No. 99-1687, 99-1728

IN THE
Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Petitioners,
v.
FREDERICK W. VOPPER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
FREDERICK W. VOPPER, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Cellular Telecommunications Industry Association ("CTIA") is the international organization of the wireless communications industry for both wireless carriers and manufacturers.[1] Membership in the association covers all commercial mobile radio service ("CMRS") providers and manufacturers. CTIA represents more broadband Personal Communications Service carriers and more cellular carriers than any other trade association. As such, CTIA is uniquely situated to represent the interests of the wireless industry with respect to the matter before the Court.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit's decision[3] undermines Congress's carefully constructed statutory scheme to secure the privacy of the contents of wireless communications. Ensuring wireless subscriber privacy furthers Congress's dual interests in developing the growth of wireless telecommunications and preserving wireless subscribers' First Amendment rights to speak freely, without fear of interception. Congress has determined that these interests outweigh any First Amendment rights the media and other individuals may have to "speak" through expressive conduct by revealing the contents of illegally intercepted communications.

Wireless service use has expanded exponentially in recent years. There are over 100 million wireless subscribers in the

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its members made any monetary contribution to the preparation or submission of this brief.

[2] CTIA has obtained consent from all Petitioners and Respondents to file this brief.

[3] *Bartnicki v. Vopper*, 200 F.3d 109 (3rd Cir. 1999).

United States today, and each day, that number grows by another 67,082 new subscribers. Since 1993, the number of wireless customers has increased by 90 million customers. Nearly 14 million of those customers have subscribed to wireless service in just the last six months.[4]

Subscribers of wireless service use their service for both business and personal purposes. Employees use wireless telephones to conduct business while commuting or traveling. Individuals use wireless telephones to keep in touch with family and friends. There is also a growing trend to replace traditional wireline telephones, both at home and in the office, with wireless telephones. Experts in the wireless industry expect that the number of current wireless subscribers will double within the next two years.[5]

The wireless industry has invested approximately $58 billion to deploy facilities and services since 1993.[6] Today, wireless competition flourishes. More than 241 million Americans can choose from between three and eight wireless service providers. More than 178 million Americans can choose from among five or more wireless providers. Over 81 million Americans can choose from among six or more wireless providers.[7] However, the industry's investments will be compromised without suitable protections for the privacy of subscriber communications. Subscribers to wireless services have a legitimate expectation of privacy in their communications, and will not speak freely if their

[4] "The History of Wireless," <www.wow-com.com/consumer/faqs/faq_history.cfm>.

[5] *Id.*

[6] "Annualized Wireless Industry Data Survey Results," <www.wow-com.com/statsurv/survey/199912b.cfm>.

[7] "The History of Wireless," <www.wow-com.com/consumer/faqs/faq_history.cfm>.

expectations are not met. Recognizing the threat to subscribers' First Amendment rights and the wireless industry, Congress carefully tailored statutory protection for privacy in wireless communications.

The Third Circuit's decision invalidating the protections of the Electronic Communications Privacy Act of 1986 ("ECPA")[8] against disclosure of illegally intercepted communications, if allowed to stand, will have significant and far-reaching repercussions beyond the issues involved in this case. The decision will nullify a large number of state laws providing similar protection. More generally, such a decision could ultimately restrict the application of numerous other laws restricting the disclosure of information, such as those preserving the confidentiality of the names of rape victims or juvenile offenders, as long as the disclosing party has not participated in the illegal interception or theft of that information.

Congress has determined that in order to preserve certain values of American society—protecting the confidentiality of private conversations, the names of young wrongdoers and the identity of innocent victims of crime—any rights of the public to "speak" by disclosing certain private or sensitive information must be curtailed. This restriction applies with even greater justification where that information was obtained through unlawful means. ECPA was carefully crafted to address the specific problems Congress identified, without unnecessarily restricting any additional "speech." The Third Circuit's decision upsets this balance. CTIA submits this brief in support of Petitioners' argument that the Third Circuit's decision in this matter must be reversed.

