No. 25-____

In the Supreme Court of the United States

ASHLEY GRAYSON, PETITIONER

v.

UNITED STATES

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) prohibits intentionally intercepting wire or oral communications or disclosing contents of unlawfully intercepted communications. 18 U.S.C. § 2511(1)(a), (c). In turn, Title III's exclusionary rule, 18 U.S.C. § 2515, provides that "no part of the contents" of an intercepted communication "and no evidence derived therefrom may be received in evidence in any trial, hearing, or proceeding" before any state or federal court or governmental body "if the disclosure of that information" would violate Title III.

The courts of appeals plus a state high court have openly split over whether § 2515's exclusionary rule applies against the government when the government wasn't involved in the unlawful interception. The First, Third, Fourth, Eighth, and Ninth Circuits and the Massachusetts high court apply § 2515 as written, with no exception if the government wasn't involved in the interception. *United States v. Vest*, 813 F.2d 477, 479-80 (1st Cir. 1987); *In re Grand Jury*, 111 F.3d 1066, 1077-79 (3d Cir. 1997); *United States v. Crabtree*, 565 F.3d 887, 889-90 (4th Cir. 2009); *United States v. Phillips*, 540 F.2d 319, 327 n.5 (8th Cir. 1976); *Chandler v. United States Army*, 125 F.3d 1296, 1302 (9th Cir. 1997); *Commonwealth v. Damiano*, 828 N.E.2d 510, 517 (Mass. 2005). The Sixth Circuit alone reads a clean-hands exception into § 2515, allowing the government to introduce unlawfully intercepted communications if the government played no part in interception. *United States v. Murdock*, 63 F.3d 1391, 1402-04 (6th Cir. 1995). The question presented is:

Whether § 2515's exclusionary rule contains an unwritten clean-hands exception.

RELATED PROCEEDINGS

Supreme Court of the United States:

Grayson v. United States, No. 25A581 (order extending time to file a petition for a writ of certiorari)

United States Court of Appeals (6th Cir.):

United States v. Grayson, No. 24-5988 (6th Cir. Sept. 15, 2025) (denial of rehearing en banc)

United States v. Grayson, No. 24-5988 (6th Cir. Aug. 14, 2025) (opinion below)

United States District Court (W.D. Tenn.):

United States v. Grayson, et al., No. 2:23-cr-20121 (W.D. Tenn. Oct. 31, 2024) (entering judgment against Ashley Grayson)

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INTRODUCTION

This case presents an acknowledged circuit split over an important and outcome-determinative question of federal law: Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. §§ 2510–2523, contains an unwritten clean-hands exception that allows the government to introduce unlawfully intercepted communications at trial if the government played no role in the interception.

Subject to enumerated exceptions, Title III prohibits any public or private actor from intentionally intercepting wire or oral communications. 18 U.S.C. § 2511(1)(a). It also prohibits knowingly disclosing the contents of unlawfully intercepted communications. *Id.* § 2511(1)(c). Title III contains a broad exclusionary rule—which Congress intended to apply in all state and federal courts and in all governmental proceedings—providing that "no part of the contents" of an intercepted wire or oral communication "and no evidence derived therefrom may be received in evidence … if the disclosure of that information" would violate Title III. *Id.* § 2515.

The question presented, on which the courts of appeals and a state high court have split 6–1, is whether § 2515 contains an unwritten clean-hands exception that allows the government to introduce an unlawfully intercepted communication at trial if the government wasn't involved in the interception. The question presented is important, and this case shows why. Ashley Grayson was convicted of a murder-for-hire conspiracy, and she received a long prison sentence. Key to her conviction was a recorded FaceTime call, which was intercepted in violation of Title III and used to extort her. The recording would have been

suppressed had she been charged in one of the jurisdictions applying § 2515 as written. And the erroneous failure to suppress was prejudicial. Indeed, Grayson's husband, who was tried alongside her and who didn't appear in the recorded call, was acquitted. The Court should grant review.

1. The courts of appeals and a state high court have split 6–1 over whether § 2515 contains an unwritten clean-hands exception. The First, Third, Fourth, Eighth, and Ninth Circuits, and the Supreme Judicial Court of Massachusetts, apply § 2515 without a clean-hands exception. *United States v. Vest*, 813 F.2d 477, 479-80 (1st Cir. 1987); *In re Grand Jury*, 111 F.3d 1066, 1077-78 (3d Cir. 1997); *United States v. Crabtree*, 565 F.3d 887, 889 (4th Cir. 2009); *United States v. Phillips*, 540 F.2d 319, 327 n.5 (8th Cir. 1976); *Chandler v. United States Army*, 125 F.3d 1296, 1302 (9th Cir. 1997); *Commonwealth v. Damiano*, 828 N.E.2d 510, 517 (Mass. 2005). In those courts, admissibility under § 2515 turns exclusively on whether the evidence's disclosure would violate Title III—as the statute commands.

The Sixth Circuit alone holds that § 2515 contains a clean-hands exception. *See United States v. Murdock*, 63 F.3d 1391, 1402-04 (6th Cir. 1995). Under *Murdock*, the government can introduce unlawfully intercepted communications at criminal trials so long as "the government played no part in the unlawful interception." *Id.* at 1404. That holding rested entirely on the Sixth Circuit's "reading of the legislative history of Title III." *Id.* at 1403.

The split is entrenched, and the Court should resolve it now. Indeed, the decision below acknowledged the lopsided split and conceded that the court would

not "likely consider the statute's legislative history in interpreting [its] text in the way *Murdock* chose to do." App. 14a. But the court denied en banc review. App. 38a-39a. This Court should intervene and correct the Sixth Circuit's outlier rule.

2. The Sixth Circuit's rule is wrong. Title III's unambiguous text makes clear that § 2515 doesn't contain a clean-hands exception. Title III prohibits knowingly disclosing the contents of unlawfully intercepted communications. 18 U.S.C. § 2511(1)(c). And § 2515 requires suppression of the contents of any intercepted wire or oral communication "if the disclosure of that information" would violate Title III. The statute contains no exception for privately intercepted communications. Title III's structure reinforces that conclusion. The statute's prohibitions apply against both private and public actors. Congress did not simply forget to carve out an exception to § 2515's uniform exclusionary rule for privately intercepted communications in criminal cases.

