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Appeal No. 20-16294

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYUDMYLA PYANKOVSKA

Plaintiff-Appellant,

v.

SEAN ABID and JOHN JONES

Defendants-Appellees

On Appeal from A Judgement of The United States District Court
for The District Of Nevada
USDC No. 2:16-cv-0294-JCM-BNW
The Honorable James C. Mahan

APPELLEE JOHN JONES' REPLACEMENT ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

Appellee John Jones ("Attorney Jones") agrees with the Jurisdictional Statement contained in the Appellant's Replacement Opening Brief ("Opening Brief").

STATEMENT OF ISSUES[1]

Question #1: Whether the claims under 18 U.S.C. §2510 *et. seq.* (the "Wiretap Act") against Attorney Jones were barred under the First Amendment of the Constitution of the United States because he took no part in (and had no advance knowledge of) the allegedly unlawful recordings and his actions were limited to submitting the recordings to the Court as part of court proceedings seeking their admission into evidence?

Question #2: Whether the District Court properly dismissed the Appellants claims under Wiretap Act against Attorney Jones under the *Noerr-Pennington* doctrine, when his activity in connection to the recordings was as counsel for Respondent Sean Abid in Nevada state court child custody proceedings (initiated by Appellant) and limited to presenting the recordings to the Court, arguing that they were legally obtained by Abid and admissible as evidence under the

[1] The issue statement in this appeal are only those pertaining to Attorney Jones, dismissed at the outset of this case pursuant to his Motion to Dismiss. He was no longer part of the case as it proceeded against Mr. Abid.

vicarious consent doctrine or alternatively could properly be provided to a court-appointed expert assigned to evaluate the child?

Question #3: Did the district court correctly dismiss the state law claims?

STANDARDS OF REVIEW

Attorney Jones agrees with the standard of Review stated in the Opening Brief as to the issues on appeal pertaining to him.

STATEMENT OF THE CASE

I. Rulings for Review[2]

The only ruling relevant to this appeal pertaining to Respondent Jones is the District Court's grant of his motion to dismiss the claims against him. ER 077.

II. Procedural History

A. Proceedings In Federal Court

Appellant filed her Complaint in this action on December 20, 2016. SER 246. It was filed by Appellant, representing herself *pro se*, but also purported to bring claims for Appellant's husband and her children. The claims identified were (1) claims under the Wiretap Act; (2) a claim for "Invasion of Privacy and Conspiracy to Commit Invasion of Privacy;" (3) a claim for violation of NRS 200.650 (Nevada's

[2] Only rulings that have been appealed by Appellant and raised in the Opening Brief pertinent to Attorney Jones are addressed in this brief.

wiretapping statute): and (4) a claim alleging violation of 18 U.S.C. §2261 *et. seq.* (a federal anti-stalking statute). *Id.*

On March 27, 2017, Attorney Jones filed a motion to dismiss all claims against him. SER 188-203. That Motion to Dismiss made several arguments regarding the failure of any claim under the Wiretap Act against Attorney Jones (SER 193 to 199), but also sought dismissal of the state law claims (on the grounds that, at least as to him, they were protected First Amendment activity, did not satisfy FRCP 8, and were barred by the absolute litigation privilege). SER 199-200. Attorney Jones further moved to dismiss any claim made by someone other than Appellant because Appellant was not an attorney and could not bring claims for others or represent them in court, as well as the dismissal of the Fourth Claim (alleging a violation of 18 U.S.C. §2261A) because that statute was a criminal statute granting no private right of civil action. SER 200-201. Plaintiff abandoned any claims asserted on behalf of third parties and the claim under 18 U.S.C. §2261A. SER 079-94.

In response to Jones' Motion to Dismiss, Appellant filed an Opposition on April 10, 2017, arguing *only* issues pertaining to the Wiretap Act, effectively conceding that the state law claims would properly be dismissed. SER 067-78.

Further, nowhere in the Opposition does Appellant discuss the First Amendment and *Noerr-Pennington* doctrine raised by Attorney Jones in his Motion to Dismiss. *Id*.[3]

Attorney Jones filed his Reply on April 17, 2017, which, in addition to arguing regarding the Wiretap Act (and arguing that the proposed amended pleading did not affect the merits of the motion to dismiss), noted the lack of any coherent or actual argument in the Opposition against the dismissal of Wiretap Act claim under the First Amendment and *Noerr-Pennington* or the state law claims. SER 055-056.

On November 16, 2017, the District Court granted Attorney Jones' Motion to Dismiss, dismissing him entirely from the case. ER 080-88. Although Respondent Abid had filed Joinder's in Attorney Jones' Motion to Dismiss, the Court noted that the facts and circumstances were quite different as to him, and that the Complaint did state claims against him despite failing to state claims against Attorney Jones. ER 087.

As to the Wiretap Act claims against Jones the District Court found that Attorney Jones' actions in submitting the recordings/transcripts obtained by his client and without his knowledge to the state court making a good faith argument

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[3] Her Opposition did cite a number of old cases, none of which addressed the First Amendment in connection with the Wiretap Act nor *Noerr-Pennington*. Indeed, the cases cited by Plaintiff in her Opposition did not consider First Amendment issues and all predated the critical U.S. Supreme Court case of *Bartnicki v. Vopper,* 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001). She cited no *Noerr-Pennington* cases at all, and failed to even discuss *Bartnicki* or the *Noerr-Pennington* cases cited and discussed in the Motion to Dismiss.

that they were properly obtained and admissible under the vicarious consent doctrine was protected activity under the First Amendment of the United States Constitution and that the statutory Wiretap Act claim against Attorney Jones was barred under *Noerr-Pennington*. ER 86-87. The Court rejected other arguments made by Jones pertaining to the Wiretap that would have independently mandated dismissal of the claims against him.

While the Order concludes that no claim had been stated against Attorney Jones, claims had been asserted against Respondent Abid that could proceed, the Court's order also granted Appellant leave to file an amended complaint, which she did on June 3, 2018, changing the originally proposed amended complaint to name only Abid as a defendant and asserting additional state law claims against Abid. ER 061-74.

Appellant filed a Motion to Alter Or Amend the district court's order dismissing Attorney Jones ("Motion for Reconsideration") on November 27, 2017. SER 002. The Court denied the Motion to Reconsider on May 4, 2018, finding that the Appellant did not provide any new law on point and any additional facts she sought to argue were not pertinent to Attorney John Jones' conduct and that the motion was merely a re-argument of those issues previously argued and "not an appropriate use of a motion for reconsideration." ER 077-79.

B. Facts

Appellant and Respondent were married and have one son together. SER 116 (ll. 24-25). After their divorce, Appellant and Respondent Abid shared joint legal and physical custody for a number of years. *Id; Abid v. Abid*, 133 Nev. 770, 477, 406 P.3d 476 (2017) (*en banc*).[4] They continued to have custody issues, which ultimately erupted in 2015. SER 100-102; 205-224; 247. The claims against Attorney Jones here all arise out of his work as counsel for Respondent Abid *in court* regarding that custody dispute that began in early 2015. SER 247-248 (¶¶12-17).

Specifically, on January 9, 2015, Appellant filed a motion (in the Eighth Judicial District Court Family Division) seeking to hold Mr. Abid in contempt and modify the parental timeshare. SER 247 (¶12). Abid, through Attorney Jones, responded and counter-moved to change custody to give Mr. Abid primary custody. SER 247-248 (¶¶12-17); SER 205-224. Part of that Opposition and Counter-motion filed by Attorney Jones included the submission of a declaration by Mr. Abid which relayed a transcript of excerpts from recordings that had been made by Respondent Abid of conversations between Appellant and their son. *Id.* Mr. Abid procured these recordings by placing a tape recorder (without the child or Appellant's knowledge) in the child's backpack before the son would go over to his mother's for

[4] *Abid v. Abid* is the reported Nevada Supreme Court opinion arising out of the disputes between Abid and Appellant in Nevada state court regarding custody.

her physical custodial time. SER 215 (¶¶2-3); SER 236-237; *Abid*, 133 Nev. at 771, 406 p.3d 478. Mr. Abid took this action because he believed that Appellant was making harsh negative comments about him to their son, causing him confusion and harm by alienating the child against his father and emotionally harming him. *Id.*[5] The transcripts provided to Attorney Jones were, as the Appellant concedes, edited by Mr. Abid to only contain the relevant recorded statements pertinent to his claim of alienation (the discussions where Appellant made disparaging remarks about Abid to their son) and the complete original recordings destroyed by Abid, again without Attorney Jones' knowledge, advice or approval, before being provided to Jones. SER 085; 232-233; *Abid*, 133 Nev. at 771, 406 P.3d at 478.[6]

Contrary to the suggestion in the Opening Brief, Jones did not submit the recordings knowing they were unlawfully obtained. He submitted them, as was necessary to support the issues then pending before the court arguing and believing they were not unlawfully obtained because there was consent via vicarious consent

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[5] One parent making disparaging comments about the other parent, which is known as "parental alienation" is considered a form of child mental abuse. *See McClain v. McClain,* 539 S.W.3d 170, 200 (Tenn. App. 2017) ("The Court does find and does believe that parental alienation is a form of emotional abuse that should not be tolerated.").

[6] The Complaint alleges at paragraph 16 concedes this. SER 247-248. The state court was made aware of all of Mr. Abid's actions pertaining to the recordings, including that he only kept recordings between Appellant and their son and that he destroyed the originals, and was part of that court's determinations. SER 235-245; 156; 163-164; *Abid,* 133 Nev. at 771, 406 P.3d at 478.

(adult legal guardian consenting for the minor). Ultimately, after considering the arguments of Attorney Jones regarding the vicarious consent doctrine and other evidence and the facts regarding how the tapes were collected and handled by Mr. Abid, the state court judge found that *Mr. Abid* could not meet the requirements for applying that doctrine and that the tapes/transcripts themselves would be inadmissible directly as evidence. SER 235-245; 156; *Abid,* 133 Nev. at 771, 406 P.3d at 478. However, after briefing, an evidentiary hearing and argument, the state court judge did rule that the expert appointed by the Court to evaluate the child (in terms of whether there was parental alienation taking place) would be allowed access to the transcripts and tapes as part of the information the expert could consider in rendering a report/evaluation pursuant to NRS 50.285. SER 244-245; 205-227, 156; *Abid,* 133 Nev. at 771, 406 P.3d at 478.