[8] 18 U.S.C. §§ 2510 *et seq.*

ARGUMENT

I. ENSURING THE PRIVACY OF SUBSCRIBER COMMUNICATIONS FURTHERS THE FEDERAL POLICIES OF ALLOWING WIRELESS CUSTOMERS TO EXERCISE THEIR RIGHT TO SPEAK FREELY AND ENCOURAGING THE GROWTH OF THE WIRELESS INDUSTRY

Congress repeatedly has recognized that preserving subscribers' expectation of private communications is essential to its dual goals of protecting the First Amendment rights of wireless subscribers and promoting the growth and development of the wireless industry. Through Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by ECPA, and the Communications Act of 1934 (the "Communications Act"), Congress has given express privacy protection to communication over wireless telephones and has established remedies for invasions of these communications. These provisions represent a congressional mandate to secure subscriber privacy. The Third Circuit's decision undermines wireless subscriber privacy rights. It also contradicts Congress's determination that the preservation of subscriber privacy is vital to wireless subscribers' First Amendment right to speak and, in turn, to the growth and development of the wireless service industry.

A. There is a Strong Federal Policy of Protecting Wireless Subscribers' Rights as First Amendment Speakers.

Americans have a significant societal and financial interest in maintaining the privacy of communications, and legitimately expect that their communications, including

wireless communications, are private.[9] They expect that their communications will not be unlawfully intercepted, and that the contents of their communications will not be unlawfully disclosed or used. A loss of the expectation of privacy in effect nullifies wireless subscribers' First Amendment right to speak.

Congress recognized that a loss of privacy would restrict the speech of wireless subscribers, and took a number of legislative steps to ensure subscriber privacy. Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (amended by ECPA) to "protect[] the privacy of wire and oral communications" and "delineat[e] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."[10] In 1986, when the cellular telecommunications industry was in its infancy, Congress amended the prior definition of protected "wire communication" specifically to include cellular communications.[11] Thus, ECPA protects communications, including wireless communications, from

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[9] Although the Petitioners in this matter may be considered public figures who were discussing matters that may be of public concern, their public stature and the public nature of their conversation does not obliterate the protection of privacy afforded them in their communications. Notably, had there been no illegal interception of their communication, Respondents would not have known about the communication, whether it was between public figures or private individuals, and whether its nature was of public concern or a private interest.

Even if this Court finds that Petitioners' communication was not protected from disclosure and use because the Petitioners were public figures discussing a matter of public concern, this Court should find that communications between private individuals regarding private or public matters are protected from unlawful interception, disclosure, and use.

[10] S. Rep. No. 90-1097, 90th Cong., 2d Sess., 66 (1968).

[11] *See* S. Rep. No. 99-541, 99th Cong., 2d Sess., 6 (1986).

unlawful interception, and from the unlawful disclosure and use of information obtained from such unlawful interceptions.

The legislative history of ECPA confirms that ECPA was designed to "protect the privacy of our citizens" so that potential customers would not be "discourage[d] . . . from using innovative communications systems."[12] This Court also has recognized that in enacting ECPA, "the protection of privacy was an overriding congressional concern." *Gelbard v. United States*, 408 U.S. 41, 48, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). Similarly, in *United States v. Cianfrani*, the court noted that:

> protection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. . . . Only by governing strictly both authorization and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately.

573 F.2d 835, 856 (3rd Cir. 1978).

Section 302(d) of the Communications Act confirms the overriding importance that Congress has placed on privacy in wireless communications. Section 302(d) directs the Federal Communications Commission ("FCC") to deny equipment authorization to any scanning receiver that is capable of receiving transmissions in the frequencies allotted to wireless service, or may be readily altered to receive such transmissions, and prohibits the manufacture or import of such receivers. 47 U.S.C. § 302a(d). Further, Congress also has taken steps to increase subscriber confidence in the confidentiality of wireless communications by making it a crime to engage in a broad array of activities related to the

[12] *Id.* at 5.

theft of wireless service,[13] and to engage in the manufacture, distribution, possession, or advertising of interception devices.[14]

B. There is a Strong Federal Policy of Encouraging the Growth and Development of the Wireless Service Industry.

The privacy protections described above are a critical element of the statutory framework to encourage the growth in wireless services. If persons do not expect that their wireless communications will be kept private, they will not be willing to subscribe to wireless service. Such a result contradicts the explicit Federal policy of encouraging the use of wireless service.

