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 AMICUS CURIAE OF REP. JAMES A. McDERMOTT IN SUPPORT OF RESPONDENTS

Filed October 25th, 2000

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

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QUESTION PRESENTED

Whether the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern because *someone else* previously obtained that information unlawfully.

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INTEREST OF THE *AMICUS*

Amicus curiae Rep. James A. McDermott has a strong interest in this Court's resolution of this case, both as a litigant in a pending case, *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *pet'n for cert. filed*, 68 U.S.L.W. 3686 (Apr. 25, 2000) (No. 99-1709), and as a citizen and Congressman concerned with upholding the Constitution.[1] The facts of the *Boehner* lawsuit help to place in perspective the important First Amendment question in this case, and to highlight the importance of affirming the Third Circuit's holding that a person cannot be punished for disclosing truthful information on a matter of public concern because *someone else* previously obtained that information unlawfully.

The *Boehner* lawsuit arises out of the unlawful interception of a December 1996 telephone conversation among Newt Gingrich, then Speaker of the United States House of Representatives, and other top political leaders, including Rep. John A. Boehner, then Chairman of the House Republican Conference. The conversation involved efforts "to limit political fallout" from an ethics investigation into the Speaker's activities, in apparent violation of an agreement between the Speaker and the Ethics Committee. A transcript of the conversation appeared on the front page of *The New York Times* and other newspapers in January 1997. A Florida couple, John and Alice Martin, subsequently pleaded guilty to the unlawful interception, in violation of the federal wiretapping statute, 18 U.S.C. §§ 2511(1)(a), 2511(4)(b)(ii), and were fined $500 each.

Rep. Boehner subsequently brought a lawsuit charging Rep. McDermott with having disclosed to the media the audiotape unlawfully intercepted by the Martins, in violation of 18 U.S.C.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to S. Ct. R. 37.3.

§§ 2511(1)(c), 2520. The complaint did not allege that Rep. McDermott had been involved in the underlying interception, or had broken the law by receiving the audiotaped conversation from the Martins. The District Court granted Rep. McDermott's motion to dismiss on First Amendment grounds, but a fractured panel of the D.C. Circuit reversed. 191 F.3d 463. Petitioners here rely on the D.C. Circuit's *Boehner* decision, *see, e.g.*, Govt. Br. 37-38; Bartnicki Br. 36-37, and the government acknowledges that the decision is "inconsistent" with the Third Circuit's decision in this case, Govt. Br. in *McDermott v. Boehner*, No. 99-1709, at 10-11 (May 25, 2000). Accordingly, Rep. McDermott urges this Court to affirm the Third Circuit's judgment and to vacate and remand the D.C. Circuit's judgment for further consideration in light of that decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an age when the First Amendment has been construed to protect such activities as flag burning and liquor advertising, this case calls for a return to basics. At least since the days of the Alien and Sedition Acts, it has been settled that the First Amendment protects Americans' right to disclose truthful information that they have lawfully obtained on matters of public concern. Thus, this Court has repeatedly subjected prohibitions on such disclosure to strict scrutiny. *See Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-38 (1978).

The statute at issue here is a direct ban on speech: it prohibits the "disclos[ure]" of "information." 18 U.S.C. § 2511(1)(c). Petitioners, however, argue that this ban should be subjected only to intermediate scrutiny. That argument turns First Amendment law upside down. Such relaxed scrutiny is warranted in situations where First Amendment interests are more attenuated, such as restrictions on expressive conduct, or content-neutral restrictions on the time, place, or

manner of speech. In these contexts, the speaker remains free to express the same message in a different manner, or at a different time or place. To uphold a *total ban* on *pure speech* under intermediate scrutiny would mean that precedents designed to address "expressive conduct" and other matters at the "outer ambit" of the First Amendment, *e.g., City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) (plurality opinion), would now be used to gut the Amendment's core protections. Citizens would be free to burn flags, but not to disclose apparent official misconduct. This is the stuff of political parody, not constitutional law.

Not surprisingly, petitioners invoke a bewildering array of alternative rationales to justify the application of intermediate scrutiny to a direct ban on speech, including the alleged content neutrality, general applicability, and benevolent intentions of the wiretapping statutes. At bottom, petitioners' argument boils down to the proposition that information becomes "tainted" if unlawfully obtained by *anyone*, and that the government is thereafter free to proscribe and punish its disclosure by subsequent recipients unconnected to the illegality until some unspecified future point when the information becomes "common knowledge," and the "taint" dissipates. The concept of "tainted" information, however, is alien to the First Amendment, which may explain why petitioners cannot identify (and neither courts nor private parties could ever determine) when such a "taint" dissipates.