After a trial, in which the Court-appointed expert testified regarding her multiple interviews with the child, the State Court ultimately ruled that what Mr. Abid feared was happening was *precisely* what was going on (i.e, alienation by Appellant) and changed custody awarding primary physical custody to Mr. Abid as in the best interest of the child to protect him from further emotional damage from the Appellant's actions. SER 116-125.[7]

[7] The trial court's decision, while relying on the appointed expert, does not, however, rely on the recordings, and instead cites to the expert's own interviews

This ruling was appealed by Appellant to the Nevada Supreme Court and ultimately affirmed in a unanimous *en banc* published opinion. *Abid*, 133 Nev. 770, 406 P.3d 476 (2017). In doing so, the Nevada Supreme Court made a number of important rulings, which Appellant ignores in the Opening Brief. First, the Nevada Supreme Court found that *even if* the recordings were illegally made, that the trial court ruled they could be provided to an expert to be considered by her in determining the best interests of the child was not only proper, *it served a compelling public interest*. *Id.* at 772-773, 406 P.3d at 478-79. The Nevada Supreme Court recognized that the purpose of wiretap statutes was to protect privacy interests, but found that given that the expert was already charged with delving deeply into the intimate details of the child's relationship and interactions with his mother, prohibiting the expert from considering and relying on *highly probative* evidence such as the recordings did not advance those purposes, but did subvert a compelling issue of public concern: the child's best interest. *Id.* (in a child custody case "the 'child's best interest is paramount'" (*quoting Bluestein v. Bluestein*, 131 Nev. 106, 112, 345 P.3d 1044, 1048 (2015)). The Nevada Supreme Court went on to note that a child custody matters are *quite different* from some "mere adversary proceeding between plaintiff and defendant," *id.* at 479, 406 P.3d at 774, and that

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with the child and mother and other documents as amply demonstrating that there was an ongoing effort at parental alienation. SER 116-125.

> [h]ere, the interests of a nonlitigant child are at stake. Prohibiting an expert from considering evidence punishes that child by hindering the expert's inquiry into the child's best interests. It is sanctioning the child for the alleged crime of his parent.

Id.[8]

Second, the Nevada Supreme Court rejected the concept of *per se* inadmissibility in Nevada for civil proceedings, particularly in child custody proceedings where "[c]atagorically excluding such evidence would clearly be against the best interests of the minor and, therefore, in contravention of NRS 125C.045(2)." *Id.* at 481, 406 P.3d at 776. Indeed, the Nevada Supreme Court went on to rule that it was *error* by the lower court to rule the recordings/transcripts themselves inadmissible as evidence. *Id.*[9]

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[8] The Nevada Supreme Court went out of its way to make clear it did not sanction what it perceived to be likely unlawful recording by Appellant Abid. It noted there were many ways he could be independently punished and the conduct deterred if it were an unlawful recording without, in the context of proceedings considering the potential physical or mental harm to the child, forcing "the district court to close its eyes to relevant evidence and possibly place or leave a child in a dangerous living situation." *Id.* at 479-481, 406 P.3d at 775-76. But the Nevada Supreme Court was very clear that "a district court 'needs to consider as much relevant evidence as possible when deciding child custody.'" *Id.* at 775, 406 P.3d 480. *See also* (cited in *Abid*) *Munson v. Munson*, 27 Cal.2d 659, 166 P.2d 268, 271 (1946) ("[T]he controlling rights are those of the minor child and the state in the child's welfare.").

[9] Thus the assertion in the Opening Brief at page 6 that the recordings were barred from admission in court proceedings claiming any exception to such a bar is "not relevant here" is entirely incorrect. In Nevada, it is error to not admit such evidence of emotional abuse of a child *notwithstanding* the evidence may have been unlawfully obtained, and of course, it would be malpractice for an attorney presented with such evidence to fail to provide it to the court.

The Court concluded its opinion as follows:

> In a child custody setting, the "[c]hild's best interest is paramount." *Bluestein,* 131 Nev. at ___, 345 P.3d at 1048. The court's duty to determine the best interests of a nonlitigant child must outweigh the policy interests in deterring illegal conduct between parent litigants. Accordingly, the district court did not abuse its discretion in providing the recordings to the expert because reviewing them furthered the expert's evaluation of the child's relationship with his parents and aided the district court's determination as to the child's best interest. We affirm.

Id. at 481-82, 406 P.3d at 777.[10]

The Complaint allegations concerning Attorney Jones are that as counsel for Mr. Abid in the state court proceedings, he submitted the transcriptions to the Nevada state court judge presiding over the ongoing custody dispute between Appellant and Respondent Abid.[11] SER 247-248; 205-227.[12] As noted above, the

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[10] These were Nevada state court proceedings on a very state-centered issue (custody). Attorney Jones' conduct must be evaluated in that context given Nevada law and an attorney's duty to zealously represent his client effectively mandated that he submit the relevant evidence to the court and argue for its admissibility (and/or provision to the expert), particularly in light of the U.S. Supreme Court's holding in *Bartnicki* that the Wiretap Act's provisions *do have* First Amendment limits on how even illegally obtained information may be disclosed and used.

[11] Appellant was represented by counsel in the Nevada state court proceedings both at the trial level and on Appeal. SER 116; 153; 159; 163; *Abid,* 133 Nev. at 770, 406 P.3d at 477.

[12] Attorney Jones and Respondent both submitted to the district court and relied upon with respect to the Motion to Dismiss certain records from the Nevada state court proceedings. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) ("A court may consider evidence on which the complaint 'necessarily relies' if (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.").

admissibility was litigated before that trial court, which ultimately ruled that the recordings were not admissible under the vicarious consent doctrine, and excluded them from evidence (erroneously excluded the Nevada Supreme Court, *en banc*, later found), but allowed an expert to listen to the tapes and rely upon them in making a report. As to Jones, the Complaint alleges that he violated the federal Wiretap Act by "disclosing" or "using" the intercepts in Court.

As for Attorney Jones, all parties and the Nevada state court recognize that Jones was informed only *after the fact*, and did nothing more than present the evidence to the state court and argue for its admission as evidence and/or use by the Court-appointed expert. SER 248 (¶16); 163-164 (state court minutes finding Jones did not participate in, advise, consent or know of the making of the recordings or deletion of portions in advance).

SUMMARY OF THE ARGUMENT

I. The District Court's Dismissal Of The Wiretap Act Claims Should Be Affirmed

A. The District Court Properly Ruled That Jones Could Not Be Sued Under The First Amendment And *Noerr-Pennington*

There is no dispute Attorney Jones had *nothing to do* with Respondent Abid's actions in placing the recorder and had no knowledge of it until after the recordings were made. SER 247-248 (¶¶12-17); 163-64 (court minutes finding recordings "not made at the suggestion, consent or upon the advice of Mr. Jones"). He is a licensed

Nevada attorney practicing in family law, knows full well the harm that can be caused by parental alienation and was presented with his client's shocking evidence of what he and many consider child abuse: the verbal bashing by one parent of the other (i.e., parental alienation). As an attorney with the ethical obligation to zealously represent his client, as well as a family law attorney knowing Nevada's *laser focus* on the best interests of the child in all matters pertaining to custody, he could not just ignore this pertinent and relevant evidence—and the Nevada Supreme Court not only approved of submitting that evidence to the lower court for consideration by the expert but that the lower court was *wrong* to have excluded the transcripts from evidence themselves. *Abid* at 481, 406 P.3d at 776.

After researching the issue, he determined that there was a viable and proper basis to believe, and for the Court to determine, that the recordings were lawfully made: the vicarious consent doctrine (which will be discussed *infra,* but can be summarized as one parent "consenting" on behalf of the minor child to the recording, thus making the recording lawful and admissible as made with at least one participant's consent). Attorney Jones submitted the evidence to the Court, arguing it was lawful and admissible under the vicarious consent doctrine. He also argued that whether or not ruled admissible, it could be provided to the court appointed expert for review to assist in her evaluation. While the Nevada state courts ultimately ruled that Abid did not meet his burden under the vicarious consent doctrine, the

district court, and then Nevada Supreme Court, agreed with Attorney Jones and ultimately ruled the evidence was admissible and highly relevant to determining the best interests of the child with respect to custody.

The blind application of an unlimited prohibition from use or disclosure of evidence of emotional harm being intentionally done to children in court proceedings involving the best interest of children as advocated by Appellant would not only "force the district court to close its eyes to relevant evidence and possibly place or leave a child in a dangerous living situation"[13] it would unacceptably infringe upon and harm core activity protected under the First Amendment to the United States Constitution: the right to speech and petition the government. Attorney Jones did not participate in making the recordings. Like the media who published recordings unlawfully made but innocently received, Attorney Jones "disclosed" them and/or "used" them, *only in Court*, on a matter of vital public interest in Nevada: the well-being of a child and the prevention of mental or emotional abuse.[14] Like the media defendant in *Bartnicki*, his activity is protected under the First Amendment and he cannot be held liable under the Wiretap Act. This core constitutional principal and protection is, when involving activities *in court*, discussed under the *Noerr-Pennington* doctrine, which applies to immunize from

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[13] *Abid*, at 776, 406 P.3d at 481.

[14] *Bartnicki v. Vopper,* 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001).

statutory criminal or civil liability good faith petitions to the government. Here, as to Attorney Jones, he discharged his ethical obligations to his client *as well as followed "paramount" public interest and policy concerns* regarding the best interest of a *non-litigant* child in custody proceedings. *The only thing* he did was submit it to the Nevada state court and argue regarding its admissibility and non-illegality and that it could be used by the court-appointed expert in any event. And while the Nevada Supreme Court ultimately did not disturb the lower court's conclusion that Respondent Abid could not rely on the vicarious consent doctrine, *it unanimously approved of* their submission to the court by Jones (and ultimately arguing for their admissibility as evidence) as *vital for the well-being of the child*.

The district court properly dismissed the claims against Attorney Jones because the Wiretap Act cannot impose civil or criminal penalties when the use or disclosure is protected under the First Amendment. *Bartnicki,* 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001). There can be no doubt that the wellbeing of a child is a fundamental matter of public concern in Nevada: described repeatedly by the Nevada Supreme Court as "paramount" to *all* other considerations. Further, as Attorney Jones' conduct was limited strictly to petitioning the government to allow the recordings to be used (either as evidence directly or by the Court-appointed expert), this is protected activity and he cannot be pursued under any federal criminal or civil statute by Appellant under *Noerr-Pennington*. That Attorney Jones' filings

and efforts were in good faith is obvious; not only was he meeting his ethical obligations as an attorney, he was serving the "paramount" public interest of the best interest of the child in these custody proceedings and the Nevada Supreme Court has ruled*, en banc, that he was right to do so*.

B. The State Law Claims Were Also Properly Dismissed

As part of his Motion to Dismiss, Attorney Jones also moved to dismiss the Appellant's state law claims (for which the Complaint was unclear, but appeared to be asserted against him) for "violation" of NRS 200.650 and Invasion of Privacy. At the time Jones was dismissed from the lawsuit, those were the only state-law claims asserted against him. The Amended Complaint filed by Appellant did not assert any new claims against Attorney Jones.

In any event, as to state law claims, Appellant's Complaint against Attorney Jones failed to adequately allege facts sufficient to state any claim under FRCP 8. Moreover, as to Attorney Jones, his exclusively in-court conduct was also fully shielded under Nevada state law by the litigation privilege as to those state law claims. Indeed, given the outcome of *Abid v. Abid*, it is clear that Attorney Jones' submission and argument concerning the recordings was entirely proper under Nevada law, also precluding Appellant from stating a claim even were his actions not absolutely privileged.

