Nos. 99-1687 and 99-1728

In the Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR., PETITIONERS

v.

FREDERICK W. VOPPER, AKA FRED WILLIAMS, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

FREDERICK W. VOPPER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the imposition of civil liability under 18 U.S.C. 2511(1)(c) and (d) for using or disclosing the contents of illegally intercepted communications, where the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., were plaintiffs in the district court and appellees in the court of appeals. Petitioner United States of America appeared as an intervenor of right in the court of appeals pursuant to 28 U.S.C. 2403(a). Respondents Frederick W. Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; Lackazerne, Inc., d/b/a WGBI Radio; and Jack Yocum were defendants in the district court and appellants in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a[1]) is reported at 200 F.3d 109. The opinions and orders of the district court (Pet. App. 59a-68a, 69a, 70a-74a, 75a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1999. The petitions for rehearing were denied on February 25, 2000. The petitions for writs of certiorari

[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari in *United States* v. *Vopper*, No. 99-1728.

were granted on June 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and relevant provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.*, are set forth in an appendix, *infra*, at 1a-10a.

STATEMENT

This case involves a constitutional challenge to provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* (Title III), the principal federal wiretapping statute. Title III generally prohibits the interception of wire, oral, and electronic communications. The provisions at issue in this case—18 U.S.C. 2511(1)(c) and (d)—bar use and disclosure of the contents of illegally intercepted communications by any person who knows or has reason to know that the communications were intercepted in violation of Title III.

1. Congress enacted Title III in 1968 in response to the widespread perception that technology was rapidly eroding the security of otherwise private means of communication. As the Senate Report on Title III explained, "tremendous scientific and technological developments" had made possible "widespread use and abuse of electronic surveillance"; as a result, the privacy of communications was being "seriously jeopardized." See S. Rep. No. 1097, 90th Cong., 2d Sess. 67 (1968) (1968 Senate Report). The 1968 Senate Report continued:

> Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating

> to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Ibid.

The importance of offering protection against such intrusions was underscored in the 1967 report of the President's Commission on Law Enforcement and Administration of Justice, which was influential in the development of wiretap legislation. See *United States* v. *Giordano*, 416 U.S. 505, 517-518 n.7 (1974); *United States* v. *Jones*, 542 F.2d 661, 667 n.10 (6th Cir. 1976). See also 1968 Senate Report 67. The Commission observed:

> In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas. When dissent from the popular view is discouraged, intellectual controversy is smothered, the process for testing new concepts and ideas is hindered and desirable change is slowed.

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202 (1967). "[E]lectronic surveillance," the report noted, was being used by "numerous private persons" "to carry on industrial espionage," "to assist in preparing for civil litigation," to conduct "personnel investigations," and for other purposes. *Ibid.*

Electronic surveillance has also been understood to threaten the development of new and vital channels of communication. While "[a] letter sent by first class mail is afforded a high level of protection," S. Rep. No. 541, 99th

Cong., 2d Sess. 5 (1986), and "from the beginning of our history, first-class mail has had the reputation for preserving privacy, while at the same time promoting commerce," *Electronic Communications Privacy Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 4 (1985 & 1986) (*ECPA Hearings*), that same guarantee of privacy was absent with respect to the mails' "new technological equivalents." *Id.* at 2 (statement of Sen. Kastenmeier). See also *id.* at 4 ("We cannot let any American feel less confident in putting information into an electronic mail network than he or she would in putting it into an envelope and dropping it off at the post office.").

To address those concerns, Title III provides a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard* v. *United States*, 408 U.S. 41, 46 (1972). See also Pub. L. No. 90-351, Tit. III, § 801, 82 Stat. 211 (Title III designed "to protect effectively the privacy of oral and wire communications"). Title III bars the unauthorized acquisition of wire, oral, and electronic communications through the use of electronic, mechanical, and other devices. Specifically, Section 2511(1)(a) provides that, "[e]xcept as otherwise specifically provided" in Title III, it is unlawful for "any person" to "intentionally intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." See also 18 U.S.C. 2510(4) (defining the term "intercept" to mean acquisition of a "communication through the use of any electronic, mechanical, or other device.").[2] Sections 2516 and 2518, in turn, set forth

[2] As enacted in 1968, Title III applied only to wire and oral communications. See Pub. L. No. 90-351, Tit. III, § 802, 82 Stat. 212. Consequently, for some time it was unsettled whether Title III's definition of "wire communication" reached the radio portion of cellular telephone

the procedures that must be employed, and the substantive criteria that must be met, before a wiretap or other form of electronic surveillance may be authorized under Title III. 18 U.S.C. 2516, 2518 (1994 & Supp. IV 1998). As this Court has explained, Section 2511(1)(a) is designed "effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral[,] [electronic,] and wire communications, except those specifically provided for in the Act." *Giordano*, 416 U.S. at 514.

In framing Title III, Congress concluded that merely prohibiting interceptions would not be sufficient. It observed that "[o]nly by striking at all aspects of the problem" could "privacy be adequately protected." 1968 Senate Report 69. Accordingly, Congress reinforced the prohibition on unauthorized interception with several related restrictions. For example, Congress banned the possession, shipment, sale, manufacture, and advertisement of listening devices where the device's design "renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications." 18 U.S.C. 2512. And it prohibited the use of the contents of illegally intercepted communications as evidence in any proceeding, including criminal prosecutions. 18 U.S.C. 2515.

In 18 U.S.C. 2511(1)(c) and (d), Congress also prohibited use and disclosure of the contents of illegally intercepted communications. Section 2511(1)(c) makes it unlawful for any person to "intentionally disclose[], or endeavor[] to

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communications. See, *e.g.*, *Edwards* v. *State Farm Ins. Co.*, 833 F.2d 535, 538 (5th Cir. 1987). In 1986, however, Congress amended Title III to clarify that Title III extends to communications on cellular and other wireless telephone systems, see 18 U.S.C. 2510(1). At the same time, Congress extended Title III to cover the electronic transmission of non-voice data such as electronic mail and other Internet communications. See 18 U.S.C. 2510(12) (1994 & Supp. IV 1998). See generally Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848; S. Rep. No. 541, *supra*, at 1-3, 7-8, 11.

disclose, to any other person the contents of any wire, oral, or electronic communication" if the person "know[s] or ha[s] reason to know" that the information "was obtained through the interception of a wire, oral, or electronic communication in violation of" Title III. Section 2511(1)(d) makes it unlawful for any person with the same knowledge to "intentionally use[], or endeavor[] to use, the contents of any wire, oral, or electronic communication." Taken together, those two provisions proscribe all unauthorized uses of illegally intercepted communications by anyone with knowledge or reason to know of their unlawful origin. See also 50 U.S.C. 1809 (similar prohibition); 47 U.S.C. 605 (1994 & Supp. IV 1998) (barring divulgence of private wire and radio communications to individuals other than the addressee).

Violations of Title III may be prosecuted as criminal offenses or result in the imposition of civil fines. 18 U.S.C. 2511(4) and (5). Title III also provides a private cause of action for any person whose communication is intercepted, disclosed, or used in violation of the statute. 18 U.S.C. 2520(a). In a civil action under Title III, a court may award "such * * * relief as may be appropriate," including declaratory and injunctive relief, compensatory damages or prescribed statutory damages, and punitive damages "in appropriate cases." 18 U.S.C. 2520(b) and (c).

2. This case arises out of the illegal interception of a telephone conversation between Gloria Bartnicki, the chief negotiator for a Pennsylvania teachers union, and Anthony Kane, the union's president. The union was engaged in contract negotiations with a local school board, and Bartnicki and Kane held a confidential telephone conversation in which they discussed the status of the negotiations; Bartnicki used a cellular telephone. Pet. App. 3a. Both the confidential nature of the conversation, and the fact that Bartnicki was using a car phone, were obvious from the conversation itself.

See J.A. 43 ("[T]his is very confidential."); J.A. 42 (indicating that Bartnicki was in her car).

An unknown person intercepted the conversation, recorded it, and anonymously delivered a copy of the recording to respondent Jack Yocum. Yocum was president of a local taxpayers' association, formed for the purpose of opposing the union's bargaining demands. Pet. App. 3a. Yocum listened to the recording, recognized Bartnicki's and Kane's voices, and heard provocative remarks about the school board. *Ibid.*[3]

Although Yocum has stated that the contents of the recording caused him to become concerned about the safety of school board members, he did not turn the tape over to the police. J.A. 54, 118. Instead, he gave a copy to respondent Frederick Vopper, the host of a local radio talk show, so that Vopper would "make it public." J.A. 118; see Pet. App. 3a-4a. Yocum also played the tape for several school board members. J.A. 116-117. Respondent Vopper retained the tape for several months, J.A. 76; Pet. App. 55a-56a n.6 (Pollak, J., dissenting), but eventually played it on his program repeatedly, Pet. App. 4a; J.A. 20, 39, 64. The program was broadcast by two local radio stations, respondent station WILK and respondent station WGBI. Pet. App. 4a.