The Third Circuit was therefore correct to hold that the First Amendment protects the disclosure challenged in this case. The Third Circuit erred, however, by subjecting the statute to intermediate rather than strict scrutiny. As explained in this brief, strict scrutiny is warranted here because petitioners seek to punish respondents for disclosing truthful and lawfully obtained information on a matter of public concern. *See infra* Part A. None of the rationales proffered by petitioners justifies the application of intermediate scrutiny. Indeed, petitioners cite *no* case outside of the prison context that applied relaxed

scrutiny to a total ban on pure speech. *See infra* Part B. The even more radical contention advanced by petitioners' *amici*—that First Amendment protections do not apply at all—is every bit as unfounded. The disclosure of information is unquestionably speech, and thus has always been protected under the First Amendment. *See infra* Part C. Accordingly, this Court should affirm the Third Circuit's judgment.

ARGUMENT

THE WIRETAPPING ACTS' PROHIBITIONS ON THE DISCLOSURE OF INFORMATION ARE SUBJECT TO STRICT SCRUTINY.

A. This Court Has Long Held That the First Amendment Allows Punishment for the Disclosure of Truthful and Lawfully Obtained Information on a Matter of Public Concern Only Where Necessary to Satisfy an Interest of the Highest Order.

This Court has long held that "where a person lawfully obtains truthful information about a matter of public significance, . . . [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Butterworth,* 494 U.S. at 632 (internal quotation omitted); *see also Fla. Star*, 491 U.S. at 533; *Daily Mail,* 443 U.S. at 103; *Landmark,* 435 U.S. at 837-38.[2] This is the language of strict scrutiny, which is entirely appropriate in evaluating laws targeted at suppressing the dissemination of truthful information in a free society. As

[2] It is well-settled that the imposition of civil liability for damages, whether pursuant to a statute or the common law, amounts to government-sanctioned punishment for purposes of the First Amendment. *See, e.g., Fla. Star*, 491 U.S. at 540-41; *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *N.Y. York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). That principle applies with particular force where, as here, the plaintiffs do not allege any particularized injury or seek compensatory damages, but rather seek exclusively statutory and punitive damages. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974).

this Court has emphasized, "state action to punish the publication of truthful information seldom can satisfy constitutional standards," especially where the information involves matters of public concern. *Daily Mail*, 443 U.S. at 102; *Fla. Star*, 491 U.S. at 533.

In *Daily Mail*, for example, this Court invalidated a statute making it a crime for a newspaper to disclose the name of any youth charged as a juvenile offender. 443 U.S. at 105. Because the information at issue there was truthful and had been lawfully obtained by the defendant, the Court held, its disclosure could not be punished absent "the highest form of state interest." *Id.* at 102; *see also id.* at 103 ("[I]f 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.").

Florida Star is to the same effect. At issue there was the constitutionality of a Florida statute outlawing the publication of a rape victim's name in any instrument of mass communication. *See* 491 U.S. at 526 & n.1 (citing Fla. Stat. § 794.03). It was "undisputed," the Court noted, that the challenged publication of the victim's name was "accurate." 491 U.S. at 536. In addition, the defendant had lawfully received the information, regardless of whether state law had been violated by the release of that information in the first instance. *See id.* Finally, the Court noted that "[i]t is clear . . . that the news article concerned a matter of public significance," *i.e.,* "the commission, and investigation, of a violent crime which had been reported to authorities." *Id.* at 537. Under these circumstances, the Court held, the asserted governmental interests in punishing the challenged publication were not sufficiently weighty to justify the "extreme step" of punishing the disclosure of truthful information on a matter of public concern by a person who lawfully obtained that information. *Id.*

That analysis is controlling here because this case (like the *Boehner* case) represents an attempt to impose punishment for the alleged disclosure of (1) truthful information (2) that the defendants lawfully obtained (3) about a matter of public concern. *First*, the relevant information was undisputedly "truthful"; neither petitioners nor Rep. Boehner has ever alleged that the contents of the disputed audiotapes were in any way inaccurate or misleading.

