

In the
Supreme Court of the United States

KATHERINE FERNANDEZ–RUNDLE, IN HER OFFICIAL CAPACITY
AS STATE ATTORNEY, ELEVENTH JUDICIAL CIRCUIT, STATE OF FLORIDA,

Applicant,

v.

JAMES ERIC McDONOUGH,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT**

DIRECTED TO THE HONORABLE CLARENCE THOMAS
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT

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December 1, 2017

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI**

**To the Honorable Clarence Thomas, Associate Justice of the
Supreme Court of the United States, as Circuit Justice for the United
States Court of Appeals for the Eleventh Circuit:**

Pursuant to Supreme Court Rule 13.5, Applicant, the State Attorney for the Eleventh Judicial Circuit of the State of Florida, respectfully requests an extension of 40 days for the State Attorney to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. A petition for a writ of certiorari is currently due on December 13, 2017. By operation of Supreme Court Rule 30.1, a 40-day extension would make a petition for a writ of certiorari due on January 22, 2018.

The Eleventh Circuit issued its decision on July 12, 2017. App. A. On August 2, 2017, the State Attorney timely filed a petition for panel rehearing and rehearing en banc. App. D. The Eleventh Circuit denied the State Attorney's petition on September 14, 2017. App. B. A petition for a writ of certiorari is currently due on December 13, 2017. *See* Sup. Ct. R. 13.1, 13.3. This application is being filed on December 1, 2017, more than 10 days before the petition is due. *See* Sup. Ct. R. 13.5, 30.2.

The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). The panel opinion of the court of appeals is attached to this application. App. A.

1. This case originally concerned a First Amendment challenge to Florida's Security of Communications Act ("SCA"), Fla. Stat. § 934.03, but as a result of the Eleventh Circuit's ruling, it now also concerns the following question: whether a prospective criminal defendant's claim that a threatened state prosecution is not authorized by state law, standing alone, supplies a basis for obtaining relief in a preemptive civil suit filed under 42 U.S.C. § 1983.

2. Florida's SCA prohibits, with certain exceptions not applicable here, the intentional interception of "any . . . oral . . . communication," as well as the intentional disclosure of the contents of any such communication to any other person by someone with knowledge or reason to know "that the information was obtained through the interception of" such a communication. Fla. Stat. § 934.03(1)(a), (c). The SCA defines "[o]ral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication." Fla. Stat. § 934.02(2).

3. This case began when, on February 7, 2014, Respondent audio-recorded his conversation with a police chief in the police chief's office without the police chief's knowledge or consent. App. A at 4. After Respondent posted an edited version of the recording on the Internet, the State Attorney sent him a cease-and-desist letter, advising that the SCA prohibited his conduct and that "a future violation would expose [him] to criminal prosecution." App. A at 5–6.

4. Respondent sued the State Attorney under 42 U.S.C. § 1983 for declaratory and injunctive relief. The district court dismissed Respondent’s facial First Amendment challenge, and the parties filed cross-motions for summary judgment on his as-applied claim. The district court denied Respondent’s motion and granted the State Attorney’s. App. A at 6.

5. On appeal, after the conclusion of initial briefing, the Eleventh Circuit ordered two rounds of supplemental briefing—one to address certain First Amendment issues, and another to address Article III standing. The panel did not ask the State Attorney to brief any disputed state-law issues, and the State Attorney never provided any such briefing.

By a 2–1 vote, the panel reversed, holding—as to what it saw as the “dispositive issue,” App. A at 8—that the State Attorney’s “threatened prosecution has no basis” in state law, App. A at 3. Because the panel purported to “resolve this case under state law,” it declined to “reach the constitutional issue of whether the recording is protected by the First Amendment.” App. A at 3. The Court reversed the district court’s judgment, remanding “for further proceedings, if necessary.” App. A at 12.

Chief Judge Carnes dissented. “Instead of deciding whether the threatened prosecution violates the First Amendment,” he noted, “the Court tells McDonough not to worry about” his federal claims, because his conduct “does not, in the Court’s view, violate” the SCA. App. A at 13. That view of state law, Chief Judge Carnes observed, “will come as news to the State Attorney and to some of us who have read

the various (and varied) Florida appellate court decisions interpreting” the SCA. App. A at 13.

At any rate, Chief Judge Carnes explained, the Court’s remand puts the district court in an untenable position. There are only “two possibilities about whether more [proceedings] will be necessary on remand.” App. A at 13. First, the State Attorney might agree that her threatened prosecution was based on an incorrect understanding of state law. Second, she might not. If that happens, “[i]n order to comply with this Court’s remand instructions, the district court will have to do what the Supreme Court has unequivocally held that federal courts cannot do, which is lecture state officials on state law.” App. A at 14–15. (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984)). “To avoid deciding a First Amendment issue,” Chief Judge Carnes stressed, “the Court violates the Eleventh Amendment.” App. A at 15.

6. The State Attorney then sought panel rehearing and rehearing en banc on the question “[w]hether a prospective criminal defendant’s claim that a threatened state prosecution is not authorized by state law, standing alone, supplies a basis for obtaining relief in a preemptive civil suit filed under 42 U.S.C. § 1983.” App. D at 1. The State Attorney argued that not only does the Eleventh Amendment—as construed by *Pennhurst*—require an answer in the negative, so too does the plain text of Section 1983. App. D at 6–11. Section 1983, the State Attorney observed, provides a cause of action for deprivations of federal rights. App. D at 9. The State Attorney pointed to decisions of every federal court of appeals except the Federal

Circuit that have held that a violation of state law, standing alone, cannot supply a basis for Section 1983 relief, asserting that the panel's ruling created a new circuit conflict. App. D at 10–11. The Eleventh Circuit denied rehearing. App. B.

