No. 21-2203

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

ASHLEY POPA,
Plaintiff / Appellant

v.

HARRIET CARTER GIFTS, INC. and NAVISTONE, INC.
Defendants / Appellees

Appeal From the United States District Court for The Western District of Pennsylvania, Case No. 2:19-cv-00450,
Judge William S. Stickman IV

DEFENDANTS' PETITION FOR REHEARING BY PANEL AND *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellee Harriet Carter Gifts, Inc. states that it has no parent corporation and no publicly traded corporation owns 10% or more of its stock, and Appellee NaviStone, Inc. states that it has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

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STATEMENT PURSUANT TO THIRD CIRCUIT RULE 35.1

Relying solely on a 2012 amendment to the Wiretapping and Electronic Surveillance Control Act (WESCA), the panel's decision changes Pennsylvania law on the dispositive issue in this case, ignoring *Commonwealth v. Diego* 119 A.3d 370, 380 (Pa. Super. 2015), *appeal denied* 129 A.3d 1240 (Pa. 2015), a 2015 case addressing the same amendment but reaching the opposite result. Now, someone receiving a direct communication will be guilty of "intercepting" it, a position Pennsylvania courts long rejected. *See id*. The practical, and intolerable, result is that the same facts will yield different outcomes depending on whether a WESCA case is filed in Pennsylvania courts or federal courts.

The panel's break with Pennsylvania precedent means any third party receiving a GET request from a Pennsylvania visitor browsing a website located anywhere in the world "intercepts" that communication under WESCA. Nearly all websites have JavaScript code that causes browsers to send GET requests directly to third parties.[1] This unprecedented interpretation transforms WESCA into a super-regulatory authority over the entire internet, subjecting all website operators and

[1]This includes this Court's website, which causes visitors' browsers to send GET requests with information about their browsing activities to Google via the Google Analytics tool. https://www.ca3.uscourts.gov/. The Court's privacy policy does not mention such communications. https://www.ca3.uscourts.gov/privacy-policy/. The websites of the federal and Pennsylvania state courts do the same. App 673.

their service providers to potential criminal and civil penalties simply because their websites are accessible from Pennsylvania. 18 Pa.C.S. 5725(a)(1).[2]

This is precisely what *Diego* warned against. *Diego* not only considered the meaning of "intercept" under WESCA after the 2012 amendment, it explained that the interpretation adopted by the panel here would have an impact far beyond the GET requests at issue in this case. It would be "the equivalent of saying that everyone receiving a text message … has committed a Wiretap Act violation." *Diego*, 119 A.3d at 381. No Pennsylvania case contradicts or undercuts *Diego*; yet the panel did not discuss or cite *Diego*. Instead, it redefined the term "intercept" as if working from a clean slate.[3]

[2]GET requests are routinely sent to websites and their service providers for many reasons: obtaining website content; processing payments; or, as here, providing data about how webpages are accessed and browsed. Dozens of communications can occur on each page. The Pennsylvania courts' website front page, for example, causes 229 GET requests to be sent by each visitor's web browser to third parties. *See* APP 673.

[3]"Had we considered this case a decade ago" before the 2012 amendment, the panel acknowledged, it might have reached a different conclusion because "for years Pennsylvania courts routinely determined there is no interception under the WESCA when the alleged 'interceptor' was the intended recipient of the information." ECF 78 at 8. Those cases "strongly suggest the Pennsylvania courts have carved out direct recipients from the WESCA's reach." *Id*. at 10. The panel's rejection of the established definition of "intercept" also applies retroactively—to 2017 in this case, because of WESCA's two-year statute of limitations—creating liability for past practices despite uniform Pennsylvania precedent to the contrary. *See* 42 Pa.C.S. § 5524(5).

Diego remains binding on courts within the Commonwealth. By failing to address *Diego*, the panel's decision violates precedent from this Court and the Supreme Court requiring federal courts to consider intermediate state appellate court decisions and give them significant weight absent compelling evidence the state supreme court would not. No lawyer or judge reading the panel's opinion would know of *Diego*'s existence, let alone why the panel did not follow it. The parties brought *Diego* to the panel's attention, yet the panel overlooked it, warranting panel rehearing. *See* Fed. R. App. P. 40(a)(2).