Second, respondents and Rep. McDermott broke no law by receiving and possessing the challenged audiotapes because neither the federal nor the state statutes proscribe the *receipt* or *possession* of unlawfully intercepted communications. *See, e.g., Boehner*, 191 F.3d at 479 (Ginsburg, J., concurring) ("Congress has not prohibited the receipt of information obtained by means of an illegal wiretap").

Third, there is no question that the tapes involve a matter of substantial public concern. The *Bartnicki* tape included a threat to "blow the[] porches off" of school board members' houses in connection with a teachers' pay dispute, while the *Boehner* tape suggested (if not established) that the Speaker of the House of Representatives, the man second in line for the Presidency of the United States, had violated an agreement with the House Ethics Committee not to orchestrate a political response to a forthcoming reprimand. *See Bartnicki v. Vopper*, 200 F.3d 109, 113 (3d Cir.1999); *Boehner*, 191 F.3d at 465. Indeed, neither petitioners nor Rep. Boehner has alleged that the audiotape caused them any injury, and both seek only statutory and punitive (not compensatory) damages. Govt. Br. 8 n.4 (citing J.A. 130); *Boehner v. McDermott*, No. 98-594, 1998 WL 436897, at *7 (D.D.C. July 28, 1998), *rev'd*, 191 F.3d 463 (D.C. Cir. 1999).

Notwithstanding these points, petitioners seek to distinguish this Court's strict scrutiny cases "on their precise facts," primarily because in those cases, "the newspaper that published the information acquired it by lawful means." Govt. Br. 28-29

(emphasis added); *see also* Bartnicki Br. 25-26.[3] But that is no distinction at all. In those cases, as here, the *defendants* broke no law by obtaining the disputed information, even though *someone else* broke the law by disclosing that information in the first instance. Accordingly, in those cases, as here, the defendants' alleged disclosure of the information is governed by strict scrutiny.

For example, the issue in *Landmark* was whether the defendant newspaper could be punished for disclosing truthful and lawfully obtained information about a judicial disciplinary proceeding that had been unlawfully divulged by someone else. The Virginia Constitution provided that such proceedings must be kept confidential, *see* 435 U.S. at 830 n.1 (citing Va. Const. art. 6 § 10), and a criminal statute implemented that provision by prohibiting the disclosure of information regarding such proceedings "'by any person to anyone except the Commission,'" *id.* (quoting Va. Code § 2.1-37.13). The defendant newspaper nonetheless obtained and published information regarding such a proceeding, knowing that it had been disclosed in violation of that statute. *See id.* at 832.

While reserving judgment on whether participants in the inquiry could constitutionally be punished for the initial disclosure, this Court held that "third persons who are strangers to the inquiry" could not be punished for disclosing such truthful information of public concern. *See id.* at 837-38. Even

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[3] It is worth noting that petitioners do not suggest that a different analysis applies to individual defendants than to media defendants. That tacit concession is wise, as there is no distinction between the First Amendment rights of the media and other citizens. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 703-05 (1972). The *Butterworth* Court thus underscored that the relevant analysis is not limited to media defendants, but applies more broadly to any "person" who "'lawfully obtains truthful information about a matter of public significance.'" 494 U.S. at 632 (quoting *Daily Mail*, 443 U.S. at 103, and *Fla. Star*, 491 U.S. at 533); *see also United States v. Aguilar*, 515 U.S. 593, 605 (1995).

though it was a criminal offense for the participants in the proceeding to *disclose* the information, and the newspaper defendant knew the information had been unlawfully disclosed, the Court assumed that the newspaper had lawfully *received* the information. *See id.* at 837 ("We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it."). The *Landmark* Court accordingly applied strict scrutiny to the State's attempt to punish the defendant for disclosing the information.

Similarly, in *Florida Star*, the plaintiff argued that the defendant newspaper did not "lawfully obtain" her name because it was unlawful for the police department to disclose it—just as petitioners here argue that respondents did not "lawfully obtain" the audiotape because it was unlawful for someone else to intercept and disclose the tape to them. *See* 491 U.S. at 536; *see also id.* at 544 (White, J., dissenting) (noting that "Florida law forbids . . . disclosure" by the police). This Court rejected that argument: although the police department apparently broke the law by disclosing the name, the newspaper did not break the law by receiving it. "Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." *Id.* at 536 (emphasis in original). Any unlawful disclosure by the police department, in other words, did not "taint" the underlying information or otherwise render unlawful its subsequent receipt. *See id.* ("Nor does the fact that the Department apparently failed to fulfill its obligation under [Fla. Stat.] § 794.03 not to 'cause or allow to be . . . published' the name of a sexual offense victim make the newspaper's ensuing receipt of this information unlawful.").[4] Indeed, the plaintiff in

[4] In light of these statements, the government errs by asserting that *Florida Star* reserved in a footnote the question whether the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern merely because *someone else* previously disclosed (continued...)