Bartnicki and Kane filed this action in the United States District Court for the Middle District of Pennsylvania against Yocum and Vopper, as well as the respondent radio stations, under Title III, 18 U.S.C. 2520, and a parallel provision of Pennsylvania law, 18 Pa. Cons. Stat. Ann. § 5701 *et seq.* (West 1983). They asserted that respondents had disclosed and used the taped conversation, knowing or having reason to know that it had been intercepted unlaw-

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[3] During the phone call, Kane stated that, if the school board did not offer more than a three percent raise, the union would have to "go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys." J.A. 46.

fully, in violation of 18 U.S.C. 2511(1)(c) and (d), and in violation of the corresponding provisions of Pennsylvania law, 18 Pa. Cons. Stat. Ann. § 5725 (West 1983 & Supp. 1999). See J.A. 12, 15, 17. Bartnicki and Kane seek statutory and punitive damages.[4]

Respondents sought summary judgment, arguing that application of Title III and the Pennsylvania statute to their actions would violate the First Amendment. They asserted that, where a private conversation involving matters of public significance is illegally intercepted and recorded through an electronic eavesdropping device, third parties have a constitutional right to disclose the contents of the conversation so long as they were not responsible for the initial interception. Pet. App. 65a; see also *id.* at 74a. The district court denied respondents' motion, holding, *inter alia*, that the application of Title III to respondents does not violate the First Amendment. Pet. App. 65a-67a, 74a. The district court then certified the First Amendment issue for interlocutory appeal under 28 U.S.C. 1292(b), Pet. App. 75a-76a, and respondents filed a petition for interlocutory review, *id.* at 5a.

3. After the court of appeals heard oral argument, it notified the Attorney General that the constitutionality of 18 U.S.C. 2511(1)(c) and (d) was at issue; the court invited the United States to present its views. Pet. App. 77a-79a; see 28 U.S.C. 2403(a).[5] The United States intervened and filed a brief to defend those provisions. Pet. App. 5a.

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[4] Although Bartnicki and Kane's complaint prays for compensatory damages, J.A. 18, the parties have stipulated to dismissal of that request, J.A. 130. Accordingly, this case does not present any question concerning the propriety or proper measure of compensatory damages.

[5] Under 28 U.S.C. 2403(a), when the constitutionality of an Act of Congress is drawn into question in a federal suit to which the United States is not a party, federal courts are required to notify the Attorney

A divided panel of the court of appeals reversed. Pet. App. 1a-58a. The court framed the issue as "whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants * * * played no direct or indirect role in the interception." *Id.* at 2a. The court of appeals concluded that 18 U.S.C. 2511(1)(c) and (d), and the corresponding provisions of Pennsylvania law, are "content neutral" and therefore subject to intermediate rather than strict constitutional scrutiny. Pet. App. 17a-28a. But it held that Title III does not meet that standard of judicial review when applied to "the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged th[e] interception." *Id.* at 42a.

The court of appeals rejected the government's contention that Title III's bar on the use and dissemination of illegally intercepted conversations is needed to diminish the demand for such materials and thus to decrease the incentive for illegal interceptions. Pet. App. 33a-36a. "The connection between prohibiting third parties from using or disclosing" such communications and "preventing the initial interception," the court of appeals stated, is too "indirect." *Id.* at 33a. The government's interest in protecting privacy and ensuring public confidence in the integrity of communications, the court of appeals found, "can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants." *Id.* at 35a.

The court of appeals also rejected the government's contention that Title III's use and disclosure prohibition serves the legitimate interest of protecting individuals from the further injury that occurs when illegally intercepted commu-

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General and to permit the United States to intervene with "all the rights of a party" to defend the constitutionality of the statute.

nications are disclosed to additional parties or otherwise used. See Pet. App. 26a-27a. The court stated that protecting "intimate" facts from public disclosure is not a cognizable interest for purposes of intermediate scrutiny because, in the court's view, it turns on the communicative impact of the information being disclosed. *Id.* at 27a.

Finally, the court of appeals expressed concern that Section 2511(1)(c) and (d)'s prohibition might chill free expression. Pet. App. 36a. The threat of liability, the court stated, might deter the media from publishing material that was not in fact obtained in violation of Title III when the information's origin is unclear. *Ibid.*

Judge Pollak (Senior D.J., sitting by designation) dissented. Pet. App. 42a-58a. Judge Pollak agreed that intermediate scrutiny is appropriate, but he "part[ed] company" with the majority on the proper application of that standard to Title III. *Id.* at 47a. He explained that, without the prohibition on disclosure, there would be an incentive to conduct illegal interceptions and the damage from such violations would be "compounded." *Id.* at 50a-51a. Judge Pollak concluded that the "First Amendment values on which [respondents] take their stand are countered by privacy values sought to be advanced by Congress and the Pennsylvania General Assembly that are of comparable—indeed kindred—dimension." *Id.* at 58a.

The United States and the plaintiffs filed petitions for rehearing en banc. The court denied rehearing en banc by a 6-5 vote. Pet. App. 82a-83a.

SUMMARY OF ARGUMENT

Title III renders it unlawful for any person to use or disclose the contents of a wire, oral, or electronic communication when the person knows or has reason to know that the communication was intercepted in violation of federal wiretapping law. The court of appeals held that this restriction on speech violates the First Amendment as applied to

the facts of this case, which involves the illegal interception and tape-recording of a private, cellular telephone call between union officials followed by the public broadcast of the tape on radio stations. The court of appeals' holding is incorrect. It rests on a misapprehension about the substantial interests that Title III serves in protecting privacy, fostering new technologies for communications, and safeguarding uninhibited private communications. And it overstates the incidental effect on speech.

I. Title III is subject to intermediate scrutiny under the First Amendment. Where, as here, a generally applicable law burdens speech not for the purpose of excising ideas or information from public or private debate, but instead to promote legitimate regulatory aims unrelated to the communicative impact of the regulated activity, the Court applies at most an intermediate level of scrutiny. Under that approach, a law is valid if it furthers an important government interest that is unrelated to the suppression of free expression, and if the incidental restriction on speech is no greater than necessary to promote that interest. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994); *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

The restrictions in Title III are properly evaluated under intermediate scrutiny, as the court of appeals held in this case. The critical inquiry is whether the law is designed to "stifle[] speech on account of its message," or instead fulfills regulatory goals independent of the message of the speech. *Turner*, 512 U.S. at 641. Here, three central attributes of Title III show that its purpose is not to trammel speech because of disagreement with the message it may convey.

First, Title III is a content-neutral provision. The statute, on its face, draws no distinctions as to subject matter or viewpoint; it instead applies to "the contents of any wire, oral, or electronic communication." 18 U.S.C. 2511(1)(c) and (d). The impartiality of those prohibitions reveals a legis-

lative design to protect all private communications against unlawful intrusions, not to suppress any particular type of speech. As such, the restrictions are "*justified* without reference to the content of the regulated speech," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), and turn only on the illegal source of the communications at issue. See *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 30-34 (1984) (applying intermediate scrutiny to a law that restricted speech based on the source, rather than the subject matter, of the information at issue).

Second, Title III is generally applicable to all uses of illegally intercepted communications, including non-expressive uses, where the individual has the requisite degree of knowledge of the illegal source. Title III prohibits uses of illegally intercepted communications in competing with a business rival or in trading in securities; it bars use of such communications in an extortionate scheme; and it has been construed to bar uses of illegally intercepted communications in criminal and regulatory investigations. The combined prohibition against all "uses" in Section 2511(1)(d) and all "disclos[ures]" in Section 2511(1)(c) reinforces the conclusion that Congress's intention was not to suppress speech, but to avoid the harms to privacy, free expression, and technological innovation that flow from exploitation of illegal surveillance of communications. The general applicability of a law is a feature that makes strict scrutiny inappropriate. See *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669-672 (1991); see also *Hill* v. *Colorado*, 120 S. Ct. 2480, 2497 (2000); *Turner*, 512 U.S. at 661.

Third, Title III itself furthers the constitutional objective of encouraging free expression. The willingness of individuals to speak freely in private is seriously jeopardized by a constant fear of surveillance and public exposure or misuse of such conversations. Much valuable interchange—personal, philosophical, political, or business—takes place only

because of the spontaneity and candor that can occur when a speaker can select and limit the audience to which his comments are addressed. That is itself a value protected by the First Amendment. See *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 559 (1985). Because Title III furthers that purpose, this is a case in which "constitutionally protected interests lie on both sides of the legal equation," *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911 (2000) (concurring opinion), and intermediate scrutiny is appropriate.

