SC23-432

In the Supreme Court of Florida

WILLIAM J. MITCHELL,
Petitioner,

v.

DAVID W. RACE,
Respondent.

On Petition for Discretionary Review from the
Fourth District Court of Appeal
DCA No. 4D22-1979

AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF PETITIONER

ASHLEY MOODY
Attorney General

HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitor General
ROBERT SCOTT SCHENCK (FBN1044532)
Assistant Solicitor General
robert.schenck@myfloridalegal.com
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300

October 12, 2023

Counsel for Attorney General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

Attorney General Ashley Moody submits this brief as amicus curiae in support of Petitioner William J. Mitchell.

Mitchell raises two important questions about the power of state courts to enforce the Florida Security of Communications Act. The first issue is statutory—whether Section 48.193(1)(a)2., Florida Statutes, allows Florida courts to hear a tort claim that a person present out-of-state has "intentionally intercepted" the contents of a phone call with a person in Florida. The second issue is constitutional—whether the Due Process Clause of the Fourteenth Amendment permits state courts to hear these disputes. The State of Florida and the Attorney General thus have an interest in advancing the correct interpretation of both the Florida Statutes and the United States Constitution as they bear on the power of state courts to adjudicate cases involving privacy rights of Florida residents.

SUMMARY OF ARGUMENT

Through the Security of Communications Act, Florida has long protected its residents' reasonable expectation of privacy in their phone calls by requiring that no party may record phone conversations without the consent of all others.[1] This case tests whether Florida courts can vindicate that privacy interest by exercising personal jurisdiction over an out-of-state defendant, Respondent David Race, alleged to have violated the Act by surreptitiously recording phone calls with a Florida resident, Petitioner William Mitchell.

Both requisites for personal jurisdiction—statutory authority within constitutional limits—are met here. Florida's long-arm statute is met because Race "[c]ommit[ted] a tortious act within this state." § 48.193(1)(a)2., Fla. Stat. Under this Court's precedent, the "interception" occurs where a communication originates—in Florida, where

[1] 11 other states have a similar rule. *See* 18 Pa. C. S. A. §§ 5703, 5704(4); Mich. Code § 750.539c; Mont. Code Ann. § 45-8-213(1)(c); Wash. Code § 9.73.030(1)(a)–(b); Cal. Pen. Code § 632(a); N.H. Rev. Stat. Ann. § 507-A:2, :11; Mass. Gen. Law. ch. 272, § 99; Nev. Rev. Stat. § 200.620(1)(a), .690; 720 Ill. Comp. Stat. Ann. 5/14-2; Del. Code Ann. tit. 11, § 1335(a)(4); *State v. Geraw*, 795 A.2d 1219, 1221 (Vt. 2002); *but see* Del. Code Ann. tit. 11, § 2402 (separate criminal provision permitting recording where one party consents if recording is not done to further a criminal or tortious act).

Mitchell took the phone calls. Even without that precedent, Race committed a "tortious act within this state" because Mitchell's cause of action arises from a communication sent into the State and separately, because injury occurred here.

Race's contacts with the State also satisfy the Due Process Clause. There would be no question about personal jurisdiction if Race had physically come to Florida and eavesdropped on Mitchell. The fact that Race injured Mitchell through virtual means should not yield a different result. Regardless, under an alternative test that focuses on the effects of a defendant's out-of-state conduct, jurisdiction is still proper.

This Court should quash the decision below.

ARGUMENT

I. The Florida Security of Communications Act protects the privacy of Floridians.

This case implicates the privacy interests of Florida residents, which the State has protected for more than 50 years through its Security of Communications Act. Ch. 69-17, Laws of Fla. (1969); *State v. Tsavaris*, 394 So. 2d 418, 422 (Fla. 1981), *receded from in part on other grounds by Dean v. State*, 478 So. 2d 38, 40–41 (Fla.

