No. 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, et al.
Respondents.

UNITED STATES OF AMERICA,
Petitioner

V.

FREDERICK W. VOPPER, et al.,
Respondents.

BRIEF OF AMICI CURIAE WFAA-TV and ROBERTS RIGGS IN SUPPORT OF RESPONDENTS

FILED October 25th, 2000

QUESTION PRESENTED

Whether the imposition of civil liability on a media defendant under 18 U.S.C. § 2511(1)(c) and (d), and a parallel state statute, for using or disclosing the contents of illegally intercepted communications violates the First Amendment to the United States Constitution.

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INTEREST OF *AMICI CURIAE*

Amici WFAA-TV and Robert Riggs are defendants-appellees in *Peavy v. WFAA-TV, Inc.*, 37 F. Supp.2d 495 (N.D. Tex. 1999), *aff'd in part, rev'd in part*, 221 F.3d 158 (5th Cir. 2000), which presents the same First Amendment question as this case.[1] The litigation in which *amici* are involved illuminates the issues raised here and also gives *amici* a particular interest in this case.

Amici are the subject of a civil lawsuit by Carver Dan Peavy (Peavy), a public official elected a trustee for the Dallas Independent School District (DISD) from 1986 until 1995. 37 F. Supp.2d at 502. By the early 1990s, Peavy controlled purchases of insurance for DISD employees. He was a friend and business associate of insurance agent Eugene Oliver, a felon who had been convicted as an accomplice to murder in an insurance scam. Together, Peavy and Oliver allegedly executed an insurance kickback scheme affecting DISD employees.

Peavy's telephone conversations were intercepted not by petitioners WFAA-TV and Riggs, but by Peavy's next-door neighbor, Charles Harman. Harman testified that he consulted the Dallas County District Attorney's office regarding the intercepted conversations. 37 F. Supp.2d at 502. According to Harman, he asked Assistant District Attorney Bill Geyer whether it would be lawful to listen to the cordless telephone conversations, and Geyer responded, "Absolutely." *Id.* Harman then inquired whether he could record the telephone calls. According to Harman, Geyer replied, "Go ahead. Anything over the air is free." *Id.* Harman called District Attorney John Vance to inform him that Peavy had made certain threats against Harman and that Peavy was engaged in possible improprieties regarding DISD insurance. Vance instructed Harman to "keep

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel, has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* state that the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of this Court.

taping." *Id.* at 503. Vance met with Harman on January 17, 1995. Also present were Assistant District Attorney Mike Gillett and Investigator Bob Jennings. According to Harman, all the participants reassured him that his actions were legal. *Id.* at 503 n.3.

Harman also called WFAA-TV and said that he was in possession of information concerning possible corruption of a public official. Riggs, a senior reporter at WFAA-TV, met with Harman, who assured him that his actions had been approved by the Dallas County District Attorney and the Dallas Police Department. *Id.* at 503. WFAA also contacted its attorney, Paul Watler, to determine whether it was legal to use the tape recordings. Watler advised that WFAA-TV could accept and broadcast the tapes. This advice was confirmed in a written legal memorandum dated January 4, 1995. *Id.*

Harman provided WFAA with 18 tapes containing 188 telephone conversations between Peavy and others. *Id.* Several weeks later, Riggs was informed by a law enforcement source about a recent amendment to Title III. Riggs contacted Watler to determine whether the interception of cordless telephone calls was prohibited under the new law. Watler researched the issue and learned that an October 1994 amendment made it unlawful to intercept the radio portion of a cordless telephone call. *Id.* He immediately advised WFAA not to accept any additional tapes from Harman, not to broadcast the tapes already in its possession, and not to confront individuals about conversations on the tapes. But Watler told WFAA and Riggs that they could continue to investigate Peavy. WFAA and Riggs followed this advice. The original tapes were returned to Harman on or about March 1, 1995. *Id.* at 504. Copies of the tapes and all related documents were delivered to Watler for safekeeping. *Id.*

Meanwhile, WFAA continued to investigate Peavy, without receiving any more tapes from Harman. Riggs learned that Peavy had been appointed by the president of the school board to solicit new bids on group term life and disability insurance for DISD employees. 37 F. Supp.2d at 504. Peavy had designated

his associate Eugene Oliver as the exclusive insurance agent to obtain these bids. The contracts were ultimately awarded to two companies represented by Oliver. Thereafter, Oliver split his commissions with Peavy and several others. Riggs also uncovered a similar arrangement between Peavy and Oliver involving a cancer insurance policy that Oliver wanted to negotiate with Mary Kay Cosmetics. *Id.*

In the summer of 1995, WFAA aired a three-part series regarding the relationship between Peavy and Oliver. WFAA did not play or even mention any of the tapes received from Harman during the broadcasts. 37 F. Supp.2d at 504. On July 31, 1995, DISD Superintendent Chad Woolery announced an investigation into the school district's insurance program. Peavy was stripped of his authority over insurance procurement, and DISD stopped paying agent commissions on all insurance contracts. Peavy later resigned from the school board. *Id.*

The FBI conducted a parallel criminal investigation during the same time period. As a result of this investigation, Peavy and Oliver were indicted on more than forty counts of official bribery, conspiracy, and income tax evasion, although they were eventually acquitted of all charges. 37 F. Supp.2d at 504.

The district court held that the First Amendment precluded the imposition of liability on *amici*, but the Fifth Circuit reversed. 221 F.3d 158. *Amici* will be filing a petition for certiorari seeking review of the Fifth Circuit's judgment, which is due October 30, 2000.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case at bar, the *Peavy* case, and the case of *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (Apr. 25, 2000) (No. 99-1709), demonstrate the fundamental First Amendment rights abridged by Sections 2511(1)(c) and (d), 18 U.S.C. § 2511(1)(c) and (d), and by parallel state statutes. These cases involve both political speech at the core of the First Amendment and the traditional

role of the press in disclosing corruption and malfeasance by public officials.