The Sixth Circuit's reasoning for adopting a clean-hands exception fails. The exception is unmoored from Title III's text, as the panel below acknowledged. App. 14a. Instead the reasoning relies on the court's selective reading of Title III's legislative history. But legislative history cannot "muddy clear statutory language." *Milner v. Department of the Navy*, 562 U.S. 562, 572 (2011). What's more, the Sixth Circuit misinterpreted the legislative history, which states that § 2515 "applies to suppress evidence *directly … or indirectly obtained* in violation of [Title III]," S. Rep. No. 90-1097, at 96 (1968) (emphasis added), thus confirming that § 2515 means what it says.

3. The question presented is important, and this case is an ideal vehicle for resolving it. Congress enacted Title III to impose uniform, nationwide rules governing the interception of wire and oral communications and their use as evidence in all state and federal courts. The Sixth Circuit's approach—which federal district courts and state courts outside that circuit have adopted—defeats Congress's carefully designed scheme. It also invites private actors to intercept communications in violation of federal law, knowing that the government can later use the fruits of their unlawful conduct in criminal prosecutions. That concern is especially acute in this digital age, when it's easier than ever to record a private conversation or call. And the split is outcome-determinative: If Grayson had been tried in a majority-rule jurisdiction, the FaceTime recording would have been suppressed and she likely would have been acquitted.

The Court should grant review.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-21a) is unpublished but available at 2025 WL 2366262. The district court's opinion (App. 22a-37a) is unreported.

JURISDICTION

The court of appeals issued its opinion and entered judgment on August 14, 2025, App. 1a-21a, and denied rehearing en banc on September 15, 2025, App. 38a-39a. On November 18, 2025, Justice Kavanaugh extended the time to file a petition for a writ of certiorari to January 14, 2026. *See* 28 U.S.C. § 2101(c). This petition is timely filed on January 14, 2026. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix reproduces 18 U.S.C. §§ 2511(1), (2)(d), and 2515. *See* App. 40a-43a.

STATEMENT

A. Legal background

Congress enacted Title III to "prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in [Title III]." *United States v. Giordano*, 416 U.S. 505, 514 (1974) (footnote omitted). "[C]entral to the legislative scheme," *Gelbard v. United States*, 408 U.S. 41, 50 (1972), Title III contains a broad exclusionary rule, 18 U.S.C. § 2515, that prohibits the use of unlawfully intercepted wire or oral communications as evidence in any proceeding before any state or federal court or governmental body.

1. Title III's prohibitions are sweeping and, "[e]xcept as otherwise specifically provided" in Title III, apply against public and private entities. 18 U.S.C. § 2511(1). Title III makes it unlawful to "intentionally intercept[] … any wire, oral, or electronic communication." *Id.* § 2511(1)(a). The statute covers not only initial interceptions but also subsequent disclosures. Title III prohibits "any person" from "intentionally disclos[ing] … the contents of any wire, oral, or electronic communication" that that person "know[s] or [has] reason to know" "was obtained … in violation of [Title III]." *Id.* § 2511(1), (1)(c).

Title III's prohibitions are broad. "[I]ntercept" means "the aural or other acquisition of the contents of any" covered communication "through the use of any electronic, mechanical, or other device." *Id.* § 2510(4). An "oral communication" is "any oral

communication uttered by a person," if that person has a "justif[ied]" "expectation that such communication is not subject to interception." *Id.* § 2510(2). And a "wire communication" means "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception." *Id.* § 2510(1). Given the breadth of those terms, the Court has made clear that Title III "applies to the interception of conversations over both cellular and cordless phones." *Bartnicki v. Vopper*, 532 U.S. 514, 524 (2001).

Title III carves out narrow exceptions to its general prohibition. For example, the statute contains detailed provisions governing how the government may seek court-ordered authorization to intercept communications. *See* 18 U.S.C. §§ 2516–2518. And, relevant here, it's not unlawful for "a party to the communication" to intercept that communication—but only if the communication is not "intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d). Put differently, that one-party consent exception does not apply—and § 2511(1)(a)'s prohibition thus does apply—if a party intercepted the communication for an unlawful purpose.

2. Section 2515 commands that any unlawfully intercepted wire or oral communication be suppressed. It provides that "no part of the contents" of an unlawfully intercepted wire or oral communication "and no evidence derived therefrom may be received in evidence" when "the disclosure of that information" would violate Title III. 18 U.S.C. § 2515. And, as noted (at 5), knowingly disclosing the contents of unlawfully

intercepted communications violates Title III. Section 2515's exclusionary rule applies in both state and federal courts and in proceedings before every level of government.

The Court has recognized that § 2515 is "central to [Title III's] legislative scheme," and that "[i]ts importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." *Gelbard*, 408 U.S. at 50. Indeed, Congress's findings enacted with Title III explain that the law's purpose was to provide "uniform" rules that prohibit both the "unauthorized interception of [wire and oral] communications" and "the use of the contents thereof in evidence in courts and administrative proceedings." Pub. L. No. 90-351, § 801(b), 82 Stat. 197, 211 (1968). Thus, "§ 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct." *Gelbard*, 408 U.S. at 51 (footnote omitted).

B. Factual and procedural background

Ashley Grayson was convicted of conspiracy to commit murder for hire, in violation of 18 U.S.C. § 1958. A key piece of evidence was a recorded FaceTime call in which she purportedly discussed the scheme with Olivia Johnson, with whom the government accused Grayson of conspiring. Although Johnson recorded the call in violation of Title III, and § 2515 thus required suppression, the district court admitted it into evidence, and the court of appeals affirmed, relying on the Sixth Circuit's clean-hands exception.

1. Grayson, a Dallas-based social media influencer who helped people repair their credit, met Johnson, a Memphis-based hairdresser, on Facebook

in 2017. App. 2a; *see* Dist. Ct. Doc. 144, at 252-53. Hoping to expand her reach into the Memphis market, Grayson offered Johnson her credit-repair services in exchange for Johnson's promoting Grayson's business on social media. App. 2a.

Grayson and Johnson stayed in touch. *Id.* In May 2022, Grayson told Johnson she wanted to do a "give-away in Memphis" by buying a house for a single mother and asked for Johnson's help identifying a worthy recipient. Dist. Ct. Doc. 144, at 258-59. The house eventually went to Johnson's mother. App. 2a. Although Johnson's mother lived there rent-free, Grayson owned the house. *Id.* That became a source of tension between Johnson and Grayson, because Johnson had believed her mother would own the house outright. App. 2a-3a.