1985). That law was "identical in its language to the [federal] Omnibus Crime Control and Safe Streets Act of 1968." *Hicks v. State*, 359 So. 2d 475, 477 (Fla. 1st DCA 1978). Like its federal counterpart, Florida's law regulates the interception of "wire, oral, or electronic communication[s]," and has two functions. First, it requires law enforcement, before intercepting communications in which the parties have a reasonable expectation of privacy, to receive a warrant from a court in the "territorial jurisdiction" where the communications will be intercepted. *See* §§ 934.08, 934.09(f)(3), Fla. Stat.[2] Second, it creates a cause of action for and criminalizes a private individual's interception of communications and similarly criminalizes the disclosure or use of intercepted communications when the individual has "reason to know" that they were unlawfully intercepted. §§ 934.03(1), (4), 934.10(1), Fla. Stat.

Both the federal and Florida laws were a reaction to worries that arose in the 1960s and '70s about the security of personal conversations, as evolving technology allowed governmental and private actors

[2] Though this case is civil in nature, cases in the warrant context—like *State v. Mozo*, 655 So. 2d 1115 (Fla. 1995)—are relevant because they interpret the same language: "interception."

to listen in on previously private conversations. After the Supreme Court's holding that the federal constitution did not create a general "right to be let alone," *Katz v. United States*, 389 U.S. 347, 350–51 (1967), no fewer than 10 states adopted constitutional provisions expressly protecting a right to privacy. Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 Fla. St. U. L. Rev. 671, 681–82 (1978). Florida voters followed suit in 1980, when privacy concerns culminated in their adoption of a constitutional provision protecting a "right to be let alone" from government intrusions. *See* Art. I, § 23, Fla. Const. And every state except Vermont enacted a statute protecting communications against unconsented recording.[3] *See* Ian K. Peterson, *When "May" Means "Shall": The Case for Mandatory Liquidated Damages Under the Federal Wiretap Act*, 35 Stetson L. Rev. 1051, 1077 & n.189 (2006). Likewise, in 1968, Florida's new constitution guaranteed a right "against the unreasonable interception of private communications by any means," and required warrants to be issued only "upon probable cause, supported by affidavit,

[3] Vermont protects communications from governmental intrusion via judicial precedent. *Geraw*, 795 A.2d at 1221.

particularly describing . . . the communication to be intercepted." *See* Art. I, § 12, Fla. Const. (1968).

Florida's Security of Communications Act "implement[s]" the constitutional warrant requirements in Article I, Section 12. *See Sarmiento v. State*, 371 So. 2d 1047, 1052 (Fla. 3d DCA 1979). In 1974, the Legislature amended the Act to provide even greater protection than the federal wiretap statute, the latter requiring only that one party to a communication consent to recording. *Tsavaris*, 394 So. 2d at 422. With little debate, the Legislature required that all parties to a communication consent to recording. *Id.* The bill "ma[d]e it illegal[] for a person to record a conversation, even though he's a party to it, without the other person's consent." *Id.*

In other words, the Florida Legislature made a "policy decision" that "each party to a conversation [should] have an expectation of privacy from interception by another party to the conversation," reflecting the view that "the right of any caller to the privacy of his conversation is of greater societal value than the interest served by permitting eavesdropping or wiretapping." *Id.*

II. The trial court has personal jurisdiction over Race.

Mitchell is correct that the trial court has personal jurisdiction

over Race. Personal jurisdiction requires, first, that the State's long-arm jurisdiction statute be satisfied, and second, that the exercise of personal jurisdiction comport with the Due Process Clause. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). Both requisites are met here.

A. Race's tortious conduct, committed in Florida, satisfies the long-arm jurisdiction statute.

Under Florida's long-arm jurisdiction statute, a defendant can be sued in Florida courts for a controversy "arising from . . . [c]ommitting a tortious act within this state." § 48.193(1)(a), Fla. Stat.; *see also Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002). For any of three reasons, that standard is satisfied.

1. When a tort is committed in Florida, that triggers the long-arm statute. *See Exec-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 585 (Fla. 2000). And here, Race's act of interception—the tort itself—occurred in Florida.