I. This case should be decided according to a simple, bright line rule: if a journalist breaks the law to obtain information, she is subject to whatever generally applicable legal penalties may be triggered by the act of misappropriation. However the journalist has obtained information, she may be punished only for any impropriety in obtaining it, and not for publishing it, absent a countervailing governmental interest of the highest order. The press has a First Amendment right to examine such information without regard to how it was obtained, to make an independent judgment as to whether it is newsworthy, and to disseminate it to the public. This is the principle of *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

Under the new rule proposed by the United States, by the private petitioners, and by their *amici* in these cases, the Pentagon Papers never would have been published by The New York Times and The Washington Post. For the classified documents in that landmark case had been "purloined from the Government's possession and . . . the newspapers received them with knowledge that they had been feloniously acquired." *New York Times Co. v. United States*, 403 U.S. 713, 754 (1971) (Harlan, J., dissenting). Petitioners' *amici* go so far as to say that there was no First Amendment issue at all in the Pentagon Papers case because the press has no constitutional right to distribute "other people's speech." Brief of *Amicus Curiae* Rep. John A. Boehner in Support of Petitioners at 12. This position is plainly untenable.

This Court should make clear that the proper First Amendment analysis does not depend on whether the media defendant may be deemed to have been on notice of, or have participated in, the underlying illegal interception. Any person who intercepts a wire or electronic communication, or procures another person to do so, is subject to punishment under Section 2511(1)(a). The availability of separate sanctions under that section provides *less* reason to punish the disclosure itself under

Section 2511(1)(c), not *more*. While media defendants may be punished for their role in the interception, they should never be punished for exercising their First Amendment rights.

II. Even if the rule of *Florida Star* did not apply here, Section 2511(1)(c) (the "disclosure" provision) would be subject to strict scrutiny under conventional First Amendment analysis. Section 2511(1)(c) is a direct prohibition on speech and nothing but speech. Accordingly, it would be subject to strict scrutiny even if it were deemed to be content-neutral. This Court should hold that the matter of "disclosure" of intercepted communications is governed solely by Section 2511(1)(c) and its state-law counterparts, and may not be treated simply as a form of "use" under Section 2511(1)(d) and corresponding state statutes.

III. Apart from the rule of *Florida Star*, Section 2511(1)(c) and Section 2511(1)(d) are subject to strict scrutiny under conventional First Amendment doctrine because they are content-based prohibitions on speech. They do not operate in a mechanical fashion as a straightforward ban on the verbatim broadcast of tapes of intercepted communications. Instead, Title III requires a court to examine the communicative substance of what a defendant says in order to determine whether it "uses" or "discloses" "the contents of" an illegal interception. For example, in the *Peavy* case the Fifth Circuit held that *amici* could be held liable under Title III even though WFAA did not play or even mention any interception tapes in the television broadcasts. 221 F.3d at 166.

In an analogous way, the New York "Son of Sam" law at issue in *Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105 (1991), was content-based because it was "directed only at works with a specified content," *id.* at 116 – namely, those manifesting a defendant's "thoughts, feelings, opinions or emotions regarding [his] crime." *Id.* at 109. Just as the New York statute required a court to dissect the content of a book or movie in order to determine whether it expressed a defendant's knowledge about his past misdeeds,

Title III requires a court to examine the communicative substance of a broadcast or publication to determine whether it "uses" or "discloses" "the contents of" a past misdeed (an intercepted communication).

In addition, the prohibitions of Section 2511(1)(c) and Section 2511(1)(d) do not apply unless a court first examines the social meaning of what the speech communicates and determines that it is not "common knowledge." This inquiry into how the listener understands the speech underscores how content-based the statute's prohibition is.

Moreover, Title III's purpose is likewise inextricably linked to the content of speech. Title III is aimed at preventing the psychic harm associated with the disclosure of private facts that a telecommunications user wishes to shield from public view. Such a purpose is content-based and independently triggers strict scrutiny.

IV. Even if intermediate scrutiny were to apply, the government could not meet its burden of justifying Section 2511(1)(c) and Section 2511(1)(d). The statute is a gratuitous restriction on speech, penalizing expression while providing no clear assurance that it serves any important governmental interest – much less any assurance that the statute is a narrowly tailored means of achieving that interest.

V. However this Court decides the First Amendment question presented, the Court should hold that the imposition of liability under 18 U.S.C. § 2511(1)(c) and (d) requires a showing, by clear and convincing evidence, that the defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection." This Court should make clear that this means a defendant may not be held liable if it has a reasonable basis for believing that the interception was lawful.

ARGUMENT

I. THIS CASE IS GOVERNED BY THE RULE OF *FLORIDA STAR*.

A simple, bright line rule is warranted here: if a journalist misappropriates information or otherwise breaks the law to obtain it, she is subject to whatever generally applicable legal penalties may be triggered by the act of wrongfully obtaining the information. However the journalist has obtained information, she may be punished only for any impropriety in obtaining it, and not for publishing it, absent a countervailing governmental interest of the highest order. This strict scrutiny principle is apparent from a series of this Court's decisions.