The Communications Act includes several provisions to facilitate and encourage the growth of the wireless service industry. Section 1 of the Communications Act, for instance, establishes the national policy of "mak[ing] available . . . a rapid, efficient, Nation-wide, and world-wide . . . radio communication service . . . ." 47 U.S.C. § 151. Likewise, section 309(j) of the Communications Act establishes a competitive

[13] For instance, 18 U.S.C. § 1029 imposes fines, imprisonment ranging from 10 to 20 years, or both, on a person who "knowingly and with intent to defraud uses, produces, traffics in, has control or custody of, or possesses a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications services" (§ 1029(a)(7)); "knowingly and with intent to defraud uses, produces, traffics in, has control or custody of, or possesses a scanning receiver" (§ 1029(a)(8)); or "knowingly uses, produces, traffics in, has control or custody of, or possesses hardware or software, knowing it has been configured to insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such instrument may be used to obtain telecommunications service without authorization" (§ 1029(a)(9)).

[14] 18 U.S.C. § 2512.

bidding procedure to promote the rapid and efficient assignment of wireless spectrum. 47 U.S.C. § 309(j).

More specifically, in 1993, Congress established a national regulatory framework for CMRS that preempted state and local rate and entry regulation and authorized the deregulation of these services at the Federal level.[15] Through the enactment of section 332(c), Congress sought to promote investment in wireless services. *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd 1411, 1421 (1994).[16] The legislative history of section 332 clarifies Congress's understanding that a uniform national policy is necessary to promote competition in the wireless marketplace and further the Federal policy to encourage further investment in wireless infrastructure. *See* H.R. Rep. No. 103-213, 103d Cong., 1st Sess., 480-81 (1993), H.R. Rep. No. 103-111, 103d Cong., 1st Sess., 260 (1993).

The protection of subscriber privacy that Congress established in ECPA is crucial to Congress's overall goal of promoting the use of wireless communications and the success of the industry. As Congress recognized, allowing persons to disclose intercepted communications may discourage consumers from using those services, and "may

[15] *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, 6002(b), 107 Stat. 312, 392-393 (codified in scattered sections of 47 U.S.C.).

[16] More generally, section 332 also requires the FCC to manage the spectrum in such a way as to "improve the efficiency of spectrum use and reduce the burden upon spectrum users" and "encourage competition and provide services to the largest number of feasible users." 47 U.S.C. §§ 332(a)(2), (3).

discourage American businesses from developing new innovative forms of telecommunication."[17]

II. RESPONDENTS HAVE NO FIRST AMENDMENT RIGHT TO DISCLOSE ILLEGALLY INTERCEPTED COMMUNICATIONS

Respondents have no First Amendment right to disclose private wireless communications. Disclosing and using illegally intercepted communications is not expressive conduct protected by the First Amendment. Even if it were protected conduct, under the *O'Brien* test,[18] Respondents' First Amendment rights would be outweighed by wireless subscribers' right to privacy ensured by ECPA.

A. The Acts of Disclosing and Using Illegally Intercepted Communications Are Not Expressive Conduct Protected by the First Amendment.

Only "expressive" conduct—conduct that rises to the level of being "communicative and that, in context, would reasonably be understood by the viewer to be communicative"—may be accorded First Amendment protection. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *see also Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Disclosing and using illegally intercepted communications is not expressive conduct, and does not merit First Amendment protection.[19]

[17] S. Rep. No. 99-541, *supra*, n.11, at 5.

[18] *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

[19] Similarly, not all speech is protected by the First Amendment. *See Konigsberg v. State Bar of California*, 366 U.S. 36, 49, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961). For example, there is no First Amendment protec-

This Court has found conduct to be "expressive" where it is inexorably tied to expression of ideas or beliefs. In *Clark*, for example, persons sought permission to camp in Lafayette Park to call attention to the plight of the homeless. In *Johnson*, a person burned the American flag to protest the re-nomination of President Reagan. In contrast, Respondents' disclosure of unlawfully obtained conversations is not an attempt to express a particular viewpoint. Their act of disclosing information does not sufficiently possess the communicative elements that were found in *Johnson* to implicate the First Amendment. *See Johnson*, 491 U.S. at 404-406. As such, Respondents' conduct is not protected by the First Amendment.