This Court has held that an interception occurs where the per-

son being recorded is talking, or put another way, where the communication originates. *State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995).[4] In *Mozo*, police used an "electronic scanning device" bought at Radio Shack "to monitor private telephone calls" by scanning frequencies at random, hoping to find discussions of illegal activity. *Id.* at 1115–16. After police obtained a warrant to search the defendants' home based on evidence uncovered from the scanning, the defendants moved to suppress under the Security of Communications Act. *Id.* at 1116. In concluding that the police violated Florida's law, the Court explained that the "[t]he actual 'interception' of a communication occurs not where such is ultimately heard or recorded but where the communication originates," and "[h]ere, the 'intercepted' conversations originated within the [defendants'] home." *Id.* at 1117.

That understanding tracks the purpose of two-way consent statutes: "protecting the well-being, tranquility, and privacy of the home," an interest "of the highest order in a free and civilized society."

---

[4] *See also, e.g.*, *United States v. Jackson*, 849 F.3d 540, 551 (3d Cir. 2017); *United States v. Dahda*, 853 F.3d 1101, 1112 (10th Cir. 2017); *United States v. Ramirez*, 112 F.3d 849, 852 (7th Cir. 1997); *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992); *State v. Nettles*, 149 N.E.3d 496, 499 (Ohio 2020).

Id.; *see also* § 934.01(2), (4), Fla. Stat. *Mozo* thus shows that Race's allegedly tortious act of interception occurred in Florida, satisfying the long-arm statute.

To be sure, one district court has concluded that *Mozo* should not control the long-arm inquiry. That court's analysis, though, was "admittedly influenced" by extra-textual federalism concerns—namely, that recording without consent was lawful in the state where the defendant made the recording. *Kountze v. Kountze*, 996 So. 2d 246, 250–52 (Fla. 2d DCA 2008) (en banc). But while the Supreme Court has said that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred," *France v. France*, 90 So. 3d 860, 863 (Fla. 5th DCA 2012) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003)), that principle is inapposite. In *Campbell*, a driver involved in an accident in Utah sued its own insurer, State Farm, arguing that State Farm's refusal to settle litigation was part of a "national scheme to meet" financial goals. 538 U.S. at 412–15. The Supreme Court held that Utah could not impose punitive damages based on "nationwide" conduct—unrelated

to the case—that occurred wholly outside Utah's territory, was "lawful where it occurred[,] and"—critically—"*had no impact on* [*the State*] *or its residents*." *Id.* at 420–22 (emphasis added). That is not true here. Race's actions impacted the privacy rights of a Florida resident and impaired the State's interest in protecting that right. *Id.*

2. Even if the act of interception did not occur in Florida, this case satisfies the long-arm statute because the cause of action arises from communications sent into the State. This Court held in *Wendt* that a "tortious act" "can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida." 822 So. 2d at 1260. Thus, if the complaint states a cause of action that "stem[s] from" those communications, long-arm jurisdiction is proper. *See Arise*, *Black's Law Dictionary* (11th ed. 2019) (defining "arise" as "to originate; to stem (from)"). In *Wendt*, for example, this Court explained that Florida courts would have personal jurisdiction over an out-of-state defendant for allegedly negligent statements made during a phone call with someone within the State. *See* 822 So. 2d at 1260.

Applying that rule here, Race's act of interception is intimately

tied up with and "stem[s] from" Race's intentional decision to call Mitchell and record their conversations.[5] *See Acquadro v. Bergeron*, 851 So. 2d 665, 671 n.11 (Fla. 2003). Although Race asserts that several of the phone calls were initiated by Mitchell, it is undisputed that Race initiated at least seven calls. R. 604 ¶ 9; R. 642–43 ¶¶ 2, 4. And in the remaining calls, Race was not a passive participant and intentionally recorded those calls. *See, e.g.*, R. 216–19 ¶¶ 5–14, 24–25. So the cause of action for an intentional tort "aris[es]" from a communication placed into Florida, which is a "tortious act."

3. Finally, the existence of an *injury* in Florida also suffices under Section 48.193(1)(a)2. Though the district courts are split on the interpretation of the long-arm statute in this respect, the Court should adopt the broader view. If it does, the injury to Mitchell's privacy rights (and thus a "tortious act") occurred in Florida.