In 1971, The New York Times and The Washington Post published the classified "Pentagon Papers," which had been purloined from the government and delivered to the press. Justice Black, concurring in the per curiam judgment rejecting the government's effort to restrain publication, opined:

> [F]ar from deserving condemnation for their courageous reporting, the New York Times, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court held that a state could not constitutionally impose civil liability on a television station for broadcasting a 17-year-old rape-murder victim's name, which the station obtained from courthouse records open to public inspection. This Court acknowledged that "the century has experienced a strong tide

running in favor of the so-called right of privacy." *Id.* at 488. Nonetheless, this Court held that, "[a]t the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* at 496. This Court found inapplicable the intermediate scrutiny of *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968): "The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression – the content of a publication – and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition." 420 U.S. at 695. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.*

Next, in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), this Court held that Virginia could not punish a newspaper that had breached the confidentiality of proceedings before a commission on judicial misconduct. A third party provided the information to the newspaper in violation of state law. *Id.* at 830 n.1, 832. The newspaper was aware of the Virginia statute prohibiting publication. *Id.* at 832. This Court observed that forty-seven states, the District of Columbia, and Puerto Rico had established some type of judicial inquiry and disciplinary procedures, and all of them provided for confidentiality. *Id.* at 834. Nevertheless, this Court held that, once the information came into the hands of a newspaper, Virginia could penalize its publication only by demonstrating a clear and present danger to the administration of justice, a standard it had failed to meet. *See id.* at 837 (First Amendment does not permit "the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission").

Similarly, in *Smith v. Daily Mail*, 443 U.S. 97,101-02 (1979),

this Court held that a state could not punish a newspaper for publishing a juvenile murder suspect's name, because "a penal sanction for publishing lawfully-obtained, truthful information . . . requires the highest form of state interest to sustain its validity." This Court reaffirmed the principle that "if 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." *Id.* at 103.

And in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), this Court reversed the imposition of civil damages liability against a newspaper that published a rape victim's name in violation of a state statute. The name had been disclosed, in violation of state law, by a Sheriff's Department employee. *Id.* at 527, 536. The newspaper was aware, as evidenced by signs posted in the newsroom, that "the names of rape victims were not matters of public record, and were not to be published." *Id.* at 546 (White, J., dissenting). Nonetheless, this Court reaffirmed *Daily Mail* and warned that the press could not be expected to shoulder "the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Id.* at 536.

Thus, this Court has held that, where the press manages to obtain otherwise confidential information, it cannot be prevented from publishing it – or be punished for having done so. The rule of *Florida Star* does not depend on whether a statute is content-based or content-neutral. The word "content" does not even appear in *Florida Star*, *Daily Mail*, or *Landmark*. Rather than focusing on content discrimination, this Court has emphasized the need to resolve the conflict between truthful reporting and government-protected privacy interests. *See, e.g., Florida Star*, 491 U.S. at 530. The conflict has been decisively resolved in favor of speech.

The rule does not depend on whether the press obtains the information from the government or from a private person. In *Daily Mail*, for example, the press obtained the information

through witness interviews and other reporting techniques, not through government sources. *See* 443 U.S. at 99, 104.

Nor does the rule depend on whether information has been unlawfully acquired by a third party. This Court has held that a source's illegal conduct cannot be imputed to the media. For example, in *Landmark*, the source apparently acted illegally in disclosing the information, but this Court refused to impute that illegal conduct to the press. *See* 435 U.S. at 831 n.1. Similarly, in *Florida Star*, the Sheriff's Department violated a state statute by releasing the victim's name to the media, but this Court again refused to impute the source's illegal act to the media. *See* 491 U.S. at 536. In addition, applying a different test to so-called tainted information would have no endpoint. Once tainted, the information could never be used or published, creating an enormous burden on the press to ascertain the precise origin of any truthful information.

This Court should make clear that the proper First Amendment analysis does not depend on whether the media defendant may be deemed to have notice of, or to have "participated" in, the underlying illegal interception. In both *Landmark* and *Florida Star*, for example, the media could have been deemed a "participant" in the underlying wrongdoing. In the instant context, any person who intercepts a wire or electronic communication, or procures another person to do so, is subject to punishment under Section 2511(1)(a). The availability of separate liability under that section provides *less* reason to punish the disclosure under Section 2511(1)(c), not *more*. Media defendants may be punished for whatever role they play in an illegal interception, but not for exercising their First Amendment rights. After all, even convicted felons retain their First Amendment rights to speak about their crimes. *See, e.g., Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105 (1991).

II. SECTION 2511(1)(C) IS SUBJECT TO STRICT SCRUTINY AS A DIRECT PROHIBITION ON SPEECH AS SUCH AND NOTHING BUT SPEECH.

Even if the rule of *Florida Star* did not apply here, the central statutory provision at issue in this case – the "disclosure" prohibition of Section 2511(1)(c) – would be subject to strict scrutiny under conventional First Amendment analysis. Section 2511(1)(c) expressly targets speech and nothing but speech: it prohibits the "disclosure" of the "contents" of particular communications. Tellingly, although the Solicitor General argues that *Section 2511(1)(d)* "does not apply only to communicative activities" (Govt. Br. 23), he makes no such claim with respect to *Section 2511(1)(c)*.

Laws directly targeting and prohibiting speech as such are properly subject to strict First Amendment scrutiny, *whether or not they are deemed to be content-based. See, e.g., Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in judgment) (cataloguing cases involving content-neutral laws in which the Court has applied strict scrutiny).

In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), for example, this Court invalidated a sales tax imposed on newspapers with a circulation of more than 20,000 per week – regardless of their content or message – because a law "to limit the circulation of information to which the public is entitled" is wholly inconsistent with the First Amendment. *Id.* at 250. Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), this Court applied "exacting scrutiny" to expenditure limitations that were "direct and substantial restraints on the quantity"of speech itself, *id.* at 39, 44-45, even though they were "neutral as to the ideas expressed." *Id.* at 39. In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court employed "exacting scrutiny" to strike down a ban on the use of paid petition circulators, which "impose[d] a direct restriction which

'necessarily reduces the quantity of expression.'" *Id.* at 419, 420 (ellipsis in original and citing *Buckley*). This Court held that the law "limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach." *Id.* at 422-23. *See also City of Ladue v. Gilleo*, 512 U.S. 43, 55 & n.13 (1994) (content-neutral laws banning entire category of speech may be subject to strict scrutiny); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (applying strict scrutiny to content-neutral law that prohibited grand jury witness from publicly disclosing his own testimony after grand jury's term ended).