ARGUMENT

I. The District Court Properly Applied The First Amendment And *Noerr-Pennington* As Barring Claims Against Attorney Jones

A. Relevant Provisions Of The Wiretap Act

The Wiretap Act provides for a civil action for any person whose oral communication is intercepted, disclosed or intentionally used "in violation of this chapter." 18 U.S.C. §2520(a). As Attorney Jones was not involved in the actual interception of the communication, the pertinent part of the Wiretap Act provides it is a violation for any person to:

> (c) intentionally disclose[], or endeavors to disclose, to any other person the contents of any … oral … communication knowing or having reason to know that the information was obtained through the interception of a … oral … communication in violation of this subsection …

18 U.S.C. §2511(c). Similarly, at 18 U.S.C. §2511(1)(d), the act provides it is a violation when a person:

> (d) intentionally uses, or endeavors to use, the contents of any oral … communication knowing or having reason to know that the information was obtained through the interception of a … oral … communication in violation of this subsection.

18 U.S.C. §2511(1)(d).

Both provisions exclude from liability a person who uses or discloses the information without actual knowledge or reason to know that the information was obtained in violation of the Wiretap Act.

The Wiretap Act has as an additional limitation on its reach exclude interceptions of oral communications:

> where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception.

18 U.S.C. §2511(2)(d).[15] Lastly, it is a "complete defense against any civil action" under the Wiretap Act if the intercept, use or disclosure was done on a good faith reliance on "a court warrant or order … or a statutory authorization …" 18 U.S.C. §2520.[16]

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[15] 18 U.S.C. §2511(2)(d) has a qualifier that limits the exclusion if the interception was "for the purpose of committing any criminal or tortious act in in violation of the Constitution or laws of the United States or of any State." That exception has been interpreted to mean the primary purpose of the interception was to commit a tortious or criminal act (wholly apart from the legality of the interception itself) and would be inapplicable here, where the purpose of the interception by Appellant Abid was for the purpose of collecting evidence for use in his domestic litigation in state court and to stop what he believed were acts of parental alienation. *See*, *e.g., Council on American-Islamic Relations Action Network, Inc. v. Gaubantz et. al.,* 31 F.Supp.3rd 237, 256-57 (D.C. Cir. 2014); *Sussman v. American Broadcasting Companies, Inc.,* 186 F.3d 1200, 1202-03 (9th Cir. 1999). The purpose was in furtherance of the legal purpose of determining whether Appellant was engaged in a form of child mental abuse by intentionally poisoning her son against his father.

[16] The Wiretap Act has a pertinent statutory authorization: single party consent. Interceptions are not covered by the Act if at least one party consents. Hence, Jones had a reasonable good faith belief that *Abid's* actions collecting the recordings were, in fact, lawful—and argued that to the Nevada state court. That the Court after-the-fact determined that *Abid* did not meet the requirements for vicarious consent is somewhat ironic in light of the Nevada Supreme Court's rulings that the emotional abuse was in fact taking place, but in any event, Jones did believe he had a reasonable and good faith belief that the recordings/transcripts were not unlawful under the Wiretap Act and could be submitted as evidence or otherwise legally presented to the court for use.

B. The First Amendment And *Noerr-Pennington* Bar The Claims Against Attorney Jones As His Conduct Was Protected Under the First Amendment To The Constitution

The district court correctly ruled that Attorney Jones's could not be sued under the Wiretap Act for his actions submitting to the State courts of Nevada the transcripts arguing that they were lawfully done based upon the recognized vicarious consent doctrine and ultimately, successfully arguing that even if they were not directly admissible, the recordings could properly be submitted by the Court to the Court-appointed expert for review and consideration regarding the question of parental alienation and the child's best interests. ER 077-79; SER 163-64; SER 244-245; 205-227, 156; *Abid,* 133 Nev. at 771, 406 P.3d at 478.

i. Jones' Activity Was Protected Under The First Amendment

In *Bartnicki,* 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787, the United States Supreme Court rejected the idea that the Wiretap Act had *unlimited* reach and imposed criminal or civil liability for *any* knowing disclosure of unlawfully obtained communications without exception notwithstanding the Wiretap Act's express language stating otherwise. Rather, the Court made it clear that while the Wiretap Act might provide liability to the one actually making the unlawful intercepts, when the sole conduct at issue is disclosing or using that unlawfully obtained information (i.e., the party did not participate in the illegal actual interception) under the First Amendment, the First Amendment of the Constitution limits the Wiretap Act's reach

substantially *notwithstanding* that the defendant's use or disclosure would have been a violation of the Wiretap Act's express provisions.

In *Bartnicki*, during contentious collective bargaining negotiations between a teacher's union and a local school board, an unknown person had intercepted certain cell phone conversations between the chief union negotiator and the union president. *Id.* at 518, 121 S.Ct. at 1756. These were provided anonymously to the head of a local organization opposed union's bargaining demands (a respondent in the case named Yocum), who, in turn, played it for the school board and provided the recordings to the media, including a local media commentator, Vopper, who broadcast the recordings the recordings on his talk show.[17] *Id.* at 519, 121 S.Ct. at 1757. The union officials sued under the Wiretap Act, alleging that Yocum and Vopper both knew, or had reason to know, that the tapes were obtained in violation of the Wiretap Act and that their use and disclosure of the tapes was, itself a violation. *Id.*

The United States Supreme Court disagreed. It is important to note that, for purposes of its analysis, the Supreme Court assumed (1) that the telephone conversations were intentionally and unlawfully intercepted and (2) that the respondents (Vopper and Yocum) had at reason to know it, such that their actions

[17] Other media broadcast the tape and newspapers published the contents. *Id.* at 519, 121 S.Ct. at 1757.

delivering and playing the tapes fell within the black letter of prohibited and actionable conduct under the Wiretap Act. *Bartnicki*, 525, 121 S.Ct. at 1760 ("We accept petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents "had reason to know" that it was unlawful."). Like the facts, here, the *Bartnicki* respondents "played no part in the illegal interception. Rather, they found out about the interception only after it occurred …." *Id.* The Supreme Court also accepted for purposes of its decision, the respondents' assertion that the subject matter of the tapes was a matter of public concern. *Id.* at 525, 121 S.Ct. at 1760.[18] While the Court agreed that the Wiretap Act itself is content neutral, in that it signals out communications by virtue of their source (illegal interception) rather than the content, the Supreme Court focused on the fact that the Wiretap Act also purports to regulate speech by barring disclosure. *Id.* at 526-527; 121 S.Ct. at 1761.[19] The Court distinguished disclosure from "use" which is a regulation on conduct, but ultimately found the distinction to be without a difference in this context (even though delivery of a tape recording could be regarded as conduct) because "given that the purpose of such a delivery is to provide the recipient with the text of the recorded statements, it is like the delivery of a

[18] "If the statements about the labor negotiations had been made in a public area—during a bargaining session, for example—they would have been newsworthy."

[19] "As the majority below put it, '[i]f the acts of "disclosing" and "publishing" information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." *Id.*

handbill or a pamphlet, and as such, it is the kind of "speech" that the First Amendment protects." *Id.*[20]

In holding that there could be no Wiretap Act liability, the Supreme Court first noted that "[a]s a general matter "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.* at 527, 121 S.Ct. 1761. In this context the Court referenced various media cases, including *New York Times Co. v. United States*[21] for the long-standing principal that the state may not punish or place a prior restraint on the publication of information, even where that information was obtained illegally. *Id.*[22]

The Supreme Court went on in *Bartnicki* to discuss the interests claimed protected by the Wiretap Act: (1) removing an incentive for parties to intercept private conversations and (2) minimizing the harm to persons whose conversations have been illegally intercepted. *Bartnicki* at 529, 121 S.Ct. at 1762. While the Court found those interests sufficient to bar the use of the illegally intercepted information *by the person* who in fact did the illegal interception, "it by no means follows that

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[20] Attorney Jones' conduct was also pure speech: delivering the information that was the subject of a claimed illegal interception to the Court so that it could be herd and reviewed in a judicial proceeding, while arguing for its admissibility under a doctrine that would render the collection not a violation of the Wiretap Act, but also arguing that the court there could allow its "use" by the court-appointed expert.

[21] 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed. 822 (1971).

[22] Of course the media enjoy no special first amendment privileges, the right to speech, or to petition (also protected under the First Amendment) does not create special classes with enhanced protections.

publishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends." *Id.*

> The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of §2511(1)(a) do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.

Id. The Court found that the interest of deterring illegal interception was not sufficient to merit a suppression of speech, and rejected the idea that punishing a party who did not participate in the illegal collection of the information (through criminal or civil liability) but disclosing the information would somehow deter unlawful collection of the information. *Id.* at 516, 121 S.Ct. at 1755. As for the second interest, the protection of privacy, the Court similarly rejected the interest as sufficient when it burdened the core purpose of the First Amendment by imposing sanctions on protected First Amendment activity. *Id.* at 533-34, 121 S.Ct. at 1764-65.

Accordingly, notwithstanding the broad language of the Wiretap Act which purports to impose civil liability for *any* disclosure (or other conduct or use which is core First Amendment activity), under *Bartnicki,* the Wiretap Act's prohibitions and imposition of civil or criminal liability for the disclosure of information is limited under the First Amendment such that it *cannot* be used to impose liability (or punish)

an individual who *did not take part in any illegal interception*, but, rather, discloses (or uses)[23] the information *as an exercise of core First Amendment rights*.

Here, while the identity of the interceptor, Respondent Abid, was known, Attorney Jones had no involvement or prior knowledge of the secret recordings, did not advise that it be done. He was, as Respondent admits in her complaint (and the state court expressly found, presented with the information *after-the-fact*. SER 163-165.

Moreover, unlike the defendants in *Bartnicki*, who were presumed to have had reason to know the collection of the recordings was illegal, Attorney Jones was aware of the vicarious consent doctrine (developing in other jurisdictions, not yet addressed in Nevada at the time), aware of the significant harm that can be done to a child being inflicted with parental alienation from the other parent, and reasonably believed that the recordings were done lawfully.[24] He was also keenly aware of

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[23] *Bartnicki* expressly recognizes that some conduct which could be characterized as "use" of illegally intercepted communications would still be beyond the reach of the Wiretap Act when that conduct (i.e., "use" is part and parcel of the exercise of core First Amendment rights).

[24] And, of course, the chilling effect of imposing statutory (and possibly criminal) liability after-the-fact when through the adjudicative process it was determined that *Mr. Abid* could not rely on the vicarious consent doctrine is self-evident. In the context of this case— custody litigation over emotional abuse of a child – the interests of that innocent child are, as the Nevada Supreme Court has recognized, *paramount to any competing interests of either parent*. Imposing liability on an attorney submitting relevant information to the Court not only impermissibly infringes on core First Amendment activity, it elevates an abuser's "privacy rights" over the rights of the child to be free from such emotional harm.