In September 2022, Grayson invited Johnson and her husband, Brandon Thomas, to visit her and her husband, Joshua Grayson, in Texas. App. 3a. Johnson claims that she believed Grayson wanted to discuss the Memphis house. *Id.* But, when she arrived, Johnson says that the Graysons instead offered her and Thomas $80,000 to kill three people who had been threatening Grayson or antagonizing her on social media. *Id.*; Dist. Ct. Doc. 144, at 298-99; Dist. Ct. Doc. 145, at 12.

Johnson says that she suggested that future discussions about the scheme take place over FaceTime, because those calls "aren't traceable," so the group could speak "without anyone knowing what [they're] talking about." Dist. Ct. Doc. 145, at 18. By suggesting they converse over FaceTime, Johnson planned to capture an incriminating video of Grayson, which she intended to use to extort Grayson into giving her

mother the deed to the house. App. 4a. Thus, days after she returned to Memphis, Johnson asked Grayson to FaceTime her, and she secretly recorded the call using Thomas's phone. Dist. Ct. Doc. 145, at 25. On the call, Johnson falsely claimed to have scoped out one of the purported target's houses, and she demanded initial payment. *Id.* at 27-28.

Although Johnson never attempted to kill anyone, she and Thomas drove to Dallas to collect. App. 5a. Surveillance footage from Joshua Grayson's apartment building captured him handing something to Johnson and Thomas. Dist. Ct. Doc. 144, at 216, 239-43. Johnson testified that it was a $10,000 payment. Dist. Ct. Doc. 145, at 42-49.

Grayson and Johnson's relationship deteriorated. Johnson sent Grayson a clip of the recorded FaceTime call and demanded that Grayson transfer the title of the house to Johnson's family. App. 5a; *see* Dist. Ct. Doc. 144, at 217. Instead, Grayson reported Johnson's extortion attempt to the FBI. App. 5a. Eventually, Johnson turned the FaceTime recording over to the authorities. *Id.* Based on that recording and other information Johnson provided, Ashley and Joshua Grayson were indicted for conspiracy to commit murder for hire, in violation of 18 U.S.C. § 1958. *Id.*

2. The FaceTime recording was crucial to the government's case. But, bound by *Murdock*'s clean-hands exception, the district court denied the Graysons' motion to exclude it. The government then secured Ashley Grayson's conviction, relying significantly on the recording.

a. Before trial, the Graysons moved to exclude the FaceTime recording because, among other things, its disclosure would violate Title III and § 2515 thus

required suppression. Dist. Ct. Doc. 63, at 5-11. In particular, they explained that the one-party consent exception in § 2511(2)(d) didn't apply because Johnson intercepted the FaceTime call for an unlawful purpose—extorting Grayson into giving the house to Johnson's mother. *Id.* at 5-7. Indeed, the government didn't argue that the one-party consent exception applied. To the contrary, it later told the jury that Johnson made the recording not "to be altruistic" but to use it as leverage "to have Ms. Grayson write the house over," Dist. Ct. Doc. 144, at 217, and it elicited corroborating testimony from Johnson, Dist. Ct. Doc. 145, at 71-75.

But the district court denied the Graysons' motion. App. 27a-37a. It rejected their argument that § 2515's exclusionary rule applied, holding that the FaceTime recording was admissible under *Murdock*'s clean-hands exception. App. 28a-30a. The court explained that it was bound by that "clearly established Sixth Circuit" precedent. App. 30a.

b. The recording featured prominently at trial. The prosecution emphasized it repeatedly in its opening and closing arguments, telling the jury to "look closely at that FaceTime call." Dist. Ct. Doc. 147, at 131; *see id.* at 122-23; Dist. Ct. Doc. 144, at 215-17. And an FBI investigator testified that "the FaceTime recording" was a "big part of this investigation." Dist. Ct. Doc. 145, at 330.

The jury convicted Ashley Grayson, who was sentenced to ten years in prison. Dist. Ct. Docs. 124, 213. But it acquitted Joshua Grayson, who did not appear in the FaceTime recording. Dist. Ct. Doc. 125.

3. The court of appeals affirmed the district court's denial of suppression. App. 12a-15a.

The panel acknowledged that "Grayson may be correct" that the recording was unlawful under Title III, but held that "the legality of the recording has no bearing on its admissibility." App. 12a. The panel reasoned that the recording is "covered by the 'clean hands' exception established by *United States v. Murdock*." *Id.* In *Murdock*, the Sixth Circuit "held that suppression is not warranted in a criminal prosecution where the 'government played no part in [an] unlawful interception.'" App. 13a (quoting *Murdock*, 63 F.3d at 1404). Because the government "neither made nor encouraged the FaceTime recording," the panel concluded, Grayson "'does not enjoy the right to suppression'" under § 2515. *Id.* (alteration adopted).

The panel recognized that several courts of appeals have "refused to read a clean hands exception into" § 2515. App. 14a. The panel also claimed not to "discount Grayson's textual analysis, the touchstone for modern day statutory interpretation." *Id.* And it acknowledged that it would not "likely consider [Title III's] legislative history in interpreting that text in the way *Murdock* chose to do." *Id.* But the panel concluded that, "[r]ight or wrong," "*Murdock* controls." App. 15a.

The court denied Grayson's petition for rehearing en banc in a summary order. App. 38a-39a.

REASONS FOR GRANTING THE PETITION

The court of appeals and a state high court have split 6–1 over whether § 2515's exclusionary rule contains an unwritten clean-hands exception that allows the government to admit unlawfully intercepted communications if the government played no role in that interception. Following the statute's text, the First, Third, Fourth, Eighth, and Ninth Circuits, and the

Massachusetts high court, do not read a clean-hands exception into § 2515. The Sixth Circuit alone allows the government to introduce unlawfully intercepted communications when the government has clean hands. The split is outcome-determinative: A court in a majority-rule jurisdiction would have suppressed the FaceTime recording. And, although judges inside and outside the Sixth Circuit have criticized the clean-hands exception, the court here denied en banc review below. Only this Court can resolve the split.

The Sixth Circuit's rule is wrong. Title III's text and structure make clear that § 2515 doesn't contain a clean-hands exception. Subject to enumerated exceptions, Title III prohibits intentionally intercepting wire or oral communications or disclosing the contents of unlawfully intercepted communications. And § 2515 mandates exclusion of any evidence if its disclosure would violate Title III. Given that Title III applies broadly, to public and private actors and in civil and criminal proceedings alike, it makes no sense to think Congress simply forgot to include a textual exception for privately intercepted communications. But the Sixth Circuit disregarded § 2515's unambiguous command and relied on Title III's legislative history to graft its clean-hands exception onto the statute.

