committee meeting because the meeting was not private and because the parent was a participant in the meeting).

In sum, the absence of any effort by the Legislature to legislatively overrule *Sullivan* in the nearly forty years since it was decided—even when the Legislature contemplated other amendments to the Statutes—constitutes, at minimum, tacit acceptance of *Sullivan*'s interpretation. Thus, the doctrine of legislative acquiescence supports a finding that the Statutes were not intended to prohibit recording a conversation with the consent of one party to that conversation.

II. Maintaining the traditional interpretation of the Eavesdropping Statutes serves important First Amendment interests.

The Supreme Court of the United States has repeatedly "emphasize[d] the special and constitutionally recognized role of . . . [the press] in informing and educating the public." *Bellotti*, 435 US at 781; see also *Saxbe v Washington Post Co.*, 417 US 843, 863 (1974) (Powell, J, dissenting) ("[The press] is the means by which the people receive that free flow of information and ideas essential to intelligent self-government."); *Mills v Alabama*, 384 US 214, 219 (1966) ("The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs.") (discussing *Lovell v City of Griffin*, 303 US 444 (1938)).

Investigative journalism, in particular, has long played a prominent role in safeguarding the public interest and, in some cases, prompting important reforms. Surreptitious recordings made by journalists and sources can play a key role in such investigative reporting. Indeed, recordings have long been recognized as a "significant medium for the communication of ideas" that are entitled to full constitutional protection. *Joseph Burstyn, Inc. v Wilson*, 343 US 495, 501 (1952). As the United States Court of Appeals for the Seventh Circuit observed, audio and audiovisual recordings "are uniquely reliable and powerful methods of preserving and disseminating news . . . [T]heir self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes." *Am Civil Liberties Union of Ill v Alvarez*, 679 F3d 583, 607 (7th Cir 2012). For these reasons, reporters often rely on video and audio recordings—sometimes obtained from sources and whistleblowers—including recordings made without the knowledge of all parties to a conversation in order to inform the public about matters of public interest.

A. Investigative journalism plays a vital role in public discourse.

In many respects, investigative journalism was born out of Upton Sinclair's infamous 1906 book on Chicago's slaughterhouses, *The Jungle*, and the work of his contemporaries. See James O'Shea, *Raking the Muck*, Chi. Trib., May 21, 2006, https://perma.cc/6AZE-HWBL. While *The Jungle* is a work of fiction, Sinclair's story was rooted in extensive research. He interviewed health inspectors and industry workers, and went undercover into meatpacking facilities to document unsanitary conditions. James Diedrick, *The Jungle*, Encyclopedia of Chicago (Janice L. Reiff, Ann Durkin Keating, & James R. Grossman, eds. 2005), https://perma.cc/TXD3-3ECV. Sinclair's work is credited with aiding the passage of the Pure Food and Drug Act and Meat Inspection Act in 1906, which protected the public by instituting vigorous reforms in the meatpacking industry.

Id.; see also Wallace F. Janssen, *The Story of the Laws Behind the Labels*, Food and Drug Admin., https://perma.cc/QMF2-XAYV (last updated Mar. 11, 2014) (originally published in FDA Consumer, June 1981) ("A single chapter in Upton Sinclair's novel, *The Jungle*, precipitated legislation expanding federal meat regulation to provide continuous inspection of all red meats for interstate distribution, a far more rigorous type of control than that provided by the pure food bill.").

Investigative journalism in the public interest has been prevalent ever since. For example, in 2008, the Pulitzer Prize-winning reporting of the *Chicago Tribune* on the flawed regulation of toys, car seats, and cribs led to a recall of dangerous products and federal action to improve oversight. See *The 2008 Pulitzer Prize Winners: Investigative Reporting*, Pulitzer Prizes, https://bit.ly/2ZFFDxo. Similarly, in Florida, the *Tampa Bay Times* and the *Sarasota Herald-Tribune*'s 2011 award-winning exposé on state-funded mental hospitals led to state senate hearings and calls for reform. Anthony Cormier, *State senators scrutinize violence in Florida's mental hospitals*, Tampa Bay Times (Jan. 14, 2016), https://perma.cc/5WSB-T2HY; see also Leonora LaPeter Anton, et al., *Insane. Invisible. In Danger.*, Tampa Bay Times (Oct. 29, 2015), https://perma.cc/D4BX-CFSE.

Investigative reporting can be significantly aided by—or, in some cases, even based entirely on—audio or audiovisual recordings. Access to such recordings can enhance the accuracy and credibility of reporting, enrich news stories, and allow reporters to convey more than can be communicated based on the written word alone.

B. News media in Michigan have relied on surreptitious recordings to expose institutional fraud and abuse and to spur legislative reform.