There is no basis for applying to Title III the strict scrutiny standard of *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), and the cases on which *Florida Star* relies, including *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97 (1979). Those cases apply only to the publication of information that was "lawfully obtain[ed]." *Florida Star*, 491 U.S. at 533. The Court specifically reserved cases in which "information has been acquired *unlawfully* by a newspaper or by a source," *id.* at 535 n.8, and it made clear that when "sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired," *id.* at 534. Title III fits within that latter mold. In addition, this Court's cases applying strict scrutiny to restraints on the press dealt with content-based laws forbidding publication of particular facts; laws that focused on speech itself, rather than all uses of information based on its illegal source; and laws often directed at information about governmental processes or released from a governmental source. Title III differs from such laws in all of those respects.

II. Evaluated under the intermediate scrutiny standard, Title III is constitutional. As an initial matter, it furthers two important governmental interests that are unrelated to suppression of free speech. First, it protects against the

aggravated injury to privacy that occurs when illegally intercepted communications are then exploited or publicly disseminated. As the Court has recognized, the later use "compounds the statutorily proscribed invasion of * * * privacy," *Gelbard* v. *United States*, 408 U.S. 41, 52 (1972), and thereby multiplies the chilling effect on private communication inevitably produced by illegal electronic surveillance and interception. Relatedly, Congress wished to foster development of new technologies, such as cellular phones, e-mail, and other computer communications, by assuring the public that those channels will be as secure as the mails. Second, the ban on use and disclosure reinforces the underlying ban on illegal interception. Without barring outlets for taking advantage of illegally intercepted communications, the incentive to engage in them would be significant. Detection of illegal electronic interception is difficult and often unsuccessful. Only by removing the "market" for illegally intercepted communications could Congress effectively deter the underlying misconduct. Cf. *New York* v. *Ferber*, 458 U.S. 747, 759-760 (1982).

Those interests would be substantially less effectively served if Title III's prohibitions were limited to particular communications. Such a limited ban would do nothing to prevent the increased damage to privacy interests that disclosure of any private communication inflicts. It would therefore less effectively remove the chill that electronic surveillance places on communication, particularly with new technologies. For the same reasons, a ban on illegal interception alone would not be sufficient. Moreover, because of the difficulty in detecting illegal surveillance, such a law would enable persons who carry out illegal interceptions to launder information through third parties and thereby reap benefits from the violation. The incentives to engage in illegal interceptions would thus remain high.

There is no basis for concern that the prohibitions of Title III will chill protected speech even when the source of the information is not an illegal interception. Title III's scienter standard requires that a person "know[] or hav[e] reason to know" that the information was obtained through an illegal interception before the prohibitions on use and disclosure apply. 18 U.S.C. 2511(1)(c) and (d). That standard is satisfied only when an individual actually knows of the illegality or is aware of the facts that make the illegal source apparent. It imposes no duty of inquiry on a person to ferret out the provenance of the information. In addition, in other First Amendment contexts, the Court has crafted procedural devices, such as heightened scienter standards, heightened burdens of proof, and de novo appellate review, to avoid unduly chilling protected speech. To the extent that such concerns exist here, those legal devices would be equally capable of dispelling deleterious effects. That result would better balance the privacy and expression interests in this case than would invalidation of Title III's comprehensive legal protections against the dissemination of information acquired through illegal interceptions.

ARGUMENT

TITLE III'S RESTRICTION ON THE USE AND DISCLOSURE OF ILLEGALLY INTERCEPTED COMMUNICATIONS IS CONSISTENT WITH THE FIRST AMENDMENT

At stake in this case are interests of central importance: the interest in privacy and security of wire, oral, and electronic communications, and the interest in free expression protected by the First Amendment. Reconciling those interests requires close examination of the values at issue and the effects of the regulation; no mechanical formulation can substitute for such an inquiry. As this Court recognized in *Florida Star* v. *B.J.F.*, 491 U.S. 524, 533 (1989),

"the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the * * * case."

Title III "protect[s] the privacy of individual thought and expression," *United States* v. *United States District Court*, 407 U.S. 297, 302 (1972), by safeguarding the ability of individuals to communicate without fear of interception, use, and disclosure of their private communications. In affording such protection, Title III builds on the traditional respect in our society for the privacy of personal communications. The statute also reflects the basic principle that those who knowingly come into possession of stolen goods are not free to exploit them. While attaining Title III's purposes can result in the restriction of speech in particular cases, this Court has "pointedly refused" to hold that the publication of truthful information may never "be subjected to civil or criminal liability for invading an area of privacy defined by the State." *Florida Star*, 491 U.S. at 533 (internal quotation marks omitted). Here, liability is imposed, not because of the government's disagreement with the message, or because the government seeks to suppress public knowledge of particular subject matters, but because of the illegality of the source of the information, *i.e.*, an illegally intercepted private communication. Indeed, enforcement of Title III is necessary to assure citizens that they may communicate privately without fear of unwanted and illegal dissemination of their speech. Fostering such speech is itself a First Amendment value.

I. The Application of Title III To Disclosure Of Illegally Intercepted Communications By Persons Other Than The Wiretapper Is Subject To Intermediate Scrutiny

"[B]ecause not every interference with speech triggers the same degree of scrutiny under the First Amendment,"

this Court "must decide at the outset the [appropriate] level of scrutiny." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994). Title III's use and disclosure prohibition is a content-neutral provision of general applicability; it neither singles out a particular category of speech by subject nor singles out speech itself. Accordingly, it is properly analyzed under this Court's intermediate scrutiny standard.[6]

A. Intermediate Scrutiny Is Appropriate Where The Statute Neither Regulates Speech Because Of Its Message Nor Singles Out Speech For Differential Treatment

In order to prevent the government from suppressing unpopular ideas or disfavored views, this Court has consistently subjected to strict scrutiny laws that attempt to "stifle[] speech on account of its message." See, *e.g.*, *United States* v. *Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1880 (2000); *Reno* v. *ACLU*, 521 U.S. 844 (1997); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). Under that rigorous test, content-based statutes are generally unconstitutional unless they are "narrowly tailored to promote a compelling Government interest." *Playboy*, 120 S. Ct. at 1886.

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[6] The three courts of appeals that have considered the issue have all come to that conclusion. See Pet. App. 28a (intermediate scrutiny appropriate because Title III is "content-neutral" and "does not rely on the communicative impact of speech"); *Boehner* v. *McDermott*, 191 F.3d 463, 467 (D.C. Cir. 1999) (intermediate scrutiny appropriate because Title III contains "generally applicable, content-neutral prohibitions on conduct that create incidental burdens on speech"), petition for cert. pending, No. 99-1709; *Peavy* v. *WFAA-TV*, No. 99-10272, 2000 WL 1051909 (5th Cir. July 31, 2000) (intermediate scrutiny applicable to Title III where defendants had some participation in the illegal interceptions, because the statute is content neutral and imposes an incidental burden on speech). And, in contrast to the court below, both the D.C. Circuit and the Fifth Circuit went on to find Title III's restrictions constitutional as applied to the facts of those cases.

In contrast, laws that regulate speech or other expressive activities for purposes and in a manner unrelated to the message or its communicative impact are subject to intermediate scrutiny. That is because, "in most cases," such laws "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner*, 512 U.S. at 642. Under intermediate scrutiny, a statute is consistent with the First Amendment "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 662 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)).

The intermediate scrutiny standard originated in *O'Brien*, where the Court upheld a law prohibiting the destruction of draft cards against a First Amendment challenge. O'Brien had argued that the burning of his draft card was a form of protected political expression, a protest against the Vietnam War. See 391 U.S. at 376-386. Applying intermediate scrutiny, the Court rejected his First Amendment claim, holding that the statute furthered important governmental interests unrelated to the suppression of expression and was not unnecessarily broad. *Id.* at 376-382. The Court assumed that "the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment," *id.* at 376, but held that intermediate scrutiny was nevertheless appropriate because "the law punished him for the 'noncommunicative impact of his conduct, and for nothing else.'" *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1392 (2000) (plurality opinion) (quoting *O'Brien*, 391 U.S. at 382).

O'Brien involved a law aimed at conduct that, in particular cases, had a incidental impact on "symbolic speech" or "expressive conduct," *i.e.*, conduct that ordinarily is undertaken for non-expressive purposes, but that may be per-

formed in particular cases to convey a message. See, *e.g.*, *City of Erie*, 120 S. Ct. at 1391, 1395 (plurality opinion); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). Since deciding *O'Brien*, the Court has extended that intermediate scrutiny standard to particular First Amendment settings that involve the regulation of "pure speech." See, *e.g.*, *Procunier* v. *Martinez*, 416 U.S. 396, 410-414 (1974). Most notably, *O'Brien* provides the standards that govern the constitutionality of "content-neutral" speech regulations. See, *e.g.*, *Turner*, 512 U.S. at 641-652, 662; *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 536-537 (1987). And the *O'Brien* factors correspond to the Court's test for laws that regulate "the time, place, or manner of protected speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); see *Hill* v. *Colorado*, 120 S. Ct. 2480, 2491 (2000).