7. Applicant respectfully requests a 40-day extension of time within which to file a petition for a writ of certiorari seeking review of the Eleventh Circuit's judgment and submits there is good cause for granting the request.

a. This case presents an important question regarding whether a federal court may stand in the way of a prospective state criminal prosecution by issuing Section 1983 relief on the sole ground that, in the federal court's view, state law does not authorize prosecution.

b. As Chief Judge Carnes noted in his dissenting opinion, the Eleventh Circuit's ruling contravenes the Eleventh Amendment, as this Court construed it in *Pennhurst*, by “tell[ing] the State Attorney ‘how to conform [her] conduct to state law.’” App. A at 15. Moreover, the Eleventh Circuit's ruling creates a new split among the federal courts of appeals, as almost every other circuit has held that a state-law violation, standing alone, cannot supply a basis for Section 1983 relief.¹ Indeed, in examining Section 1983's plain text, this Court has made clear that the

¹ See, e.g., *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 831–33 (1st Cir. 1982); *Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984); *Kulwicki v. Dawson*, 969 F.2d 1454, 1468 (3d Cir. 1992); *Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988); *Brown v. Sudduth*, 675 F.3d 472, 478 (5th Cir. 2012); *Stanley v. Vining*, 602 F.3d 767, 769 (6th Cir. 2010); *Archie v. City of Racine*, 847 F.2d 1211, 1216–18 (7th Cir. 1988) (en banc); *Ebmeier v. Stump*, 70 F.3d 1012, 1013 (8th Cir. 1995); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012); *Jones v. Denver*, 854 F.2d 1206, 1209 (10th Cir. 1988); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988).

statute “provides a cause of action against state actors who violate an individual’s *rights* under *federal* law.” *Filarsky v. Delia*, 566 U.S. 377, 380 (2012) (emphases added); *see also* *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (“In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*.” (emphases in original)).

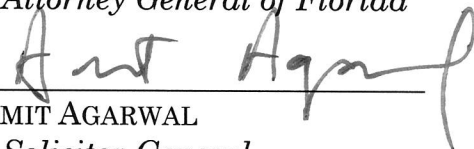
c. The additional time sought in this extension request will allow counsel to adequately prepare the petition for a writ of certiorari. During a period of reduced staffing, the Florida Office of the Solicitor General has taken on an increased caseload which has adversely impacted its ability to devote adequate resources to preparing a petition for certiorari within the default allotment of time. Attorneys with the Office have had (or will have) a number of pressing obligations before various courts during the current period of preparation for the petition.

CONCLUSION

For the foregoing reasons, the State Attorney for the Eleventh Judicial Circuit of the State of Florida respectfully requests that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including January 22, 2018.

Respectfully submitted,

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APPENDIX

- App. A Eleventh Circuit's Opinion, dated July 12, 2017.
- App. B Order on Rehearing, dated September 14, 2017
- App. C Judgment, issued as mandate September 26, 2017
- App. D Petition for panel rehearing and rehearing en banc, dated
August 2, 2017

Appendix A
11th Circuit Opinion,
dated July 12, 2017

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14642

D.C. No. 1:15-cv-20038-CMA

JAMES ERIC MCDONOUGH,

Plaintiff-Appellant,

versus

KATHERINE FERNANDEZ-RUNDLE,
in her official capacity as State Attorney,
Eleventh Judicial Circuit, State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(July 12, 2017)

Before ED CARNES, Chief Judge, FAY, and PARKER,* Circuit Judges.

* Honorable Barrington D. Parker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

PARKER, Circuit Judge:

Plaintiff-Appellant James Eric McDonough, proceeding *pro se*, appeals from a judgment of the United States District Court for the Southern District of Florida (Altonaga, J.) dismissing his complaint brought pursuant to 42 U.S.C. § 1983. After McDonough lodged a series of complaints of misconduct against an officer of the Homestead Police Department (“HPD”), he was invited by Alexander E. Rolle Jr., the Chief of Police, to a meeting in his office to discuss the complaints. Unbeknown to Chief Rolle, McDonough recorded a portion of the meeting on his cell phone and later posted portions of the recording on the internet. Shortly thereafter, he received a letter from Defendant Katherine Fernandez-Rundle, the Miami-Dade County State Attorney, informing him that his recording violated the Florida Security of Communications Act, and that the violation was a felony. *See* FLA. STAT. § 934.03 (2016). She forbade him from making future recordings and threatened him with prosecution if he did so.

McDonough then sued her under § 1983 alleging that the statute did not apply to him, was facially unconstitutional, and that the threat of prosecution violated his First Amendment right to free speech. The parties cross moved for summary judgment and the court granted Fernandez-Rundle’s motion. *See McDonough v. Fernandez Rundle*, No. 15-20038-CIV-ALTONAGA/O’Sullivan (S.D. Fla. Sept. 17, 2015). The court did not parse § 934.03, assuming that it

applied to the recording. Instead, it analyzed the recording under the First Amendment nonpublic forum principles because the recording took place in a police station. *Id.* at 8-11. The court held that § 934.03 as applied to McDonough did not violate the First Amendment because it was “reasonable and viewpoint neutral” and denied McDonough’s request for relief. *Id.* at 15-16. He appeals and we reverse.

We hold that McDonough did not violate § 934.03 and, consequently, the government’s threatened prosecution has no basis in the law. Because we resolve this case under state law, we need not reach the constitutional issue of whether the recording is protected by the First Amendment.

BACKGROUND¹

McDonough alleges that in October 2012 he complained to HPD officer Alejandro Murguido about his reckless driving and violation of traffic laws in the neighborhood where McDonough lived. McDonough alleges that Murguido then arrested him in retaliation for the complaints. In response to the arrest, McDonough filed a complaint against Murguido with the Internal Affairs Department of the HPD. Shortly thereafter, in April 2013, McDonough was again arrested for alleged incidents that Murguido claimed had occurred several months previously. Criminal charges were lodged against McDonough but were

¹ Except as otherwise noted, the relevant facts are not disputed.

eventually dismissed. In January 2014, McDonough filed a complaint with the HPD specifically alleging that Murguido arrested and harassed him in retaliation for his complaints about Murguido's conduct.

In response to these events, Chief Rolle invited McDonough to meet in his office to discuss the complaints regarding Murguido. McDonough agreed to the meeting and arrived at the HPD on February 7, 2014 accompanied by a friend, Albert Livingston, who allegedly witnessed some of the incidents involving McDonough and Murguido. Chief Rolle did not object to Livingston's attendance. A fourth person, Detective Antonio Aquino from the HDP Internal Affairs department, also joined the meeting at Chief Rolle's request. No ground rules of any sort were set for the meeting. Neither Chief Rolle nor anyone else from the HPD mentioned anything about the meeting being confidential in nature, or that recording or note taking was in any way discouraged or prohibited. At the start of the meeting, McDonough placed his cell phone in plain view on the desk between him and Chief Rolle and proceeded to record their conversation. Chief Rolle saw McDonough's cell phone but contends that he was unaware that McDonough was recording the meeting.

