No. 25-851

IN THE

Supreme Court of the United States

ASHLEY GRAYSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANTON METLITSKY
(*Counsel of Record*)
O'MELVENY & MYERS LLP
1301 Ave. of the Americas
17th Floor
New York, NY 10019
(212) 326-2000
ametlitsky@omm.com

JONATHAN HARWELL
ELLISON M. BERRYHILL
TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
2 Int'l Plaza, Suite 406,
Nashville, TN 37217

TIMUR AKMAN-DUFFY
DANIEL LAUTZENHEISER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Tennessee Association of Criminal Defense Lawyers ("TACDL") is a non-profit corporation chartered in Tennessee in 1973. It has over 750 members statewide, mostly lawyers actively representing people accused of criminal offenses. TACDL is committed to advocating for the fair and effective administration of criminal justice. Its mission includes education, training, and support to criminal defense lawyers, as well as advocacy before courts and the legislature supporting reforms calculated to improve the administration of criminal justice in Tennessee. As part of this mission, TACDL files *amicus curiae* briefs in both state and federal courts regarding issues of significant import to TACDL's members and to the criminal defendants that TACDL attorneys represent.

TACDL believes the Sixth Circuit's decision to include an atextual "clean hands" exception to the blanket prohibition against the use of unlawfully intercepted communications in 18 U.S.C. § 2515 is unsupported by the text and purpose of that statute. In TACDL's view, Section 2515 does not permit the Government to use unlawfully intercepted communications against criminal defendants, even when the Government played no role in the interception. The

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[1] Counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. All parties received notice of TACDL's intent to file this brief at least ten days before the filing deadline.

Sixth Circuit's contrary rule undermines the privacy protections and nationwide uniformity that Congress carefully crafted.

TACDL is dedicated to supporting a judicial system worthy of respect and legitimacy. Exceptions to statutory protections erode that critical foundation and conflict with the "imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222 (1960). TACDL respectfully submits this brief as *amicus curiae* in support of Ashley Grayson's petition for a writ of certiorari to aid the Court's consideration of how this important issue affects criminal defendants.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress set forth a comprehensive, privacy-protecting framework for wire, oral, and electronic communications. With limited, carefully enumerated exceptions, Title III makes it a crime to "intentionally intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(1). To further enforce this prohibition, Title III contains an exclusionary rule that serves as a blanket bar on the disclosure or use of "any" unlawfully intercepted communications in "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof." *Id.* § 2515.

Despite this clear statutory text, the Sixth Circuit has read into Section 2515 a "clean hands" exception permitting the Government to use as evidence the contents of an unlawful interception when "the government played no part in the unlawful interception." *United States v. Murdock*, 63 F.3d 1391, 1404 (6th Cir. 1995). Of the federal courts of appeals to have considered whether Section 2515 contains such a clean-hands exception, the Sixth Circuit stands alone in concluding that it does. *See United States v. Crabtree*, 565 F.3d 887, 889 (4th Cir. 2009) (joining the First, Third, and Ninth Circuits in concluding that Section 2515 "does not permit an exception to its exclusionary rule in cases where the government was not involved in illegal interception").

The Sixth Circuit is wrong. Section 2515 does not permit the Government to use unlawfully intercepted communications against defendants. The text of Title III does not contain a clean-hands exception, nor does it make any distinction between public and private actors. Title III prohibits "any person" from intercepting or disclosing "any" wire or oral communications, 18 U.S.C. § 2511(1)(a), and it states that "no part" of such communications can be used in evidence in "any" proceeding, *id.* §2515. Although this Court does not need to resort to legislative history when the text is this clear, the legislative record confirms that Section 2515 applies to suppress evidence whether obtained "directly" or "indirectly" in violation of Title III.

The Sixth Circuit's contrary conclusion has no basis in the statutory text or the legislative history. What's more, the Sixth Circuit's outlier position imposes disuniformity in nationwide administration of

Title III by making admissibility of evidence turn on geography. Since the application of the clean-hands exception can be outcome determinative in federal prosecutions, it incentivizes improper forum shopping to prosecute in a district governed by that unduly permissive rule. Rapidly changing technology has placed low-cost interception tools into widespread circulation, making them easy to misuse and only heightening the stakes. This Court should grant certiorari to resolve the circuit split and reinstate the uniform nationwide privacy protections Congress sought to enact in Title III.