This Court has never suggested that a direct limit on speech as such may be subject to anything less than strict scrutiny. Instead, this Court has held that intermediate First Amendment scrutiny is reserved for certain special categories of laws, for which Section 2511(1)(c) cannot qualify. For example, this Court has applied intermediate scrutiny to restrictions on "conduct" having merely an "incidental" effect on speech when applied to a particular example of that conduct that happens to be expressive. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567, 570 (1991) (plurality opinion); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 298 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The *O'Brien* test is triggered only when "'speech' and 'nonspeech' elements are combined in the same course of conduct," 391 U.S. at 376 – that is, where a law applies to "speech-plus" or to conduct "intertwined" or "intermingled" with speech.[2] Where (as here) a ban falls on speech, and speech alone, intermediate scrutiny is wholly inapplicable. *See Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction

[2] *See American Radio Ass'n v. Mobile Steamship Ass'n*, 419 U.S. 215, 231 (1974); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968).

resting solely upon 'speech,' . . . not upon any separately identifiable conduct . . . . *Cf. United States v. O'Brien.*").

Similarly, this Court has applied intermediate scrutiny to time, place or manner rules restricting the noncommunicative aspects of a speaker's activity, such as its decibel level, in order to limit its nuisance impact on others. *See, e.g., Ward v. Rock Against Racism, Inc.*, 491 U.S. 781 (1989). It has long been axiomatic that, in order to qualify for less than strict scrutiny, such rules must not interfere with a speaker's ability to communicate his or her chosen content to the chosen audience.[3] Yet Section 2511(1)(c) prohibits the press from disclosing the contents of intercepted communications at any time, in any place, or in any manner.

Therefore, Section 2511(1)(c) is properly subject to strict scrutiny as a direct prohibition on speech and nothing but speech. The Solicitor General, perhaps recognizing the constitutional infirmity in Section 2511(1)(c), suggests that the same speech may be punished instead under the "use" provision of Section 2511(1)(d), or that the "disclosure" provision of Section 2511(1)(c) can be upheld as part of "a unitary, undifferentiated prohibition on use." Brief of the United States at 24. But that argument ignores the text of Section 2511. The fact of the matter is that in Section 2511(1)(c) Congress *did* single out "disclosure," and hence expression, for a special prohibition.

It is simply not the case that "disclosure" under Section 2511(1)(c) may be treated as a subset of "use" under Section

[3] *See, e.g., Ward*, 491 U.S. at 802; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (under *Schneider v. State*, 308 U.S. 147 (1939), ban on leafleting in public streets cannot be considered time, place, or manner rule); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (ban on handbilling in public areas could not be considered a "time, place, or manner" rule because "[t]here is . . . no restriction in [the] application [of the ban on circulars] with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets").

2511(1)(d) or that speech may be punished under *both* Section 2511(1)(c) and Section 2511(1)(d). If Congress had intended public disclosure to be considered as a type of "use," the legislature would not have set out two separate statutory provisions. The Solicitor General's approach would render Section 2511(1)(c) surplusage, in violation of the canon of statutory interpretation that a court is "not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. . . . [A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (internal quotation omitted). *See also Miller v. French*, 120 S. Ct. 2246, 2253 (2000); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 486 (1985).

In addition, the Solicitor General's view that "disclosure" may be treated as a species of "use" is unacceptable because it would create an impermissible risk of double-counting and multiple punishment. Section 2520(a)(2)(B), 18 U.S.C. § 2520(a)(2)(B), imposes statutory penalties of up to $10,000 per violation. If a single instance of expression were treated as a form of *both* prohibited "use" under Section 2511(1)(d) *and* forbidden "disclosure" under Section 2511(1)(c), the media defendant would become subject to double statutory penalties.

Therefore, this Court should hold that Section 2511(1)(d) does not encompass "disclosure." The Court should treat "disclosure" as being governed solely by Section 2511(1)(c). The Court should hold that Section 2511(1)(c) is subject to strict First Amendment scrutiny, which the statute cannot survive.

III. SECTION 2511(1)(C) AND SECTION 2511(1)(D) ARE CONTENT-BASED PROHIBITIONS.

Apart from the rule of *Florida Star*, Section 2511(1)(c) and Section 2511(1)(d) are subject to strict scrutiny under conventional First Amendment analysis for the further reason that they are content-based prohibitions. First, by its terms the statute operates according to the content of speech. Second, the governmental purpose of Title III is inextricably linked to the content of speech.

A. Section 2511(1)(c) and Section 2511(1)(d) Are Content-Based By Their Terms.

Section 2511(1)(c) and Section 2511(1)(d) operate according to the content of expression disseminated by a defendant. Although the Solicitor General has described the scope of Title III as turning solely on the process by which information is collected (e.g., an illegal wiretap) rather than on its content, *see* Brief of the United States at 22, that description is inaccurate. The statute is not a mechanical prohibition on the verbatim broadcast of intercepted communications. Instead, Title III requires a court to examine the content of what a defendant says in order to make a judgment about the degree to which it "uses" or "discloses" "the contents of" an illegal interception. 18 U.S.C. § 2511(1)(c), (d). Title III liability is based on whether the substance of what a defendant says is sufficiently connected, as a matter of communicative meaning and subject-matter proximity, to "the contents of" an illegal interception.

For example, in the *Peavy* case the Fifth Circuit held that *amici* could be held liable under Title III even though WFAA did not play or even mention any interception tapes in the television broadcasts. The Fifth Circuit held that liability could be imposed if a court or jury examined the content of WFAA-TV's speech and determined that the "topics covered in their broadcasts" and "the material reported in those broadcasts" demonstrated that the

speech "used" or "disclosed" "the contents of" an illegal interception. 221 F.3d at 175.