McDonough alleges that during the meeting he gave Chief Rolle documents containing witness statements about the incidents with Murguido, character references, and the personnel file of Murguido that contained various accident and

injury reports. At the meeting, McDonough also filed another Internal Affairs complaint against Murguido. At one point, McDonough asked if there would be a record of their discussions, to which Aquino replied, “[W]e have all of this recorded” Appendix for Petitioner, *McDonough v. Fernandez Rundle*, No. 15-14642 (11th Cir. Dec. 31, 2015) [hereinafter Appendix] at 165.

After the meeting, McDonough filed a public records disclosure request for the documents concerning Murguido that he alleges he had given to Chief Rolle. However, when he received documents in response to his request, he discovered that certain ones concerning Murguido were not included. McDonough then filed another public records disclosure request specifically for those documents, but Chief Rolle denied having received them.

To prove that he had given the documents to Chief Rolle, McDonough published portions of the recording on YouTube. He alleged that the published portions of the transcript confirmed his account of giving the documents to Chief Rolle and proved that he was not candid when he denied having received them. A month later, McDonough received a letter dated December 9, 2014 from Fernandez-Rundel threatening him with arrest and felony prosecution under § 934.03. The letter stated:

A complaint has been filed with our office stating that on February 7, 2014, you recorded conversations you had with Chief Alexander Rolle and Internal Affairs Detective Antonio Acquino at the Chief’s offices located at #4 South Krome Avenue in Homestead,

Florida. Florida Statute § 934.03, Interception and Disclosure of Wire, Oral, or Electronic Communications prohibits any party from intentionally intercepting any wire, oral, or electronic communication without the consent of the other party.

Recording a conversation without the permission of the other party or parties is a violation of the statute and is a 3rd degree felony.

We are bringing this to your attention to prevent any further violation of Florida law, as a future violation would expose you to criminal prosecution. Enclosed is a copy of the pertinent law.

Appendix at 13.

In response to the threat of prosecution, McDonough sued under 42 U.S.C. § 1983, alleging that section 934.03 did not apply to him and that if it did, it violated the First Amendment. He sought injunctive relief barring the State Attorney from prosecuting him under the statute. As noted, the parties cross moved for summary judgment and the district court denied McDonough's motion and granted Fernandez-Rundle's motion, essentially on constitutional grounds. See *McDonough*, No. 15-20038-CIV-ALTONAGA/O'Sullivan at 16.

Because both parties agreed that McDonough had a right to record under the First Amendment, the district court reasoned that the dispositive issue was what level of scrutiny should apply under the First Amendment. The court concluded that the nonpublic forum analysis applied because the recording took place in the interior of a police station, a nonpublic forum. *Id.* at 5-11. Under the nonpublic forum analysis, a government's decision to restrict access "can be based on subject

matter and speaker identity so long as the distinctions drawn are reasonable . . . and are viewpoint neutral.” *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1280 (11th Cir. 2003); *United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986). Applying these principles, the court held that prohibiting covert recording in a police station is reasonable and viewpoint neutral because the purpose of a police station is to carry out law enforcement responsibilities. See *McDonough*, at 11. The district court granted summary judgment in favor of the State Attorney and this appeal followed. We review *de novo* a grant of summary judgment and the legal principles on which it is based. See *Smith v. Owens*, 848 F.3d 975, 978 (11th Cir. 2017); *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005).²

² As an initial matter, Fernandez-Rundle contends that McDonough lacks standing. Standing requires that: (1) the plaintiff must have suffered an injury-in-fact; (2) there must be a causal connection between the injury and the challenged conduct; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). We conclude that McDonough has sufficiently alleged these elements because the State Attorney threatened to arrest and prosecute him if he made a similar recording in the future. The letter from the State Attorney warns explicitly that “a future violation would expose you to criminal prosecution,” and refers to the fact that McDonough recorded his conversation with Chief Rolle and Acquino. Appendix at 13. It also emphasized that his action was a “violation” of Florida Statute § 934.03 and is therefore “a 3[rd] degree felony.” *Id.* It is well-settled that “an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences.” *Harrell v. Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (citing

DISCUSSION

The district court did not reach what we determine is a dispositive issue: whether § 934.03 even applies to McDonough. We hold that it does not. The Section, titled “Interception and disclosure of wire, oral, or electronic communications prohibited,” provides:

- 1) Except as otherwise specifically provided in this chapter, any person who:
 - a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication; . . .
 - c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished as provided in subsection (4).

FLA. STAT. § 934.03 (2016). Section 934.02 in turn defines “oral communication” as

any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any

Pittman v. Cole, 267 F.3d 1269, 1283 (11th Cir. 2001)). We have little difficulty concluding that McDonough suffered an injury which would be redressed by an injunction. McDonough has alleged that he would have to choose between foregoing his First Amendment speech rights or risking a felony prosecution. This injury-in-fact is directly traceable to the letter threatening prosecution under § 934.03. Redressability is also sufficiently alleged because an injunction barring such prosecution would redress McDonough’s injury. *See Lujan*, 504 U.S. at 560. Accordingly, McDonough has standing to pursue his claim.

public oral communication uttered at a public meeting or any electronic communication.

FLA. STAT. § 934.02 (2016) (emphasis added).

Section 934.02 does not apply to the recording of all oral communications. It is expressly limited to communications “uttered by a person exhibiting an expectation that such communication is not subject to interception” FLA. STAT. § 934.02 (emphasis added). “Exhibit” means “to show externally,” “to display” and “to demonstrate.” See WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (3rd ed. 1994) (defining the word “exhibit”). The Florida Legislature’s choice of this verb is telling: it required that the expectations of privacy needed to trigger application of the statute must be exhibited; in other words they must be “shown externally” or “demonstrated.” The Legislature did not want expectations of privacy to count that remained unexpressed. Consequently, the Legislature imposed a simple requirement that the expectation be “exhibited”. At no point did Chief Rolle, or for that matter, any participant in the meeting exhibit any expectation of privacy. Although that easily could have been done, Chief Rolle set no ground rules for the meeting he elected to call. At no point did any one from the HPD suggest that the meeting was confidential or “off the record.” Nor was there advance notice or published or displayed rules that established confidentiality and certainly none that prohibited

note taking or recordings. It is therefore clear to us that because Chief Rolle failed to “exhibit” the expectation of privacy that is required by the statute, the government is not entitled to invoke it and McDonough did not violate it.