If the panel does not reconsider, *en banc* review is necessary. Under Third Circuit Rule 35.1, the undersigned counsel express their belief, based on a reasoned and studied professional judgment, that the panel's decision—with far-reaching consequences for countless commercial, educational, and governmental entities—is contrary to the decisions of the Supreme Court and this Court, particularly *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Crystallex Int'l Corp. v. Petroleos De Venezuala, S.A.*, 879 F.3d 79 (3d. Cir. 2018); *Sheridan v. NGK Metals Corp.*, 609 F.3d 239 (3d Cir. 2010); and *Jewelcor Inc. v. Karfunkel*, 517 F.3d 672 (3d Cir. 2008), which provide that this Court should follow intermediate state appellate courts decisions absent compelling evidence that the state's highest court would not.[4]

[4]While Defendants submit that *Diego* is clear and controlling, to the extent that any confusion exists, certification to the Supreme Court of Pennsylvania would be proper. As set out below, the conflict between the panel opinion and *Diego* is

BACKGROUND

Ashley Popa visited www.harrietcarter.com in 2018 to search for pet stairs. ECF 78 at 4. Harriet Carter contracted with third-party NaviStone to assist it with marketing. Harriet Carter installed ordinary JavaScript code which, if authorized by visitors' browsing software, sent some information about visitors' activities on the Harriet Carter website to NaviStone. *Id*. Third-party communications like these occur on tens of millions of websites. APP 676. It is undisputed that NaviStone received only direct communications (GET requests) from Popa, and only with her browser's authorization. ECF 78 at 4.

Notwithstanding the ubiquity of these direct communications, including on her lawyers' website, APP 672-673, Popa sued NaviStone and Harriet Carter in 2019, alleging NaviStone's code "intercepted" her communications. APP 57-79. Defendants moved for summary judgment, arguing, among other things, that under *Commonwealth v. Proetto*, 771 A.2d 823 (Pa. Super. 2001), and *Commonwealth v. Cruttenden*, 619 Pa. 123 (Pa. 2012), a recipient of a direct communication could not intercept it.

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case-dispositive and of profound importance, warranting certification. *See United States v. Defreitas*, 29 F.4th 135, 141 (3d Cir. 2022). The resolution of legal uncertainty by the Pennsylvania high court serves judicial economy—in this case and any that follows. *See id*.

The district court granted summary judgment for Defendants. App 3-20. The Third Circuit had previously reached the same conclusion under federal law *and* California law, the latter of which, like WESCA, requires "two-party" consent. *See* Cal. Penal Code § 631; *see also In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 275 (3d Cir. 2016) (affirming dismissal of California claim because alleged interceptor was a direct recipient of the communications); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 140-41 (3d Cir. 2015) (same).

Popa appealed. Before argument, the panel requested supplemental briefing on whether a 2012 amendment to WESCA —addressing a narrow instance where law enforcement officers, without prior permission, induce suspects to communicate by impersonating an "actual person"—affected the precedential force of *Proetto* and *Cruttenden*. ECF 65.[5] In their supplemental brief, ECF 70, Defendants pointed out that in *Diego*, which postdated and specifically addressed the 2012 amendment, the

[5]The amendment only addresses instances where "the investigative or law enforcement officer *poses as an actual person* who is the intended recipient of the communication …." 18 Pa.C.S. § 5702 ("intercept") (emphasis added). It was a response to a Superior Court decision concluding there was *no* WESCA violation where law enforcement received a direct communication while pretending to be a fictitious person (as in *Proetto*) but that there *was* a violation if the officer pretended to be an actual person. After the 2012 amendment passed, the Pennsylvania Supreme Court overruled the Superior Court, concluding that each situation involved the direct receipt of communications and therefore fell outside the definition of "intercept." *Cruttenden*, 58 A.3d at 100.

Superior Court relied on *Cruttenden* and *Proetto* for the rule that "a party to the conversation…could not be said to have intercepted it simply because he received it." *Diego*, 119 A.3d at 380-81.

The panel vacated the summary judgment, stating "had we considered this case a decade ago, we might agree [with Defendants]," ECF 78 at 8, but finding that *Proetto* and *Cruttenden* "aren't the last word on the issue," citing the 2012 amendment which required a law enforcement officer to obtain supervisory approval before pretending to be an "actual person" in communications with a suspect. In the panel's view, this narrow amendment eliminated the "direct recipient" exception established by *Proetto* and *Cruttenden*. *Id*. at 8, 11-13. Ignoring *Diego*, it held that "[u]nder Pennsylvania law, then, there is no direct-party exception to liability under the WESCA (save for law enforcement under specific conditions involving deceptive behavior)." *Id*. at 13.