The First and Third Districts (plus the Eleventh Circuit) have

[5] In *Acquadro*, this Court approved of a now-vacated Second District case, which held that the intentional recording of a phone call was part of "telephonic communication into Florida" that could constitute a "tortious act." 851 So. 2d at 671 n.11 (citing *Koch v. Kimball*, 710 So. 2d 5 (Fla. 2d DCA 1998), *overruled by Kountze v. Kountze*, 996 So. 2d 246 (Fla. 2d DCA 2008) (en banc)).

opined that the long-arm statute "merely requires that the place of injury be within Florida." *Int'l Harvester Co. v. Mann*, 460 So. 2d 580, 581 (Fla. 1st DCA 1984), *disapproved in part by Doe v. Thompson*, 620 So. 2d 1004, 1006 (Fla. 1993) (distinguishing situation where corporate officer was sued for acts "within the scope of his employment" but not personally done); *Wood v. Wall*, 666 So. 2d 984, 986 (Fla. 3d DCA 1996); *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1216–17 (11th Cir. 1999). By contrast, courts following the narrower view have focused exclusively on where a defendant's conduct occurs, relying on the word "act" in Section 48.193(1)(a)2. *E.g.*, *Fitz v. Samuel Friedland Fam. Enters.*, 523 So. 2d 1284, 1285 (Fla. 4th DCA 1988); *Phillips v. Orange Co.*, 522 So. 2d 64, 66 (Fla. 2d DCA 1988); *McLean Fin. Corp. v. Winslow Loudermilk Corp.*, 509 So. 2d 1373, 1374 (Fla. 5th DCA 1987). This Court has recognized but declined to resolve this lingering question. *Internet Sols. Corp. v. Marshall*, 39 So. 3d 1201, 1206 n.6 (Fla. 2010).

Should it prove necessary to decide the case, the Court should adopt the broader view. As the old Fifth Circuit explained, Section 48.193(1)(a)2. mirrors other long-arm statutes that were "designed to

exploit the limits of jurisdictional due process." *Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1212 (5th Cir. 1975). What is more, the phrase "tortious act" is a term of art, the key part of which is the modifier "tortious." And "[t]o be tortious an act must cause injury"; "[t]he concept of injury is an inseparable part of the phrase ['tortious act.']" *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 763 (Ill. 1961); *see also Kailieha v. Hayes*, 536 P.2d 568, 569 (Haw. 1975) (similar). Because an injury is required to make an act tortious, a tortious act occurs where the injury occurs. Cole Barnett, *Is Injury a Tortious Act?: Interpreting Florida's Long-Arm Statute*, 66 Fla. L. Rev. 2301, 2311–12 (2014); *see also Act*, *American Heritage Dictionary* (1967) (defining "act" as "[t]o produce an effect on"). That makes sense: A Florida resident need not seek redress in some far away state when his or her injury occurred right here in Florida.

In this context, the injury is an invasion of privacy. As this Court once explained, the all-party consent provision "allow[s] each party to a conversation to have an expectation of privacy from interception by another party to the conversation." *Tsavaris*, 394 So. 2d

at 422. When that expectation is breached, the victim suffers a privacy harm wherever he or she is currently present. *See Injury*, *Black's Law Dictionary* (11th ed. 2019) (defining "injury" as "[t]he violation of another's legal right"). Thus, Race committed a "tortious act" in the State.

B. Exercising personal jurisdiction over Race comports with the Due Process Clause.

The second step of *Venetian Salami* focuses on the Fourteenth Amendment's Due Process Clause. As Mitchell notes (Init. Br. 37), specific personal jurisdiction[6] requires a showing that (1) the defendant, through its acts, purposefully availed itself of conducting activities in the state; (2) the lawsuit arises out of or is related to those acts; and (3) jurisdiction does not offend traditional notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–75 (1985). The plaintiff bears the burden on the first two requirements, which go to the defendant's "minimum contacts" with a forum. *See Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d

[6] In contrast, general personal jurisdiction exists where a person is "at home," namely their state of domicile, and allows state courts to hear all claims against an individual. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021).

1339, 1355–57 (11th Cir. 2013). If the plaintiff meets its burden, the defendant must "present a compelling case" on the third element. *See Burger King*, 471 U.S. at 477. This case concerns the first and third elements, purposeful availment and fairness, both of which are satisfied.