ARGUMENT

A. Section 2515 Does Not Permit The Government To Use Unlawfully Intercepted Communications Against Defendants.

Title III prohibits not just the unlawful interception of wire or oral communications—it also prohibits the later disclosure or use of communications that were obtained unlawfully. Specifically, Section 2515 bars receipt of the contents of unlawfully intercepted communications (and any evidence derived therefrom) into evidence when disclosure would violate Title III. In this sense, Title III is not merely a deterrence regime. It is a privacy-protective statute with its own remedial scheme. The statute's text, structure, and legislative history make this clear. The Sixth Circuit's clean-hands exception ignores the text, is wrong on the history, and undermines the privacy protections Congress carefully crafted.

1. Start with the text. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) ("The starting point for our interpretation of a statute is

always its language."). The text and structure of Title III make the admissibility of intercepted communications turn on whether the communications' disclosure or use would violate Title III—not on who performed the interception or whether the Government received the communications without fault.

With limited, enumerated exceptions, Title III prohibits "***any*** person" from "intercept[ing]" or "disclos[ing]" "***any*** wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a), (c) (emphasis added). Section 2515 supplies the evidentiary bar, tying admissibility of the communication to whether the contemplated disclosure or use would violate Title III: "Whenever ***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 . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515 (emphasis added). This applies across an array of proceedings, both state and federal. *Id.* By its express language, the text contains no clean-hands exception. Nor does Title III draw any public/private line. Its prohibitions apply to "any person," private and public actors alike. *Id.* § 2511(1).

The structure of Title III confirms the plain language of Section 2515. Title III includes limited exceptions for lawful interceptions. These include, for example, certain consensual interceptions and specifically enumerated authorizations for law enforcement purposes. *See generally id.* § 2511(2). But Title III contains no exception for privately intercepted communications that "fall[] into" the Government's hands. *Cf. Murdock*, 63 F.3d at 1403. This Court presumes that "Congress [knows] how to define the

boundaries" of a statutory exception, *Bloate v. United States*, 559 U.S. 196, 206 (2010), and will not readily "impl[y]" additional exceptions beyond those Congress expressly adopted, *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (citation omitted). Because Congress enumerated specific exceptions elsewhere in Title III, the absence of a clean-hands exception is dispositive.

2. Because the text is clear, the Court does not need to resort to legislative history. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). But the legislative history confirms Congress's categorical evidentiary bar and the privacy harms compounded by courtroom use of unlawful interceptions. In legislative findings, Congress declared that the purpose of Title III was to create "uniform" rules around the interception and use of wire and oral communications, and to "prohibit ***any*** unauthorized interception . . . 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) (emphasis added). The Senate report accompanying Title III's enactment confirms that Section 2515 "applies to suppress evidence ***directly . . . or indirectly*** obtained in violation of" Title III. S. Rep. No. 90-1097, at 96 (1968) (emphasis added).

The Section 2515 "sanction" thus formed an "integral part" of the statutory scheme to "compel compliance" with the other parts of the statute. *Id.* Congress was concerned not just with "safeguard[ing] the privacy of innocent persons," but also

with "protect[ing] the integrity of court and administrative proceedings" that would be tainted by the use of unauthorized recordings. Pub. L. No. 90-351, § 801(b), (c), 82 Stat. at 211. In turn, courts construing Section 2515 have recognized that privacy harms are compounded by disclosure and use in court: "an invasion of privacy is not over when an interception occurs, but is compounded by disclosure in court or elsewhere." *United States v. Vest*, 813 F.2d 477, 481 (1st Cir. 1987). But this is the result of the Sixth Circuit's clean-hands exception: "compounding" the original privacy invasion by permitting repeated disclosure in judicial proceedings. *See id.*

The Sixth Circuit's contrary view of the legislative history is wrong for several reasons—as even other judges on that court have noted. First, the *Murdock* court relied on just a single sentence from the Senate report to argue that Section 2515 "was not intended 'generally to press the scope of the suppression role beyond present search and seizure law.'" *Murdock*, 63 F.3d at 1402 (quoting *United States v. Baranek*, 903 F.2d 1068, 1072 (6th Cir. 1990)). But as another Sixth Circuit judge has observed, not only did *Murdock* use this stray sentence to "override[]" the clear language of the statute, but a full view of the legislative history shows that Congress intended Section 2515 to "appl[y] to suppress evidence directly or indirectly obtained." *Doe v. S.E.C.*, 86 F.3d 589, 599 (6th Cir.) (Merritt, J., dissenting) (citation omitted) (quoting S. Rep. No. 90-1097, at 96), *reh'g en banc granted, opinion vacated*, 86 F.3d 599 (6th Cir. 1996), *and superseded sub nom. Smith v. S.E.C.*, 129 F.3d 356 (6th Cir. 1997); *see supra* at 6.