That was error. Legislative history cannot override clear statutory text. And the Sixth Circuit also misinterpreted Title III's legislative history, which reinforces that § 2515 means what it says.

The question presented is important, and this case is an ideal vehicle. Congress enacted Title III because it wanted uniform, nationwide rules governing the interception of communications and their admissibility

at trial. The Sixth Circuit's approach—which federal district courts and lower state courts around the country have erroneously followed—destroys the uniformity Title III was designed to achieve and invites private actors to violate the law. The split is entrenched. And it matters. Had the district court correctly applied § 2515 without a clean-hands exception, the FaceTime recording would have been suppressed and Grayson likely would have been acquitted, just like her husband.

The Court should grant review.

I. The courts of appeals and a state high court have split 6–1 over whether § 2515's exclusionary rule contains an unwritten clean-hands exception.

The courts of appeals and a state high court have split over whether § 2515 contains an unwritten clean-hands exception. The First, Third, Fourth, Eighth, and Ninth Circuits, and the Massachusetts high court, apply § 2515 as written. Only the Sixth Circuit reads a clean-hands exception into the statute and allows the government to introduce unlawfully intercepted communications if the government had no role in the interception. Judges inside and outside the Sixth Circuit have criticized that court's approach, but the court has declined to join the circuit consensus, and it denied en banc review below. Only this Court can resolve the conflict.

A. The First, Third Fourth, Eighth, and Ninth Circuits, and the Massachusetts high court, hold that § 2515 does not contain a clean-hands exception.

1. In *Crabtree*, the Fourth Circuit acknowledged that "[w]hether § 2515 should be understood as

containing a 'clean hands' exception … has divided the circuits." 565 F.3d at 889. The court "agree[d] with the majority" and held that "§ 2515 does not permit an exception … where the government was not involved in illegal interception." *Id.*

While Crabtree was on supervised release, his girlfriend secretly recorded telephone conversations in which he threatened to burn down her house. *Id.* at 888. The government relied on those recordings to revoke Crabtree's supervised release. *Id.* "[T]here [was] no dispute" that the girlfriend "violated Title III by recording" the conversations. *Id.* Crabtree argued on appeal that the district court erred by nonetheless admitting the recordings based on a "'clean hands' exception to § 2515." *Id.* at 889.

The Fourth Circuit agreed with Crabtree, holding that "the issue is resolved by the language of § 2515 itself." *Id.* Section 2515 "clearly and unambiguously prohibit[s] the use in court of improperly intercepted communications," and there are "no gaps or shadows in the language that might leave lurking a clean-hands exception." *Id.*

The court expressly rejected the Sixth Circuit's approach in *Murdock*, which invoked Title III's legislative history. *Id.* at 891. "[E]ven if resort to the legislative history were appropriate," the Fourth Circuit explained, *Murdock*'s holding was not consistent with "Congress's overriding interest" in Title III of "protecting the privacy of wire communications." *Id.* at 890. The court thus "disagree[d] with the inferences drawn from [Title III's] history by the Sixth Circuit." *Id.* at 891.

2. The Third Circuit has also acknowledged the split and rejected the clean-hands exception, holding

that § 2515's "evidentiary prohibition must be applied to perpetrators and non-perpetrators alike." *In re Grand Jury*, 111 F.3d at 1077-78 & n.13. In *Grand Jury*, the court considered whether "§ 2515 contains a 'clean hands' exception that permits disclosure" of communications "unlawfully intercepted by a private party without government complicity." *Id.* at 1070. A grand jury had subpoenaed a witness for telephone recordings that, all agreed, "were made in violation of § 2511(1)(a)." *Id.* at 1069, 1077. The individuals in those recordings objected, arguing that the recordings' contents couldn't be disclosed to the grand jury under § 2515. *Id.* at 1069. But the district court disagreed, citing the clean-hands exception. *Id.*

The Third Circuit reversed, explaining that "the plain language of § 2515" prohibits the use of the unlawful recordings in grand jury proceedings. *Id.* at 1077. The court reasoned that § 2511(1)(c) is "unambiguous," making it a crime to intentionally disclose information known to have been unlawfully intercepted. *Id.* And § 2515, in turn, prohibits admission of information "if the disclosure of that information would be in violation" of Title III. *Id.* Because "disclosure of the contents of the intercepted communications would be a violation of § 2511(1)(c)," § 2515 required suppression. *Id.* "The language of § 2515 could not be any clearer." *Id.*

3. The Ninth Circuit has also acknowledged the split and sided with the majority.

a. In *Chandler*, the Ninth Circuit found itself "unable to avoid an intercircuit conflict" and rejected the Sixth Circuit's view that there is "a clean hands exception to 18 U.S.C. § 2515." 125 F.3d at 1302.

There, an Army officer's wife secretly recorded a phone call between her husband (Chandler) and his subordinate that revealed that Chandler and the subordinate had been having an affair. *Id.* at 1297. The wife disclosed the recording to Chandler's commanding officer, and the Army took disciplinary action. *Id.* at 1297-98. Chandler sued for declaratory judgment, claiming that the Army violated Title III by using the recording in disciplinary proceedings. *Id.*

The Ninth Circuit agreed, holding that 18 U.S.C. § 2515 barred use of the recording, even though the Army "did not participate in the illegal interception." *Id.* at 1302. The court explained why the Army's use of the recording was impermissible under Title III's "elaborate scheme of exceptions providing for law enforcement wiretapping." *Id.* at 1298-1302 (citing 18 U.S.C. §§ 2516–2518). The court then addressed, and rejected, the Sixth Circuit's "clean hands exception." *Id.* at 1302. The court explained that it could not "reconcile the Sixth Circuit['s] reading" of § 2515 "with the statutory language." *Id.* And it disagreed with the Sixth Circuit's reasoning that "recognition of a clean hands doctrine 'would not create the problem of government agents encouraging [Title III] violations.'" *Id.* The Ninth Circuit explained that Title III's purpose "is to prevent private, not just governmental, wiretapping." *Id.* Thus, § 2515's "prohibition is intended to be broad enough 'so that the courts do not become partners to illegal conduct.'" *Id.* at 1304.

b. The Ninth Circuit has made clear that *Chandler*'s holding applies to criminal cases. Relying on *Chandler*, the court held in a criminal suppression case that "§ 2515 excludes 'evidence obtained by entirely private misconduct … regardless of whether the interception was governmental or private.'" *United*

States v. McTiernan, 695 F.3d 882, 887-88 (9th Cir. 2012). In *McTiernan*, the court held that § 2515 didn't require suppression of a recording, because it was lawful under § 2511(2)(d). *Id.* at 890-91.