1. Race purposefully availed himself of conducting activities in Florida through his act of interception.

As for availment, plaintiffs can meet their burden in two ways. First, a defendant "purposefully avails itself of the privilege of conducting activities within the forum State" when it "reache[s] out beyond" its home state to create contacts with the forum by its "own choice." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024–25 (2021). In the alternative, a defendant's intentional tort that causes harmful effects in the forum can create sufficient contacts with the forum. *Walden v. Fiore*, 571 U.S. 277, 287–88 (2014). Jurisdiction is proper under either test.

A. When a defendant commits intentional tortious conduct in a state, that conduct creates sufficient minimum contacts for personal jurisdiction. *See Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 777

(1984) ("A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory."). That is, because purposeful availment involves the "privilege of *conducting activities within the forum State*," *Ford*, 141 S. Ct. at 1025–26 (emphasis added), a defendant submits to jurisdiction when he commits a tort inside the forum state. Restatement (Second) of Conflict of Laws § 36 (Am. L. Inst. 1971).

And because "physical presence" is not required for purposeful availment, *Burger King*, 471 U.S. at 476, this same logic has been extended to intentional torts that take place through remote communications. *See*, *e.g.*, *Neal v. Janssen*, 270 F.3d 328, 331–32 (6th Cir. 2001) (phone calls and faxes); *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 212–13 (5th Cir. 1999) (phone calls); *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1068–69 (4th Cir. 1982) (same). Indeed, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines." *Burger King*, 471 U.S. at 476.

While the Supreme Court has not addressed virtual or digital

contacts, there is no reason to treat them differently from physical contacts in the context of intentional torts. *Heritage House Rests., Inc. v. Cont'l Funding Grp., Inc.*, 906 F.2d 276, 282 (7th Cir. 1990) ("Continental created a relationship which is naturally based on telephone and mail contacts rather than physical presence, and it should not be able to avoid jurisdiction based on that distinction."); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) ("Different results should not be reached simply because [a tort] is conducted over the Internet."). That test comports with the logic of specific personal jurisdiction doctrine, with a commonsense way of dealing with a host of intentional torts that can be committed virtually, and notions of fundamental fairness that underly due process.

To start, personal jurisdiction doctrine focuses primarily on whether a person avails themselves of the privilege of "conducting *activities within the forum State,*" *Ford*, 141 S. Ct. at 1024 (emphasis added), so courts have long held that tortious activities within a state suffice for personal jurisdiction purposes, *Keeton*, 465 U.S. at 774

(libelous magazines sent into a state). And a defendant who uses virtual means to accomplish a tort has committed the tort no less than someone who physically mails a newspaper containing defamatory material, a letter containing misrepresentations, or a bomb. *See* Adam R. Kleven, *Minimum Virtual Contacts: A Framework for Specific Personal Jurisdiction in Cyberspace*, 116 Mich. L. Rev. 785, 798 (2018). Otherwise, wrongdoers would be encouraged to dodge accountability by committing virtual torts out of state.

Nor are these digital contacts with the forum "random" or "fortuitous," when a defendant intentionally reaches out to a forum remotely through their phone calls or other virtual contacts. *See Trois v. Apple Tree Auction Ctr., Inc.*, 882 F.3d 485, 491 (5th Cir. 2018). These contacts are voluntary (because a defendant intentionally engages in them) and they will often foreseeably lead to litigation (because a defendant can "reasonably anticipate being haled into court"). *See PREP Tours, Inc. v. Am. Youth Soccer Org.*, 913 F.3d 11, 19–20 (1st Cir. 2019); *cf. also Zippo*, 952 F. Supp. at 1124 (focusing on interactivity of a website in evaluating internet personal jurisdiction). It is no answer to say that a plaintiff "fortuitously reside[s]" in

the forum, because, if that were true, "the defendant could mail a bomb to a person in [the forum] but claim [the forum] had no jurisdiction because it was fortuitous that the victim's zip code was in [the forum]." *Wien Air*, 195 F.3d at 213.[7] That cannot be correct.