Nevada's clear directives that the well-being of children is a matter of public interest and that the clearly public policy (both statutory and Nevada Supreme Court precedent) of Nevada mandated that the best interest of the nonlitigant child is paramount to *all other interests* in child custody proceedings. *See Abid; Bluestein, supra.*

The Opening Brief expends several pages arguing that the vicarious consent doctrine does not apply in this instance. *See* Opening Brief at pp. 24-26. Of course, that is *apropos* of noting, as the Nevada lower state court ruled that it did not apply on the facts of that case and whether the doctrine applied here was *irrelevant* to the district court's dismissal of the claims against Attorney Jones below.[25] Vicarious consent is a doctrine adopted by many courts and there was ample basis at the time for Attorney Jones to in good faith believe the recordings were at least arguably lawfully made and admissible. *See e.g.*, *Pollock v. Pollock,* 154 F.3d 601, 610-11 (6th Cir. 1998) (adopting the doctrine of vicarious consent in wiretap action, holding that a parent may consent to recording for minor when "the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child."); *Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994) ("We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for

[25] The Nevada Supreme Court did not address the issue, only noting in the *Abid* opinion that the lower court had found it was "likely" the collection of the recordings by *Abid* was unlawful. *Abid* at 771, 406 P.3d 478.

recording their minor child's phone conversations out of concern for that child's well-being"); *Com. v. F.W.*, 986 N.E.2d 868, 877 (Mass. 2013) (approving vicarious consent for electronic recording of oral communications by non-custodial sibling; "Our conclusion is consistent with the State's "compelling interest in protecting children from actual or potential harm [citation omitted] to which the privacy interests of the grandfather must yield."); *State v. Whitner*, 732 S.E.2d 861, 864-65 (S.C. 2012); *Wagner v Wagner*, 64 F.Supp.2d 895, 896 (D.Minn. 1999) (guardian may consent on behalf of minor to the interception of a communication); *Campbell v. Price,* 2 F.Supp. 2d 1186, 1191 (E.D. Ark. 1998) (parent's good faith concern for his minor child's best interest may empower the parent to legally intercept the child's conversations); *Thompson v. Dulaney,* 838 F.Supp. 1535, 1544 (D. Utah 1993) (finding the vicarious consent doctrine permissible under the federal wiretap statute because of a parent's duty to act in the best interest of their child). It is the general proposition that, in the circumstance when a parent (sometimes not even a parent) believes that the interception is necessary for the best interest of the child, the parent may consent *for* the minor child, and, therefore at least one party to the communication consented to the recording, taking it out from coverage under the Wiretap Act.

While the Nevada state trial court judge ultimately ruled that Respondent Abid did not meet the requirements of the doctrine (in part because it found *Abid* did not

have a good faith basis that it was necessary for the best interest of the child), this ruling was in advance of the hearing on the merits, where it became plain that Respondent Abid's belief the child was being subjected to parental alienation by Appellant, a form of emotional abuse, was not only a reasonable belief, it was, in fact, happening. SER 116-125; 235-245; *Abid*, 133 Nev. at 771-72, 406 P.3d at 478.[26] The Nevada Supreme Court affirmed the lower court, thus making the lower court ruling that abid had no good faith belief that the abuse was happening as a basis for vicariously consenting for his child recordings incongruous. Abid believed parental alienation was happening and causing harm to his son, which caused him to place the recorder in the first place, and, ultimately, *was proven correct*. Even though the state court in this matter did not believe the vicarious consent doctrine

[26] As part of the trial court's findings of fact, the state trial court found (relying on the expert's own interviews with the child) that "[t]he child's own statements during the four interviews clearly established that Mom was directly and overtly attempting to influence the child's belief system regarding Dad." SER 128 (ll.13-19). The state trial court further found that "the child exhibited significant signs of distress and confusion. Further the child is internalizing a belief system that is not his own. The child is confused by statements Mom makes to the child about the child's father." SER 128 (ll. 20-23). As to mothers admitted instruction to the child not to discuss things with Respondent Abid, the court found "this type of speech restriction causes confusion and distress in children." SER 128 (line 24) to 129 (line 4). Finally, the trial court found "As a direct result of Mom's direct and overt actions, the child is experiencing: confusion; distress; a divided loyalty between his parents; and a decreased desire to spend time with Dad." SER 129 (ll18-19).

would be applicable to make the recordings admissible, the district clearly believed Attorney Jones' state court conduct to be reasonable.[27]

Attorney Jones did nothing illegal with respect to having possession of the transcripts or tapes, his client provided them after-the-fact. But once he had them, he was presented with an ethical, legal and moral *obligation* to deliver them to the

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[27] The state trial court also found that the fact that the child was physically with the Appellant at the time the recordings were made as disqualifying *Abid* from claiming vicarious consent. While there are some case authorities that suggest that physical custody (ignoring shared *legal custody*) is an important fact in applying vicarious consent, Nevada at the time of Attorneys' Jones' actions had not considered vicarious consent nor had any case considered joint legal custody (the right to make important decisions, including legal ones, for the child). Indeed, the district court's discussion of vicarious consent misapprehended the different forms of custody and erroneously believed *physical* custody at the time the recordings were made was a pertinent consideration when arguably, it is *legal* custody that ought to be the driving consideration. Both Appellant and Respondent Abid shared *joint legal custody*. Physical custody is merely who the child lives with during specified periods of time. *Legal* custody is the right to make important decisions for the best interest of the child. When it is joint, the legal right to consent resides in *both parents*. *See, e.g., Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009). The right and the power is not contingent on who the child happens to be physically with at the time, except for minor day to day items. *Id. See also Mack v. Ashlock*, 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996) (Shearing, J. *concurring opinion*)(noting that joint legal custody means both parents have an equal right and responsibility to make decisions for the minor irrespective of where physical custody may be). While the parents are supposed to confer and attempt agree on important decisions in the context of joint legal custody, obviously, under these facts, *that was not possible*. But that did not deprive Appellant Abid of the legal power with joint legal custody to make those important decisions unilaterally when the feared harm *is coming from the other parent*. Certainly Attorney Jones was entitled to believe and argue that Abid as *legal* guardian is not prevented from protecting the child because the source of the harm might object. Attorney Jones had more than enough reasonable basis to believe Abid's joint legal custody gave him the power to consent.

Court and argue for their admission as evidence, given he had a good faith belief the vicarious consent doctrine made them lawfully obtained recordings, or alternatively, as what ultimately happened, if found not lawful, not admitted as evidence on their own, be provided to the court-appointed expert.[28] As noted, Nevada, like most other jurisdictions, imposes a duty to act in the best interests of children as a "paramount" issue of public concern and public policy. *See Bluestein*, 131 Nev. at 112, 345 P.3d at 1048; *Abid*, 133 Nev. at 773; 406 P.3d at 479; NRS 125C.0035(1) ("In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child."). As a lawyer practicing primarily in family law his entire career, Attorney Jones was well aware of this compelling state interest and his obligation, as an officer of the court, to ensure probative and potentially admissible evidence *bearing directly on the best interest of the child*, was presented to the court.[29] Further, as an attorney representing a client, he is charged with zealously

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[28] Jones had good reason to believe the evidence was proper and, in one way or another, properly introduced in the custody dispute either as direct evidence or as material to be provided the expert, but first had to present it to the court for evaluation and ruling. He was proven right. *Abid*, *supra.* Punishing him has a tremendous chilling effect on an attorney's duty to zealously represent a client and present all good faith and legally supported (under the law, or a good faith argument to change or extend the law) facts and arguments. *Brown v. State*, 110 Nev. 846, 877 P.2d 1071 (1994) ("a properly zealous advocate must do all he can to defend his client.").

[29] *NC-DSH, Inc. v. Garner*, 125 Nev 647, 218 P.3d 853 (2009) (attorney is an officer of the court).

representing his client.[30] More importantly, when the issue is custody, while his client was Abid, Nevada's clear caselaw and public policy establishes that the child is the real party in interest in a custody determination. He both, as a human being and as an attorney and officer of the court, absolutely had the First Amendment right to deliver the intercepted information *very relevant* to the issue of whether abuse by parental alienation was ongoing, to the state court, a body that by Nevada law and policy was charged with the sole purpose of acting in the child's best interest, and argue that it should be accepted either directly into evidence or provided to the expert.[31] He cannot be subject to civil or criminal liability for having done so. *Bartnicki*, *supra.*[32] He also had the ethical and moral obligation to do so rather than

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[30] *Dezzani v. Kern & Associates, Ltd*., 134 Nev. 61, 69, 412 P.3d 56, 62 (2018) (recognizing "an attorney's ethical obligations to be candid with a client and zealously represent his or her client, and the general presumption that an attorney providing legal services to a client is generally not subject to third-party liability for that representation …"); *Brown v. State*, 110 Nev. 846, 849, 877 P.2d 1071, 1073 (1994) ("[A] properly zealous advocate must do all that he can to defend his client"); *Greenberg Traurig, LLC v. Frias Holding Co.,* 130 Nev. 627, 630, 331 P.3d 901, 903 (2014) (noting Nevada state litigation privilege exists to grant attorney's "'as officers of the court the utmost freedom in their efforts to obtain justice for their clients.'").

[31] The nature of the action makes it and Attorney Jones' speech in disclosing the recordings to the Nevada state court patently a matter of preeminent public concern under Nevada law. But even were that not the case, court proceedings are always a matter of public concern. *See, e.g., Green v. Philadelphia Housing Authority*, 105 F.3d 882, 886-888 (3rd Cir. 1997) ("[W]e begin with the proposition that all court appearances are a matter of public concern.").

[32] While submitting the intercepted information to the court is in part conduct, it was the act of delivering the information to the court to make the information known, which as *Bartnicki* recognized, while arguably also "use" it was also core speech.

"blind the court" to ongoing mental abuse. The Nevada Supreme Court believed, in a unanimous *en banc* opinion, that under the compelling public and state interest in acting in the best interest of children, *that he was right to have done so*. *Abid, supra.*[33]

In her Opposition to the Motion to Dismiss below, Appellant never attempted to address *Bartnicki* at all, much less present any cogent argument why the First Amendment principals insulating the defendant in *Bartnicki* did not apply to Appellant Jones.[34] Now addressing *Bartnicki* for the first time on appeal, Appellant dismisses *Bartnicki* proclaiming it a "narrow" holding because it involved illegal intercepts published (broadcast widely to the public) on a matter of public concern.

Appellant seeks to suggest that Jones is not entitled to the protections of the First Amendment because he is not a member of the media, but offers no authority

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Bartnicki, 532 U.S. at 527, 121 S.Ct. at 1761. Here, Attorney Jones disclosed the information by delivering it through court filings, which is protected speech, while arguing that *others* (the Court and/or the Court appointed expert, should make "use" of it).