What unites expressive conduct cases like *O'Brien*, "content-neutral speech regulation" cases like *Turner*, and "time, place, and manner" cases like *Ward*, is that, in each instance, the law is not hostile to a particular message and does not seek to curtail the communicative impact of the expression. Instead, the justification for the law lies in the "noncommunicative impact" of the regulated activity. *O'Brien*, 391 U.S. at 382. To the extent that such laws burden the exchange of ideas and information, the burden is incidental to the government's pursuit of "a legitimate regulatory goal" unrelated to the suppression of speech or the content of the speaker's message. *Turner*, 512 U.S. at 641. Such laws, as this Court explained in *Turner*, "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny." *Id.* at 661.

When deciding whether a law that regulates expression is subject to strict or intermediate scrutiny, the relevant

inquiry is whether the law is designed to "stifle[] speech on account of its message," or, alternatively, reflects the legislature's pursuit of legitimate governmental goals that are unrelated to the message being conveyed. *Turner*, 512 U.S. at 641; *City of Erie*, 120 S. Ct. at 1391 (plurality opinion) ("If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien*," but "[i]f the government interest is related to the content of the expression, * * * then the regulation falls outside the scope of the *O'Brien* test."). The fact that a law is not aimed at the communicative impact of expression does not necessarily mean that the law presents no First Amendment concerns. But laws that are justified without reference to the message, content, or viewpoint of speech "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue," *Turner*, 512 U.S. at 642, and are appropriately held to the less-demanding standard of intermediate scrutiny.

B. Title III Is Subject To Intermediate Scrutiny Because It Is Content Neutral And Has General Applicability

Title III is not directed at suppressing the dissemination of disfavored ideas or information. Indeed, Title III does not single out speech from other activities as a subject for regulation. Instead, it prohibits all uses of illegally intercepted communications, whether or not the use is communicative in nature. And where Title III prohibits disclosure, it does so in a content-neutral fashion. Title III thereby furthers legitimate and substantial interests in ensuring the integrity of vital means of private communication and in promoting free expression through those channels. As such, it is "justified without reference to the content of the regulated speech," *Ward*, 491 U.S. at 791 (emphasis omitted), and is subject to intermediate scrutiny.

1. Title III is inherently content neutral. "[T]he principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner*, 512 U.S. at 642 (internal quotation marks omitted). The "purpose, or justification" of the law is thus the touchstone in ascertaining content neutrality. *Ibid.* "Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (emphasis in original; internal quotation marks omitted).[7]

Neither Title III's text nor its history suggests a purpose of singling out a particular message, speaker, subject, or viewpoint for disfavored treatment. Contrast *Playboy*, 120 S. Ct. at 1885 (statute that singled out particular content and particular speakers). To the contrary, Title III applies to illegal interception of "any wire, oral, or electronic communication." The statute applies without regard to the content, subject matter, or participants in the communication. Title III thus does not reflect an effort by Congress to "suppress, disadvantage, or impose differential burdens upon speech because of its content," *Turner*, 512 U.S. at 642. Instead, Title III's restrictions reflect an impartial legislative judgment that individuals should be able to engage in

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[7] Because the ultimate issue is whether the justification for a regulation turns on the content of the regulated expression, "even a regulation neutral on its face may be content based," and hence subject to strict scrutiny, "if its manifest purpose is to regulate speech because of the message it conveys." *Turner*, 512 U.S. at 645. Conversely, a law that regulates speech based on its subject matter may nevertheless be deemed content neutral, and therefore subject to intermediate scrutiny, if (for example) it is justified by non-communicative "secondary effects" associated with the speech rather than by the communicative effect of the speech. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-55 (1986); see also *Boos* v. *Barry*, 485 U.S. 312, 320-321 (1988) (plurality opinion).

telephone conversations and other forms of confidential communication without fear that their conversations will be used by third parties without consent. The restrictions are thus "*justified* without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791.

Title III thus does not seek to insulate particular facts or subjects from public scrutiny. Contrast *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 489 (1975) (tort of publication of private facts). Nor does liability under Title III depend on the communicative impact of the use to which the intercepted communication is put. See *ibid.* Instead, liability depends solely on the *means* by which a communication is obtained—*i.e.*, whether or not the communication was obtained through illegal electronic surveillance. As the D.C. Circuit has explained, Title III "identifies matters" that the statute covers "by reference not to their content, but instead to the process by which they are collected." *Lam Lek Chong* v. *United States Drug Enforcement Admin.*, 929 F.2d 729, 733 (D.C. Cir. 1991). Consequently, an individual who obtains the *identical* content from a lawful source is free under Title III to disseminate or make any use of it he chooses.

This Court has previously applied intermediate scrutiny to a restriction on speech that was based on the source of the information, while leaving unrestricted the dissemination of the same facts if acquired by an independent lawful means. In *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 30-34 (1984), a media defendant was placed under a protective order in a civil action that prohibited it from disclosing discovery information obtained from the plaintiffs. The defendant claimed that the protective order was subject to strict scrutiny, but this Court disagreed. *Id.* at 32. The Court explained that "such a protective order prevents a party from disseminating only that information obtained through use of the discovery process" while leaving the party free to "disseminate the identical information covered by the protective

order as long as the information is gained through means independent of the court's processes." *Id.* at 34. Thus, the protective order "implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Ibid.*

Because liability under Section 2511(1)(c) and (d) is tied to a particular means of acquisition (illegal electronic surveillance), rather than to a particular category of information, and because liability is not contingent on the communicative impact of disclosure, Title III's object is not to exclude a category of information from the public domain or otherwise inhibit free debate. It may be that Title III's restrictions will occasionally prevent the news media or other persons from providing specific information to the public in particular instances. But so too does Title III's underlying prohibition on wiretapping. See *Branzburg* v. *Hayes*, 408 U.S. 665, 691 (1972) ("Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune [under the First Amendment] from conviction for such conduct, whatever the impact on the flow of news."). The fact that some information may not be lawfully revealed under Title III because it was acquired in an illegal interception does not make the statute subject to strict scrutiny for regulations "that stifle[] speech on account of its message," *Turner*, 512 U.S. at 641; rather, that incidental effect on speech must be judged under the intermediate scrutiny of the *O'Brien* test.

2. Title III should also be subjected to intermediate scrutiny because it imposes a general prohibition on the use of illegally intercepted communications, and does not apply only to communicative activities. The statutory prohibitions on disclosure and use, 18 U.S.C. 2511(1)(c) and (d), together reflect a single congressional aim to bar *all* exploitation of illegally intercepted communications when the recipient

knows or has reason to know of the illegal source. Consequently, it is unlawful for a company to use an illegally intercepted communication about a business rival in order to create a competing product; it is unlawful for an investor to use illegally intercepted communications in trading in securities; it is unlawful for a union to use an illegally intercepted communication about management (or vice versa) to prepare strategy for contract negotiations; it is unlawful for a supervisor to use information in an illegally recorded conversation to discipline a subordinate; and it is unlawful for a blackmailer to use an illegally intercepted communication for purposes of extortion. See, *e.g.*, 1968 Senate Report 67 (corporate and labor-management uses); *Fultz* v. *Gilliam*, 942 F.2d 396, 400 n.4 (6th Cir. 1991) (extortion); *Dorris* v. *Absher*, 959 F. Supp. 813, 815-817 (M.D. Tenn. 1997) (workplace discipline), aff'd in part, rev'd in part, 179 F.3d 420 (6th Cir. 1999). The statute has also been held to bar the use of illegally intercepted communications for important and socially valuable purposes. See *In re Grand Jury*, 111 F.3d 1066, 1077-1079 (3d Cir. 1997) (Sections 2511 and 2515 prohibit disclosure of illegally recorded conversation to grand jury, even where such disclosure would be in compliance with subpoena); *Berry* v. *Funk*, 146 F.3d 1003, 1011-1013 (D.C. Cir. 1998) (Section 2511 prohibits knowing investigatory use of unlawfully intercepted communications by Inspector General); *Chandler* v. *United States Army*, 125 F.3d 1296, 1298-1302 (9th Cir. 1997) (Section 2511 prohibits United States Army from using taped conversation to investigate charge of adultery).