Consider a hypothetical case in which a newspaper, having conducted an independent investigation of a public official's financial records and tax returns as well as having been provided with tapes of intercepted conversations involving him, publishes an article accusing the official of "corruption." A court could not even begin to determine whether that accusation "uses" or "discloses" "the contents of" an intercepted communication without analyzing the expressive meaning of the newspaper's charge and determining how closely it is linked to the information learned from the tapes. What exactly did the newspaper mean by "corruption," and on what facts did the newspaper base its accusation? If the newspaper had learned from the official's tax returns that he had engaged in sham business transactions, while a taped phone call revealed that the official had actually been bribed, does the charge of "corruption" "use" or "disclose" "the contents of" the intercepted communication? By calling the official "corrupt," did the newspaper mean simply that he was of low moral standing or did it mean that he had transgressed anti-bribery laws? The necessity of such an inquiry demonstrates the content-based nature of the prohibition on speech.

In an analogous way, the "Son of Sam" law at issue in *Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105 (1991), was content-based because it was "directed only at works with a specified content," *id.* at 116 – *i.e.,* those expressing a defendant's "thoughts, feelings, opinions or emotions regarding [his] crime." *Id.* at 109. This Court explained that the law would therefore extend to "such works as . . . the Confessions of Saint Augustine, in which the author laments 'my past foulness and the carnal corruptions of my soul,' one instance of which involved the theft of pears from a neighboring vineyard." *Id.* at 121.

Title III functions, in effect, as a law requiring St. Augustine

to confess "the contents of" (18 U.S.C. § 2511(1)(c), (d)) his eavesdropping. Just as the New York "Son of Sam" statute requires a court to parse the content of a book or movie in order to determine whether it reflects a defendant's knowledge of his past misdeeds, Title III requires a court to examine the communicative substance of a broadcast or publication to determine whether it "uses" or "discloses" "the contents of" a past misdeed (an intercepted communication). Indeed, Title III is more objectionable, in First Amendment terms, than the "Son of Sam" law. Title III does not merely prohibit a person who knows of an illegal interception from pocketing the financial proceeds of that crime; Title III flatly prohibits the person from "using" or "disclosing" the informational "contents" (18 U.S.C. § 2511(1)(c), (d)) flowing from the interception. This Court has noted the difficulty of applying the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*, 371 U.S. 471 (1963), under which evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment are inadmissible.[4] The inquiry mandated by Title III is even more slippery and subjective.

Under Title III, whether civil liability is imposed on a defendant is determined precisely by what he says and by what ideas and information he conveys. "[B]y any commonsense understanding of the term, the ban in this case is 'content-based.'" *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).[5]

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[4] *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (metaphor can be "misleading"); *Segura v. United States*, 468 U.S. 796, 815 (1984) ("fruit of poisonous tree" doctrine inapplicable where "the link between the illegality and that evidence was sufficiently attenuated to dissipate the taint"); *Nix v. Williams*, 467 U.S. 431, 442, 445 (1984) (doctrine is "admittedly drastic and socially costly" and rigid application would be "formalistic, pointless, and punitive").

[5] Contrary to the argument of petitioners' *amici*, *see* Brief of *Amicus Curiae* Rep. John A. Boehner in Support of Petitioners at 4-8, the statute here is not

Prohibitions that operate according to the content of speech trigger strict scrutiny. In *Burson v. Freeman*, 504 U.S. 191 (1992), for example, this Court applied strict scrutiny to a statute prohibiting the solicitation of votes and the display of campaign materials within 100 feet of a polling place. A plurality explained that the statute's terms, which "distinguish[ed] among types of speech," "require[d] that the statute be subjected to strict scrutiny." *Id.* at 207. *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (applying strict scrutiny to state statute prohibiting the distribution of anonymous campaign literature, on the ground that "the category of covered documents is defined by their content").

Similarly, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court invalidated a ban on "editorials" — regardless of viewpoint or subject matter — by public broadcast stations receiving government funds. This Court observed that "the scope of [the] ban is defined solely on the basis of the content of the suppressed speech": "in order to determine whether a particular statement by station management constitutes an 'editorial' proscribed by [the statute], enforcement authorities must necessarily examine the content of the message that is conveyed." *Id.* at 383. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), this Court held that a law taxing general interest magazines, but exempting newspapers and religious, professional, trade, and sports journals, was content-based because, "[i]n order to determine whether a magazine is subject to sales tax, . . . enforcement authorities must necessarily

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like the Copyright Act, which restricts publication of a particular form of expression, but does not restrict dissemination of the facts or ideas expressed. *See Harper & Row v. Nation Enterprises*, 471 U.S. 539, 556 (1985). The prohibition on speech in Section 2511(1)(c) and Section 2511(1)(d) is broader than the Copyright Act because Title III bans the use or dissemination of facts and ideas expressed regardless of the form the communication takes. In addition, Section 2511(1)(c) and Section 2511(1)(d) cannot be applied without examining the content of communication.

examine the content of the message that is conveyed." The same is true with respect to Section 2511(1)(c) and Section 2511(1)(d).

The scope of the prohibition in Section 2511(1)(c) and Section 2511(1)(d) is content-based for another, independent reason: it turns on an assessment of the communicative effect of the expression on "the minds of the [audience]." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585 (1991) (Souter, J., concurring). As the Solicitor General interprets Title III, it does not "prohibit anyone from disseminating that which is already common knowledge." Brief of the United States at 44. "The 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)." *Id.* (internal quotation omitted).