Thus, under the panel's holding, the direct receipt of a communication is always an "interception" absent law enforcement officers impersonating "actual persons." *Diego* rejects this interpretation, postdates the 2012 amendment, and is binding on Pennsylvania courts. *See Commonwealth v. Ingram*, 926 A.2d 470, 476 (Pa. Super. 2007).

REASONS FOR GRANTING THE PETITION

I. The Panel Should Grant Rehearing to Consider *Diego*, Especially in Light of the Sweeping Effects of Ignoring that Precedent.

Panel rehearing is warranted where a petitioner identifies a point of law or fact "that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a). Here, the panel did not address *Diego*, which answers the dispositive legal question and contradicts the panel's opinion. By ignoring *Diego*, the panel has created an unprecedented change in Pennsylvania law with nationwide consequences and a conflict between how Pennsylvania courts and federal courts interpret WESCA.

Federal courts must give effect to the decisions of the state's highest court, and if none applies, look to decisions of intermediate appellate courts, following them absent a compelling basis not to do so, because: "[W]here an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West*, 311 U.S. at 237; *see also Sheriden*, 609 F.3d at 253; *Crystallex*, 879 F.3d at 84; *Jewelcor*, 517 F.3d at 676 n.4.

"It is decidedly not the business of the federal courts to alter or augment state law to meet the felt necessities of the case; to suggest otherwise is to ignore fundamental principles of comity inherent in our federal system of government."

City of Philadelphia v. Lead Indus. Ass'n, Inc., 994 F.2d 112, 129 (3d Cir. 1993). This Court must "give 'due deference' to the intermediate state courts' rulings," and accord them "significant weight in the absence of an indication that the highest state court would rule otherwise." *Jewelcor Inc.*, 517 F.3d at 676 n.4; *see also Wayne Moving & Storage of New Jersey, Inc. v. School Dist. of Philadelphia*, 625 F.3d 148, 154 (3d Cir. 2010) ("We begin our analysis with intermediate state court judgments…"); *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979) (federal court "may not ignore a decision of an intermediate state court as to matters of state law" and may deviate from it only "if, after analysis it believes the state's highest court would hold otherwise").

The question here is whether the recipient of a direct communication—*e.g.*, a GET request sent directly from a browser—has "intercepted" that communication under WESCA. For years, Pennsylvania courts emphatically said "no." *See Proetto*, 771 A.2d at 831 ("[W]here a party receives information from a communication as a result of being a direct party to that communication, there is no interception."); *Cruttenden*, 58 A.3d at 100 ("[T]he fact which takes the case out of the purview of [WESCA] is that Appellee Lanier elected to communicate with the person answering the call and that the communication was direct. Therefore, there was no eavesdropping or listening in, and no interception took place.").

The panel acknowledged that all prior decisions interpreted "intercept" to exclude the receipt of a direct communication, noting that otherwise "anyone could 'intercept' communications, including people who 'acquire' a text message or chat sent directly to them." ECF 78 at 8. However, the panel found that the 2012 amendment abrogated the holdings of *Cruttenden* and *Proetto*, despite the absence of even a single supporting state court case and a legislative history to the contrary. *Id*. at 12 n.3.

Instead of looking to Pennsylvania court decisions for guidance, the panel instead invoked the *expresio unius* canon to conclude that the narrow law enforcement exception to the term "intercept" silently eliminated the *Proetto*/*Cruttenden* rule. The panel thus held that, "[u]nder Pennsylvania law, then, there [now] is no direct-party exception to liability under WESCA (save for law enforcement under specific conditions)." ECF 78 at 13.

But in 2015, *Diego* held otherwise. In *Diego*, the defendant exchanged text messages with an informant, Gary Still, in the presence of law enforcement. 119 A.3d at 372. The court acknowledged the 2012 law enforcement amendment but concluded that because "no law enforcement officer was a direct party to the communication … the Section 5702 exception to the definition of 'intercept' does not apply." *Id*. at 380. *However*, the court went on to hold that *no interception had occurred* because "Gary Still, and not the police, spoke directly with Appellee by

text message, and he did so voluntarily. Still was a party to the conversation, and therefore he could not be said to have intercepted it simply because he received it." *Id*. at 380–81. This is the *exact* rule of law the panel asserts the 2012 amendment abrogated. *Diego* post-dated the 2012 amendment, expressly acknowledged and analyzed the amendment, *and* nonetheless applied the *Proetto*/*Cruttenden* rule.