[33] In his concurring opinion in *Bartnicki*, Justice Breyer (joined by Justice O'Connor) noted that the individuals who had been recorded had no *legitimate* interest in maintaining the privacy of the conversations in question (which included suggestion of violent acts). 532 U.S. at 539, 121 S.Ct. at 1767. Similarly, a parent engaged in badmouthing the other to cause alienation and harming a child has no *legitimate* interest in privacy.

[34] Having failed to address *Bartnicki* and the First Amendment bar to her claims against Attorney Jones below Appellant cannot now raised those arguments for the first time on appeal. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 887 (9th Cir. 2002) (issue argued for first time on appeal waived).

to suggest that members of the media have some form of "super First Amendment" protections not available to other core First Amendment activities not applicable to the equally core First Amendment activity of petitioning an arm of the government for relief. As for the Openings Brief's dismissal of matters concerning children from potential emotional abuse as not "of public concern" the State of Nevada vigorously disagrees. *See*, *e.g., Abid,* at 773, 406 P.3d at 479-80 (noting that "a child custody proceeding is no 'mere adversary proceeding between plaintiff and defendant[,]'" and recognizing "'the substantial social cost of ignoring children's safety' exceeds 'the minimal additional deterrence achieved by apply the exclusionary rule'"); *Bluestein v. Bluestein*, 131 Nev. 106, 112, 345 P.3d 1044, 1048 (2015) (the "child's best interest is paramount."); *Clark County Dist. Atty., Juvenile Div. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 337, 346 n.23, 167 922, 928 n.23 (2007) ("When resolving a child custody dispute involving a child's natural parent, the child's best interest is paramount, even though the parent may have a competing constitutionally protected interest ….").[35]

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[35] *See, e.g., Del Papa v. Steffen*, 112 Nev. 369, 915 P.2d 245 (1996) (noting that a major purpose of the First Amendment is the "free discussion of governmental affairs" the openness of court proceedings are matters of public concern and that "'[t]he operations of the courts and the judicial conduct of judges are matters of the utmost public concern.'"); *Green v. Philadelphia Housing Authority*, 105 F.3d 882, 886-888 (3rd Cir. 1997) ("[W]e begin with the proposition that all court appearances are a matter of public concern.").

More importantly however, Appellant simply ignores the significance of *Bartnicki* and attempts to conflate *Bartnicki's* specific framing of limits on the media's right to broadcast news items notwithstanding the Wiretap Acts prohibition against "use" and "disclosure" when the subject matter is newsworthy (i.e., of "public concern") with the *equally important* First Amendment protection for speech in the form of petitioning the government. *Bartnicki* is significant in that it clearly and broadly recognizes that the Wiretap Act's prohibitions against the use or disclosure of unlawfully intercepted communications is unconstitutional when those express prohibitions—facially violated by the defendants in *Bartnicki*--conflict with the First Amendment. Although it does limit its discussion to the First Amendment right at issue there: the publishing through broadcast of information concerning a matter of public concern (which, of course is the primary function of the press) it is not limited in its impact here establishing that, where the Wire Tap act would function to civilly or criminally punish activity protected under the First Amendment, the Wire Tap acts provisions are unenforceable. In the context of petitioning the government, the First Amendment is not limited to newsworthy matters of "public concern" because the judicial system *exists* to apply to the government for the resolution of disputes and protecting children from harm, and in

the context of allegations of intentional emotional abuse of a child, the interest of the state (and the public) of protecting children from harm is "paramount."[36]

In the context of the first amendment activity at issue here while *Bartnicki* alone should be sufficient to affirm the district court, *Noerr Pennington* is the applicable First Amendment protection, not those pertinent to the media's right to publish news stories on matters of public concern (which does not involve applying to the state for relief), which contains its own exception to preclude abuse by excluding from its protection "sham" litigation (which is obviously not pertinent here).

ii. *Noerr-Pennington*

In *Bartnicki,* the United States Supreme Court unequivocally established that the Act's reach has First Amendment limits and could not impose criminal or civil liability on core First Amendment conduct. *Bartnicki*, 532 U.S. at 527-28, 121 S.Ct. at 1761-62. The *Noerr-Pennington* doctrine, as applied here, recognizes that in addition to classic public speech, the First Amendment protects the *fundamental right* protected under the First Amendment to petition the government and precludes

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[36] *Lewton v. Divingnzzo*, 772 F.Supp.2d 1046, 1059 (D. Neb. 2011) "The court finds that Mr. Bianco did not act improperly in presenting the material to Judge Arterburn for a ruling on admissibility." The court did find, however, that the attorney should not have, outside of court and without the court's permission, sent the recordings to experts and a guardian *ad litem*, as well as the other side's counsel. Attorney Jones did no such thing here; he only submitted the evidence to the court and argued for its admission, and that the expert could review it.

a claim attempting to hold a party engaged in good-faith petitioning activity criminally or civilly liable for doing so under the Wiretap Act.

Whether or not the collection of the recordings were unlawful by Mr. Abid, the Appellant's claims below sought to hold Attorney Jones liable for speech that is at the core of the First Amendment: speech directly to the government for the purpose of redressing grievances.

> The Supreme Court has described the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights" and "intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press."

White v. Lee, 227 F.3d 1214, 1231-32 (9th Cir. 2000) ("It is 'cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression.'").[37]

The protection for this fundamental and core First Amendment activity from statutes chilling its exercise and imposing after-the-fact punishment has been identified by the courts as its own doctrine, *Noerr-Pennington*, the names of the duo of United States Supreme Court cases addressing necessary protection of this fundamental right. *Sanders v. Brown*, 504 F.3d 903, 912 (9th Cir. 2007). Originally arising in the antitrust context, it is based on core First Amendment rights and this

[37] Further, petitioning advocacy does not lose its protection simply because it advocates an unlawful act. *See, White*, 227 F.3d at 1227; *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

Circuit holds that it applies to all petitioning activity to any branch of the government. *White*, 227 F.3d at 1231 ("While the Noerr-Pennington doctrine originally arose in the antitrust context, it is based upon and implements the First Amendment right to petition and therefore, with ***one*** exception we discuss *infra* [internal cite omitted], applies equally in all contexts.") (emphasis added) .[38] This Circuit has held that the doctrine extends to petitioning activity to the courts as well as all related communications to the court in support of a request that the court do something, or not do something, and immunizes not only the lawyer doing the petitioning, but also extends to the party. *See id* at 1231 (noting the expansion of the doctrine to include petitioning activity in the courts); *Freeman v. Lasky, Hass & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005) (*Noerr-Pennington* immunity applies to petitioning activity in the courts both affirmatively and defensively, including conduct incidental to a petition, such as settlement or refusal to settle, and noting that *Noerr-Pennington* immunity is "not limited to lawyers").

Here, as to Attorney Jones, his only activity alleged by Appellant was pure petitioning activity. Attorney Jones received, from his client, relevant evidence to which he filed papers *with the court* arguing that the evidence (the recordings/transcripts) were legally obtained and admissible and/or could properly

[38] *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) ("The immunity is no longer limited to the antitrust context ….").

be provided to the court-appointed expert in the context of a child custody proceeding. His sole activities were submitting the pertinent evidence to the Court, arguing that the court rule it was admissible as not unlawfully obtained, and alternatively provide it to the court appointed expert, all in support of his client's opposition to a motion to alter custody brought by Appellant and in support of Respondent Abid's counter-motion to give him primary custody in light of the ongoing parental alienation. As previously discussed, regardless of whether the recordings were illegally obtained by his client, the Nevada Supreme Court unanimously ruled that the information was relevant, its proffer and provision, with court permission, to the expert, served a compelling, indeed, "paramount" public interest, and ultimately, the recordings should have been received into evidence. *Abid, supra.* Indeed, the Nevada Supreme Court rejected the idea that courts should blind themselves to possible physical or mental abuse, finding that the best interest of the child *manifestly* outweigh other considerations.

Obviously, the only way this information makes it to a court, for proper action, is through a party or lawyer submitting it as part of First Amendment protected petitioning activity. "The Noerr-Pennington doctrine ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, ***notwithstanding the fact that their activity might otherwise be proscribed by the statute involved.***" *White,* 227 F.3d at 1231 (emphasis added).

In a circular argument, Appellant suggests that Congress can, at will, impose civil and criminal penalties for engaging in conduct protected under the First Amendment merely by being express in its intention to prohibit the activity and intended to do so. Thus, Appellant contends that petitioning activity is not protected under the First Amendment if Congress merely expressly prohibits the conduct intentionally, which it did in the Wiretap Act by placing bars on the use or disclosure of unlawfully obtained intercepts without exception. Apparently the argument is Congress may violate the First Amendment at will so long as it expressly does so. But if that were the case, then *Bartnicki* could not have held as it did. If First Amendment protections fail in the context of the core First Amendment activity of petitioning the government, then they would have failed in *Bartnicki* as well but instead, the Supreme Court found that because it impermissibly burdened protected First Amendment Activity it could not constitutionally be applied in that case. The First Amendment exists precisely to prevent such overreach and ensure the right to speech, including the right to petition, is abridged by *no law*. *See White, supra.*[39]

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> The Supreme Court has described the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights" and "intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press.

In any event, the authority cited in the Opening Brief does not in any way hold or support any such limitation on *Noerr-Pennington* and is contrary to the precedent of this Circuit. While the Supreme Court did, interpret the Sherman Act as not prohibiting otherwise lawful petitioning activity (even if the intent was anticompetitive), it did so to avoid the very problem the Wiretap Act has: such express prohibition of protected First Amendment conduct would create "raise important constitutional questions." Neither *Noerr* nor *Pennington* in any way contemplates, *sub silentio*, the exception proffered by the Opening Brief, to the application of the *Noerr-Pennington* doctrine *immunizing* petitioning activity.

Indeed, in the 9th Circuit, the authorities are clear that *Noerr-Pennington* has broad application to protect petitioning activity, and as recognized by this Circuit in *White:* "The Noerr-Pennington doctrine ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, ***notwithstanding the fact that their activity might otherwise be proscribed by the statute involved.***" *White,* 227 F.3d at 1231 (emphasis added).

The Appellant's next attack on the clearly appropriate application of *Noerr-Pennington's* application here by the district court is to disparage the idea that individuals ought not to be subject to civil or criminal liability for petitioning the

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White, 227 F.3d at 1231-32 ("It is 'cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression.'")

government as a "smoke screen" and suggests that the real inquiry is whether the Wiretap Acts *blanket prohibition* on the use or disclosure of unlawfully intercepted communications violates the First Amendment. The answer is it isn't and that has already been decided in *Bartnicki*.