It does not undermine the generality of Title III's prohibition that Congress addressed disclosure and other uses of illegally intercepted communications in separate subsections of 18 U.S.C. 2511. The statutory bar created by Section 2511(1)(c) and (d) is identical in scope and operation to a unitary, undifferentiated prohibition on use. Indeed, the

only difference is one of clarity: by breaking the prohibition into separate provisions, Congress underscored that the prohibition is not limited to non-communicative uses, but extends to "disclosure" as well. The essential fact is that Congress has not singled out disclosure from other uses for any special burden or sanction, but instead has subjected communicative and non-communicative uses to the same legal restraint. The generality of the prohibition reinforces the conclusion that Congress's interest is not in suppression of free expression, but in combating the dangers flowing from illegal interception.

In related contexts, the Court has recognized that the generality of a law's applicability is a significant factor in evaluating a First Amendment claim. For example, in *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991), a newspaper obtained information from an anonymous source in return for a promise of confidentiality, but proceeded to publish the source's identity nonetheless. The source—who was connected to a political campaign and who had provided information about his candidate's opponent—sued the newspaper for damages based on the newspaper's failure to honor its promise of confidentiality. This Court held that the First Amendment did not bar a claim by the source for damages under Minnesota's common law doctrine of promissory estoppel. See *id.* at 668-672. The Court rested its decision on the principle that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.

Cohen demonstrates that strict scrutiny does not apply to laws of general applicability, even when, in particular cases, they attach liability to the public disclosure of truthful, newsworthy information, such as the identity of the information's source. 501 U.S. at 671-672. As the Court stated in *Konigsberg* v. *State Bar*, 366 U.S. 36, 50-51 (1961),

"general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests."[8]

Cohen, moreover, exemplifies the broader principle that, for First Amendment purposes, "the comprehensiveness of [a] statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill* v. *Colorado*, 120 S. Ct. at 2497; cf. *Turner*, 512 U.S. at 661 ("broad based" regulations "do not pose the same dangers of suppression and manipulation that [are] posed by * * * more narrowly targeted regulations [aimed at particular speakers]"); *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 424-426 (1993). That reasoning is equally applicable here. The fact that Title III's restrictions are not confined to disclosure, but instead apply with equal force to other uses, confirms that Congress was not animated by hostility toward the dissemination of information generally or a particular category of information. Instead, the legislature was concerned with the "noncommunicative impact," *O'Brien*, 391 U.S. at 382, on privacy of allowing any use (expressive or not) of illegally intercepted communications.

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[8] In *Cohen*, the Court held that the general law at issue in that case was not subject to any heightened scrutiny under the First Amendment, notwithstanding the fact that the defendant was a member of the media and the law could have an incidental impact on newsgathering and reporting. 501 U.S. at 668-669. The Court has also recognized, however, that the application of a general law to "conduct with a significant expressive element" may make intermediate scrutiny under *O'Brien* appropriate. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706-707 (1986). While *Cohen* supports the conclusion that strict scrutiny is not appropriate for general laws that could have some incidental impact on speech, Title III's direct application to speech makes it appropriate to apply intermediate scrutiny under *O'Brien*.

Thus, contrary to the court of appeals' view that Title III's broad scope has no bearing on its constitutionality, Pet. App. 21a-22a, Congress's enactment of a comprehensive ban demonstrates that it was acting not for prohibited anti-speech purposes, but for the legitimate end of ensuring the inviolability of vital means of private communication.

3. Finally, the role that Title III's restrictions play in encouraging the uninhibited exchange of ideas and information among private parties argues in favor of intermediate rather than strict scrutiny. "[W]here constitutionally protected interests lie on both sides of the legal equation[,] * * * there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'" *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911 (2000) (Breyer, J., concurring). Instead, when a law "implicates competing constitutionally protected interests in complex ways," what is called for is a more reflective inquiry that considers the statutory balance struck between the respective interests, rather than "a simple test that effectively presumes unconstitutionality." *Id.* at 912.

Title III "implicates competing constitutionally protected interests in complex ways." As this Court has recognized:

> The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

Harper & Row, Publishers, Inc. v. *Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Estate of Ernest Hemingway* v. *Random House*, 244 N.E.2d 250, 255 (N.Y. 1968)). There can be little doubt that the right that Title III creates—the right of those engaged in conversations through private channels

to control whether the conversation remains private or is instead published to the world—serves that "countervailing First Amendment value." *Id.* at 560. Nor can there be any doubt that it promotes the free and uninhibited exchanges in private conversation that would be chilled if every communication were subject to the threat of publication or use by strangers. Intermediate scrutiny provides the means by which to take account of the "constitutionally protected interests * * * on both sides of the legal equation" in this case. *Nixon*, 120 S. Ct. at 911 (Breyer, J., concurring).

C. This Court's Cases Do Not Require The Application Of Strict Scrutiny To Title III

In a line of cases culminating in *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), this Court has applied strict scrutiny to laws restricting publication of truthful information on matters of public significance. See *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Cox Broad. Corp.*, 420 U.S. at 469. Those cases, however, were explicitly decided on their precise facts, which differ in critical respects from this case.

1. In *Florida Star*, this Court considered the constitutionality of a state law that prohibited the mass media from publicly disclosing the identity of rape victims. 491 U.S. at 526 & n.1. In that case, a newspaper obtained a rape victim's identity from the police, who had inadvertently included it in a publicly available report; the newspaper then published the victim's name as part of its coverage of the rape. *Id.* at 526-528. After reviewing *Landmark Communications*, *Cox Broadcasting*, and *Daily Mail*, the Court in *Florida Star* applied what has come to be known as the "*Daily Mail* principle"—that when "'a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of

the highest order.'" 491 U.S. at 533 (quoting *Daily Mail*, 443 U.S. at 103).

The *Daily Mail* principle is inapplicable here. Both as originally stated and later explained in *Florida Star*, it extends only to the publication of information that has been "lawfully obtained." 491 U.S. at 534. Indeed, in *Florida Star* itself, the information was not illegally obtained by anyone; the newspaper that published the information acquired it by lawful means, *i.e.*, looking through files the police made publicly available. This Court specifically noted that the case would be different if the information were in private hands and legally protected: "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Ibid.* Because Title III regulates the use of private communications that were *unlawfully* intercepted in violation of Title III, its restrictions fall "outside of the *Daily Mail* principle."

Florida Star also expressly reserved this type of case. The Court specifically noted that "[t]he *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper *or by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n.8 (emphasis added). The Court's reference to "information [that] has been acquired *unlawfully* by * * * a source" applies to cases—like this one—in which someone other than the person who discloses the information acquired it unlawfully. The significance of the language is also illuminated by the Court's observation in footnote eight that this issue was "raised but not definitively resolved" in the Pentagon Papers case, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam). In that case, the issue of illegal acquisition of information was presented by

the actions of the source, not by the actions of the newspapers that later sought to publish the information.

2. The differences between Title III and the laws at issue in the *Florida Star* line of cases also make apparent the appropriateness of intermediate rather than strict scrutiny. First, neither *Florida Star* nor its predecessors involved a "general regulatory statute[]" that, like Title III, "incidentally limit[s]" expressive activities in particular cases, *Konigsberg*, 366 U.S. at 50. To the contrary, in each of those cases, the statute under review was specifically directed at speech alone. In *Florida Star*, the law prohibited publication of the name of a rape victim "in any instrument of mass communication." 491 U.S. at 526. In *Daily Mail*, the statute barred "publication" of the names of juvenile offenders "in any newspaper." 443 U.S. at 98, 104-105. In *Cox Broadcasting*, the statute and tort at issue made it unlawful to "print and publish, broadcast, televise, or disseminate" by radio the identity of rape victims or otherwise to publicize "private" facts. 420 U.S. at 471 n.1, 487. And in *Landmark Communications*, the law made it unlawful to "divulge[]" papers or information about particular proceedings. 435 U.S. at 831 n.1. This Court squarely held in *Cohen* v. *Cowles Media Co.*, *supra*, that a generally applicable law that does not single out expression is not governed by *Florida Star*, even if the law in a particular case is applied to a media defendant based on its disclosure of truthful information about a matter of public significance. See 501 U.S. at 668-669.