The Pennsylvania Supreme Court denied review in *Diego*, *see* 119 A.3d 370 (Pa. 2015). This Court has recognized that the denial of review by the state's highest court amplifies the need to treat such an intermediate appellate court as controlling. *See Budget Rent-A-Car Sys., Inc. v. Chappell*, 407 F.3d 166, 174 n.7 (3d Cir. 2005). Moreover, *Diego* specifically embraced the reasoning of *Proetto* and *Cruttenden*. *Diego*, 119 A.3d at 381; *see also Cruttenden*, 58 A.3d at 132–33. As recently as 2020, the Pennsylvania Supreme Court reaffirmed the principles of *Proetto* and *Cruttenden*, citing each with no indication their force had been diminished. *See Com. v. Byrd*, 235 A.3d 311, 317–20 (Pa. 2020) (also citing *Diego*).

The need to follow state court precedent is especially compelling where, as here, the panel's contrary rule reverberates nationally: any website generating GET requests to a third party must obtain the visitor's consent before doing so. The summary judgment record shows that GET requests and third-party analytics are used by tens of millions of websites daily. App 208-257, 315, 674. Website operators nationwide now face a new rule of unknown dimensions with potential application

to communications that took place *before* the panel abruptly (and retroactively) eliminated the *Proetto/Cruttenden* rule.

Nor is the impact limited to websites based in Pennsylvania. The panel went out of its way to hold that WESCA applies to any website accessed by a person browsing the web from within Pennsylvania, regardless of the location of the servers operating the website or the website owner's place of business.[6] ECF 78 at 17-18. Because most websites are viewable anywhere, the practical result is that any website, regardless of its nexus to Pennsylvania, must comply with WESCA or face potential criminal sanctions or civil liability. This would be a significant shift to the *national* legal landscape. It would also conflict with the clear holdings of Pennsylvania's courts, which oppose the extraterritorial application of WESCA to other states' citizens. *See Larrison v. Larrison*, 750 A.2d 895, 898 (Pa. Super. 2000).

The availability of a consent defense does little to mitigate the sudden retroactive expansion of WESCA to cover its two-year limitations period. *See* 42 Pa.C.S. § 5524(5). Like this Court's website (though unlike Harriet Carter's), most websites did not (and do not) expressly disclose direct communications to third

[6]In evaluating the extraterritorial reach of WESCA, the panel considered only two possible "intercept" points: the location of NaviStone's servers or the location where Popa browsed the website. ECF 78 at 17. This analysis fails to consider a third option: Harriet Carter's web server where the allegedly offending code was installed which initiated the GET requests to occur. This concerns a factual matter which must first be determined by the trial court in connection with any remand.

parties. Moreover, the panel opinion gives the impression that privacy policies are the sole means of obtaining consent, contrary to the *Diego* court's reaffirming the principle of *Proetto* and *Cruttenden* that the act of sending an electronic communication amounts to consent for it to be received in that form. 119 A.3d at 376-377 ("By the very act of sending a communication over the Internet, the party expressly consents to the recording of the message.") (quoting *Proetto*, 771 A.2d at 829.

Because *Diego* post-dates the 2012 amendment, addresses it, and answers the case-dispositive legal question differently, Defendants respectfully request that the panel vacate its decision and affirm the district court by applying *Diego*.[7]

II. *En Banc* Review Is Warranted.

If the panel does not vacate its decision, the *en banc* Court should.

First, the question whether any website accessible in Pennsylvania, as well as any third-party service providers with whom it contracts, may be liable for

[7]The panel declined to opine on Plaintiff's argument that NaviStone was not a direct recipient of the communications. Circuit precedent forecloses this argument, however. *In re Google*, 806 F.3d at 140-41, holds that third-party servers receiving GET requests from a website visitor's browser are direct recipients of those communications—even under a state wiretapping statute requiring two-party consent (in that case, California's). The Court re-affirmed this conclusion in *In re Nickelodeon*, 827 F.3d at 275. The undisputed record shows that the data NaviStone received came in the form of direct GET requests just like those at issue in *Google* and *Nickelodeon* and that Plaintiff admitted in connection summary judgment that these were direct communications to NaviStone. APP 643, 650, 670-671, 675–676; ECF 41 at 30-32.