The Opening Brief cites to *B&G Foods North America, Inc. v. Embry*, 29 F.4th 527 (2022) as further support for this novel suggestion of a limitation on *Noerr-Pennington* that congress can freely invade protected First Amendment Activity by just being express in that invasion. The case says no such thing. It does, however, cite to *White v. Lee* and actually *expands* the applicability of *Noerr-Pennington* to "state actors" being sued under 42 U.S.A. §1983 even though the state is not protected by the First Amendment. *B&G* does suggest that the Court must strive to interpret the statute at issue to not burden protected petitioning activity. That is consistent with the general imperative for courts to construe statutes in a way that does not offend the constitution if possible to avoid constitutional infirmities. *See United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022).[40] However, it cannot follow that one can only be entitled to *immunity* under *Noerr-Pennington* from liability under a federal statute for petitioning activity if one can show that the statute does

[40] This case, along with the case upon which it relies, *Sosa v. Direct TV,* 437 F.3d 923 (2006) conflict with other Circuit decisions, such as *White* which in no way suggest that *Noerr-Pennington* protection turns on whether or not the person claiming it doesn't need it because the statute in question doesn't apply to them.

not actually apply to the person claiming immunity and their conduct. Immunity would be unnecessary in that circumstance. Rather, the rule of construction would properly be interpreted to be an initial step in a *Noerr-Pennington* immunity issue: if the statute can be interpreted to not cover the petitioning activity in question, then there is no immunity needed and the action is dismissed for failure to state a claim. If it does, then the Court proceeds to determine if the petitioning activity is a sham, the *only* recognize exception to *Noerr-Pennington.*[41] Applying *Noerr-Pennington* here, as the district court did here, avoids constitutional infirmities by protecting a certain group of limited actors from liability. Because the alternative is that the Wiretap Act, as held in *Bartnicki,* must be invalidated in part to the extent it burdens protected speech as unconstitutional in this case.[42]

The only exception to the *Noerr-Pennington* doctrine is if the litigation activity is a sham. *See*, *e.g., White*, 227 F.3d at 1231-32. But this Circuit's decisions demonstrate that the bar for concluding litigation activity is a sham is very high. *Id.* Indeed, for it to be deemed a sham and unprotected, the standard is such that the litigation/litigation activity must be "'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.'" *Id.* It *also* must

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[41] This progression might be modified when the particular activity is not clearly protected petitioning activity (which is not the case here) as the threshold issue then would likely be is *Noerr-Pennington* even relevant.

[42] *See also, United States v. Rundo,* 990 F.3d 709 (9th Cir. 2021)

have been done in subjective bad faith. *Id; Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 572 U.S. 545, 555-56, 134 S.Ct. 1749, 1757, 188 L.Ed.2d 1749 (2014).

As this Court stated in *White,* subjective intent (bad motives) is not relevant to this inquiry even if there was in fact a subjective bad motive: "'an objectively reasonable effort to litigate cannot be sham *regardless of subjective intent*.'" *White,* 227 F.3d at 1232. Further, that the state court trial court concluded that the recordings were not admissible as lawfully obtained under the vicarious consent doctrine is does not mean Attorney Jones' petitioning activity was a sham. First, ultimately, the Nevada Supreme Court ruled in favor of Respondent Abid, affirming not only the change in custody but also the provision to and reliance by the expert on the recordings *regardless of whether or not they were lawfully obtained or not*.[43] Hence, Attorney Jones was successful, while he did not prevail on his arguments regarding vicarious consent, they were soundly based in existing law and, ultimately, the state trial and Supreme Court ruled the tapes were important and should have been used by the district court (through an expert or themselves) to serve the State's dominant and compelling interest in the child's best interest. *Abid, supra.* Second, this Circuit holds that merely not winning on the merits does *not* show the lawsuit

[43] The Court also ruled that the trial court erred in ruling the recordings themselves inadmissible.

was objectively baseless for purposes of *Noerr-Pennington* immunity. *White* 227 F.3d at 1232. Indeed, the Court there quoted from the US Supreme Court:

> "A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must 'resist the understandable temptation to engage in post hoc reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'"

White 227 F.3d at 1232 (*quoting Professional Real Estate Investors v. Columbia Pictures, Indus., Inc.*, 508 U.S. 49, 60 n.5; 98 S.Ct. 1920 (1993).[44] "We do not lightly conclude in any Noerr-Pennington case that the litigation in question is objectively baseless, as doing so would leave that action without the ordinary protections afforded by the First Amendment, a result we would reach only with great reluctance." *Id.*[45]

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[44] There is simply no basis to Appellant's suggestion that Attorney Jones' petitioning activities were not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, which is the standard the *White* court noted was applied by the United States Supreme Court in such determinations.

[45] The *White* opinion goes on to state: "This court has held that when an action involves 'the right to petition governmental bodies under *Noerr-Pennington*,' it is necessary to apply a 'heightened level of protection … to avoid "a chilling effect on the exercise of this fundamental First Amendment right."'" *Id.* at 1234.

Attorney Jones' conduct was patently not a sham and was clearly protected activity for which he is immunized under *Noerr-Pennington*.[46] Indeed, it is not at all clear she can even argue that Attorney Jones conduct was a sham removing *Noerr Pennington* immunity. She failed to address *Noerr-Pennington* in her opposition to Attorney Jones' Motion to Dismiss *at all*. When she finally did try to argue it in a motion for reconsideration, *she affirmatively conceded* the sham exception to *Noerr-Pennington* did not apply in this matter: "In this matter, because both Sean Abid and Jones achieved favorable results as a result of their action, their endeavors were, by definition, **not baseless**, and thus do not fall under sham exception." SER 012 (ll. 22-26) (emphasis in the original).[47]

The Opening Brief suggests that Attorney Jones uses the First Amendment and *Noerr-Pennington* as some form of "smoke screen" and argues that stopping unlawful interception in domestic cases is one of the purposes of the Wiretap Act he improperly sought to get around. Not so. There is nothing suggesting Jones acted in any way other than good faith. He acted, consistent with Nevada law, to ensure the

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[46] To be clear, Attorney Jones did nothing but petition the court, which would not in any way create immunity for the actual collection of the recordings, which was something he had nothing to do with.

[47] To be sure, there was no fraud on the court undermining the legitimacy of the process. Attorney Jones' conduct was known and vetted at every level. *See Abid*, 133 Nev. at 771-72, 406 P.3d at 477-479; SER 235-245; SER 152-165. This included the so-called selective editing by Abid (to remove irrelevant conversations). *Id.*

state court had extremely relevant information to the paramount interest at issue: the child's best interest. While the court's do not wish to be partners to illegal conduct, the illegality was in the collection, nor should the court's elevate the parent's interests over that of the child's and turn its eyes away from evidence of ongoing harm to the child. *Abid*, *supra.*[48] As the Supreme court held in *Bartnicki*, while discouraging unlawful interceptions may be a purpose, a statute that punishes use or disclosure by someone who did not engage in the initial illegal collection must fall to core constitutional protections, and the laudable intention of discouraging the unlawful conduct does not override that. Indeed, the Court found scant reason to believe punishing disclosure or use by someone who did not engage in the initial unlawful illegality would advance the goal of Congress, and suggested that rather than undermine the First Amendment, the penalties for the interception ought to be enhanced. *Bartnicki* 532 U.S. at 530-31, 121S.Ct. at 1762-63.

The Opening Brief also cites a number of cases suggesting that petitioning activities are not absolute and that there are limits. To be sure this Circuit (and the Supreme Court) recognizes that a sham cannot claim protection. But there was no

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[48] *Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994) ("We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for that child's well-being"). The Nevada Supreme Court addressed this issue in *Abid*, finding that there were alternative ways to deter the illegal interception that do not endanger children by an absolute bar to submitting even illegally obtained communications to the Court and admitting them as evidence. *Abid* at 774, 406 P.3d at 479-80.

sham here as discussed *supra.*[49] As for the arguments centered on court rules, discovery restrictions, Rule 11, even filing fees as arguably "restraints on the right to petition," these arguments are entirely without merit. In *Seattle Time Co. v. Rinehart*, 467 U.S. 20, 33-37 (1984), cited in the Opening Brief, at issue what whether a court could condition compelled disclosure of alleged private information to use only within the litigation and not provide it to others outside of that context. The courthouse door was not shut to the party and it is a very different thing to consider limits on use and disclosure from compelled discovery only obtained through the authority of the Court. At issue here is the unconstitutional imposition of statutory civil and/or criminal liability for protected conduct. If anything, *Seattle Times* supports that the right to petition—including the right to submit relevant evidence that otherwise would be barred from disclosure to the litigant at all—is an interest superior to the privacy rights of the litigant.[50] Appellant cites to *Theofel v.*

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[49] *Cal Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 514 (1972) is such a case but presented as some more expansive limitation on protection of petitioning activity. The opinion clearly is a sham exception case which focused on abuse of the system as part of a much broader scheme not relevant here.

[50] As for Rule 11, that is a rule of practice that would be akin to the *Noerr-Pennington* sham exception. It isn't a restriction on constitutional rights at all (there is no right to make frivolous arguments to the court). Filing fees are similarly not a restriction (and there are exceptions for the indigent). This case is not about minor time, place and manner regulations, but, rather, the idea that Congress can shut the courthouse door to information—and punish the submission to the court--suggesting ongoing harm to a child elevating privacy rights over the constitutional rights of others to petition the court to protect that child.

Farey-Jones, 359 F.3d 1066 (9th Cir. 2003). That case expressed doubt that *Noerr-Pennington* immunity would apply to subpoenaing private parties in connection with private commercial litigation but assuming it did, *Noerr-Pennington* would not apply because the subpoena's themselves were *objectively baseless*. That case has nothing to do with the petitioning activity *in court*, alleged here. Moreover, in the later case of *Freeman v. Lasky, Hass & Cohler*, 410 F.3d 1180 (9th Cir. 2005), the Court made clear that in *Theofel*, the distinguishing issue was that the misconduct was in discovery which is a communication between parties in aid of litigation, and "is not in any sense a communication to the court and therefore not a petition." *Id.* at 1184.[51] The *Freeman* court went on to make clear that *the merit lawsuit* was the issue, not individual actions or conduct "incidental" to the petition, unless they were so pervasive and went undiscovered and totally undermined the legitimately of the proceeding. *Id.* at 1185 ("Discovery misconduct, subornation of perjury and witness intimidation are, of course, serious matters. Had they not been brought to light in time, it is entirely possible that they would have so infected the defense of the lawsuit as to make it a sham. But we need not decide that question today because it is clear that the defense here was not a sham."), s*ee also id.* at 1185 ("There was enough objective merit and subjective good faith in the defense of the original antitrust suit to cover it, and the conduct incidental to it, with the *Noerr-Pennington* cloak.").