Second, the statutes in *Florida Star* and its predecessors were manifestly content based rather than content neutral. In each case, the statute specifically identified a particular fact to be suppressed or regulated speech pertaining to a particular subject matter. In *Florida Star*, the statute prohibited dissemination of the identity of rape victims, 491 U.S. at 526, and was defended by the State's interest in keeping the identity of such victims a secret, *id.* at 537. The

laws at issue in *Florida Star*'s predecessors were likewise subject and content specific. See *Daily Mail*, 443 U.S. at 98 (statute prohibiting publication of name of juvenile offender to protect identity); *Cox Broad.*, 420 U.S. at 471 n.1, 487 (statute prohibiting publication of name of rape victim, and common-law tort prohibiting disclosure of "private information," both invoked to protect victim's identity); *Landmark Communications*, 435 U.S. at 831 n.1, 835-836 (bar on divulgence of testimony, evidence, and papers in judicial discipline proceedings in order to protect judge's reputation). In contrast to Title III, none of those statutes barred disclosure and all other uses of information, not based on its content, but based on the means by which the information was acquired.[9]

Finally, *Florida Star* turned to some degree on the fact that the information at issue was released by the government itself. Although the Court in *Daily Mail* made clear that its analysis did not depend on whether information

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[9] The law at issue in *Landmark* prohibited the disclosure of testimony and evidence before a judicial misconduct commission. Read literally, the law based its prohibition on the *source* of the information, since it applied to all "papers" filed with the commission (regardless of their substance) and did not prohibit publication of allegations of judicial misconduct made outside the confines of the commission. See 435 U.S. at 830 n.1. But the law in *Landmark* was still not content neutral, since the State singled out a particular type of proceeding by subject matter (judicial misconduct), and its manifest purpose was preventing public knowledge of the anticipated content at such proceedings, *e.g.*, allegations that might injure a "judge's reputation" or damage public "confidence in the judicial system." *Id.* at 833. The state grand jury secrecy law addressed by the Court in *Butterworth* v. *Smith*, 494 U.S. 624 (1990), can be understood as not content neutral for similar reasons, *i.e.*, it was justified by the interest in suppressing speech about the workings of a particular governmental proceeding. See *id.* at 632-634. In addition, *Butterworth* involved a prohibition on disclosure of information acquired by a witness independently of the grand jury, *i.e.*, lawfully obtained. Indeed, it was for that reason that the Court found *Daily Mail* and *Florida Star* controlling. *Id.* at 632.

came from a governmental source, 443 U.S. at 103 (newspaper is entitled to publish information based on usual methods of newsgathering), "[w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Florida Star*, 491 U.S. at 534. In contrast, when information is in private hands—and where (as here) the government has made the initial acquisition of the information a crime—the force of that reasoning is greatly diminished. The Court in *Florida Star* also expressed concern that "timidity and self-censorship" might result if the news media were subject to sanctions for publishing information "released, without qualification, by the government," because the press would then have to "sift[] through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Id.* at 535-536. That concern has no bearing where, as here, the information was obtained from a private source under circumstances that indicate that the source obtained the information unlawfully, eliminating any "implied representations of the lawfulness of dissemination," *id.* at 536, from the government or anyone else.

In sum, *Florida Star* and its predecessors differ in basic ways from the case now before this Court. Those cases involved laws that singled out speech for different, and disfavored treatment, compared to non-speech uses of the same information; restricted speech on the basis of its content; sought to foreclose public knowledge of specific information altogether; penalized the disclosure of information even when its initial acquisition was lawful; and sanctioned the press for publishing information provided by the government itself or, in many cases, that was related to the activities of the government itself. Because Title III's restrictions differ from those laws in every one of those respects, subjecting its provisions to strict scrutiny under

Florida Star and its predecessors would contravene this Court's direction that conflicts between free speech and privacy values must be resolved on the basis of "limited principles that sweep no more broadly than the appropriate context of the * * * case." 491 U.S. at 533.

II. Title III's Restrictions Satisfy Intermediate Scrutiny

A law that is subject to intermediate scrutiny under the First Amendment must meet three basic requirements. First, it must "further[] an important or substantial governmental interest." *O'Brien*, 391 U.S. at 377. Second, the governmental interest must be "unrelated to the suppression of free expression." *Ibid.* Third, "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Ibid.* Title III's prohibitions meet each of those requirements.

A. The Restriction On Use And Disclosure Furthers Significant Interests Unrelated To The Suppression of Expression

The fundamental purpose of Title III is to ensure that the public may use vital means of private wire, electronic, and oral communication without fear that private communications will be intercepted or used without their permission or consent. See pp. 2-5, *supra*. Title III thus places the force of law behind the security of the nation's widely used channels of private communication, including telephones, cellular phones, faxes, and e-mail. In so doing, Title III supports every person's reasonable expectation of privacy in his personal telephone conversations. See *Katz* v. *United States*, 389 U.S. 347, 352 (1967). See also *Harper & Row*, 471 U.S. at 557-558 (noting the First Amendment right of each individual to determine whether or not he will speak publicly).

The use and disclosure prohibitions serve two essential purposes in Title III's protective scheme. First, by guaranteeing to individuals the right to speak freely without having their private conversations exposed to "the uninvited ear" of strangers, *Katz*, 389 U.S. at 352, Title III encourages exchanges of information and ideas. Relatedly, Title III promotes the development and use of new technological methods of communication, a goal that also serves First Amendment values. Second, Title III's use and disclosure prohibitions reinforce the underlying restriction on illegal interceptions; without that restraint, a person could accede to the temptation to engage in surreptitious surveillance with knowledge that the fruits could be disclosed through or otherwise used by third parties.

1. As this Court has recognized, the injury to privacy that flows from unlawful interceptions does not end with the interception itself. To the contrary, as the Court stated in upholding a grand jury witness's right not to answer questions based on an illegal interception of his communications, the disclosure following the initial intrusion "compounds the statutorily proscribed invasion of * * * privacy." *Gelbard* v. *United States*, 408 U.S. 41, 52 (1972). By prohibiting the use and disclosure of illegally intercepted communications, Title III directly guards against that further intrusion into the integrity of private communications. And, in so doing, it advances the First Amendment value in the choice *not* to speak publicly. See *Harper & Row*, 471 U.S. at 559; *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977).

Because disclosure and other uses of illegally intercepted communications multiply the injury that results from interception, they also multiply the degree to which such intrusions inhibit the free exchange of thoughts and ideas. If individuals lack assurance that the law will protect the confidentiality of their conversations, their willingness to speak candidly will necessarily suffer. See *United States* v.

Nixon, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests."); *Swidler & Berlin* v. *United States*, 524 U.S. 399, 407 (1998) ("fear of disclosure," even after death, would likely lead to a client's "withholding of information from counsel"); *Jaffee* v. *Redmond*, 518 U.S. 1, 10 (1996) (lack of assurance of confidentiality would impede psychotherapy). Indeed, the profound chilling effect created by the possibility of unauthorized publication has been recognized by the common law from this nation's earliest days. As Justice Story explained in the context of private letters more than 150 years ago, publication of such communications "strikes at the root of all that free and mutual interchange of advice, opinions, and sentiments, between relatives and friends, and correspondents, which is so essential to the well-being of society," by "compel[ing] every one in self defence to write, even to his dearest friends, with the cold and formal severity, with which he would write to his wariest opponents, or most implacable enemies." 2 J. Story, *Commentaries on Equity Jurisprudence* 220-221 (1836 ed., reprinted 1972).[10] Title III's use and disclosure prohibition is thus crucial to ensuring that the threat of technological incursion into private communications does not erode individuals' willingness and ability to exchange frank and candid views.

In 1986, Congress expanded Title III's protection against illegal surveillance to reach electronic communications. Electronic Communications Privacy Act of 1986 (ECPA),

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[10] See also *Denis* v. *LeClerc*, 5 Am. Dec. 712, 716, 1811 WL 986, at *5-*6 (La. Terr. Super. Orleans 1811); F. Lieber, *On Civil Liberty and Self-Government* 109 (1853) (Because "freedom of communion" between individuals is "one of the primary elements of civil liberty," and because nobody "can imagine himself free if his communion with his fellows is * * * submitted to surveillance," all "[f]ree nations" guarantee not merely "the liberty of the press" but "the sacredness of epistolary communion.").

Pub. L. No. 99-508, 100 Stat. 1848. Again, Congress recognized the damage to candid expression that would result from an unimpeded ability to disclose illegally intercepted private communications. Congress noted that the "tremendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," with the result that private communications and electronically stored private data "may be open to possible wrongful use *and public disclosure* by * * * unauthorized private parties." S. Rep. No. 541, 99th Cong., 2d Sess. 3 (1986) (emphasis added). Cellular telephones exemplify the type of communications technology that would be substantially less attractive to users if interception and dissemination of their calls were lawful. Congress proposed to protect such new forms of computer and telecommunications interchange that "American citizens and American businesses are using * * * in lieu of, or side-by-side with, first class mail and common carrier telephone services." *Id.* at 5.[11]

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[11] As Congress noted in expanding the scope of Title III in 1986, the absence of legal protection against surreptitious interceptions would "discourage potential customers from using innovative communications systems" and "businesses from developing new [and] innovative forms of telecommunications and computer technology." S. Rep. No. 541, *supra*, at 5. See *Electronic Communications Privacy Act*: *Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 44 (1985 & 1986) (*ECPA Hearings*) (testimony of Fred W. Weingarten, Program Manager, Communication and Technologies Program, Office of Technology Assessment) ("There are two dangers in leaving this type of new application unprotected. One danger, of course, is a gradual erosion of privacy, a loss of the right to whisper and to keep our dealings confidential. The other danger is that we may be denied useful applications and useful new technologies because they're unprotected. Consumers and users simply will not use these services if they are not properly protected, and they will not be developed and offered in the marketplace."). See also *id.* at 4, 38-39, 70, 93, 155 (similar testimony).