In fact, ECPA was enacted to prohibit the very sort of conduct in which Respondents engaged. ECPA does not limit to whom its prohibitions apply. Neither any individual nor the media is exempt from these prohibitions. As this Court has recognized, the "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). Nor is the First Amendment a "license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). "Although stealing documents or private wiretapping could provide newsworthy information, neither

tion for publication of libelous statements (*see New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)); for advocating use of force or violation of law to incite or produce imminent lawlessness (*see Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)); or for appropriation of an author's copyrightable expressions (*see Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985)).

reporter nor source is immune from conviction for such conduct . . . ." *Branzburg*, 408 U.S. at 691.[20]

B. Even if Respondents' Acts of Disclosing and Using Illegally Intercepted Communications Are Expressive Conduct, Their Right to Engage in Such Conduct Is Outweighed by the Government's Substantial Interest in Protecting Privacy in Wireless Communications.

Even if Respondents' actions are deemed expressive conduct, their First Amendment right to disclose information is outweighed by the Government's substantial interest in protecting the privacy of wireless communications. Expressive conduct protected by the First Amendment "may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." *Clark*, 468 U.S. at 294 (citing *O'Brien*). Courts have often tempered First Amendment rights in this manner. In *Clark*, for example, the Court found that the statute restricting individuals from sleeping in the park served the substantial governmental interest of maintaining the park in an attractive and intact condition, and thus justified limitations on First Amendment freedoms. The Government has such a similarly substantial interest in protecting the privacy of wireless communications.

[20] While the Court on one occasion permitted newspapers to publish stolen, confidential documents (*i.e.*, the Pentagon Papers), *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), it did so because it found that the Government did not meet its burden of showing justification for the imposition of a prior restraint on expression.

1. *The Government Has A Substantial Interest in Protecting the Privacy of Wireless Communications.*

There is a substantial governmental interest in protecting the privacy of wireless communications. As described fully above, ECPA's prohibitions on illegal interception, disclosure, and use of private communications are part of a continuing congressional effort to preserve wireless subscribers' right to speak freely, and to promote investment in and development of wireless technology and infrastructure by encouraging consumer confidence in the service, the network, and the privacy of wireless communications.

For these reasons, the court below and other courts considering the question have agreed that there is a substantial governmental interest in protecting privacy in communications. *Bartnicki*, 200 F.3d at 122; *Peavy v. WFAA-TV, Inc.*, 2000 WL 1051909 (5th Cir. 2000), *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999).[21]

2. *ECPA's Prohibitions on Expressive Conduct Are Narrowly Drawn.*

Statutory prohibitions on speech or expressive conduct comport with the First Amendment if the burdens on the prohibited speech are necessary and narrowly tailored to achieve the Government's interest. *O'Brien*, 391 U.S. at 377.

[21] In the search-and-seizure context, moreover, this Court and Congress have recognized a constitutional right to privacy of telephone conversations, whether wireline or wireless. *See Katz v. United States*, 389 U.S. 347, 352, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (telephone conversations intended by the speakers to be private are private; "[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication"); *see also* S. Rep. No. 99-541 at 2 (citing *Katz*).

ECPA's prohibition on certain expressive speech meets this standard.

First, ECPA's burdens on speech are necessary in order to protect the privacy of wireless communications and the First Amendment rights of wireless users to speak freely without fear of being intercepted. The *Boehner* and *Peavy* courts specifically recognized the suppressing effect on free speech that results from lack of privacy. *See Boehner*, 191 F.3d at 468 ("[e]avesdroppers destroy the privacy of conversations. The greater the threat of intrusion, the greater the inhibition on candid exchanges. Interception itself is damaging enough. But the damage to free speech is all the more severe when illegally intercepted communications may be distributed with impunity."); *Peavy*, 2000 WL 1051909 at 36 (the "protection of communications' confidentiality encourages, rather than suppresses, free expression."). As the *Boehner* and *Peavy* decisions recognize, parties to a communication will no longer speak freely if they fear their communications can be unlawfully intercepted, disclosed, and used without recourse.