[51] The panel in *Freeman* consisted of two of the three Judges that decided *Theofel*

In its last section pertaining to Jones, the Opening Brief argues a number of issues that are not in fact before the Court as to the federal Wiretap Act claims. They were arguments raised below based on common law principles that the district court rejected such as Nevada's litigation privilege. Appellant also suggests that the district court was wrong to dismiss Jones because the Wiretap Act contains no express exceptions for attorneys. True. But nor does it contain a media exception although one obviously exists under *Bartnicki.* But that does not change the fact that Jones was obliged under Nevada law to not just suppress the potentially unlawfully obtained intercepts but seek a ruling from the Court—and the Nevada Supreme Court found not only he was right to have done it, but that the transcripts were, in fact, proper and admissible evidence in a custody case involving the best interest of a child. *Abid, supra*.[52]

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[52] There is passing references in the Opening Brief criticizing *how* Attorney Jones presented the information to the Court. This is a red herring as the Opening Brief itself points out, the constitutional infirmity of the Wiretap Act is its total bar and punishment affecting the First Amendment conduct here for which under the language of the Wiretap Statute, there is no expressed exception. Hence while the preference in Nevada is for open court proceedings, even had Jones filed them under seal, the claimed violation of the Wiretap Act here would remain the same. The issues here are not best practices advice with 20/20 hindsight because a statute cannot impose punishment if it is not clear in what is prohibited and how to comply (such as sealing). *See Kolender v. Lawson*, 461 U.S. 353, 357-58, 103 S.Ct. 1855, 1858 (1983) Lastly, Appellant had a right (and standing) to seek the sealing of such documents herself. She was represented by counsel in the state court proceedings, yet failed to do so *for over 3 years*. SER 027 (Jones court filing in February, 2015); Appellant's Further Excerpts of Record at 129 (motion to seal not filed until late 2018).

II. The District Court Properly Dismissed The State Law Claims

It is unclear whether Appellant is actually challenging the dismissal of her state law claims for failure to state a claim. The Opening Brief does not in any way address them beyond noting they were alleged. As for the state law claims, Attorney Jones's argument with respect to the state law claims asserted against him was simple and direct: because all of his conduct was *in court*, Nevada state law as to those state law claims afforded him *absolute* immunity against her state law claims.

To be clear, Attorney Jones also argued in his Motion to Dismiss that the state law claims were inadequately pled under the standards directed by the Supreme Court under *Twombly* and *Iqbal*.[53] SER 199-200. She never disputed that below nor sought to cure the defect. But ultimately, that defect was not curable because of Nevada law's robust and absolute common-law litigation privilege.

> This court has recognized "'the long-standing common law rule that communications uttered or published in the court of judicial proceedings are absolutely privileged'" rendering those who made the communications immune from civil liability.

Greenberg Traurig, 130 Nev. at 630, 331 P.3d at 903. "'The policy behind the [litigation] privilege, as it applies to attorneys participating in judicial proceedings, is to grant them 'as officers of the court the utmost freedom in their efforts to obtain justice for their clients.'" *Id.* (*quoting Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d

[53] *Ashcraft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

640, 643 (2002); *see also Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (dismissing based on privilege dismissing all claims, including malicious prosecution and intentional infliction of emotional distress: "An absolute privilege bars any civil litigation based on the underlying communication").

"The litigation privilege immunizes from civil liability communicative acts occurring in the court of judicial proceedings, even if those acts would otherwise be tortious." *Greenberg Traurig,* 130 Nev. at 628, 331 P.3d at 902. The federal district court's in Nevada have similarly recognized that the privilege extends to all civil claims that may be asserted arising out of a lawyer's in court actions and communications. *See e.g., Baily v. City Attorney's Office of North Las Vegas,* 2015 WL 4506179 at *2-4 (D. Nev. July 23, 2015) (referencing unpublished Nevada Supreme Court decision *Bullivant Houser Bailey PC v. Eighth Jud. Dist. Court*, 2012 WL 1117467 (Nev. March 30, 2012)), in which the Nevada Supreme Court found all civil claims asserted barred by the privilege).[54] *See also* NRS 41.650 ("A person who engages in a good faith communication in furtherance of the right to petition or

[54] In *Bailey*, the district of Nevada noted that the 9th Circuit had already opined in 2009 that Nevada law gave broad application to the absolute privilege in *Crocket Myers v. Napier, Fitzgerald & Kirby*, 583 F.3d 1232, 1237 (9th Cir. 2009), and noted that prediction was proven correct in the *Boulivant Hauser* case.

the right to free speech in direct connection with an issue of public concern is immune from any civil action for claims based upon that communication.").[55]

The district court correctly determined the state law claims were inadequately pled and that they were barred by the litigation privilege and should be affirmed. Further, Appellant has waived this issue on appeal.

CONCLUSION

The district court correctly applied the First Amendment of the Constitution of the United States and the *Noerr-Pennington* doctrine when it ruled that Appellant could not pursue statutory claims against Attorney Jones for his core First Amendment petitions to the state courts of Nevada. The district court further did not err when it dismissed the state law claims as inadequately pled and barred by Nevada's litigation privilege.

The judgment below dismissing Attorney Jones should be affirmed.

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[55] This is part of Nevada's Anti-Slapp statute, which defines a good faith communication in furtherance of the right to petition or the right to free speech means any: "1. Communication that is aimed at procuring any governmental or electoral action, result or outcome; 2. Communication of information or a complaint to a Legislator, officer of employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body …." NRS 41.637. Jones' communications to the Nevada state court were clearly protected communications under Nevada law and immune from civil suit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appeal No. 20-16294

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYUDMYLA PYANKOVSKA,

Plaintiff-Appellant,

v.

SEAN ABID and JOHN JONES

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
USDC No. 2:16-cv-0294-JCM-BNWHon.
The Honorable James C. Mahan

APPELLEE SEAN ABID'S REPLACEMENT ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

Appellee Sean Abid (Sean) agrees with the Jurisdictional Statement contained in the Appellant's Replacement Opening Brief ("Opening Brief").

STATEMENT OF ISSUES

Question #1: Whether the district court erred or abused its discretion in awarding Appellant only $10,000.00 pursuant to the Wiretap Act 18 U.S.C. §2510 et. seq.

Question #2: Whether the district court erred or abused its discretion when it did not award Appellant compensatory and punitive damages on her Nevada common-law claims.

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INTRODUCTION

Appellee Abid agrees with the Facts of the Case as recited in Appellee Jones Replacement Answering Brief, Procedural History, Section II(B).

SUMMARY OF THE ARGUMENT

Appellant argues that the district court abused its discretion by not awarding her $100.00 per day for 703 days she asserts the transcripts of the offending recordings were posted publicly. Appellant advances this argument for the first time in her Opening Brief. The district court had discretion to award or not award the damages it did award in Appellee's favor and it had discretion to award no more, though Appellant frames the argument as one which the district court was forced to award the amount she demands (though she provides no actual competent evidence that the offending transcripts were online for 703 days).

Furthermore, the district court did in fact consider Appellant's "competent evidence" (which was not at all competent) and rejected it, exercising the discretion the district court is imbued with when considering compensatory and punitive damages.

For those reasons, the district court's decision should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT COMMIT CLEAR LEGAL ERROR OR ABUSE ITS DISCRETION IN RENDERING THE AWARD IT DID PURSUANT TO 18 U.S.C. §2510 ET. SEQ.

Appellant asserts, first, correctly, that "[a] district court's award of damages [and a denial of litigation costs] is reviewed for an abuse of discretion." Appellant's Brief (AB) 19. Appellant then asserts that "[a]n error of law is an abuse of discretion." Citing *Strauss v. Comm. of the S. S. A.*, 635 F.3d 1135, 1137 (9th Cir. 2011).

It is important to note that, as the district court stated:

> "The general rule of law is that upon default the factual allegations of the complaint, **except those relating to the amount of damages**, will be taken as true." *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977) (citing *Pope v. United States*, 323 U.S. 1, 12 (1944); *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir. 1974)). Indeed, Fed. R. Civ. P. 8(b)(6) provides that "[a]n allegation— **other than one relating to the amount of damages**—is admitted if a responsive pleading is required and the allegation is not denied." Fed. R. Civ. P. 8 (emphasis added).

Thus, damages must be proven. Again, as the district court indicated, this is born out by FRCP 55, governing default judgments, which require the district court to "(B) determine damages." Fed. R. Civ. P. 55(b)(2).

Furthermore, it's important at the outset to be clear what a clear legal error is and what is an abuse of discretion.

B. CLEAR LEGAL ERROR

A district court's findings of fact are reviewed under the clearly erroneous standard. See Fed. R. Civ. P. 52(a)(6); *United States v. Cazares*, 121 F.3d 1241, 1245 (9th Cir. 1997) (standard applied in both civil and criminal proceedings). "Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations, which explains why they are reviewed deferentially under the clearly erroneous standard." *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc). Special deference is paid to a trial court's credibility findings. See *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985); *McClure v. Thompson*, 323 F.3d 1233, 1241 (9th Cir. 2003).

Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." See *Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1136 (9th Cir. 2011); *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1175 (9th Cir. 2010) (en banc) (per curiam); see also *Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 888 (9th Cir. 2008) (concluding the district court clearly erred). If the district court's account of the evidence is plausible in light of the entire record, the court of appeals may not reverse, even if it would have weighed the evidence differently. See *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002); see also *United States v. McCarty*, 648 F.3d

820, 824 (9th Cir. 2011); *Katie A., ex. Rel. Ludin v. Los Angeles County*, 481 F.3d 1150, 1155 (9th Cir. 2007). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Elliott*, 322 F.3d 710, 715 (9th Cir. 2003); see also *United States v. Stanley*, 653 F.3d 946, 952 (9th Cir. 2011); *United States v. Al Nasser*, 555 F.3d 722, 727 (9th Cir. 2009).

This Court reviews for clear error where:

1. District court adopts proposed findings submitted by parties. See *Anderson v. Bessemer City*, 470 U.S. 564, 571-73 (1985); see also *Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006); *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 2000) (noting while review is for clear error, the reviewing court will review with "particularly close scrutiny" when findings are adopted).

2. Findings of fact are based on stipulations. See *Smith v. Commissioner*, 300 F.3d 1023, 1028 (9th Cir. 2002).

3. Findings of fact are based solely on written record. *See R.B., ex.rel. F.B. v. Napa Valley Unified School District*, 496 F.3d 932, 937 (9th Cir. 2007); *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001).

4. Findings of fact after a bench trial. See *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011); *Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869, 879 (9th Cir. 2005); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003), clarified by 366 F.3d 731 (9th Cir. 2004) (order); see also *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 384 (9th Cir. 1994) ("In reviewing a bench trial, this court shall not set aside the district court's findings of fact, whether based on oral or documentary evidence, unless they are clearly erroneous.")

B. ABUSE OF DISCRETION

"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted); see also *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 698 n.11 (9th Cir. 2011). Under the abuse of discretion standard, a reviewing court cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. See *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 953 (9th Cir. 2011); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010) (citing *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001)); *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (noting reversal under abuse of discretion standard is possible only "when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances"). The abuse of discretion standard requires an appellate court to uphold a district court determination that falls within a broad range of permissible conclusions. See *Kode v. Carlson*, 596 F.3d 608, 612-13 (9th Cir. 2010) (per curiam); *Grant v. City of Long Beach*, 315 F.3d 1081, 1091 (9th Cir. 2002), amended by 334 F.3d 795 (9th Cir. 2003)

This Court reviews for abuses of discretion when:

1. District court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *See Jeff D. v. Otter*, 643 f.3d 278 (9th Cir. 2011) (citing *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004)).