"intercepting" communications from a user's web browser simply by receiving them is of exceptional national importance. Though the question appears to implicate only state law, the panel's opinion in effect created a novel, nationwide wiretapping rule.

Second, Supreme Court and Third Circuit precedent dictate that when sitting in diversity, panels must give "significant weight" to decisions of intermediate appellate courts and apply their rulings unless convinced that the state's highest court would rule otherwise. *Jewelcor Inc.*, 517 F.3d at 676 n.4. The panel did not, and so its decision was contrary to Supreme Court and Circuit precedent, meriting *en banc* review.

A. The question is one of exceptional importance.

Questions of exceptional importance warrant *en banc* review. Fed. R. App. P. 35(a)(2). As discussed above, *see* Section II, the panel's holding will reverberate nationally and could lead to significant civil liability and possibly even criminal charges to countless modern commercial, educational, and governmental websites throughout the United States. If such a shift is to occur, it should be on the result of careful consideration by the *en banc* Court.

B. The panel ignored *Diego*, violating Supreme Court and Circuit precedent.

The legal question addressed by the panel was whether, following the 2012 WESCA amendment, a recipient of an electronic communication "intercepted" a direct communication by receiving it. Defendants directed the panel to *Diego*, which

held that recipients could not be interceptors despite the amendment. It was incumbent on the panel either to provide a compelling reason why the Pennsylvania Supreme Court would not follow *Diego* or to apply *Diego* to affirm the judgment. The panel did not cite to *Diego*, distinguish *Diego*, or explain why the Pennsylvania Supreme Court would not follow *Diego*.

This Court's role in a diversity case like this one "is to apply state law." *Crystallex*, 879 F.3d at 84 (quoting *Sheriden*, 609 F.3d at 254). "[I]t is the duty of [federal courts] in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law.'" *West*, 311 U.S. at 237 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 78 (1938)). "[I]t is not the role of a federal court to expand state law in ways not foreshadowed by state precedent." *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002). The panel's *tabula rasa* approach to interpreting the 2012 amendment based solely on a pure application of a canon of construction reflects the practice of "general law" prohibited by *West*. *See* 311 U.S. at 237 (citing *Erie*, 304 U.S. 78).[8]

[8]This reasoning also violates the axiom that legislatures do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). It makes little sense that the Pennsylvania legislature would massively expand wiretapping liability via a narrow amendment aimed at reversing one aspect of a single court decision regarding a "sting operation" without making it clear that it was, in the process, eliminating the direct recipient rule. *See* ECF 70 at 2-6. It makes even less

"Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West*, 311 U.S. at 237; *see also Wayne Moving*, 625 F.3d at 154; *Jewelcor Inc.*, 517 F.3d at 676 n.4; *Blake*, 612 F.2d at 723. This standard "places a significant constraint on [the Court]" and if the Court is to disregard the state intermediate appellate court, it must be "convinced by other persuasive data" that the state's highest court would likewise disregard it. *Jewelcor, Inc.*, 517 F.3d at 676 n.4. When a state's highest court denies review, as it did in *Diego*, "the policy reasons for following an intermediate court decision (absent compelling evidence to the contrary) are strengthened." *Budget Rent-A-Car Sys., Inc.*, 407 F.3d at 174 n.7.

To be clear, Defendants recognize that, ordinarily, errors in the interpretation of state law do not merit *en banc* review. *En banc* review *is* warranted in this unusual circumstance, however, because the panel's erroneous interpretation of WESCA and unprecedented expansion of its extraterritorial reach will affect entities well beyond the geographic confines of the Commonwealth, and because the panel's mode of analysis violated the directive that on questions of state law, state court decisions

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sense for a federal court to adopt this view in the face of a state court case, *Diego*, which held the opposite.

have primacy. Treating a settled question of state law as unanswered does violence to this principle. *En banc* review is warranted to secure decisional uniformity between the Pennsylvania courts and this Court.

CONCLUSION

Defendants respectfully request that the panel or *en banc* court vacate the panel opinion and affirm the judgment below.

Respectfully submitted,

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Dated: August 30, 2022

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