4. The First Circuit also rejects the clean-hands exception.

In *Vest*, the government sought to introduce at trial a conversation recorded in violation of Title III, arguing that "the exclusionary rule of section 2515 is inapplicable where the government is merely the innocent recipient, rather than the procurer, of an illegally-intercepted communication." 813 F.2d at 480. The government contended that § 2515's purpose "is to deter violations of Title III's other provisions," so "it would be pointless to apply section 2515 against the government" when it didn't illegally intercept the communication. *Id.*

The court rejected that argument. "[T]he government's characterization of section 2515 as solely aimed at deterring Title III violations [was] too narrow," given that "'the protection of privacy was an overriding congressional concern' when it enacted Title III." *Id.* at 480-81. And "an invasion of privacy is not over when an interception occurs, but is compounded by disclosure in court or elsewhere." *Id.* Section 2515 protects against that subsequent disclosure, the court explained, whether the unlawful interceptor was the government or a private party. *Id.*

The court also rejected the government's argument that courts should "read into section 2515 the exception to the fourth amendment exclusionary rule for evidence falling into the government's hands after a private search and seizure." *Id.* at 481. The court explained that its role was "to interpret[] rather than

modify[]" "the congressionally-created rule of section 2515." *Id.* And allowing the use of communications unlawfully intercepted by private parties as evidence "would eviscerate [Title III's] statutory protection of privacy." *Id.*

5. The Eighth Circuit, too, has declined to read a clean-hands exception into § 2515.

In *Phillips*, the court vacated a defendant's conviction and remanded for the district court to assess in the first instance whether a recorded conversation between the defendant and others—the "critical evidence admitted at trial"—was made in violation of § 2511. 540 F.2d at 323-24. The court explained that § 2515 "imposes an evidentiary sanction," because "any oral communication intercepted in violation of [Title III] shall not be received in evidence in any judicial proceeding." *Id.* at 325. Thus, if making the recording violated Title III, "the tape must be suppressed." *Id.* at 327.

The Eighth Circuit specifically "reject[ed] the government's argument" that the tape was "independently admissible because the government had no part in the decision to record or the actual recording of the conversation." *Id.* at 327 n.5. The court found unpersuasive the government's analogy to the Fourth and Fifth Amendments, which "proscribe government action, not private action," in light of § 2515's command "that certain conversations which are electronically intercepted by private persons are not admissible in any official proceeding." *Id.* That "specific statutory directive" controlled. *Id.* The court thus remanded for the district court to assess whether the recording was lawful under § 2511(2)(d). *Id.* at 327.

6. Agreeing with the federal appellate consensus, the Massachusetts Supreme Judicial Court has also "decline[d] to read into § 2515 a 'clean hands' exception." *Damiano*, 828 N.E.2d at 517.

In *Damiano*, a criminal case, the trial court suppressed the contents of a telephone conversation, which a private individual intercepted and disclosed to the police. *Id.* at 512-13. The government urged the Massachusetts high court "to apply a 'clean hands' exception to [§ 2515], so as to permit the introduction in evidence of any unlawfully intercepted wire or oral communication" when "the police are only the recipients and not the interceptors." *Id.* at 515. Noting "disagreement" among the federal courts of appeals, the Massachusetts high court sided with "the majority of courts" and held "that government involvement in the unlawful interception of a wire or oral communication is not required to trigger Title III's exclusionary rule." *Id.* at 515-16. The court reasoned that "[t]he plain language of § 2515 mandates" that its "'evidentiary prohibition must be applied to perpetrators'" of the unlawful interception "'and non-perpetrators alike.'" *Id.* at 516.

B. The Sixth Circuit alone reads an unwritten clean-hands exception into § 2515.

The Sixth Circuit is the only federal court of appeals that holds that § 2515's exclusionary rule doesn't apply against the government when it "played no part in the unlawful interception." *Murdock*, 63 F.3d at 1404.

1. In *Murdock*, the Sixth Circuit recognized that "'clean hands' exception to Section 2515." *Id.* at 1402.

Murdock, a school-board president, had been convicted of tax evasion after failing to report a bribe as income. *Id.* at 1392. A crucial piece of evidence was a telephone conversation that his wife recorded. *Id.* at 1392-93. Murdock moved unsuccessfully to suppress the recording under § 2515, contending that his conversation had been intercepted in violation of Title III. *Id.* at 1393. On appeal, the Sixth Circuit agreed with Murdock that his wife had violated § 2511(1)(a) by intercepting his conversation and that the recording was not lawful under any of Title III's exceptions. *Id.* at 1393-1400.

The court nonetheless held that § 2515 did not require suppression. *Id.* at 1400-04. It acknowledged the First Circuit's view that, under § 2515, "all illegally intercepted evidence must be suppressed." *Id.* at 1401 (citing *Vest*, 813 F.2d at 481). But the Sixth Circuit disagreed, relying on Title III's legislative history to reason that Congress intended only that "the *victim* of an unlawful interception is entitled to protection in court proceedings from any attempt by the *perpetrator* to use the interception against the victim." *Id.* at 1403. "There is nothing in [Title III's] legislative history," the court opined, "which requires that the government be precluded from using evidence that literally falls into its hands." *Id.* Thus, because "the government played no part in the unlawful interception," the court concluded that Murdock did "not enjoy the … right to the suppression." *Id.* at 1404.

2. The panel here noted the split but nonetheless reaffirmed *Murdock*'s vitality. It conceded that "Grayson may be correct" that the FaceTime recording was unlawful but nonetheless held that "the legality of the recording has no bearing on its admissibility … because the clips of the recorded call are covered by the

'clean hands' exception." App. 12a. The court noted that "several of [its] sister circuits … have refused to read a clean hands exception into [§ 2515]." App. 14a. But it reaffirmed *Murdock*'s holding that "suppression is not warranted in a criminal prosecution where the 'government played no part in the unlawful interception.'" App. 13a (quoting *Murdock*, 63 F.3d at 1404). "Right or wrong," the court concluded, "*Murdock* controls." App. 15a. The full Sixth Circuit then denied rehearing en banc. App. 38a-39a.