The recording also falls under an exception carved out in section 934.02 for communications “uttered at a public meeting.” FLA. STAT. § 934.02. McDonough was a member of the public who attended the meeting at Chief Rolle’s invitation. The public nature of this meeting became all the more evident when Chief Rolle allowed Livingston, a second and uninvited member of the public, to attend. In *Dept. of Ag. & Con. Servs. v. Edwards*, 654 So.2d 628, 632-33 (Fla. 1st DCA 1995), the court found that the fact that several people were present at a meeting rendered any subjective expectation of privacy unreasonable. Here, there were at least four participants present: two members of the public, and two public officials also attended the meeting in the performance of their official duties. Moreover, the topic of their meeting was one of acute public interest: citizens discussing allegations of possible police misconduct with the chief of police. The fact that the content of the meeting would likely be subject to public record disclosure is underscored by the fact that Aquino assured McDonough that “we have all of this recorded, what you stated” Appendix at 165.

Furthermore, in addition to the fact that an expectation of privacy must be exhibited, the statute also requires that the “circumstances” must “justify [an]

expectation” of privacy. FLA. STAT. § 934.02. If no privacy-related ground rules were established in advance of this public meeting, then circumstances that could justify an expectation of privacy do not exist. This conclusion is firmly grounded in Florida law. All the attendees were charged with knowledge that the content of their conversation could be subject to public records disclosure laws. *See* FLA. STAT. § 286.011 (2012) (Florida’s Government in the Sunshine Law). As the Florida Supreme Court has emphasized, the “Florida Constitution contemplates that public business is to be conducted in the ‘sunshine.’” *Edwards*, at 631; *see also* FLA. CONST. art. II, § 8. Based on this open-government premise, the facts that all attendees of the meeting were either public employees acting in furtherance of their public duties, or members of the public discussing a matter of public interest, undermines any objective expectation of privacy.

The Florida Supreme Court has interpreted § 934.02 to require “a reasonable expectation of privacy,” which includes “one’s actual subjective expectation of privacy as well as whether society is prepared to recognize this expectation as reasonable.” *State v. Inciarrano*, 473 So.2d 1272, 1275 (Fla. 1985) (citing *Shapiro v. State*, 390 So.2d 344 (Fla. 1980), *cert. denied*, 450 U.S. 982 (1981)) (emphasis in original). Thus, in *Inciarrano*, a criminal defendant who murdered a victim in an office meeting moved to suppress a recording that the victim made of the meeting. The Florida Supreme Court held that even though the defendant had a

subjective expectation of privacy, there was no reasonable objective expectation of privacy because the meeting took place in an office, which the court noted as having a “quasi-public nature.” *Inciarrano*, 473 So.2d at 1274. Other Florida decisions support our conclusion. *See e.g., State v. Smith*, 641 So.2d 849, 852 (Fla. 1994) (no reasonable expectation of privacy where recorded conversation was held in the back of a police car); *Edwards*, 654 So.2d at 632-33 (no reasonable expectation of privacy where the recorded conversation was between three police officers in an office meeting about employment grievances).

CONCLUSION

We hold that because the recording on February 7, 2014 falls outside of the definition of “oral communication” in section 934.02, McDonough did not violate the statute and it imposes no restriction on his use of the recording he made at that meeting.³ For the foregoing reasons, the judgment of the district court is reversed and the matter is remanded to the district court for further proceedings, if necessary, consistent with this opinion.

³ We are not called on to reach the constitutional issue of whether the recording is protected by the First Amendment. *See BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1176 (11th Cir. 2001) (noting the “longstanding principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided.”)(citing *Santamarena v. Ga. Military Coll.*, 147 F.3d 1337, 1343 (11th Cir. 1998)).

ED CARNES, Chief Judge, dissenting:

Because James McDonough covertly recorded a conversation with the police chief during a meeting, he received a letter from the State Attorney's Office threatening, in no uncertain terms, to prosecute him for violating Florida's Wiretap Act if he engaged in similar recording activity in the future. Because of the threat, McDonough filed this lawsuit seeking a declaratory judgment that it would violate the First Amendment to prosecute him for covertly recording the chief or other law enforcement authorities in the same or similar circumstances, and also asking for an injunction prohibiting the State Attorney from prosecuting him.

Instead of deciding whether the threatened prosecution violates the First Amendment and the State Attorney should be enjoined, the Court tells McDonough not to worry about it. He shouldn't worry about it because what he did before and wants to do again does not, in the Court's view, violate the Florida Wiretap Act. That will come as news to the State Attorney and to some of us who have read the various (and varied) Florida appellate court decisions interpreting that act.

The Court remands this case to the district court for further proceedings consistent with this opinion "if necessary." McDonough wants to do something that the State Attorney has threatened to prosecute him for doing. There are, I suppose, two possibilities about whether more will be necessary on remand and, if

so, what more. One possibility is that the State Attorney will read the opinion and be persuaded by it, apologize for bothering McDonough, and assure him that he can continue to covertly record conversations in circumstances like those that prompted her unfriendly letter to him in the first place.

The second possibility is that the State Attorney will not disavow her intent to prosecute McDonough if he commits this type of conduct again in the future. If that is the situation, McDonough will be back where he started, except that he has been told not to bother this Court with his constitutional claim. The only way for him to get protection from prosecution is for the district court to enjoin the State Attorney from prosecuting him on the ground that this Court has determined that his conduct does not violate Florida law. To conduct further proceedings “consistent with this opinion” the district court will have to declare that McDonough’s conduct does not violate the Florida Wiretap Act and enjoin the State Attorney from prosecuting him. Failing to do that would be “[in]consistent with this opinion” and its holding that the conduct in question is not contrary to Florida law.

In order to comply with this Court’s remand instructions, the district court will have to do what the Supreme Court has unequivocally held that federal courts cannot do, which is lecture state officials on state law. The reason they cannot do that, the Court has explained, is that: “[I]t is difficult to think of a greater intrusion

on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984). This Court has done what Pennhurst instructs us not to do, which is tell the State Attorney “how to conform [her] conduct to state law.” If she prosecutes McDonough for his covert recording activities, this Court says, she will not be conforming her conduct to Florida law.