If this Court affirms the Third Circuit's ruling, persons whose privacy has been invaded through illegal interception, disclosure, and use of their communications will have no recourse for the damages they have suffered, because the identity of the person who unlawfully intercepts the communication is often never known.[22] As Judge Pollak noted below in his dissent, "[o]ne would not expect [the unlawful eavesdropper] to reveal publicly the contents of the communication; if [he] did so [he] would risk incriminating

[22] While the media outlet may know the identity of the interceptor, state shield laws will prevent disclosure of the interceptor's identity. Further, as discussed above, affirming the Third Circuit's holding will likely nullify most, if not all, of the state statutes, including Pennsylvania's statute, that regulate electronic surveillance and the disclosure of private communications obtained through such surveillance.

[himself]." *Bartnicki*, 200 F.3d at 133 (quoting *Boehner*, 191 F.3d at 470). Likewise, in *Boehner*, the court explained that interceptors " 'can literally launder illegally intercepted information' and there would be 'almost no force to deter exposure of any intercepted secret.'" *Id.* at 470 (quoting *Boehner v. McDermott*, 1998 WL 436897, *4 (D.D.C. July 28, 1998)).[23] It is for this very reason that Congress imposed liability on individuals who knowingly disclose or use illegally intercepted communications. Congress's goals cannot be achieved without a corresponding burden on the media or other individuals' speech or expressive conduct.

Second, ECPA's burdens on speech are narrowly tailored to address the Government's interests. The Third Circuit erroneously held that there was no evidence that ECPA furthers the Government's interest in promoting privacy, that the connection between preventing third parties from using or disclosing intercepted material and preventing the initial interception was "indirect at best," and that the court was "not prepared to accept the United States' unsupported allegation that the statute is likely to produce the hypothesized effect." *Bartnicki*, 200 F.3d at 125-26. However, it is patently obvious that if individuals and the media cannot disclose or use a communication that they know, or have reason to know, has been obtained through an illegally intercepted communication, the demand for such communications will be largely eliminated, thus deterring would-be interceptors. The Third Circuit's demand that the United States offer concrete evidence that ECPA's prohibition has "deterred any other would-be interceptors" sets an unattainable standard. The deterrent effect of the statute is proved by the fewer number of unlawful eavesdropping cases and the less frequent need

[23] Even where the identity of the interceptor is known, as it was in *Boehner*, meaningful recourse is often impossible once the private speech has been publicly disclosed.

for enforcement activity under ECPA, neither of which is capable of being presented as evidence. Under the Third Circuit's interpretation of narrow tailoring, the balance of harms would weigh in favor of disclosure in each instance. Such a result is not compatible with the standard set forth by this Court in *O'Brien*.

The other courts that have balanced ECPA and First Amendment considerations have found more than a sufficient nexus between the problem and solution. For instance, the *Peavy* court found that:

> [p]rohibiting interception alone is not sufficient to protect the privacy of communications. Without the use and disclosure proscriptions, government's efforts to prohibit interception would be far less effective, because a person who illegally intercepts a conversation and wishes to disclose it to the public can do so, at no risk to himself, by simply anonymously providing the contents of the communication—by use of a tape or otherwise—to third parties, such as the media, who have an interest in disclosing, or otherwise using, those contents (as in Bartnicki).

2000 WL 1059109 at 36.[24]

The *Boehner* court also recognized the connection between the activities prohibited by ECPA and the statute's desired result:

> [u]less disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is

[24] The *Peavy* court distinguishes its holding (and that in *Boehner*) from the Third Circuit's decision below on the basis that in *Peavy* and *Boehner*, there were allegations that the defendants had participated in the illegal interception. However, the holdings of *Peavy* and *Boehner* apply with equal force here, because liability for unauthorized disclosure and use under ECPA does not depend on participation in the underlying illegal interception.

> prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore 'essential' for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of non-disclosure.

191 F.3d at 470.

As the dissent below persuasively argued, ECPA is narrowly tailored to achieve the substantial governmental interest in protecting the privacy of wireless communications. This Court should similarly find that the Government's interest in protecting the privacy of wireless communications is narrowly tailored.

C. The Cases Cited by Respondents As Support for the Argument that the First Amendment Bars ECPA's Prohibitions On Expressive Conduct Are Inapposite.

Respondents rely principally upon four cases for the proposition that the First Amendment protects lawfully obtained information and prohibits criminal sanctions for the publication of truthful information. Although all four cases address the conflict between First Amendment rights and personal privacy, as protected by various state statutes, these cases are factually inapposite to the matter before the Court. This case involves the imposition of civil sanctions for the intentional disclosure and use of a private communication that the parties to the communication had not made public and that the Respondents knew, or had reason to know, was unlawfully obtained. Far from deciding the case at bar, the cases relied upon by Respondents specifically reserved the question of whether prohibition of disclosure or use of

unlawfully obtained information would violate the First Amendment.

First, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) is of no avail to Respondents because the Court specifically found in *Cox* that the information disclosed was not private. The Court held that a rape victim's privacy had faded, even though her name was published in violation of a Georgia statute, because the reporter lawfully learned the name of the victim from records made available for public inspection. Accordingly, the First Amendment barred the State from imposing any sanctions on the newspaper for publication after disclosure. In contrast, in this case, the information disclosed was a private communication that neither party to the communication made public. More specifically, the communication here was unlawfully intercepted, disclosed, and used.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) is similarly unavailing. There, the Court held that criminal sanctions could not be imposed on a newspaper for unlawfully divulging lawfully obtained, truthful information regarding certain confidential proceedings because the State's interests in protecting such confidentiality did not sufficiently justify the infringement on First Amendment rights. In this case, however, the remedy being sought is civil, not criminal; the subject of the civil suit is an unlawful disclosure of information that was unlawfully obtained from a private communication; and the Government's interest in protecting privacy in communications, accomplished by ECPA's prohibitions, justifies the limitations on the Respondents' First Amendment rights, as elaborated previously.

Respondents' reliance on *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) is also baseless. In *Daily Mail*, the Court held that there was no expectation of privacy, and criminal sanctions could not be

imposed when newspapers published, in violation of a West Virginia statute, the name of a juvenile offender that they lawfully obtained from witnesses, the police, and a prosecutor. In this case, the disclosure concerned unlawfully obtained information. Further, the parties to the communication at issue here had a reasonable expectation of privacy that did not fade when their communication was illegally intercepted, disclosed, and used.

Finally, *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) does not support Respondents' arguments. In *Florida Star*, the Court held that a statute prohibiting a newspaper from publishing the name of a victim it had obtained from a publicly released police report violated the First Amendment. But unlike the information published in *Florida Star*, the communication disclosed and used in this case was not lawfully obtained. Rather, it was obtained through an illegal interception of a private communication. *Florida Star* did not decide the question presented by this case: "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.

Contrary to Respondents' suggestion, the protected status of otherwise public information provides no support for an asserted right to publish information that has been unlawfully obtained or intercepted. This Court should affirm its past precedent of allowing disclosure of private information only when such information has been lawfully obtained, and hold that unlawfully obtained, non-public information protected by statute must be kept confidential. If individuals and the media can disclose the fruits of unlawful interception with impunity, the privacy of this confidential information—whether the contents of a confidential wireless communication, the name of a juror, or the identify of a rape victim—will be fatally compromised, and those whose

privacy has been violated will be left without an effective remedy. The right to publish must be tempered by this right to privacy. Likewise, the right of citizens to communicate freely with one another is strengthened by precluding the disclosure of unlawfully intercepted conversations.

CONCLUSION

For the above reasons, the decision of the Third Circuit allowing the media to disclose the contents of unlawfully intercepted, private wireless communications should be reversed.

Respectfully submitted,

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