C. Appellate courts and judges—including some on the Sixth Circuit—have widely criticized the clean-hands exception, but the Sixth Circuit has refused to reconsider its view.

Since *Murdock*, appellate courts have criticized that decision's methodology and reasoning. So have Sixth Circuit judges. Despite that warranted criticism, the Sixth Circuit has refused for decades to reconsider its atextual clean-hands exception. Indeed, it denied rehearing en banc here even after the panel acknowledged the circuit split and *Murdock*'s problematic reasoning. It's time for this Court to intervene.

1. As explained (at 13-19), no other court of appeals or state high court has adopted *Murdock*'s clean-hands exception. And four of the courts on the other side of the split have expressly noted and disagreed with the Sixth Circuit's reasoning. *See Crabtree*, 565 F.3d at 891; *In re Grand Jury*, 111 F.3d at 1077-78 & n.13; *Chandler*, 125 F.3d at 1302; *Damiano*, 828 N.E.2d at 515-16.

What's more, even courts that have not issued holdings on whether § 2515's exclusionary rule contains a clean-hands exception have criticized *Murdock*

or declined to apply it in related contexts. For example, in ruling on the scope of Title III's law-enforcement exception in § 2517, the D.C. Circuit "rejected" *Murdock*'s reasoning, noting that *Murdock* "seems to have relied only on policy notions rather than the language of the statute in accepting the government's 'clean hands' argument." *Berry v. Funk*, 146 F.3d 1003, 1013 (D.C. Cir. 1998). The D.C. Circuit concluded that the Sixth Circuit's decision "did not square with the statute's language." *Id.* And, in interpreting a state-law wiretap statute, the Maryland high court "decline[d] to go so far as to adopt the 'clean hands doctrine' of *United States v. Murdock*." *Miles v. State*, 781 A.2d 787, 816 n.14 (Md. 2001).

2. Sixth Circuit judges have criticized *Murdock*. Because § 2515 "could not be more clear and conclusive," Chief Judge Merritt wrote, the court "should recognize that *Murdock* was wrongly decided." *Doe v. SEC*, 86 F.3d 589, 598 (6th Cir. 1996) (Merritt, C.J., dissenting), *superseded sub nom., Smith v. SEC*, 129 F.3d 356 (6th Cir. 1997) (en banc). In Chief Judge Merritt's view, the *Murdock* panel "misinterpreted the legislative history" of Title III, relying on "one sentence in [a] committee report" to "override[] the language of the statute." *Id.* at 598-99. But although the Sixth Circuit voted to take *Doe* en banc, mootness prevented the court from correcting *Murdock*'s error. *See Smith*, 129 F.3d at 362.

Even the panel here expressed skepticism of *Murdock*. The court acknowledged "Grayson's textual analysis"—that § 2515 "unambiguously prohibits the use of any improperly intercepted communications as evidence, without regard to whether the government was involved in the procurement." App. 13a-14a. And the court said that, if writing on a blank slate, it would

not "likely consider the statute's legislative history in interpreting [its] text in the way *Murdock* chose to do." App. 14a. Indeed, it even acknowledged that "the use of legislative history was particularly unusual in *Murdock*": The court drew a negative inference from the fact that "'nothing in the legislative history' spoke against the 'clean hands' exception." *Id.* (quoting *Murdock*, 63 F.3d at 1403).

* * *

Despite all the judicial criticism of *Murdock*, the Sixth Circuit has not joined the circuit consensus. Indeed, when given the opportunity to grant rehearing here, the court rejected it. App. 38a-39a. This Court should intervene and correct the Sixth Circuit's outlier rule.

D. The split is outcome-determinative.

The split is outcome-determinative. Had Grayson been tried in a majority-rule jurisdiction, the FaceTime recording would have been suppressed. What's more, had the evidence been suppressed, Grayson likely would have been acquitted.

In jurisdictions applying the statute as written, the dispositive question on a motion to suppress under § 2515 is whether the evidence was unlawfully intercepted. If it was, § 2515 requires suppression. Those jurisdictions do not consider whether "the government played [any] part in the unlawful interception," *Murdock*, 63 F.3d at 1404.

Under that correct approach, the FaceTime recording would have been suppressed, because it was intercepted in violation of Title III. *Infra* pp. 26-27. And, without the recording, Grayson likely would have been acquitted—as was her husband, who was

tried with her and who did not appear in the recording. *Infra* pp. 31-32.

But because Grayson was charged in a federal district court in the Sixth Circuit—instead of in her home state of Texas—the government was able to introduce the FaceTime recording. It thus secured her wrongful conviction, and she is now serving a lengthy prison sentence—all because of the Sixth Circuit's atextual clean-hands exception.

II. The Sixth Circuit's rule is wrong.

The First, Third, Fourth, Eighth, and Ninth Circuits, and the Massachusetts high court, are correct. There is no clean-hands exception to § 2515. Under that correct reading, the FaceTime recording here would have been suppressed. The Sixth Circuit's clean-hands exception cannot be squared with Title III's text and relies on a misinterpretation of the statute's legislative history.

A. Title III's text and structure make clear that § 2515 does not contain a clean-hands exception.

Title III's text and structure show that the Sixth Circuit's clean-hands exception is wrong. Applying the statute as written requires suppressing the FaceTime recording.

1. "[S]tatutory construction," the Court has repeatedly explained, "begin[s] 'with the language of the statute.'" *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 171 (2016). And, when that "language is unambiguous and 'the statutory scheme is coherent and consistent,'" "the inquiry ceases." *Id.* (alteration adopted). Those principles resolve the question presented. Title III's text is unambiguous,

and the statutory scheme reinforces that § 2515 means what it says. Wire and oral communications intercepted in violation of Title III cannot be received in evidence at trial, no matter how clean the government's hands are.

a. Start with Title III's text. Subject to "specifically" enumerated exceptions in Title III, § 2511(1)(a) prohibits "intentionally intercept[ing] … any wire, oral, or electronic communication." Section 2511(1)(c), in turn, makes it unlawful for "any person" to "intentionally disclose[] … the contents of any wire, oral, or electronic communication" that that person "know[s] or [has] reason to know" was intercepted in violation of Title III. Title III's exclusionary rule is clear and absolute. If "any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial" or official proceeding, "if the disclosure of that information" would violate Title III. 18 U.S.C. § 2515.