Thus, when a media defendant publishes information – even the verbatim transcript of an interception illegal under Title III – the prohibitions of Section 2511(1)(c) and Section 2511(1)(d) do not apply unless a court first examines the communicative substance of the speech and determines that it is not "common knowledge." This inquiry into how a listener understands the speech and its social meaning renders the statute content-based. *See Regan v. Time, Inc.*, 468 U.S. 641, 648, 655-56 (1984) (inquiry into color and size of currency reproduction is content-neutral, but exception for currency reproductions serving "philatelic, numismatic, educational, historical, or newsworthy purposes" is content-based). *See also* Brief of Petitioners Bartnicki and Kane at 23 n.6 ("A prohibition of disclosure of information presented to a grand jury may be viewed as content-based . . . .").

B. The Statutory Purpose Is Content-Based.

Section 2511(1)(c) and Section 2511(1)(d) are content-based for the additional reason that the governmental purpose they are designed to serve is derived completely from the content of speech. The purpose of Title III, according to its proponents, is

to prevent the psychic harm associated with the disclosure of private facts that a telecommunications user would wish to shield from public view. The Solicitor General, for example, asserts that the statute "protects against the aggravated injury to privacy that occurs when illegally intercepted communications are then exploited or publicly disseminated." Brief of the United States at 14. That is why "the interests underlying [Title III's] prohibition 'fade once information already appears on the public record.'" *Id.* at 44 (citation omitted).

Similarly, the private petitioners insist that Title III is necessary to protect "the participants to a private conversation [who] speak unguardedly of their friends and adversaries, talk in deepest confidence of their strategy regarding a labor dispute, and even give out their telephone numbers." Brief of Bartnicki and Kane at 30. The private petitioners stress that, in the intercepted conversation in this case, "Bartnicki gave Kane both her home telephone number and her cellular carphone number." *Id.* at 5. They also note that "[w]e send sophisticated legal documents, a bid, a love letter [electronically]." *Id.* at 27 (quoting statement of Sen. Leahy). "None of us is so circumspect in our speech that we can countenance the later use of our most private utterances, played with the shattering impact of a broadcast in our own words." *Id.* at 35-36 (quoting S. Rep. No. 90-1097, at 175 (additional views of Sen. Hart)). Of course, the sensitivity of these matters reflects the content-based nature of the governmental interest.

Petitioners' *amici* similarly discuss the importance of avoiding "the inhibition of candid exchanges," and they compare the interests underlying Title III – "protecting the confidentiality of private conversations" – to interests which this Court has previously found to trigger strict scrutiny: "protecting . . . the names of young wrongdoers and the identity of innocent victims of crime." Brief *Amicus Curiae* of the Cellular Telecommunications Industry Assn. in Support of Petitioners at 3, 13. *Amici* compare electronic interception to "the perusal of one's private diary" and "the Orwellian nightmare of having their

most private conversations broadcast over the Nation's airwaves." Brief of *Amicus Curiae* Rep. John A. Boehner in Support of Petitioners at 24, 27. Even the stated governmental interest in fostering public willingness to use new communications technologies rests, at bottom, on preventing disclosures that would be embarrassing because of the content they would expose to a media defendant's listeners and readers.

Far from supporting the law, the interests purportedly served by Section 2511(1)(c) and Section 2511(1)(d) reveal the inevitably content-based nature of the statute. The interests stem from the communicative impact of speech – what information it contains and how the audience would understand it. Yet this Court has instructed that "reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *see also City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) (plurality opinion) ("If the government interest is related to the content of expression, . . . then the regulation falls outside the scope of the *O'Brien* test."); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J., joined by Stevens and Scalia, JJ.) ("regulations that focus on the direct impact of speech on its audience" – the speech's "primary effects" – are not properly treated as content-neutral).

Indeed, in another context the Solicitor General acknowledges that a law is content-based if its "manifest purpose [is] preventing public knowledge of the anticipated content . . ., *e.g.*, allegations that might injure a 'judge's reputation' or damage public 'confidence in the judicial system.'" Brief of the United States at 31 n.9. Section 2511(1)(c) and Section 2511(1)(d) must therefore be deemed content-based. The statute necessarily triggers strict scrutiny for this independent reason.

IV. SECTION 2511(1)(C) AND SECTION 2511(1)(D) FAIL INTERMEDIATE SCRUTINY.

This Court has repeatedly held that, even under merely

intermediate scrutiny, restrictions on speech cannot be justified by unadorned speculation, even if labeled "common sense." In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), for example, a plurality of this Court explained that a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrated that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666. In *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), this Court noted, in addition to the extensive factual findings made by Congress in the text of the statute itself, "a record of tens of thousands of pages" supporting the rules. *Id.* at 187 (internal quotation omitted). This Court stressed that there was a "substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions." *Id.* at 196. This Court pointed to "specific support" for Congress' conclusion (*id.* at 197): "[s]ubstantial evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 202-03); and "[e]mpirical research in the record before Congress" (*id.* at 208). Nothing of the sort exists in this case.[6]

Section 2511(1)(c) and Section 2511(1)(d) impose an

[6] *See also Greater New Orleans Broadcasting Council v. United States*, 527 U.S. 173, 188 (1999) ("'Th[e] [government's] burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'") (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (plurality opinion) (rejecting government's "common sense" justification: "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (expressly rejecting government's "common sense" justification for restriction on speech); *Ibanez v. Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 143 (1994) ("unsupported assertions" are "insufficient" to justify restrictions on speech).

absolute, categorical ban on speech traceable to an illegal interception in order to serve what the Solicitor General describes as a "deterrent function" – to reduce the incentive of would-be eavesdroppers to intercept electronic communications by "dry[ing] up the market for this material." Brief of the United States at 40. But the Solicitor General can point to little beyond speculation and analogies to quite different contexts ("fencing" of stolen property and child pornography, for example) to support his argument. It seems equally plausible to assume that, unlike the markets for stolen property and child pornography, which are driven primarily by economic considerations, few if any eavesdroppers are motivated chiefly by the prospect of delivering information to the press. Rather, like Mr. Harman in the *Peavy* case, they are motivated by other considerations and will not alter their behavior as a result of Section 2511(1)(c) and Section 2511(1)(d). Tellingly, Harman began taping *before* he even approached WFAA-TV, and he continued to tape even *after* WFAA-TV informed him that it would not accept any additional tapes.