Second, *Murdock* posited—without support—that its own "independent reading" of the legislative history led to the conclusion that Congress was only concerned about a specific kind of privacy: protection against a perpetrator's use of unlawfully intercepted communications against the victim. *Murdock*, 63 F.3d at 1403. But as the panel below acknowledged, even if it were inclined to resort to legislative history, this conclusion is "particularly unusual" because *Murdock* relied on the *absence* of any evidence in the legislative history to support its clean-hands exception. *See United States v. Grayson*, 2025 WL 2366262, at *6 (6th Cir. Aug. 14, 2025), *petition for cert. filed*, No. 25-851 (Jan. 14, 2026); *Murdock*, 63 F.3d at 1403 ("There is nothing in the legislative history which requires that the government be precluded from using evidence that literally falls into its hands."). This is not how statutory analysis works. "Given the clarity of the text, mere silence in the legislative history cannot justify reading" a clean-hands exception into the statute. *See Whitfield v. United States*, 543 U.S. 209, 216 (2005).

3. Having ignored the text and misread the legislative history, the *Murdock* court also looked outside Title III to the Fourth Amendment, which the court found "instructive" in fashioning its atextual clean-hands exception. 63 F.3d at 1403. Again, the Sixth Circuit's view is in the minority. A host of its sister circuits have repeatedly declined to import Fourth Amendment limitations or judge-made exceptions into Section 2515's statutory rule.

Citing to this Court's decision in *United States v. Jacobsen*, *Murdock* concluded that it is "well established that evidence obtained by a private search is

not subject to the Fourth Amendment exclusionary rule." *Murdock*, 63 F.3d at 1403; *see United States v. Jacobsen*, 466 U.S. 109, 115 (1984) (discussing scope of so-called "private search" doctrine permitting government officials, without a warrant, to repeat a search conducted by a private party so long as the government does not expand on the prior search). And so where the government "played no part in the unlawful interception," the Sixth Circuit, analogizing to the private search doctrine, would decline to exclude the evidence of that "private" search. *See Murdock*, 63 F.3d at 1404.

As *Murdock* recognized, its holding was directly contrary to the First Circuit's. In *Vest*, the First Circuit declined to read into Section 2515 this same Fourth Amendment-style exception "for evidence falling into the government's hands after a private search and seizure," explaining that Section 2515 is a "congressionally-created rule" that courts are "limited to interpreting rather than modifying." *Vest*, 813 F.2d at 481. Other circuits agree. The Fifth Circuit has refused to graft Fourth Amendment attenuation concepts onto Title III, noting that attenuation did "not excuse a substantive violation of" the statute. *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 174 (5th Cir. 2000) (quotations omitted). As the Seventh Circuit neatly summarized, "Title III's suppression remedy" is not "coextensive" with the Fourth Amendment exclusionary rule. *United States v. Dorfman*, 690 F.2d 1217, 1227 (7th Cir. 1982). Instead, Title III is a "specific statutory directive" barring use of private unlawful interceptions "in any official proceeding." *United States v. Phillips*, 540 F.2d 319, 327 n.5 (8th Cir. 1976).

The breadth of Title III further cautions against Fourth Amendment analogies. Unlike Section 2515, which applies to bar unlawfully obtained evidence across a raft of proceedings, the Fourth Amendment exclusionary rule has been "reject[ed]" in virtually "all contexts other than a criminal trial." *See United States v. Robinson*, 63 F.4th 530, 536 (6th Cir. 2023). That mismatch between Section 2515's across-the-board reach and the Fourth Amendment exclusionary rule's criminal-trial confinement underscores why the Sixth Circuit's apples-to-oranges analogy is misplaced.