Title III thus advances a significant purpose in protecting the modern equivalents of letters, such as phone calls, e-mails, and faxes. And because electronic intrusions into modern communications—unlike intrusions into letters—can be accomplished without the physical access that ordinarily permits prevention and detection, the need for legal protection against unauthorized disclosure in this context is even greater. Attesting to the importance of that interest, more than three dozen States and the District of Columbia have enacted legislation proscribing the unauthorized use and disclosure of illegally intercepted communications. See *Boehner* v. *McDermott*, 191 F.3d 463, 468 n.6 (D.C. Cir. 1999), petition for cert. pending, No. 99-1709.

2. Prohibiting the use and disclosure of illegally intercepted communications also reinforces the underlying prohibition on illegal surveillance itself. In particular, by barring the knowing use and disclosure of illegally intercepted communications, Title III's prohibitions reduce demand for such communications and deprive potential wiretappers of the fruits of their labors. *Boehner*, 191 F.3d at 469-470; see *Fultz* v. *Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991).

The need to prohibit such uses is particularly important because illegal interception is by nature a clandestine enterprise. See President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202 (1967) ("Detection of surveillance devices is difficult."); 1968 Senate Report 69 (because of surreptitious nature of activity, fact or source of such an invasion "[a]ll too often * * * will go unknown"); *id.* at 96 ("[U]nlawful electronic surveillance is typically a clandestine crime."); *ECPA Hearings* 54-55 (noting the increasing difficulty of detecting surveillance).[12] If untrammeled disclosure by non-

[12] Indeed, "[t]he last 20 years have seen an extraordinary explosion in technologies for invading people's privacy." *Protection from Personal*

participants were lawful, illegally intercepted communications could be easily "laundered" to prevent discovery of the interceptor. See *Boehner*, 191 F.3d at 471 (invalidation of use or disclosure prohibition would effectively "render[] the government powerless to prevent disclosure of private information, because criminals"—who may bug residences, intercept phone calls, or engage in other forms of unlawful electronic surveillance—"can literally launder illegally intercepted information") (internal quotation marks omitted). All an individual has to do is covertly carry on an interception—an activity that can be conducted from the privacy of the home —and anonymously provide a tape of it to a person known to have an interest in disclosing it. If the ban on illegal interceptions could be evaded that easily, there would be a large incentive to carry out illegal interceptions in order to make use of them through third parties.

3. The court of appeals did not dispute the legitimacy of the above interests. But it declared the first interest (in privacy and promoting free expression) to be non-cognizable

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Intrusion Act and Privacy Protection Act of 1998: Hearing Before the House Comm. on the Judiciary, 105th Cong., 2d Sess. 75 (1998) (statement of Professor Lawrence Lessig, Harvard Law School). For example, an FBI publication reports that "[l]ittle or no technical expertise is needed to convert a readily available computer equipped with sound capability, a modem, and the appropriate software into a device that will allow the surreptitious interception of any audio generated within its proximity." C. W. O'Neal, *Surreptitious Audio Surveillance: The Unknown Danger to Law Enforcement*, FBI Law Enforcement Bulletin, June 1998, at 10, 11. Even conversations held behind closed doors may not be safe from intrusion. According to some, eavesdroppers can listen through closed windows using a laser listening device. When the laser beam is pointed at a window, the device detects the window's vibration and thus conversations going on inside; the device can work from as far as a quarter-mile away. See T. Larsen, *The Layman's Guide to Electronic Eavesdropping* 55-56 (1996). See also http://www.espionage-store.com/surveillance.html (describing device); http://www.pimall.com/nais/n.lazer.eaves.html (similar).

under intermediate scrutiny, and the latter (deterrence) too conjectural to sustain the statute. Both of those conclusions are incorrect.

a. The court of appeals rejected the government's interest in preserving privacy and the right *not* to speak publicly as "content-based" and therefore not cognizable for purposes of intermediate scrutiny. Pet. App. 26a-27a. In so concluding, the court of appeals erroneously assumed that Title III's restrictions are designed to protect individuals from the harms associated with the disclosure of "intimate facts concerning one's life." *Id.* at 26a. But the spectrum of communications that Title III covers is unlimited in subject matter or nature; it encompasses business, social, personal, and familial interchange, and protects serious debate as well as idle conversation. Title III's restrictions thus do not seek to protect against the injury that occurs when particularly personal facts, or identified pieces of information, are disclosed. Instead, Title III protects against the magnified harm that results when any illegally intercepted conversation is disseminated to a wider audience. Just as having additional eavesdroppers rather than a single eavesdropper listening in on a conversation multiplies the intrusion into privacy regardless of content, so too multiplying the number of individuals to whom the conversation is disclosed after the fact increases the harm, whether or not intimate facts are involved. The interests in preventing that increased injury and in reassuring individuals that they can communicate freely and candidly in private are independent of the content of any communications that could be disclosed absent the prohibition.

It is plain that this interest is directly advanced by Title III's prohibition on disclosure and other uses of illegally intercepted information. Title III does not impose restrictions on some speakers while leaving others who have the same knowledge from the illegal source free to disseminate

the communication. Such selectivity in speakers undermined the degree to which the laws involved in *Florida Star* and *Daily Mail* advanced their stated purposes. But Title III does not single out media of mass communication, *Florida Star*, 491 U.S. at 526 n.1, 540, or newspapers, *Smith* v. *Daily Mail*, 443 U.S. at 98, 104; it applies evenhandedly to all speakers. Congress thereby crafted a law that does all it can reasonably do to advance its underlying purpose of protecting the privacy of wire, oral, and electronic communications.

b. The court of appeals likewise erred in dismissing the deterrent function of the Title III prohibition. See Pet. App. 32a-34a. In particular, the court expressed skepticism that reducing the opportunities to disclose illegally intercepted communications would reduce the frequency of unlawful interceptions, dismissing the link between them as "*ipse dixit*" that rests on "nothing more than assertion and conjecture." *Id.* at 33a-34a. But that very logic has long been accepted as a justification for statutes that prohibit the knowing receipt and sale of stolen property. See, *e.g.*, *United States* v. *Gardner*, 516 F.2d 334, 349 (7th Cir.), cert. denied, 423 U.S. 861 (1975); *United States* v. *Bolin*, 423 F.2d 834, 838 (9th Cir.), cert. denied, 398 U.S. 954 (1970). By denying the thief an outlet for distribution of the stolen goods, the law deters the underlying act of theft. See 2 W. R. LaFave & A. W. Scott, Jr., *Substantive Criminal Law* § 8.10(a), at 422 (1986) ("Without such receivers, theft ceases to be profitable. It is obvious that the receiver must be a principal target of any society anxious to stamp out theft in its various forms."). This Court relied on a similar rationale in *New York* v. *Ferber*, 458 U.S. 747, 759-760 (1982), when it held that "[t]he most expeditious if not the only practical method" of effectuating a ban on the production of child pornography "may be to dry up the market for this material" by imposing sanctions on advertising and distribution. And the Court relied on the same rationale again to sustain a

prohibition on the possession of child pornography in *Osborne* v. *Ohio*, 495 U.S. 103, 109-110 (1990), finding it "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."[13]

The court of appeals suggested that the government was obligated to "prove" the deterrent effect of the use restrictions on illegal surveillance. Pet. App. 34a. In light of the history of statutory prohibitions on fencing stolen property, and the holdings of cases such as *Ferber*, no such evidentiary showing is required. The well-recognized connection between the existence of outlets for illegally acquired goods and the incentive to engage in the illegal acquisition of those goods provides proof enough of the proposition that more surveillance will take place if eavesdroppers enjoy unrestricted demand for the fruits of their illegal labors. Cf. *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. at 906 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). Insistence on rigid empirical proof of a deterrent connection in this context could prevent Congress from

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[13] Respondents attempt to distinguish the market for stolen communications from the markets for stolen goods and child pornography by pointing out that "money drives the market" for the latter products whereas, in this case, no one appears to have paid the interceptor for the taped conversation. Vopper Br. in Opp. 12 n.7. That does not mean that the interception in this case had no economic motive; the individual who intercepted the phone conversation and passed it to Jack Yocum was likely motivated by a desire to embarrass the union and thwart its bargaining demands. In any event, whatever motivates an illegal interception—and motives range from acquiring embarrassing information about a neighbor to achieving political ends—the incentive to do so will be sharply diminished if there is a legal impediment to use or disclosure of the information.

regulating at all. "[A]s a practical matter it is never easy to prove a negative [and] it is hardly likely that conclusive factual data could ever be assembled." *Elkins* v. *United States*, 364 U.S. 206, 218 (1960) (discussing exclusionary rule).[14]

B. The Restrictions On Use And Disclosure Do Not Unnecessarily Restrict Expressive Activities

The burden that Title III's restrictions place on expressive activity is "no greater than is essential to the furtherance of th[e] interest[s]," *O'Brien*, 391 U.S. at 377, underlying Title III. "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner*, 512 U.S. at 662. Instead, "the requirement of narrow tailoring is satisfied so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ibid.* (internal quotation marks omitted). A regulation is considered to be narrowly tailored, for these purposes, as long as "the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." *Ibid.* (internal quotation marks omitted).