2. District court rules in an irrational manner. *See Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003); *see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1084 (9th Cir. 2010) (concluding district court did not rule in an irrational manner).

3. District court makes an error of law. *See Koon v. United States*, 518 U.S. 81, 100 (1996); *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1137 (9th Cir. 2011) (citing *Koon*); *Forest Grove School Dist. v. T.A.*, 523 F.3d 1078, 1085 (9th Cir. 2008) (applying *Koon*); *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (applying *Koon*). Thus, the court abuses its discretion by erroneously interpreting a law, *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its decision on an inaccurate view of the law, *Richard S. v. Dep't of Dev. Servs.*, 317 F.3d 1080, 1085-86 (9th Cir. 2003). *See also Fox v. Vice*, 131 S. Ct. 2205, 2211 (2011) (recognizing trial court has wide discretion "but only when, it calls the game by the right rules").

4. Record contains no evidence to support district court's decision. *See Oregon Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995).

Here, Appellant first argues that because the district court awarded statutory damages, any award of actual damages are irrelevant because under 18 U.S.C. § 2520(c)(2) Plaintiffs may recover the greater of either (a) actual damages **or** (b) statutory damages of $100 per day for each day of violation **or** statutory damages of $10,000, whichever is greater. Appellant then argues that "because Abid's

liability is final, Pyankovska need only show that Abid's Wiretap Act violations occurred on more than 100 days to prove that her statutory damages exceed the $10,000.00 award." AB 38-39.

However, as the district court observed, "damages must be proven. This requirement is born out by Rule 55, governing default judgment, which provides as follows…(B) determine the amount of damages" ECF 142. Not only did Appellant fail to prove any damages, this is the first time she is advancing the claim that the Wiretap act was violated for 703 days. See FER 4-64. Rather, those documents are submitted to support her state court claims for compensatory damages. The district court, however, chose not to award such damages but chose instead to award damages pursuant to §2520(c)(2). Any award of compensatory or punitive damages is entirely discretionary. The award or denial of compensatory damages is reviewed for an abuse of discretion, *Park ex rel Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006), while punitive damages is reviewed for an abuse of discretion. *Fair Housing of Marin v. Combs*, 285 F.3d 899, 906-07 (9th Cir. 2002).

Under §2520(c)(2), however, awarding damages at all is discretionary. Section §2520(c)(2) states:

> [i]n any other action under this section, the court ***may*** assess as damages whichever is the greater of—

> (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
>
> (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000

(Emphasis added).

The word "may" denotes the district court's discretion to award some damages in whatever amount it wishes or no damages at all, whether under section (A) or (B). Though this Court has not weighed in on the issue, the clear trend in the law is to give the trial court discretion either to award civil damages under the scheme found in Section §2520(c)(2) or to award no damages at all. See *Nally v. Nally*, 53 F.3d 649 (4th Cir. 1995); *Reynolds v. Spears*, 93 F.3d 428 (8th Cir. 1996); *Dorris v. Absher*, 179 F.3d 420 (6th Cir. 1999); *DirecTV v. Brown*, 371 F.3d 814 (11th Cir. 2004). Indeed, in *Directv, Inc. v. Rawlins*, 523 F.3d 318 (4th Cir. 2008) the 4th Circuit "has recognized, consistent with the language of the statute and with the views of the majority of our sister circuits, that the award of damages under § 2520(c)(2) is discretionary." *Directv, Inc. v. Rawlins*, 523 F.3d 318, 324 (4th Cir. 2008). The word "may" by itself strongly suggests the district court was imbued with such discretion.

Appellant's core argument is that the district court should have assessed $100.00 per day for every day the transcripts of the intercepted communications were broadcast online. Again, Appellant provides no support for her contention

that those transcripts were online for over 700 days. She points to the record at FER-068 or FER 094-098. The record does not support her contention, as it did not at the district court. Rather, the posts that are presented as evidence are not dated and no date range is provided. It is impossible to tell, therefore, how long those posts were online. In fact, there is only one post that shows what looks like transcripts, but it is impossible to tell whether they are transcripts of the intercepted wire at all. See FER 094-098. The fact that Plaintiff provided no "competent evidence" as required by the district court's order, it is difficult if not impossible to understand how Appellant believes the district court abused its discretion with the "evidence" (which was hardly competent) provided to it.

II. THE DISTRICT COURT DID NOT COMMITT CLEAR LEGAL ERROR OR ABUSE ITS DISCRETION IN DECLINING TO AWARD APPELLANT ANY COMPENSATORY OR PUNITIVE DAMAGES

In support of her Nevada common-law claims, Plaintiff produced a number of reports and receipts, none of which presumably convinced the district court because the aggregate amount of those costs did not exceed the $10,000.00 she was actually awarded. The idea that the district court failed to consider Appellant's evidence is belied by the record. In fact, the district court acknowledged her "competent evidence" (which is not competent at all, as further discussed below) and disregarded it. The district court stated:

> Here, plaintiff is prosecuting a case predicated entirely on defendant's illegal act: placing a recording device in his minor son's backpack

> with the intent to surreptitiously record plaintiff. (ECF No. 81). Although some of plaintiff's damages stem from the state court's decision, plaintiff (sic) does not challenge that decision—or the corresponding judgment—as erroneous. Accordingly, the court finds that it has jurisdiction to award damages incurred as a result of the underlying state court action.
>
> Although the court has jurisdiction to award such damages, it does not necessarily follow that it ought to. The court now considers whether plaintiff is entitled to recover her requested damages under the Wiretap Act.

ECF 142. The district court therefore actually considered Appellant's "competent evidence" but was not convinced by it. Perhaps for the following reasons.

In FER 025-26 Appellant submits an evaluation from Total Care Family Practice. The document does not come with an affidavit from a custodian of records, invoices, receipts for payment of fees, or an original signature. There is no indicia at all that the document is authentic. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. FRE 901(a). As stated, no such evidence is provided here. Thus, this exhibit is not legally admissible, i.e., competent, evidence.

In FER 030-033 Appellant submits an evaluation from Total Care Family Practice. The document does not come with an affidavit from a custodian of records, invoices, receipts for payment of fees, or an original signature. There is no indicia at all that the document is authentic. To satisfy the requirement of

authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. FRE 901(a). As stated, no such evidence is provided here. Thus, this exhibit is not legally admissible, i.e., competent, evidence.

Furthermore, the evidence submitted is not relevant. Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. FRE 401. Here, the report from Total Care indicates that Plaintiff "is going through a custody battle and is very anxious and hasn't been able to sleep." (ECF 124-2 at 2). Nothing in the report suggests that anything Sean has done has caused Appellant's anxiety and stress, only that, in general, Plaintiff was stressed out and anxious about the pending court proceedings. As such, the document is irrelevant.

In FER 035-038 Appellant submits for the district court's consideration a negative performance review from her employer dated January 29, 2018. As with the second exhibit, this exhibit is not authenticated and it is irrelevant to these proceedings. There is no custodian of records indicating the document is what it purports to be from whom it purports to be from and there are no original signatures on the document. In addition, the contents of the document are irrelevant as the only proof it evidences is that Appellant suffered a poor performance reviews from her employer and nothing more: a matter of fact that is

of no relevance to a determination of whether Plaintiff is entitled to damages in the amount of $309,000.00. Thus, Exhibit 3 is not competent evidence and should not be considered in this matter.

FER 039-040 is, on its face, of no value and relevance and should not have been considered in this matter.

FER 025-029, are receipts from Dr. Nicolas Ponzo, submitted in support of Appellant's contention that she suffered monetary damages in the amount of $3,125.00.

FER 041-064 are receipts for court costs that, adding the above expenses, do not exceed the $10,000.00 that Appellant was actually awarded.

Returning to whether the district court abused its discretion, it did not, for the following reasons:

1. First, there was no error of law. Examples of such errors are provided supra. None of those examples fit what happened here.

2. District court did apply the correct law and did not rest its decision on a clearly erroneous finding of a material fact. *See Jeff D. v. Otter*, 643 f.3d 278 (9th Cir. 2011) (citing *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004)). In fact, the district court considered all of Appellant's evidence and disregarded, as it should have, for the reasons set forth above.

3. The district court ruled in an rational manner. *See Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003); *see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1084 (9th Cir. 2010) (concluding district court did not rule in an irrational manner). It took all of Appellant's evidence into consideration

and actually awarded her damages. It actually did consider the offer's of proof made by Appellant but that is all her evidence was, offers of proof, not competent evidence that would otherwise be admissible at trial.

4. District court made no legal error. *See Koon v. United States*, 518 U.S. 81, 100 (1996); *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1137 (9th Cir. 2011) (citing *Koon*); *Forest Grove School Dist. v. T.A.*, 523 F.3d 1078, 1085 (9th Cir. 2008) (applying *Koon*); *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (applying *Koon*). Thus, the court abuses its discretion by erroneously interpreting a law, *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its decision on an inaccurate view of the law, *Richard S. v. Dep't of Dev. Servs.*, 317 F.3d 1080, 1085-86 (9th Cir. 2003). *See also Fox v. Vice*, 131 S. Ct. 2205, 2211 (2011) (recognizing trial court has wide discretion "but only when, it calls the game by the right rules"). The district court has discretion in its application of section 2520(c)(2). It exercised it's discretion and awarded Appellant the maximum statutory amount - $10,000.00. Given that Appellant never advanced that position before the district court, now taken by her new Appellate counsel, that the transcripts at issue were online for 703 days, a contention made with no support in their own excerpts, it cannot be said that the district court abused its discretion or committed any legal error.

5. The record does not contain evidence to support Appellant's decision and vindicates the district court's decision. *See Oregon Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995). Appellant failed to demonstrate that the offending records were online for 703 days and she did not convince the district court that either compensatory or punitive damages were warranted. Given that she was in fact awarded $10,000.00, and her compensatory damages "proof" could reasonably be considered self-reported history of "trauma" of her own making (a result of the stress of the State district court proceedings, not anything that Sean did), the district court's decision should not be disturbed.

CONCLUSION

Because there was no legal error committed by the district court and, necessarily, no abuse of discretion (the district court had discretion to award any damages it deemed appropriate under Section 2520(c)(2)), and because there was plenty of reason for the district court to disregard Appellant's Nevada common law claims, this Court should affirm the decision below.

Date: June 24, 2022

ALEX B. GHIBAUDO, P.C.

/s/ Alex Ghibaudo
Alex Ghibaudo, Esq.

Attorneys for Appellee Sean Abid

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature: //s// Alex Ghibaudo, Esq. **Date:** 6/24/2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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