As a result, the Sixth Circuit's reasoning that even if the interception was unlawful, "the legality of the recording has no bearing on its admissibility," *Grayson*, 2025 WL 2366262, at *5, is not supported by Title III. Section 2515 ties admissibility to whether the communication was unlawfully intercepted and its disclosure or use would violate Title III—not governmental fault or participation. The Sixth Circuit's adoption of a Fourth Amendment style exception inverts the statute and harms the very rights Title III aims to protect.

* * *

The clean-hands exception stands at odds with Title III's text, structure, and purpose. The exception undercuts the uniform rules Congress enacted by carving out an atextual allowance. It undermines the strong privacy protections the statute created. It weakens the deterrence purposes a robust Section 2515 exclusionary rule provides. *See Phillips*, 540 F.2d at 325 (observing that Section 2515 "imposes an evidentiary sanction to compel compliance with" Ti-

tle III's protections). And it makes courts and other judicial bodies complicit in the violation by entering into evidence unlawfully intercepted recordings—a complicity wholly at odds with the statute and its purpose. *See Gelbard v. United States*, 408 U.S. 41, 51 (1972) (Section 2515 "serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct") (footnote omitted).

B. The Clean-Hands Exception Undermines Title III's Uniform Administration And Privacy-Protective Design.

1. Title III's text and structure impose uniform nationwide rules governing the evidentiary consequences of unlawful interception. As this Court has explained, "Title III provides a ***comprehensive*** scheme for the regulation of electronic surveillance." *Dalia v. United States*, 441 U.S. 238, 249 (1979) (emphasis added). Consistent with that design, Title III's suppression rule is not confined to a particular forum or procedural posture; it applies broadly across proceedings—federal, state, and administrative. Congress's choice of a categorical evidentiary sanction reflects a preference for uniform, predictable administration and for privacy protections that do not depend on local doctrine or judicially created exceptions.

This Court has recognized Congress's uniformity objective, observing Title III's twin purposes of privacy protection and "delineating ***on a uniform basis*** the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Gelbard*, 408 U.S. at 48 (quot-

ing S. Rep. No. 90-1097, at 66). Lower courts have echoed that understanding. *See, e.g.*, *United States v. Montgomery*, 290 F. Supp. 3d 396, 411 (W.D. Pa. 2018) (same, citing Congress's findings), *aff'd sub nom. United States v. Perrin*, 149 F.4th 267 (3d Cir. 2025); *United States v. Tortorello*, 342 F. Supp. 1029, 1032 (S.D.N.Y. 1972) (Title III "created uniform prerequisites and standards to be observed by state and federal authorities"), *aff'd*, 480 F.2d 764 (2d Cir. 1973). In short, Title III presupposes that admissibility questions under Section 2515 should be resolved by reference to a nationally uniform statutory rule, not by judicially created, jurisdiction-specific carve-outs.

2. The Sixth Circuit's clean-hands exception defeats that design by making admissibility turn on geography. Where a defendant is tried—and whether that forum has adopted the clean-hands exception—can determine whether an unlawful interception is admissible, a decision that can be outcome determinative.

United States v. Lam, 271 F. Supp. 2d 1182 (N.D. Cal. 2003)—with facts closely paralleling this case—illustrates the point. There, a third party unlawfully recorded defendant Lam's communications. *Id.* at 1183–84 (citing 18 U.S.C. § 2511(1)(a)). Even though the Government took no part in the illegal interception, the court granted Lam's motion to suppress, emphasizing that the "significant purpose of section 2515 is to protect against the invasion of the defendant's privacy by the introduction of unlawfully intercepted communications at trial." *Id.* at 1186. After the court suppressed the recordings, the Government dismissed Lam's charges. *See United*

States v. Yip, et al., No. 01-cr-00099, Dkt. 72 (N.D. Cal. June 2, 2003) (reflecting dismissal on the Government's motion). Had the case been litigated under the Sixth Circuit's clean-hands rule, there would have been no basis to exclude the illegal interception, and Lam may have faced a substantially worse outcome.

This case presents materially identical facts but yielded the opposite result because it was prosecuted within the Sixth Circuit rather than the Ninth Circuit. A private party unlawfully intercepted Ms. Grayson's communications, and the Government sought to use the recording anyway. Under *Lam*'s approach—and the approach of a majority of federal circuits—that recording would have been suppressed, potentially collapsing the prosecution. Yet the clean-hands exception allowed the unlawful recording's admission in the Western District of Tennessee, driving the case to conviction. And the disparate consequences between admission and exclusion are underscored by what happened here: Ms. Grayson was convicted, while her husband—also charged in the alleged plot but not captured in the illegal recording—was not.