Those statutory commands answer the question presented. Section 2511(1)(c) makes it a violation of Title III to knowingly disclose the contents of unlawfully intercepted wire or oral communications. And § 2515 mandates that "no part of the contents" of a wire or oral communication can be received in evidence if disclosure would violate Title III. Put differently, if any wire or oral communication is intercepted in violation of § 2511(1)(a), knowing disclosure of its contents violates § 2511(1)(c), and the contents of that communication cannot be received in evidence under § 2515. There are "no gaps or shadows in [Title III's] language that might leave lurking a clean-hands exception." *Crabtree*, 565 F.3d at 889. Indeed,

"[t]he language of § 2515 could not be any clearer." *In re Grand Jury*, 111 F.3d at 1077.

b. Title III's structure reinforces § 2515's unambiguous text. Title III's prohibition on intercepting communications applies against both the state and federal governments and private actors. Indeed, Congress enacted Title III because it was concerned that contents of intercepted communications were "being used by public and private parties as evidence in court," and it was thus "necessary for Congress to define on a uniform basis the circumstances under which the interception of wire and oral communication may be authorized." Pub. L. No. 90-351, § 801(a), (b), 82 Stat. at 211. Given Title III's deliberately broad sweep and application against public and private interceptions, it makes no sense to think that Congress simply forgot to expressly carve out private interceptions from § 2515's exclusionary rule in criminal cases, as the Sixth Circuit holds.

2. All the Court needs to do is reverse the Sixth Circuit's clean-hands-exception holding and remand for the lower courts to decide the suppression question without that supposed exception. With the question presented correctly answered, however, the answer to the suppression question is straightforward: The FaceTime recording should have been suppressed.

Johnson intentionally intercepted the FaceTime call in violation of Title III. An "intercept[ion]" under the statute is the "acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Intentionally using a phone to record a private FaceTime call, as Johnson indisputably did, Dist. Ct. Doc. 145, at 25, thus violates § 2511(1)(a).

Johnson's interception was not lawful under § 2511(2)(d) (or any provision in Title III). As explained (at 5, 25-26), that exception to § 2511(1)'s prohibition makes it lawful for "a party to the communication" to intercept the communication—but only when it is not intercepted for an unlawful purpose. 18 U.S.C. § 2511(2)(d). Section 2511(2)(d) doesn't apply here, because Johnson intercepted the FaceTime recording to extort Grayson. The government effectively conceded that at trial. *Supra* p. 10. Indeed, the government did not argue below that Johnson's interception of the FaceTime recording was lawful under § 2511(2)(d). *See* CA6 Doc. 38, at 25-29. And because intercepting the FaceTime call was unlawful under § 2511(1)(a), disclosing its contents would violate § 2511(1)(c), and § 2515 thus requires suppression.

B. The Sixth Circuit erred by relying on silence in Title III's legislative history to graft an atextual clean-hands exception onto § 2515.

In crafting its clean-hands exception, the Sixth Circuit erred methodologically and substantively by "rel[ying] only on policy notions" from Title III's legislative history rather than on "the language of the statute." *Berry*, 146 F.3d at 1013. Legislative history cannot override clear statutory language, as this Court has repeatedly admonished. And even if legislative history were relevant, it only reinforces that Congress intended § 2515 to apply as written.

1. The Sixth Circuit erred methodologically by relying on Title III's legislative history to override its clear text, as even the panel below acknowledged.

"[L]egislative history is not the law," *Azar v. Allina Health Services*, 587 U.S. 566, 579 (2019), and it cannot "muddy clear statutory language," *Milner*, 562 U.S. at 572. "[T]he text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022).

But *Murdock*'s clean-hands holding relied entirely on the Sixth Circuit's "reading of the legislative history of Title III." *Murdock*, 63 F.3d at 1403. Even the panel below recognized that error. The panel acknowledged that "textual analysis" is "the touchstone for modern day statutory interpretation." App. 14a. And the panel acknowledged that today, the court would not "consider the statute's legislative history in interpreting that text in the way *Murdock* chose to do." *Id.* But the Sixth Circuit nonetheless refused to grant en banc review to correct *Murdock*'s error. App. 38a-39a,

2. What's more, *Murdock* drew the wrong inferences from legislative history anyway, as other courts and judges on the Sixth Circuit have noted. *See, e.g.*, *Crabtree*, 565 F.3d at 890-91; *Doe*, 86 F.3d at 598-99 (Merritt, C.J., dissenting).

a. Title III's legislative history reinforces that § 2515 doesn't contain a clean-hands exception. The accompanying Senate report states that § 2515 "applies to suppress evidence *directly … or indirectly obtained* in violation of [Title III]." S. Rep. No. 90-1097, at 96 (emphasis added). Section 2515 "thus forms an integral part of the system of limitations designed to protect privacy." *Id.* Indeed, this Court has already explained that "[t]he purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored." *Gelbard*, 408 U.S. at 51.

That's because "§ 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct." *Id.* (footnote omitted). And Congress deliberately crafted a broad exclusionary rule in § 2515, explaining that "[t]he privacy of the communication to be protected is to be comprehensive." S. Rep. No. 90-1097, at 91.

Congress could not have been clearer. Legislative findings accompanying Title III—which Congress *did* enact into law—further explain that it was "necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized" and "to prohibit *any* unauthorized interception … *and the use of the contents thereof in evidence in courts*." Pub. L. No. 90-351, § 801(b), 82 Stat. at 211 (emphasis added). In sum, Title III's legislative history shows that Congress meant what it said in § 2515: No unlawfully intercepted wire or oral communication may be used as evidence in courts.

b. As noted (at 21-23), other courts and even judges on the Sixth Circuit have explained that "the *Murdock* court misinterpreted [Title III's] legislative history." *Doe*, 86 F.3d at 598 (Merritt, C.J., dissenting). Indeed, the panel below acknowledged that "the use of legislative history was particularly unusual in *Murdock*," because the court there "relied on the fact that, to its mind, 'nothing in the legislative history' spoke against the 'clean hands' exception." App. 14a (quoting *Murdock*, 63 F.3d at 1403). Putting aside the problem of inferring Congress's intent from silence in legislative history, *Murdock* overlooked clear clues in Title III's legislative history, explained above (at 28-29), showing that Congress intended § 2515 to be enforced as written.