To avoid deciding a First Amendment issue, the Court violates the Eleventh Amendment. While federal courts “should avoid reaching constitutional questions if there are other grounds upon which a case can be decided,” BellSouth Telecomms., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1176 (11th Cir. 2001), we cannot do so at the Eleventh Amendment’s expense, see Pennhurst, 465 U.S. at 121–23, 104 S. Ct. at 919–20 (“[C]onsiderations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State.”). Because of Pennhurst and the principles it espouses, I cannot join the constitutional avoidance effort in this case. We should, as a Court, reach and decide the First Amendment issue and not instruct Florida officials how they must read the law of that state.

Appendix B
Order on Rehearing,
dated September 14, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14642-GG

JAMES ERIC MCDONOUGH,

Plaintiff - Appellant,

versus

KATHERINE FERNANDEZ-RUNDLE,
in her official capacity as State Attorney,
Eleventh Judicial Circuit, State of Florida,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, FAY and PARKER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


CHIEF JUDGE

*Honorable Barrington D. Parker, Jr., United States Circuit Judge for the Second Circuit, sitting
by designation.

ORD-42

Appendix C
Judgment,
Issued as Mandate September 26, 2017

**UNITED STATES COURT OF APPEALS
For the Eleventh Circuit**

No. 15-14642

District Court Docket No.
1:15-cv-20038-CMA

JAMES ERIC MCDONOUGH,

Plaintiff - Appellant,

versus

KATHERINE FERNANDEZ-RUNDLE,
in her official capacity as State Attorney,
Eleventh Judicial Circuit, State of Florida,

Defendant - Appellee.

Appeal from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: July 12, 2017
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

Appendix D

**Petition for panel rehearing and rehearing en
banc,
dated August 2, 2017**

No. 15-14642-GG

**In the United States Court of Appeals
for the Eleventh Circuit**

JAMES ERIC MCDONOUGH,

Plaintiff–Appellant,

v.

KATHERINE FERNANDEZ–RUNDLE,

Defendant–Appellee.

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 1:15-CV-20038-CMA

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and the rules of this Court, Defendant–Appellee submits the following certificate of interested persons:

1. Agarwal, Amit, Solicitor General
2. Altonaga, Cecilia M., U.S. District Judge, Southern District of Florida
3. Bondi, Pamela Jo, Attorney General
4. Eaton, Carrol Cherry, Senior Assistant Attorney General
5. Eggers, Melissa, Assistant Attorney General
6. Fahlbusch, Charles M., former Special Counsel Assistant Attorney General
7. Fernandez–Rundle, Katherine, Defendant–Appellee
8. Florida Department of Financial Services
9. Funes, Freddy, court-appointed amicus curiae
10. Gelber, Schachter & Greenberg, P.A.
11. Glantz, David J., former Senior Assistant Attorney General
12. Greenstein, Alan, trial court counsel for Plaintiff–Appellant
13. McDonough, James Eric, Plaintiff–Appellant
14. O’Sullivan, John, U.S. Magistrate Judge, Southern District of Florida
15. Pratt, Jordan E., Deputy Solicitor General
16. Rolle, Alexander E., Chief of the Homestead Police Department

RULE 35 STATEMENT REGARDING BASIS FOR PETITION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Whether a prospective criminal defendant’s claim that a threatened state prosecution is not authorized by state law, standing alone, supplies a basis for obtaining relief in a preemptive civil suit filed in federal court under 42 U.S.C. § 1983. “Section 1983 provides a cause of action against state actors who violate an individual’s *rights* under *federal law*.” *Filarsky v. Delia*, 566 U.S. 377, 380 (2012) (emphases added). Under the panel decision in this case, a plaintiff may obtain relief under § 1983 without establishing a violation of *any* right—state *or* federal. That conclusion cannot be reconciled with the text of § 1983 or the caselaw construing it, *e.g.*, *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002), and it has been uniformly rejected by the federal courts of appeals.

/s/ Jordan E. Pratt

Attorney of Record for Defendant-Appellee

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STATEMENT OF ISSUE MERITING EN BANC CONSIDERATION

Whether a prospective criminal defendant's claim that a threatened state prosecution is not authorized by state law, standing alone, supplies a basis for obtaining relief in a preemptive civil suit filed under 42 U.S.C. § 1983.

STATEMENT OF THE CASE AND FACTS

1. On February 7, 2014, Appellant James McDonough met with Homestead Police Department ("HPD") Chief of Police Alexander Rolle to discuss his complaints against an HPD officer. DE47:3.¹ The meeting occurred at the police station in the police chief's personal office. *Id.* McDonough brought a friend with him, and an HPD internal-affairs detective also participated. DE48:2.

McDonough conceded that he used his cell phone to surreptitiously record the conversation that took place. DE69:2 & n.3; DE47:3, 8; *see* DE48:2. McDonough did not allege, and the record does not indicate, that any other participant made an audio or video recording of that meeting.²

Without requesting or receiving Chief Rolle's permission, McDonough

¹ Record citations appear in the format DE [district court dkt. entry #]:[ECF pg. #]. Citations to "A:" refer to the panel opinion found in Appendix A to this petition.

² Although the internal-affairs officer stated "we have all of this recorded," A:5, from context it is apparent that the officer was referring to notes that he was taking "[j]ust to make sure we've got" McDonough's "specific complaint" so the complaint could be "addressed." *See* DE58-4:96.

published an edited version of his recording on the Internet. This prompted the State Attorney for the Eleventh Judicial Circuit, Katherine Fernandez–Rundle, to send McDonough a cease-and-desist letter. DE48:3. The letter advised him that his actions had violated the Florida Security of Communications Act (“SCA”), Fla. Stat. § 934.03, and that “a future violation would expose” him to “criminal prosecution.” DE1-3.

2. McDonough sued the State Attorney under 42 U.S.C. § 1983 for declaratory and injunctive relief. DE1 ¶¶ 5, 20. His single-count complaint claimed the SCA “is unconstitutional on its face and as applied to [his] actions.” DE1 ¶ 20. He did not allege that the State Attorney’s threatened criminal prosecution was not authorized by state law, nor did he invoke any cause of action other than § 1983. *See* DE1.

The district court dismissed McDonough’s facial challenge, DE17, and the parties filed cross-motions for summary judgment on his as-applied claim. In his renewed motion for summary judgment, McDonough confirmed that his “action was brought pursuant to 42 U.S.C. § 1983 for violation of the Plaintiff’s rights under the First and Fourteenth Amendments.” DE47:2. McDonough did not argue that the State Attorney’s view of state law was incorrect. Instead, he claimed that “Florida Statute §934.03 infringes on the Plaintiff’s First Amendment rights.” DE47:5.