1. The government's legitimate interest in preserving the confidential nature of all private wire, oral, and

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[14] Even if one were to assume that empirical evidence were required, however, the government was not given the opportunity to meet that burden, as it is entitled to do under 28 U.S.C. 2403. When the constitutionality of an Act of Congress is called into question in private litigation, federal courts are required by law to give the United States an opportunity for "presentation of evidence" on the constitutional issue. 28 U.S.C. 2403(a). In this case, however, the Attorney General did not receive notice of respondents' constitutional challenge to Title III until after the oral argument in the court of appeals, see p. 8, *supra*, and the court of appeals indicated that it found the government's position to be "unsupported" for the first time in its opinion. Pet. App. 34a.

electronic communications, regardless of their subject matter, would be less effectively met, if met at all, in the absence of Title III's comprehensive use and disclosure prohibition. Persons engaged in telephone conversations reasonably expect and wish their communications to remain confidential. *Katz*, 389 U.S. at 352. That reasonable expectation of privacy would be severely jeopardized by the multiplication of the intrusion accomplished by disclosure and other uses. While the knowledge (or suspicion) that a conversation could be illegally intercepted would deter private communications, it is far more chilling of speech for a person to know that his private expressions may later be reported with impunity to the world at large.

It would not be reasonable to require the government to confine the protections of Section 2511(1)(c) and (d) to disclosure or other uses of "sensitive" or "private" information. See Vopper Br. in Opp. 12 n.7. Such a rule in itself would create a content-based distinction. Moreover, it would be ineffective to reassure speakers that conversations of any sort would remain confidential, as intended. That uncertainty would dampen the development and use of new technological media for communication. And if only some private speech were protected, speakers would be unsure, at the time of a communication, what subjects would be covered as sufficiently sensitive or private, thus chilling communication as whole. As a result, the interests underlying Title III "would be achieved less effectively absent the regulation," *Turner*, 512 U.S. at 662.

2. Congress's interests could not be as effectively achieved by relying exclusively on Title III's underlying prohibition on unauthorized electronic surveillance (18 U.S.C. 2511(1)(a)). As noted above, the use of intercepted communications causes additional harm to privacy interests beyond that created by interception alone. See *Gelbard*, 408 U.S. at 52 (disclosure "compounds the statutorily proscribed

invasion of * * * privacy"). Without Title III's prohibition on use and disclosure, the government would be powerless to counteract the chilling effect that exploitation of unlawfully intercepted communications has on the public's confidence in the security of private means of communication.

Deterrence of illegal interceptions would also be markedly less effective if Title III's prohibition reached only the ban on interceptions. Electronic surveillance is, by its very nature, a surreptitious enterprise, and if illegally intercepted communications could be "laundered" through non-participants, the illegal wiretapper could often achieve his goals while escaping punishment. *Boehner*, 191 F.3d at 471. Indeed, this case graphically illustrates the fact that a person who illegally intercepts a conversation and wishes to make it public can do so, without any risk to himself, by turning it over anonymously to third parties who have an interest in disclosing its contents. Given the ease with which the identity of the intercepting party can be concealed, Title III would lose much of its force if the only means of preventing invasions into the sanctity of private communications were prosecution of the illegal interceptor himself.

Finally, as noted above, Title III's prohibitions extend no further than necessary to achieve its goals. Title III does not impose any restriction on the use or disclosure of information obtained by means other than illegal surveillance. And Title III was not intended to prohibit anyone from disseminating that which is already common knowledge. See 1968 Senate Report 93 ("[t]he disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited" by Section 2511(1)(c) and (d)). Title III is thus crafted to take account of the fact that the interests underlying its prohibition "fade once information already appears on the public record." *Florida Star*, 491 U.S. at 532 n.7. In sum, Title III's restrictions on the use

and disclosure of illegally intercepted communications are an appropriately tailored means of protecting privacy and speech interests without impinging unnecessarily on the free flow of information and ideas.

C. Title III's Restrictions On Use And Disclosure Do Not Impermissibly Chill Protected Speech

The court of appeals expressed concern that the threat of liability under Title III for the use or disclosure of illegally intercepted communications would deter the news media from disseminating information that is *not* the product of illegal electronic surveillance. Pet. App. 36a. In particular, the court of appeals expressed concern that "[r]eporters often will not know the precise origins of information they receive from witnesses and other sources." *Ibid.*

That concern is unfounded. If reporters in fact do not know the origins of their information, they cannot be held liable under Title III; the prohibitions in Section 2511(1)(c) and (d) are violated only when a defendant "know[s] or ha[s] reason to know" that the communication was intercepted in violation of Title III. That scienter requirement is demanding. Because the "reason to know" standard—unlike the phrase "should know"—"implies no duty" to investigate or to discover additional facts, Restatement (Second) of Torts § 12 cmt. a (1965), there can be no liability for simple failure to *discover* the unlawful origins of a communication, no matter how negligent. See *Novicki* v. *Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991) (reason-to-know standard "imposes no duty of inquiry; it merely requires that a person draw reasonable inferences from information already known to him"). Instead, liability may attach only if the defendant has *actual* "knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either *infer*" that the fact in question exists "or would regard its existence *as so highly probable that his conduct would be predicated upon the assumption that the fact did*

exist." Restatement (Second) of Torts § 12 cmt. a (emphasis added). That means that, unless a person actually possesses information from which he or a reasonable person would infer that the communication was unlawfully intercepted, liability cannot attach.

That scienter requirement dispels any legitimate concern regarding the chilling effect of the challenged provisions. To the extent any residual concerns remain, moreover, those concerns could be addressed by procedural measures that stop short of invalidating the provisions themselves. See Pet. App. 56a-57a (Pollak, D.J., dissenting). For example, when a claim is brought under Title III based on the disclosure of information about matters of public significance by persons who were not involved in the illegal interception, Title III's "reason to know" standard could be supplemented by requiring proof that the defendant acted with reckless disregard of facts indicating the information's illegal origins. Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (adopting "actual malice" standard in certain defamation cases). A court could also consider employment of an elevated standard of proof of scienter in civil cases, such as proof by "clear and convincing" evidence. Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (requiring clear and convincing evidence of actual malice in certain defamation cases). Finally, appellate courts might be warranted in conducting independent review of the findings of the trier of fact. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984) (*de novo* appellate review of findings regarding actual malice). See generally *Waters* v. *Churchill*, 511 U.S. 661, 669-671 (1994) (plurality opinion) (discussing circumstances in which First Amendment requires modifications of burdens of proof and other procedural rules). To the extent that enforcement of the standards of Title III leaves any question that the press may act with excessive caution, such procedural measures,

individually or collectively, would be more than adequate to ensure that Title III does not deter the dissemination of information from sources other than illegal electronic surveillance. Such an approach would far better reconcile the privacy and expression interests in this case than a holding that invalidates Congress's effort to provide comprehensive legal protection against the unauthorized dissemination of information acquired through illegal interceptions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2000

APPENDIX

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 18 U.S.C. 2510 provides in pertinent part:

§2510. Definitions

As used in this chapter—

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

* * *

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

* * *

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

* * *

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include–

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device; or

(C) any communication from a tracking device (as defined in section 3117 of this title);

3. 18 U.S.C. 2511 provides in pertinent part:

§2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter [18 U.S.C. 2510-2520] any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to

intercept, any wire, oral, or electronic communication; [or]

* * *

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

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

* * *

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

* * *

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the

essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then—

(i) if the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is—

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection—

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

4. 18 U.S.C. 2512 provides:

§2512. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who intentionally—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious

interception of wire, oral, or electronic communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined under this title or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of the business of providing that wire or electronic communication service, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof,

to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications.

(3) It shall not be unlawful under this section to advertise for sale a device described in subjection (1) of this section if the advertisement is mailed, sent, or carried in interstate or foreign commerce solely to a domestic provider of wire or electronic communication service or to an agency of the United States, a State, or a political subdivision thereof which is duly authorized to use such device.

5. 18 U.S.C. 2515 provides:

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

6. 18 U.S.C. 2520 provides:

§2520. Recovery of civil damages authorized

(a) IN GENERAL.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) COMPUTATION OF DAMAGES.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In 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.

(d) DEFENSE.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) LIMITATION.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.