III. The question presented is important, and this case is an ideal vehicle for resolving it.

A. The question presented is important and recurring.

1. Congress enacted Title III to craft "uniform" nationwide rules for when "the interception of wire and oral communications may be authorized" and for "the use of the contents thereof in evidence in courts and administrative proceedings." Pub. L. No. 90-351, § 801(a), (b), 82 Stat. at 211. Put simply, uniformity was central to Title III's legislative scheme and to § 2515's exclusionary rule in particular. That's why § 2515 expressly applies in any state or federal court and in any proceedings before any local, state, or federal governmental body. That choice reflects Congress's conclusion that privacy protection and deterrence of illegal surveillance require a clear, predictable, and nondiscretionary evidentiary rule.

The clean-hands exception upends that design. By authorizing courts to deny suppression based on judicial assessments of equity or clean hands, the Sixth Circuit's approach blurs § 2515's bright-line exclusionary rule. And the lack of uniformity isn't limited to the Sixth Circuit. Federal district courts and state courts outside the Sixth Circuit have followed *Murdock*'s reasoning and applied § 2515 with a clean-hands exception. *See, e.g.*, *United States v. Marquez*, No. 04-cr-20159, 2005 WL 8162672, at *2 (S.D. Fla. Nov. 17, 2005); *State v. Capell*, 966 P.2d 232, 235 (Or. Ct. App. 1998). As a result, § 2515 is applied inconsistently and unpredictably across the country—defeating Congress's objective of uniform enforcement.

That has sweeping consequences. It allows case-by-case balancing where Congress chose categorical exclusion. Worse still, the clean-hands exception invites private actors to violate Title III, knowing that the government can use the fruits of their unlawful conduct in criminal prosecutions. The clean-hands exception thus creates perverse incentives for private parties to engage in illegal surveillance given that they may be able to use the recordings for extortion and, if they are caught, seek immunity in exchange for testifying against their victims. That concern is especially acute in this digital age, when recording communications is easier than ever, and it erodes the privacy interests Title III was designed to protect. The increasing ease with which private and public actors can unlawfully intercept communications with a tool as ubiquitous as a smartphone underscores the need for the Court to intervene now to reaffirm § 2515's uniform exclusionary rule.

2. The Sixth Circuit's approach also raises fundamental separation-of-powers concerns that merit the Court's attention. The Court has repeatedly emphasized that, when Congress has spoken, courts may not override a statute to achieve what they see as a more sensible result. *See, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). Grafting a clean-hands exception onto § 2515 substitutes judges' policy judgment for Congress's choices about how to regulate unlawful surveillance. The Court should make clear that § 2515 means what Congress said.

B. This case is an ideal vehicle for resolving the question presented.

1. The lopsided split is entrenched and outcome-determinative. The Sixth Circuit below reaffirmed

Murdock's clean-hands exception, making clear that "the legality of the recording has no bearing on its admissibility." App. 12a. The court of appeals gave no alternative reasoning or holding that would prevent this Court from addressing the question presented. And, as explained (at 23-24, 26-27), in jurisdictions correctly applying § 2515, the FaceTime recording would have been suppressed.

Indeed, this case is a particularly good vehicle because the FaceTime recording was central to the government's case, and Grayson likely would have been acquitted had the recording been properly suppressed. The government emphasized the recording repeatedly at trial, *supra* p. 10, and conceded that the "FaceTime video … was important." CA6 Oral Argument, at 26:11-13. After all, the jury acquitted Joshua Grayson, who did not appear in the FaceTime recording, even though the government had video evidence purporting to show him giving cash to Johnson and her husband. *Supra* p. 9. The record and the jury's different verdicts as to Grayson and her husband show that this case is an ideal vehicle for correcting the Sixth Circuit's outlier position.

2. The district court's musings about whether this case "would be an appropriate vehicle for reconsider[ing]" *Murdock*'s clean-hands exception, App. 30a-31a, are unfounded.

a. For starters, the district court admitted the recording based solely on *Murdock*, concluding that it "need[] not address" any of the other issues it raised. App. 31a; Dist. Ct. Doc. 174, at 58-59 (order denying new-trial motion). Thus, even if there were unresolved questions about the recording's admissibility—and there aren't—those would be remand issues.

b. Regardless, the district court's speculation that the FaceTime recording might otherwise be admissible is wrong.

First, the district court speculated that recording a FaceTime call between two phones using a third phone might not constitute an "interception" under Title III. App. 30a-31a. But it ignored Title III's unambiguous text, which provides that an interception is the "acquisition of the contents" of a communication using "any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Acquiring the contents of a FaceTime call by recording that call with another phone—which is an electronic device—is thus an interception.

Second, the district court also speculated about whether "Ms. Grayson had a protected privacy interest in the FaceTime call," given that the call's sound played on speakerphone rather than when held against her ear, "as would be the case in phone calls which are the traditional subject in wiretap cases." App. 30a-31a & n.4. The court may have been considering the statutory definition of "oral communication," which requires a justified "expectation that such communication is not subject to interception." 18 U.S.C. § 2510(2). But any privacy-expectation questions here are irrelevant and misplaced.

For one thing, there's no question that the FaceTime call was also a "wire communication" under Title III, which doesn't depend on any privacy expectation. *See id.* § 2510(1). FaceTime calls are transmitted over the internet. *See* Apple, *FaceTime & Privacy*, https://www.apple.com/legal/privacy/data/en/face-time. Internet voice calls are wire communications under Title III. That's consistent with how the

government prosecutes crimes involving internet communications under the Wire Act, 18 U.S.C. § 1084. *See, e.g.*, *United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014). Just as in Title III, a wire communication under the Wire Act is a "transmission" sent "by aid of wire, cable, or other like connection between the points of origin and reception." *Compare* 18 U.S.C. § 1081, *with id.* § 2510(1).

For another, even if the FaceTime call were only an "oral communication," *id.* § 2510(2), Title III's protections would still apply. Title III doesn't turn off when a call recipient uses speakerphone. After all, in-person conversations are also oral communications under Title III, and people don't automatically assume that their conversations will be "subject to interception." *See id.* People similarly don't expect their FaceTime or speakerphone calls to be intercepted. That's especially true here, where Johnson suggested the parties use FaceTime specifically because of privacy concerns. *Supra* p. 8.

CONCLUSION

The courts of appeals and a state high court have split 6–1 over an important question of federal law that has significant ramifications in state and federal courts across the country. Getting the answer right matters, as the different verdicts for Grayson and her husband perfectly illustrate. The Sixth Circuit won't revisit its rule, even after recognizing its error. The Court should grant the petition.

Respectfully submitted.

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January 14, 2026