This approach also makes sense considering the variety of torts that can be accomplished virtually. For example, a hacker may gain access to computer systems in a distant venue and cause devastating injury. *Cf. WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 472 F. Supp. 3d 649 (N.D. Cal. 2020) (finding the sending of malicious code to servers in California sufficient contact with a forum under effects test). Or an email spammer may damage or slow servers, a form of trespass to chattels. *See Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d

[7] Though the Court in *Walden v. Fiore* said that it was "fortuitous" that the plaintiffs there resided in Nevada when a defendant committed a tort against them in Georgia, that case does not control here. 571 U.S. 287, 288–90 (2014). *Walden* dealt with a scenario where "the only link between the defendant and the forum" was the plaintiff's choice of residence. Indeed, the Court held that the defendant never "*contacted anyone in*, or sent anything or anyone to Nevada." *Id.* at 288–89 (emphasis added). So, *Walden* stands for the proposition that affecting a state's resident outside of the state is insufficient for due process. But the Court expressly reserved the "very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State." *Id.* at 290 n.9.

601, 617 (E.D. Va. 2002). And just the same for a news organization whose digital platform publishes a defamatory article accessible in a jurisdiction. *See Gubarev v. Buzzfeed, Inc.*, 253 F. Supp. 3d 1149, 1161 (S.D. Fla. 2017). To treat these cases differently than those involving physical acts would undercut the substantial state interest in deterring digital torts and their very real effects, while also allowing defendants to escape accountability in those states' courts.

And finally, treating virtual contacts like physical contacts is consistent with the values of fair notice and interstate federalism that underly personal jurisdiction. As to the former, defendants committing intentional torts online have "fair warning—knowledge that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," such that they may "structure their primary conduct to lessen or avoid exposure to a given State's courts." *Ford*, 141 S. Ct. at 1025 (citing *Burger King*, 471 U.S. at 472, and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). In this case, long-standing precedent holds that interception occurs where a communication originates, providing defendants with fair notice about litigation risks and how to structure their conduct. Race could

have asked for permission to record or forewent recording if he did not want to risk litigation. And, as digital contacts are an "inescapable" fact of life, *Diamond Mortgage Corp. v. Sugar*, 913 F.2d 1233, 1247 (7th Cir. 1990), the ease of committing digital torts should cause defendants to reasonably expect to be haled into court more often, not less, *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.").

As for interstate federalism, personal jurisdiction prevents encroachment by states with "little legitimate interest" in a suit on those "more affected by the controversy." *Ford*, 141 S. Ct. at 1025. But that is not the case here. The State's interest is providing *its* residents with security and privacy in their communications, § 934.01(2), Fla. Stat., and subjecting individuals like Race to suit in Florida serves that purpose.

With the proper test in view, this case is easily resolved because the interception occurred in Florida. Because Race committed a tort in Florida, he has sufficient minimum contacts with this state. *See*

Keeton, 465 U.S. at 777; *Cable/Home Commc'n Corp. v. Network Prods.*, 902 F.2d 829, 858 (11th Cir. 1990) ("A significant single act or meeting in the forum state has been held sufficient for personal jurisdiction there."). But even if this Court were to disagree that the tort of interception occurs in state, the phone calls that Race sent and recorded that "form the bases for the action" are sufficient contacts with Florida. *Neal*, 270 F.3d at 332; *see also Trois*, 882 F.3d at 491 (noting that even if a defendant did not initiate calls, personal jurisdiction is still proper because defendant was not a "passive participant on the call"). The relationship between the communications and the cause of action here "were not merely incidental communications" but rather are the "heart of the lawsuit" and constitute purposeful availment because they were directed to Florida. *Neal*, 270 F.3d at 332.

B. Race is subject to personal jurisdiction in any event because his tort was: "(1) intentional; (2) aimed at the forum state; and (3) caused harm that the defendant should have anticipated would be suffered in the forum state." *Licciardello v. Lovelady*, 544 F.3d 1280, 1286 (11th Cir. 2008); *see also Walden*, 571 U.S. at 289–90. As the

Eleventh Circuit has held, the effects test is satisfied where an intentional tort is "aimed at a specific individual in the forum whose effects were suffered in the forum." *Louis Vuitton*, 736 F.3d at 1356.