The only evidence the Solicitor General is able to muster is hopelessly out-of-date and relates to the technological state of the art in 1968 and 1986. *See* Brief of the United States at 2, 3, 5, 24, 37, 44 (citing legislative materials from 1968); *id.* at 3-4, 5, 36, 37 (citing legislative materials from 1986). This evidence fails to consider (to take obvious examples) advances in encryption, public key infrastructure, digital phones, and other technological means of protecting privacy short of a ban on speech.[7]

[7] *See, e.g., Hard of Hearing*, NEWSWEEK, Dec. 13, 1999, p. 78 ("Digital transmissions, used for most mobile phones and soon for almost all telecommunications, are harder to intercept than the old analog signals. Whereas analog signals are transmitted in a continuous stream, digital signals are broken into small, hard-to-track packets. E-mail and telephone calls that use the Internet are almost impossible to intercept. While digital packets can be snatched in bulk, reassembling them is very difficult. The sheer volume of

Thus, the Solicitor General has failed to meet his burden of justifying Section 2511(1)(c) and (d). The statute is a gratuitous restriction on speech, penalizing expression while providing no clear assurance that it serves any important governmental interest – much less any assurance that the statute is a narrowly tailored means of achieving that interest.

Far from arguing that Section 2511(1)(c) and Section 2511(1)(d) are narrow restrictions, the private petitioners contend that the statute is written "in broad terms" whose effect is "comprehensive[]." Brief of Bartnicki and Kane at 8. This very breadth and comprehensiveness represents a particularly significant source of constitutional concern under intermediate scrutiny. In *Edenfield v. Fane*, 507 U.S. 761 (1993), for example, this Court held that a flat ban on personal solicitations by accountants could not survive intermediate scrutiny as a means of preventing fraudulent solicitations. Reaffirming the principle that "[b]road prophylactic rules in the area of free expression are suspect," *id.* at 777 (internal quotation marks omitted), this Court required a showing that personal solicitations were so likely to result in fraud that, without a flat ban, a serious risk of harm would remain. *Id.* at 774-77.[8]

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global information makes it hard to sort out key words and phrases. Encryption, once rare in everyday commerce and communication, has been made commonplace by software programs that anyone . . . can get. . . . New technology poses obstacles to eavesdropping that may be virtually insuperable."); *Cordless Phones*, CONSUMER REPORTS, Nov. 1998, p. 48 ("It's extremely difficult to eavesdrop on a digital phone"); Advisory Committee on Online Access and Security - Comment, P004807, Comments of Entrust Technologies, Inc. on April 19-20 Draft Report of The Advisory Committee on Access and Security of the Federal Trade Commission (April 27, 2000) (discussing improvements in privacy protection with technologies such as public key encryption, digital signatures, certification, "hash" functions, and private keys), available at, http://www.ftc.gov <http://www.ftc.gov/>.

[8] *See also Greater New Orleans Broadcasting Council*, 527 U.S. at 193 (noting "the availability of other regulatory options which could advance the asserted interests 'in a manner less intrusive to First Amendment rights'");

V. THIS COURT SHOULD MAKE CLEAR THAT A DEFENDANT MAY NOT BE HELD LIABLE IF IT HAS A REASONABLE BASIS FOR BELIEVING THAT THE INTERCEPTION WAS LAWFUL.

However this Court decides the First Amendment question presented, it should hold that a defendant may not be held liable under Section 2511(1)(c) or Section 2511(1)(d) if he had a reasonable basis for believing that the interception was lawful. The requisite intent is statutorily defined as "knowing or having reason to know" that the information in question "was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c), (d). Some lower courts have incorrectly interpreted this scienter language as requiring a plaintiff to show only that the defendant knew, or had reason to know, sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited by Title III. These courts have refused to consider the defense that the defendant held a good faith view (based on advice from law enforcement authorities, for example) that the interception was lawful. *Peavy*, 221 F.3d at 178.

This Court should make clear that such a construction of the scienter requirement of Section 2511(1)(c) and Section 2511(1)(d) is incorrect. It may be permissible as an initial matter to presume a defendant's knowledge of the Title III legal requirements. But the scienter requirement should be interpreted as allowing the defendant to negate any presumption that he was aware of the Title III prohibition by demonstrating that he

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Rubin v. Coors Brewing Co., 514 U.S. at 491 (citing "the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech).

reasonably relied on advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information. Such evidence should properly be treated as exculpating the defendant from liability by demonstrating that he did not know, or have reason to know, that the interception was illegal. This construction is more faithful to the statutory language enacted by Congress because it gives meaning to the decision to place the phrase "in violation of this subsection" after the verb "know[s] or ha[s] reason to know[]." By any common sense understanding, a defendant who has been advised of the lawfulness of conduct by local police, the district attorney, and his own counsel has no "reason to know" that the conduct violates Title III.