Surreptitious recordings have been instrumental in enabling the news media to reveal instances of fraud and abuse in Michigan. For example, secretly recorded video has played a vital

role in news reporting on nursing home abuse in the state—a matter of increasing importance and concern due to COVID-19-based restrictions on public access to nursing homes. In May 2020, news outlets reported on a video showing the violent beating of an elderly nursing home patient. See, e.g., *Online video shows 20-year-old beating elderly nursing home patient*, Fox 2 (May 21, 2020), https://perma.cc/93VC-N2D4. Similarly, in 2018, Michigan Radio utilized footage obtained from a hidden camera to report on the physical and verbal abuse of an elderly resident by nursing home staff. See Sarah Cwiek, *"Horrible" nursing home abuse caught on hidden camera*, Michigan Radio (Mar. 5, 2018), https://perma.cc/HR46-5K6S. These reports have spurred legislative efforts to prevent and deter future abuse. See *Bill to allow cameras in Mich. nursing home residents' rooms gaining traction*, Fox 2 (July 31, 2020), https://perma.cc/BYP8-LMNU.

Michigan courts have also been impacted by investigative reporting based on surreptitiously recorded audio. In 1998, the *Detroit Free Press* reported on secretly recorded racist remarks made by then-Wayne County Circuit Judge Andrea Ferrara. See *Michigan Judge Ousted in Probe of Racial Slurs*, Washington Post (July 29, 1998), https://perma.cc/2F33-4263. The revelation of these remarks led to Ferrara's suspension, an investigation by the Michigan Judicial Tenure Commission, and ultimately, her removal from the bench by this Court. *Id.*; see also *In re Ferrara*, 458 Mich 350; 582 NW2d 817 (1998).

Under the Court of Appeals' interpretation of the Eavesdropping Statutes in *Sullivan*, none of the sources who recorded and shared these audio-visual materials with the news media were subject to civil or criminal liability. Yet if this Court were to eschew *Sullivan* in favor of Plaintiff's all-parties consent interpretation of the Statutes, individuals who capture similar recordings of corruption or abuse in the future may face up to two years of imprisonment. See MCL 750.539c. This risk would have a devastating, chilling effect on the willingness of sources and whistleblowers

to come forward and could stymie the news media's ability to report on matters of significant public interest in Michigan.

C. Plaintiff's interpretation of the Eavesdropping Statutes would create a chilling effect on newsgathering and reporting.

The significance of this case extends far beyond the individual actors involved. If Plaintiff's interpretation of the Eavesdropping Statutes is adopted, it will hinder the ability of the news media to gather news and provide the public with information of vital public interest. An all-parties consent interpretation of the Eavesdropping Statutes would expand the existing reach of the Statutes' criminal liability provision, a violation of which is punishable by up to two years' imprisonment. MCL 750.539c. This threat of criminal prosecution and punishment may deter sources and whistleblowers from providing journalists with recordings of newsworthy information, thus damming the flow of speech from sources to reporters, and reporters to the public. See *Wieman v Updegraff*, 344 US 183, 195 (1952) (Frankfurter, J, concurring) (explaining that when the government deters First Amendment protected expression, it "has an unmistakeable [sic] tendency to chill that free play of the spirit" of others).

Investigative journalists may similarly refrain from utilizing material obtained through surreptitious recording for fear of being subject to criminal liability for performing an essential newsgathering function. The resulting chilling effect would have significant ramifications on the public's ability to receive information about matters of public safety and other matters of public concern.

Moreover, overturning *Sullivan*'s long-accepted interpretation of the Eavesdropping Statutes may impact newsgathering in other states. Courts disagree on the appropriate choice-of-law analysis to apply when a phone call originating in one jurisdiction is recorded in another jurisdiction. See 2 C. Thomas Dienes et al., *Newsgathering and the Law* § 17.08 n 749 (2020)

("Courts have wrestled with the choice-of-law issues that occasionally arise when one party to an intercepted communication finds himself in an all-parties consent jurisdiction while the other is located in a consensual monitoring jurisdiction."); Rauvin Johl, *Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default*, 12 Harv L & Pol'y Rev 177, 180 (2018) ("If a recording or interception is made across state lines between a one-party state and an all-party state, the law of the all-party state controls."); Carol M. Bast, *Conflict of Law and Surreptitious Taping of Telephone Conversations*, 54 NYL Sch L Rev 147 (2009/2010) (describing the differing conflict of law analyses used by courts on this issue).

Confusion over the proper interpretation of the Eavesdropping Statutes thus may chill reporting outside the state about recordings involving Michigan residents. For example, when a Michigan resident allegedly made death threats against CNN reporters, CNN recorded the man's calls and later used them in its reporting on the story. Darran Simon, *Michigan man arrested after caller threatens to kill CNN employees*, CNN (Jan 23, 2018 1:47 A.M.), https://perma.cc/56DM-TZMN. The calls were recorded in Georgia, a one-party consent state. Ga Code Ann 16-11-66(a). Because the Eavesdropping Statutes have been interpreted since *Sullivan* to require one-party consent, no conflict of laws issues arose. However, if the Court were to adopt the all-parties consent interpretation urged by Plaintiff, uncertainty as to the potential legal implications of recording conversations involving an individual in Michigan may chill future reporting in other states on similar issues of public interest.

CONCLUSION

For the reasons stated above, amici urge this Court to hold that the Eavesdropping Statutes do not prohibit a party to a conversation from recording that conversation without the consent of all other participants.

Respectfully submitted,

Dated: February 24, 2021

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