The State Attorney filed a response in opposition, along with a consolidated cross-motion for summary judgment. DE58. At one point, the State Attorney took issue with McDonough’s suggestion that the First Amendment requires the SCA to

exempt conversations with public officials. DE58:11–12. Florida’s statute, the State Attorney explained, “purposely does ... not except or differentiate the recording of public officials.” *Id.* Instead, it protects any person who has an “expectation of privacy,” and Chief Rolle, as McDonough conceded, “did not expect that Plaintiff would record their private conversation.” DE58:12; *see* DE47:3; DE48:2 ¶ 12.

In his consolidated response and reply, McDonough reiterated that “the precise issue presented by the Plaintiff’s complaint” was “whether Florida Statute 934.03 is constitutional as applied to the recording of police officers conducting their official duties, when one of the parties ... has consented to the recording.” DE63:1. At one point, McDonough disputed the State Attorney’s argument that Chief Rolle had an expectation of privacy in his conversation with McDonough. DE63:8–9. Once again, however, McDonough did not claim that Florida law did not authorize the threatened prosecution that formed the basis for his § 1983 action; and still less did he argue that any such state-law dispute offered an independent basis for obtaining federal-court relief under § 1983.

The district court denied McDonough’s motion and granted the State Attorney’s. DE69:16. Applying forum-analysis principles, the court held that the First Amendment does not protect a right to surreptitiously record a conversation with a police officer in the interior of a police station. DE69:5–16. In keeping with “the narrow issue presented” by McDonough’s “as-applied challenge” under the First

Amendment, DE69:16, the district court did not address whether the State Attorney's threatened prosecution was based on a sound interpretation of state law.

3. Now proceeding *pro se*, McDonough appealed. DE71. In his opening brief, McDonough faulted the district court for “fail[ing] to recognize that, based on the specific facts of the case, FSS. 934.03 does not apply” to the conduct in which he engaged. Op. Br. 7. However, he did not claim that his view of state law provided a sufficient basis for obtaining relief under § 1983: “As the statute does not apply to the recording at hand, *and there is a First Amendment right to record police activity*, any retaliation for exercising of one's First Amendment rights, including *threat of arrest, violates the First Amendment*. Therefore, [the court] *must hold that FSS. 934.03 is unconstitutional* as applied to McDonough's recording.” *Id.* (emphases added; internal citation omitted).

Consistent with the sole claim set out in McDonough's single-count complaint, as well as McDonough's formulation of the issue presented on appeal, the State Attorney's answer brief addressed only McDonough's First Amendment claim. Answer Br. 10–11, 12–21. In his reply brief to this Court, McDonough suggested—in passing, and for the first time—that the State Attorney's allegedly mistaken view of state law supplied an independent ground for obtaining federal-court relief. Reply 17.

This Court ordered two rounds of supplemental briefing—one to address certain First Amendment issues, and another to address Article III standing. The panel did not ask the State Attorney to brief any disputed state-law issues, and the

State Attorney never provided any such briefing.

The panel reversed, holding—as to what it saw as the “dispositive issue”—that the State Attorney’s “threatened prosecution has no basis” in state law. A:3, 8. The panel concluded the SCA did not prohibit McDonough’s conduct for three reasons. First, no participants at the meeting “exhibited” any expectation that the meeting would not be recorded, such as by a “suggest[ion] that the meeting was confidential or ‘off the record’” or the setting, advance notice, or publication of “ground rules.” A:9. Second, the “public meeting” exception of the statute was triggered because McDonough and his friend were “members of the public” and “the topic of their meeting was one of acute public interest,” with the meeting’s content likely subject to public-records laws. A:10. Third, the circumstances did not justify any expectation of privacy, primarily because “no privacy-related ground rules were established in advance.” A:11.

Because the panel “resolve[d] this case under state law,” it declined to “reach the constitutional issue of whether the recording is protected by the First Amendment.” A:3. The Court reversed the district court’s judgment, remanding “for further proceedings, if necessary.” A:12.

Chief Judge Carnes dissented. A:13. “Instead of deciding whether the threatened prosecution violates the First Amendment,” he noted, “the Court tells McDonough not to worry about” his federal claims, because his conduct “does not, in

the Court's view, violate" the SCA. A:13. That view of state law, Chief Judge Carnes observed, "will come as news to the State Attorney and to some of us who have read the various (and varied) Florida appellate court decisions interpreting" the SCA. A:13.

At any rate, Chief Judge Carnes explained, the Court's remand puts the district court in an untenable position. There are only "two possibilities about whether more [proceedings] will be necessary on remand." A:13. First, the State Attorney might agree that her threatened prosecution was based on an incorrect understanding of state law. Second, she might not. If that happens, "[i]n order to comply with this Court's remand instructions, the district court will have to do what the Supreme Court has unequivocally held that federal courts cannot do, which is lecture state officials on state law." A:14 (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984)). "To avoid deciding a First Amendment issue," Chief Judge Carnes stressed, "the Court violates the Eleventh Amendment." A:15.

REASONS FOR GRANTING THE PETITION

I. THE PANEL DECISION CONTRAVENES THE ELEVENTH AMENDMENT, AS AUTHORITATIVELY CONSTRUED BY THE SUPREME COURT.

Addressing what it saw as a "dispositive issue," the panel held that the State Attorney's "threatened prosecution has no basis" in Florida law. A:8. That holding contravenes Supreme Court precedent prohibiting the federal courts from "instruct[ing] state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106.

Pennhurst involved a class action challenging the conditions of confinement in a state institution. *Id.* at 92. One of the claims “charged that conditions” at the hospital “violated . . . the Pennsylvania Mental Health and Mental Retardation Act of 1966.” *Id.* After a trial, the district court granted injunctive relief on multiple claims, including the state-law one. *Id.* at 93. The Court of Appeals concluded that state law “fully supported” the district court’s remedial order, so it affirmed without “reach[ing] the remaining issues of federal law.” *Id.* at 95–96.

The Supreme Court reversed, concluding that a “federal court’s grant of relief against state officials on the basis of state law . . . conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” *Id.* at 106. The Eleventh Amendment, the Court explained, embodies a constitutional “affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority” in Article III. *Id.* at 98. “[I]t is difficult to think of a greater intrusion on state sovereignty,” the Court reasoned, “than when a federal court instructs state officials on how to conform their conduct to state law.” *Id.* at 106. Accordingly, the Court held, the district court’s judgment against various Pennsylvania officials could not be sustained “solely on the basis of” state law. *Id.* at 124–25.