The evidence here meets each of these elements. First, this is an intentional tort. *See* § 934.03(1)(a), Fla. Stat. Second, Race's conduct was expressly aimed at Mitchell, who was in Florida when the calls happened, and who Race knew resided in Florida. *Licciardello*, 544 F.3d at 1287; *cf. also MacDermid, Inc. v. Deiter*, 702 F.3d 725, 730 (2d Cir. 2012) (sufficient that individual unlawfully access "system and the storage of confidential, proprietary information and trade secrets" knowing this system existed in Waterbury, Connecticut). Finally, Race should have anticipated that the harm to Mitchell's privacy rights would befall Mitchell in Florida: Race knew that Mitchell was a Florida resident, who had a Florida-based phone number, R. 216, ¶ 8; R. 219 ¶ 24–26, and Race recorded 27 different phone calls, R. 642–663.

Of course, due process requires that a defendant's contacts be "with the forum State itself," not just "contacts with persons who reside" there. *Walden*, 571 U.S. at 285. But unlike in *Walden*, we have

that here. In *Walden*, Nevada-resident plaintiffs were subjected to a tort while in Georgia and sued the defendant in Nevada, yet the only connection between the defendant and Nevada was the fact that the plaintiffs resided there. *Id.* at 285, 289. The Court emphasized that the defendant had not "contacted anyone in" the forum. *Id.* at 289. But Race contacted a known Florida resident *in Florida* via a Florida-based phone number. *See Trois*, 882 F.3d at 492 n.7 (placing a call into a jurisdiction is more than "mere knowledge of [plaintiff's] strong forum connections"); *WhatsApp Inc.*, 472 F. Supp. 3d at 673 (routing malicious code through a California server suffices to be aimed at a forum).

2. Jurisdiction over Race does not offend notions of fair play and substantial justice.

Once minimum contacts are shown, a defendant must "make a 'compelling case' that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice." *Louis Vuitton*, 736 F.3d at 1355. Courts consider (1) the burden on a defendant, (2) the forum's interest, (3) the plaintiff's interest, and (4) the judicial system's interest in resolving the dispute efficiently. *Id.* at 1358.

Race cannot make such a "compelling case." The burden on

Race here is no "greater than that routinely tolerated by courts." *Felland v. Clifton*, 682 F.3d 665, 677 (7th Cir. 2012). And not only does "modern transportation and communication [make] it much less burdensome for a party sued to defend himself," *Cable/Home Commc'n Corp.*, 902 F.2d at 858, but Florida also allows him to "litigate[] entirely through counsel," such that he does not have to "appear personally," *DeJoria v. Maghreb Petroleum Expl., S.A.*, 804 F.3d 373, 389 (5th Cir. 2015). The State's interest, on the other hand, is strong in vindicating its public policies and preventing injuries within its borders. *Keeton*, 465 U.S. at 776. And its interest is heightened because it is dealing with protecting its residents. *Felland*, 682 F.3d at 677. And finally, Mitchell's interest in obtaining convenient and effective relief is not diminished, and both the State's and judicial system's interests in efficiently litigating this issue can easily be accomplished in Florida, where a record has begun to be built.

CONCLUSION

In sum, this Court should quash the decision below.

Dated: October 12, 2023

Respectfully submitted,

ASHLEY MOODY
Attorney General

/s/ Robert Scott Schenck
HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitor General
ROBERT SCOTT SCHENCK
(FBN1044532)
Assistant Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
robert.schenck@myfloridalegal.com

Counsel for Attorney General

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 4,999 words.

/s/ Robert Scott Schenck
Assistant Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished via email or the e-filing portal to James A. Stepan (jstepan@stepanlaw.com), Thomas L. Hunker (thomas.hunker@hunkerappeals.com), James Toscano (james.toscano@lowndes-law.com), and Rebecca Rhoden (rebecca.rhoden@lowndes-law.com) this **twelfth** day of October 2023.

/s/ Robert Scott Schenck
Assistant Solicitor General