Compounding the problem, the clean-hands exception produces a doctrinal asymmetry that clashes with Section 2515's purpose of protecting "the victim of an unlawful invasion of privacy." *Gelbard*, 408 U.S. at 50. The Sixth Circuit has acknowledged that *Murdock* permits only "the government to use the contents of illegal interceptions if it played no role in the interception." *Nix v. O'Malley*, 160 F.3d 343, 350 (6th Cir. 1998). And consistent with that understanding, the Northern District of Ohio refused to

extend *Murdock* so that, if the Government disclosed illegal intercepts *to the defendant*, the defendant could then use them at trial under "clean hands." *United States v. Gray*, 2005 WL 8165337, at *4 (N.D. Ohio May 9, 2005) (noting that neither "the parties nor the [c]ourt can identify any case extending the clean hands exception in this way"). Instead, the court fell back on Title III's clear command that "a disclosure of illegal intercepts is illegal even where the victim of the intercept consents to the disclosure." *Id.* at *3 (citing *United States v. Wuliger*, 981 F.2d 1497 (6th Cir. 1992)). But that strictness disappears when the Government seeks to introduce the same unlawful interception. The upshot is that "clean hands" operates as a one-way ratchet: it expands the Government's ability to prosecute using unlawfully intercepted communications, while offering no corresponding protection to defendants.

The Sixth Circuit's clean-hands exception thus yields the worst of both worlds. The doctrine authorizes admission of unlawfully intercepted communications whenever the Government can claim it "played no part" in the interception, but courts turn around and cite Title III's privacy protections to refuse defendants a similar benefit. The result is an atextual, asymmetric regime divorced from the text of the statute.

3. The costs of this non-uniform regime are acute from the initial stages of a criminal proceeding. Defendants bear the risk *ex ante* because prosecutors can threaten to use unlawfully intercepted recordings at the charging stage, shaping pleas and sentencing exposure long before the defendant has the chance to challenge the recording in a suppres-

sion hearing. But in many cases, suppression is the difference between dismissal or a reduced charge and a lengthy sentence. This Court has recognized that suppression litigation often determines the real stakes of a case, since suppression disputes frequently involve "the most probative information bearing on the defendant's guilt or innocence," *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986), and the outcome "may often determine the eventual outcome of conviction or acquittal," *United States v. Green*, 670 F.2d 1148, 1154 (D.C. Cir. 1981). That dynamic strengthens the Government's hand in courts where it can credibly threaten to admit the recording (and demand a harsher plea if the defendant insists on litigating suppression).

This invites improper forum shopping. Many interception-driven prosecutions—like the one here—can be brought in more than one district based on where the relevant conduct occurred, where parties are located, or where effects were felt. That stands in contrast to offenses typically tied to a specific locus (e.g., simple felon-in-possession cases), where venue is usually constrained. And unlike splits in authority that do not become important until late in the proceedings (e.g., at sentencing),[2] the Government often knows at the outset whether it intends to rely on an illegal interception—and can seek a favorable forum accordingly.

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[2] *See, e.g.*, *United States v. Poore*, 2025 WL 1201946, at *3 (7th Cir. Apr. 25, 2025) (declining to modify sentence despite "entrenched circuit split" over deference to Sentencing Guidelines commentary), *petition for cert. filed*, No. 25-227 (Aug. 25, 2025).

Thus, since admissibility turns on geography, that front-end knowledge creates a predictable incentive to select a permissive forum—such as the Sixth Circuit or other jurisdictions where the clean-hands exception remains unsettled—rather than a circuit that applies Section 2515 as written. This is not idle conjecture: the Department of Justice's guidance to United States Attorneys describes the Sixth Circuit's approach as a uniquely permissive outlier compared to the majority of circuits that apply Section 2515 as written.[3] Even if just at the margins, the exception encourages prosecutors to make investigative, venue, or charging decisions calibrated to exploit it.

This case itself carries a strong suggestion of such forum-selection incentives. Despite Ms. Grayson residing in Texas during the alleged plot, the Government chose to try her in Tennessee. Federal courts in Tennessee are bound to follow the clean-hands exception; federal courts in Texas are not.