As Chief Judge Carnes recognized in his dissent, the panel did just what *Pennhurst* directs federal courts not to do, which is to tell the State Attorney “how to conform [her] conduct to state law.” A:15. “If she prosecutes McDonough for his

covert recording activities, the Court says, she will not be conforming her conduct to Florida law.” *Id.* And here, as in *Pennhurst*, that state-law ruling forms the sole basis for the panel’s judgment. *See* A:3, 12 & n.3; 465 U.S. at 124–25.

For several reasons, the panel’s reliance on state law is even more problematic than the state-law holding the Supreme Court disapproved in *Pennhurst*. *First*, unlike in *Pennhurst*, the panel in this case could not invoke doctrines recognizing federal-court jurisdiction to address pendent state-law claims. The “amended complaint” in *Pennhurst* “charged that conditions at Pennhurst violated” state law. *Id.* at 92. McDonough’s single-count complaint, however, like his motion for summary judgment, omitted any such state-law claim, and the district court never passed on any such claim. DE1; DE47; DE69. Thus, one of the principal rationales supporting the Court of Appeals’ judgment in *Pennhurst* is not available here. *See* 465 U.S. at 117–23.

Second, the Court of Appeals in *Pennhurst* had the benefit of full briefing on the disputed state-law issue. Here, however, the State Attorney had no cause to address state-law disputes in her answer brief to this Court, because McDonough failed to raise any state-law claim for relief in the district court and his federal constitutional claim does not turn on the meaning of state law.

Third, the Court of Appeals in *Pennhurst* concluded that the Pennsylvania Supreme Court had “spoken definitively” to a case-dispositive legal issue. 465 U.S. at 95. Here, by contrast, the panel cites no controlling precedent from the Florida

Supreme Court, and the panel's view that the State Attorney misunderstands state law "will come as news" to those "who have read the various (and varied) Florida appellate court decisions interpreting" the SCA. A:13 (Carnes, C.J., dissenting).

II. THE PANEL DECISION CONTRAVENES BINDING PRECEDENT ADDRESSING THE SCOPE OF LIABILITY UNDER 42 U.S.C. § 1983.

"Section 1983 provides a cause of action against state actors who violate an individual's *rights* under *federal law*." *Filarsky v. Delia*, 566 U.S. 377, 380 (2012) (emphases added). The panel expressly declined to decide whether McDonough had been deprived of any federal right. A:3 ("Because we resolve this case under state law, we need not reach the constitutional issue . . ."). Nevertheless, the panel reversed the district court's judgment. A:12.

That disposition cannot be reconciled with § 1983's text or binding caselaw construing it. "In order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *See Blessing v. Freestone*, 520 U.S. 329, 340 (1997). *A fortiori*, a § 1983 plaintiff may not seek redress by asserting a mere violation of *state law*. *See id.* "Violation of local law does not necessarily mean that federal rights have been invaded." *Paul v. Davis*, 424 U.S. 693, 700 (1976).

The panel's holding that a § 1983 plaintiff may obtain relief by establishing a violation of state law conflicts with this Court's precedent. In *Knight v. Jacobson*, for example, this Court explained that "Section 1983 does not create a remedy for every wrong committed under the color of state law, but only for those that deprive a

plaintiff of a federal right.” 300 F.3d 1272, 1276 (11th Cir. 2002). “There is no federal right,” the Court held, “not to be arrested in violation of state law.” *Id.* Similarly, there is no federal right not be prosecuted—or, as relevant here, threatened with prosecution—in violation of state law.

By reversing the district court’s rejection of McDonough’s claim without deciding whether the State Attorney’s threatened prosecution violated the First Amendment, the panel decision could dramatically expand § 1983’s coverage within this Circuit. Under the panel’s approach, any person who disagrees with the way in which state officials are administering a state law may bring a federal constitutional challenge against the statute, no matter how tenuous, and then obtain relief based on unpleaded, ancillary state-law claims—no showing of unconstitutionality needed.

The “importance” of § 1983 “in defining the role of the federal courts cannot be overstated.” Erwin Chemerinsky, *Federal Jurisdiction* 500 (6th ed. 2012). “More than 10 percent of the federal court docket consists of § 1983 suits.” *Id.* Accordingly, caution is warranted before this Court substantially expands the scope of relief available under that statute beyond what binding precedent allows.

III. THE PANEL DECISION CREATES SEVERAL NEW CONFLICTS AMONG THE FEDERAL COURTS OF APPEALS.

The panel’s § 1983 holding, in addition to its conflict with binding precedent, *see supra* Part II, also conflicts with decisions of almost every other court of appeals. The federal circuits uniformly recognize that a violation of state law does not establish

a § 1983 claim. *See, e.g., Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988) (“If there is no violation of a federal right, there is no basis for a section 1983 action A fundamental and fatal flaw in the decision [below] . . . is its assumption that a section 1983 action may be based alone on a violation of state law . . .”).³

Similarly, at least three federal courts of appeals have applied *Pennhurst* to hold that the Eleventh Amendment bars a pre-enforcement suit challenging a prospective state criminal prosecution to the extent the plaintiff claims that prosecution is not authorized by state law. *See McKinley v. Abbott*, 643 F.3d 403, 406 & nn. 7–9 (5th Cir. 2011); *Bacon v. Neer*, 631 F.3d 875, 880 (8th Cir. 2011); *Vasquez v. Rackauckas*, 734 F.3d 1025, 1041 (9th Cir. 2013).

IV. THE PANEL DECISION THREATENS TO SUBSTANTIALLY IMPAIR THE ADMINISTRATION OF CRIMINAL JUSTICE.

A. Federal courts have long been reluctant to restrain criminal proceedings. *See generally Deaver v. Seymour*, 822 F.2d 66, 68–70 (D.C. Cir. 1987) (citing authorities and providing overview of how the law in this area has evolved); *accord, e.g., Bacon*, 631

³ *Accord Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 831–33 (1st Cir. 1982); *Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984); *Kulwicki v. Dawson*, 969 F.2d 1454, 1468 (3d Cir. 1992); *Brown v. Sudduth*, 675 F.3d 472, 478 (5th Cir. 2012); *Stanley v. Vining*, 602 F.3d 767, 769 (6th Cir. 2010); *Archie v. City of Racine*, 847 F.2d 1211, 1216–18 (7th Cir. 1988) (en banc); *Ebmeier v. Stump*, 70 F.3d 1012, 1013 (8th Cir. 1995); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012); *Jones v. Denver*, 854 F.2d 1206, 1209 (10th Cir. 1988); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988).