In the *Peavy* case, for example, Harman assured WFAA and Riggs that the lawfulness of his actions had been confirmed by the Dallas County District Attorney and the Dallas Police Department. 37 F. Supp.2d at 503. The district court also found that Paul Watler, WFAA's legal counsel, advised News Director John Miller that WFAA-TV could accept and broadcast the tapes. This advice was confirmed in a written legal memorandum dated January 4, 1995. *Id.* As soon as WFAA and Riggs learned that the interceptions were unlawful, they stopped accepting tapes from Harman, returned the original tapes to him, and transferred all copies of the tapes and related documents to their attorney for safekeeping. *Id.* at 503-04. The district court commended WFAA and Riggs for "attempt[ing] to determine whether the interceptions were legal. Their actions were consistent with those of a responsible journalist – to investigate leads, verify facts, and publish newsworthy information. To require anything more would undoubtedly result in 'timidity and self-censorship.'" *Id.* at 518.[9]

[9] Nonetheless, both the district court and the Fifth Circuit in the *Peavy* case held that WFAA and Riggs could not assert a defense based on the advice they received from the government and from their attorney. *See* 37 F. Supp.2d at 511 (noting that the defendants' argument nonetheless "has some appeal");

This case presents an opportunity to articulate the contours of the intent requirement because the government has raised the scienter issue as a means of defending Title III under the First Amendment. The Solicitor General maintains that Title III's restrictions on use and disclosure do not impermissibly chill protected speech precisely because "the prohibitions in Sections 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.*" Brief of the United States at 45 (emphasis added). "That scienter requirement is demanding." *Id.* "It imposes no duty of inquiry on a person to ferret out the provenance of the information." *Id.* at 15. "[U]nless a person actually possesses information from which he or a reasonable person would infer that the communication was unlawfully intercepted, liability cannot attach." *Id.* at 46. A defendant should thus be able to show his reasonable belief, on the basis of the advice of law enforcement officials and legal counsel, as well as other information, that the communications had *not* been unlawfully intercepted.

The United States has itself urged that, to the extent any residual concerns remain regarding the chilling effect of the challenged provisions, "those concerns could be addressed by procedural measures that stop short of invalidating the provisions themselves." *Id.* One of the most obvious means of reducing the possibility of a chilling effect would be to adopt a rule that a defendant can demonstrate lack of the requisite scienter by showing that he held a reasonable, good faith view based on advice from law enforcement authorities, legal counsel, or similar sources that his actions were not unlawful under Title III. In addition, this Court should accept the Solicitor General's invitation to adopt an elevated requirement of proof of scienter in civil cases, in the form of a standard of "clear and convincing" evidence. *Id.*; *see also United States v. X-Citement Video, Inc.*,

221 F.3d at 178.

513 U.S. 64, 68-69 (1994) (rejecting "[t]he most natural grammatical reading" of scienter provision in order to create additional defense to avoid First Amendment issue).

Denying a defendant the ability to demonstrate a good-faith belief in the legality of the interception would draw an arbitrary line between the defendant's knowledge of underlying facts relevant to lawfulness (regarding which a defendant may put on evidence) and the defendants' reasonable understanding of the legal standard established by Section 2511(1)(c) and (d) (regarding which a defendant would not be allowed to offer proof, under the view of such courts as the Fifth Circuit in *Peavy*). Yet the statutory language draws no distinction whatsoever between these two categories. Section 2511(1)(c) and Section 2511(1)(d) refer to whether a defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection." The statute does not differentiate between knowledge of underlying facts relevant to lawfulness and knowledge of the governing legal standard.

Moreover, it is unreasonable to deny a defendant the opportunity to demonstrate that he reasonably believed an interception was lawful. It would permit liability to be imposed even if the defendant has been assured in writing by the Attorney General herself that the interception in question is entirely lawful under Section 2511. To impose liability in these circumstances raises serious constitutional questions. This Court has held that it runs afoul of due process to punish "a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 438 (1959); *see also Lambert v. California*, 355 U.S. 225, 227 (1957) (Los Angeles ordinance requiring felons to register their presence in the city "violates due process where it is applied to a person who has no actual knowledge of his duty to register"). This principle is underscored by the First Amendment rights at stake. If the press cannot rely on authoritative legal advice to confirm the permissibility of traditional methods of newsgathering, there will be an unacceptable risk of chill, timidity, and self-censorship.

Permitting a defendant to show that he reasonably believed an interception was lawful would not amount to judicial creation of a "mistake of law" defense. A "mistake of law" defense is a claim that a defendant's subjective belief in the lawfulness of his conduct excuses a legal violation. Here, defendants' state of mind as to the legality of their conduct bears directly on whether they possessed the requisite scienter under the statute. The issue is a matter of statutory construction of Section 2511, informed by due process and First Amendment principles. As the commentary to the Model Penal Code explains, "The general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element." Model Penal Code § 2.02, comment 11 at p.131 (Tent. Draft No. 4, 1955).

This Court has endorsed a similar approach in other contexts. In *Liparota v. United States,* 471 U.S. 419 (1985), for example, this Court held that a federal statute relating to food stamp fraud (7 U.S.C. § 2024(b)) required proof that the defendant knew his conduct to be unauthorized by the applicable statute or regulations. The relevant provision punished any person who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized [by statute] or the regulations." 471 U.S. at 420. The government argued that the term "knowingly" modified only the "use, transfer, acquisition, alteration, or possession" of the food stamps and that the government was not required to prove that the defendant was aware that such use, transfer, acquisition, alteration or possession also violated the law. This Court rejected the government's argument, holding that "§ 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations." *Id.* at 425.

Similarly, in *Morissette v. United States*, 342 U.S. 246 (1952), this Court held that it is a defense to a charge of "knowingly converting" federal property that one did not know that what one was doing was a conversion. This Court explained

that, under English common law, criminal culpability generally arose only "from concurrence of an evil-meaning mind with an evil-doing hand." *Id.* at 251. And in *Staples v. United States*, 511 U.S. 600 (1994), this Court held that, to be criminally liable under 26 U.S.C. § 5861(d), a defendant must know that his weapon possessed automatic firing capability so as to make it a machinegun as defined by the National Firearms Act. "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

CONCLUSION

The judgment of the Court of Appeals invalidating Section 2511(1)(c) and Section 2511(1)(d), as well as their state-law counterparts, as applied, should be affirmed. This Court should make clear that Section 2511(1)(c) and Section 2511(1)(d) trigger strict scrutiny (not merely intermediate scrutiny) under the First Amendment, which they cannot survive.

Respectfully submitted.

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October 25, 2000