This Court is best positioned to resolve the split and restore the uniformity Congress demanded. This Court has long recognized Congress's power to "bring about uniformity in the federal courts." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (through Rules Enabling Act); *see also United States v. Book-*

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[3] *See* Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, at 185–86 (3d ed. 2009), https://www.justice.gov/d9/criminal-ccips/legacy/2015/01/14/ssmanual2009_002.pdf ("The Sixth Circuit, however, has fashioned a 'clean hands' exception that permits the government to use any illegally intercepted communication so long as the government played no part in the unlawful interception.") (internal quotation omitted).

er, 543 U.S. 220, 260 (2005) (Sentencing Act aimed to "avoid unwarranted sentencing disparities" across districts). And this Court alone can settle the proper standards under Section 2515. *Cf. Zweibon v. Mitchell*, 516 F.2d 594, 707 (D.C. Cir. 1975) (MacKinnon, J., concurring in part and dissenting in part) (when a Title III application is unclear, if "the standards are to be judicially created, that is more properly done by the Supreme Court which can formulate nationwide standards than by the lower courts whose standards would vary from jurisdiction to jurisdiction"). It should do so now.

C. The Court Should Resolve This Split Now As Technology Fuels Unlawful Interceptions.

The clean-hands exception is increasingly consequential in our era of rapidly evolving technology. Unlawful interception is no longer a niche tactic limited to specialized equipment. High-quality and surreptitious recording tools are readily available to almost everyone, require minimal technical skill, and carry near-zero marginal cost.[4] Predictably, recordings are becoming increasingly common precisely in the contexts where incentives to weaponize private

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[4] *See, e.g.*, Eldar Haber, *The Wiretapping of Things*, 53 U.C. Davis L. Rev. 733, 735 (2019) (observing that many "devices are equipped with microphones, cameras, and other sensors" and such data "could become a goldmine for enforcement agencies"); John Villasenor, *Recording Everything: Digital Storage as an Enabler of Authoritarian Governments*, Brookings Inst. 3 (Dec. 14, 2011), https://www.brookings.edu/wp-content/uploads/2016/06/1214_digital_storage_villasenor.pdf (noting storage costs have dropped by a factor of ten roughly every four years for the last thirty years).

communications are strongest, such as domestic disputes, workplace vendettas, and blackmail scenarios—a distrustful spouse can secretly record a conversation on a smartphone, a disgruntled employee can capture a video meeting for leverage, and a predatory actor can intercept intimate communications for sextortion.[5]

The Fourth Circuit's decision in *Crabtree* captures why the clean-hands exception likely increases unlawful private interception in the modern era. The court contemplated a "vengeful former employee or estranged spouse [who] might well intercept private conversations with the fervent hope of discovering information that might land the reviled employer or spouse in jail," and observed that the Sixth Circuit's reading "would perversely give them the very benefit that they sought." *Crabtree*, 565 F.3d at 891. *Crabtree* acknowledged that suppressing a private interception may not deter the Government when the Government had no role in the interception, but it emphasized that suppression "would nonetheless

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[5] *See, e.g.*, Ioana Patringenaru, *This Is What Happens When Your Phone Is Spying on You*, Univ. of Cal. (Mar. 23, 2023), https://www.universityofcalifornia.edu/news/what-happens-when-your-phone-spying-you (describing how inexpensive, widely available apps and built-in smartphone features enable ordinary users to monitor, record, and collect others' communications without their knowledge, making covert recording increasingly common in everyday relationships and disputes); *cf.* Mitchell Willetts, *SC Mayor Is a "Revenge Porn" Victim, and She Wants Laws to Stop It, Attorney Says*, The State (July 16, 2020), https://www.thestate.com/news/nation-world/national/article244291947.html (man secretly recorded sexual encounter on cell phone and threatened release if the victim "ever ended their relationship").

have a deterrent effect ***on the private party*** intercepting the communication." *Id.* (emphasis added). After all, "[i]f vengeful employees know that their recordings cannot be used to send their employer to jail, they would be less inclined to illegally record the boss's conversations." *Id.*[6] This aspect of deterrence is missing under the clean-hands exception, but the need only grows as technology makes unlawful interception easier, cheaper, and harder to detect.