F.3d at 879; *Stolt–Nielsen v. United States*, 442 F.3d 177, 183 (3d Cir. 2006). It is a “basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury” *Younger v. Harris*, 401 U.S. 37, 43–44 (1971). “[T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered ‘irreparable’ in the special legal sense of that term. Instead, the threat to the plaintiff’s federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.” *Id.* at 46; *see Deaver*, 822 F.2d at 69 (applying same logic to suit seeking relief from an anticipated future prosecution).

Consistent with that general rule, the Supreme Court has permitted preemptive civil litigation where state criminal proceedings “threatened federal constitutional rights.” *Id.* at 68; *see Bacon*, 631 F.3d at 879. However, “the traditional reluctance . . . to interfere with criminal proceedings,” 822 F.2d at 70, may not be set aside based on a federal court’s view that there is not a state-law basis for an anticipated state prosecution. To the contrary, “the Court has recognized that federal interference with a State’s good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.” *Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965).

The panel’s ruling in this case cannot be squared with those principles. Under the panel’s approach, a potential criminal defendant may file a preemptive civil suit

under § 1983, and may ask a federal court to anticipatorily adjudicate state-law defenses to a threatened state prosecution, so long as the plaintiff also alleges the prosecution would run afoul of the federal Constitution. The federal court tasked with resolving such a suit would not only have the *power* to adjudicate such state-law issues; it would be *obliged* to resolve them first, because federal courts “should avoid reaching constitutional questions if there are other grounds” for a decision. *See* A:12 n.3.

B. The panel’s interpretation of the Florida SCA substantially narrows its scope in a way that could cast doubt on many prosecutions. For example, citing a dictionary but no Florida caselaw, the panel concluded that McDonough did not violate the SCA because no participant to the conversation “exhibit[ed]” an expectation of privacy. A:9. That conclusion was based on a plausible reading of the statutory text, but the Florida Supreme Court has held that the statute applies where the recorded person has “a subjective expectation of privacy” that “society is prepared to recognize as reasonable.” *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985). This test does not ask whether that “subjective” expectation is communicated to others.

In keeping with its test, the Florida Supreme Court has found SCA violations where no participant to the conversation communicated an expectation of privacy in the manner required by the panel. For example, the court held that police violated the statute when they wiretapped criminal defendants’ home-telephone conversations, reasoning that “the ‘intercepted’ conversations originated within the ... home *and thus*

exhibited the required expectation of privacy.” State v. Mozo, 655 So. 2d 1115, 1117 (Fla. 1995) (emphasis added). Similarly, the court has held that the statute prohibits the surreptitious, nonconsensual recording of in-person conversations within the home. *See, e.g., McDade v. State*, 154 So. 3d 292, 298 (Fla. 2014); *State v. Walls*, 356 So. 2d 294, 296 (Fla. 1978). Nowhere on the face of the court’s opinions in those cases is there any suggestion that the recorded individuals set “ground rules,” “suggest[ed] that the [conversation] was confidential,” or gave “advance notice” of “rules that established confidentiality.” A:9; *see also LaPorte v. State*, 512 So. 2d 984, 986 (Fla. 2d DCA 1987) (SCA prohibits recording conversation of women undressing in modeling studio).

Under the panel’s approach, the statute’s protection of conversational privacy would disappear where it matters most—situations, like in-person conversations within the home, in which participants have no reason to suspect their conversation is being recorded and therefore have no reason to ask that it not be.

Similarly, the panel concluded that McDonough’s surreptitious recording falls under the statutory exception for “communications ‘uttered at a public meeting.’” A:10 (quoting Fla. Stat. § 934.02(2)). Florida caselaw, however, does not support the proposition that a “public meeting” occurs whenever a state official meets with “members of the public.” *See id.* The panel’s reliance on *Department of Agriculture and Consumer Services v. Edwards*, 654 So. 2d 628 (Fla. 1st DCA 1995), is unpersuasive. The court there held that the public-meeting exception did *not* apply to the kind of meeting

at issue here. *Compare* A:10 (concluding that a meeting can be deemed a “public” one by virtue of the number of attendees, nature of the topic, attendance by public officials performing their official duties, or potential applicability of public-records disclosure laws), *with* 654 So. 2d at 633 (public-meeting exception inapplicable despite existence of all these factors).

In sum, the panel’s interpretation of the SCA is in substantial tension with Florida decisional law; and its holding casts doubt on an untold number of past, present, and future prosecutions under an important privacy-protecting statute. In holding that federal courts should not presume to instruct state officers on the meaning of state law, the Supreme Court sought to avoid just such a result. *See Pennhurst*, 465 U.S. at 122 n.32.

C. Having carefully considered the panel’s opinion, the State Attorney is not prepared to “assure [McDonough] that he can continue to covertly record conversations” of the kind at issue in this case. A:14 (Carnes, C.J., dissenting). Thus, a remand to the district court would not resolve the controversy between the parties. In addition, the district court should not have to choose between defying Supreme Court precedent and failing to give any effect to a ruling of this Court. *See id.* The best way out of that predicament is for this Court to rehear the case now.

CONCLUSION

The petition for rehearing or rehearing en banc should be granted.

Dated: August 2, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2017, the foregoing petition was served on *pro se* Appellant James Eric McDonough electronically to his e-mail address, phd2b05@gmail.com, and also by postal mail to his address, 32320 Southwest 199th Avenue, Homestead, Florida 33030. I further certify that the foregoing petition was filed with the Clerk of Court via the CM/ECF system, causing it to be served on the following registered counsel of record:

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In addition, nineteen copies were sent by overnight courier, next business day delivery, to the Clerk of Court.

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CERTIFICATE OF COMPLIANCE

This document has been prepared in Microsoft Word using a proportionally spaced typeface (Garamond 14-point font) and complies with the type-volume limit of Fed. R. App. P. 32(c). This document also complies with the word limit of Fed. R. App. P. 35(b)(2)(A) because, excluding parts of the document exempted by applicable rules, this document contains 3,836 words.

/s/ *Jordan E. Pratt*
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