The problem is no longer confined to intentional bad actors—unlawful interceptions can now readily occur without any human intentionality at all. Courts have recognized that common household devices such as "smart speakers" can illegally intercept the contents of a conversation. For example, in *Garner v. Amazon.com, Inc.*, the court held it plausible that an Alexa device violates Title III when it is "record[ing] private conversations not directed toward Alexa and not preceded by the wake word," be-

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[6] This was no mere hypothetical for the Fourth Circuit. *Crabtree* involved a girlfriend secretly recording her boyfriend after she "became suspicious about [his] relationship with his ex-wife." 565 F.3d at 888. Indeed, many of the cases dealing with the clean-hands exception contain similarly dramatic facts. *Vest* involved police detectives being recorded taking a bribe from a man who had been arrested for shooting another police officer. *Vest*, 813 F.2d at 479. *Chandler v. U.S. Army* involved a wife secretly recording her husband, concluding he was having an affair, and taking steps to retaliate against him. 125 F.3d 1296, 1297 (9th Cir. 1997). *Murdock* involved a wife secretly recording her husband after she "became suspicious of [his] conduct, both business and personal," including possible bribery in his role as a local public official. *Murdock*, 63 F.3d at 1392–93. And this case involves a woman secretly recording Ms. Grayson after the pair had a falling out over a property dispute. *See Grayson*, 2025 WL 2366262, at *1–2.

cause "one could reasonably conclude that Amazon is an interloper rather than a party to the communication." 603 F. Supp. 3d 985, 1002 (W.D. Wash. 2022) (declining to dismiss federal wiretap claims by unregistered users who did not intentionally communicate with Alexa). And the point will only sharpen as technological and artificial intelligence tools proliferate: suits already allege that AI-meeting assistants have intercepted "oral communications" in real time during Google Meet, Zoom, and Microsoft Teams calls, in violation of Section 2511. *See, e.g.*, *In re Otter.AI Privacy Litig.*, No. 25-cv-06911, Dkt. 35 ¶¶ 243–46 (N.D. Cal. Aug. 15, 2025). In short, emerging technologies are dramatically expanding the opportunities for unlawful interception.

Once unlawful recordings exist, the Government faces a predictable temptation to utilize the recordings as evidence. The clean-hands exception gives that temptation doctrinal footing by tying admissibility to "government involvement" rather than on whether the proposed disclosure or use is itself unlawful under Title III. That framing is backwards: it grants privacy protection only when the Government has acted badly, instead of providing the across-the-board protections the statute was designed to secure.

This Court has repeatedly cautioned that evolving technological change can magnify the threats to personal privacy, making Title III's statutory safeguards more, not less, necessary. In the digital era, the scale, ease, and persistence of recording changes the practical consequences of allowing unlawful interceptions to be used in court, even if law enforcement did not initiate the interception. Title III's statutory regime is designed to preserve predictabil-

ity and prevent opportunistic end-runs around lawful process; the clean-hands exception undermines those objectives precisely when ubiquitous recording makes opportunistic private interception most likely. "Dramatic technological change may . . . provide increased convenience or security at the expense of privacy." *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring). And the Court has felt obligated—as "subtler and more far-reaching means of invading privacy have become available to the Government"—to ensure that the "progress of science" does not erode fundamental privacy protections. *Carpenter v. United States*, 585 U.S. 296, 320 (2018) (citations omitted).

At bottom, the clean-hands exception is atextual, improper, and increasingly consequential. The Court should resolve the circuit split now, before ubiquitous recording technology and an admissibility rule keyed to governmental "involvement" further entrench incentives for unlawful interception and make the privacy and fairness costs of the exception more frequent and more severe.

CONCLUSION

The Court should grant certiorari to resolve the split created by *Murdock* and uphold Title III's privacy protections.

Respectfully submitted,

ANTON METLITSKY
(*Counsel of Record*)
O'MELVENY & MYERS LLP
1301 Ave. of the Americas
17th Floor
New York, NY 10019
(212) 326-2000
ametlitsky@omm.com

TIMUR AKMAN-DUFFY
DANIEL LAUTZENHEISER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006

JONATHAN HARWELL
ELLISON M. BERRYHILL
TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
2 Int'l Plaza, Suite 406,
Nashville, TN 37217

Attorneys for Amicus Curiae

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