Florida Star sued the police department as well as the newspaper for the disclosure, and the department settled that case prior to trial. *See id.* at 528.

The bottom line is that a defendant "lawfully obtains" information that *he* obtains lawfully, regardless of whether *someone else* previously obtained that information unlawfully. Because it is lawful to *receive* information unlawfully *disclosed* by someone else, such information is lawfully obtained by the recipient. Contrary to Judge Ginsburg's assertion in *Boehner*, that commonsense proposition is not "an exercise in empty formalism" in which "[o]nly the most formal minded" would engage." 191 F.3d at 479 & n.**. It is not "empty formalism" but conventional statutory interpretation to conclude that a statute means what it says and says what it means. *See, e.g., Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). That is particularly true where, as here, the relevant statutes have both civil and criminal application. *See, e.g., United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 & n.10 (1992) (applying rule of lenity in construing statute with both civil and criminal application). Thus, as Rep. Boehner conceded below, "[although] the acquisition of appellant's phone call by the Martins was itself a crime, . . . *Rep. McDermott's receipt of that information was not.*" Br. for

[4] (...continued)
that information unlawfully. *See* Govt. Br. 29 (citing *Fla. Star*, 491 U.S. at 535 n.8). As noted in text, *Florida Star* expressly resolved that question. The footnote cited by the government instead reserved the question whether the person *who unlawfully acquired the information* could be punished for the disclosure as well as the acquisition. *See* 491 U.S. at 535 n.8 (reserving the question whether "government may ever punish not only the unlawful acquisition, but the ensuing publication as well"). That much is apparent not only from the text of the footnote itself, but also from its reference to *Landmark*, where that question was also reserved. *See id.* (citing 435 U.S. at 837, which states that "[w]e are not here concerned with the possible applicability of the [anti-disclosure] statute to one who secures the information by illegal means and thereafter divulges it").

Appellant, D.C. Cir. No. 98-7156, at 31 (Dec. 29, 1998) (emphasis added).[5]

To dismiss this point as "empty formalism" is to ignore the very substantial difference between proscribing the *disclosure* of information by one person and the *receipt* of such information by someone else. Congress knows how to proscribe receipt or possession (as distinct from disclosure or distribution) when it so desires. *See, e.g.*, 18 U.S.C. § 1202(a) (proscribing receipt or possession of ransom money); 26 U.S.C. § 5861(d) (proscribing receipt or possession of unregistered firearm). Unless and until Congress takes the extreme step of proscribing the receipt of information unlawfully obtained or disclosed by someone else, such receipt remains lawful.

Indeed, as Judge Sentelle recognized, if unlawfully intercepted information is "tainted" and hence outside the scope of the First Amendment, there is no basis for limiting the "taint" only to the first person who lawfully receives that information. *See Boehner*, 191 F.3d at 485 (dissenting opinion). Anyone who heard the Bartnicki tape on the radio (or read the front-page *New York Times* story about the audiotaped conversation in *Boehner*) received the challenged information with knowledge or reason to know that it had been unlawfully intercepted in the first instance. But no one would seriously argue that all of these people obtained that

[5] Rep. Boehner now asserts that his allegation that the Martins told Rep. McDermott that they had been promised immunity for their conduct "'gives rise to an inference that the 'transaction may have involved a *quid pro quo*' and that McDermott is the 'obvious candidate' to have brokered this 'illegal transaction.'" Boehner Br. 2 (quoting *Boehner*, 191 F.3d at 476 (opinion of Randolph, J.)). That assertion, however, has no basis in the complaint, and is in fact contradicted by Rep. Boehner's concession that Rep. McDermott was not complicit in the underlying interception, *see infra* p. 11, and the district court's conclusion (which Rep. Boehner never challenged below) that "[t]he Complaint contains no allegation that [Rep. McDermott] directed the Martins' actions, or that he was otherwise complicit in their crime," or was even "aware of the tape's existence until the Martins dropped it on his doorstep." *Boehner*, 1998 WL 436897, at *3.

information unlawfully. Petitioners' suggestion that the "taint" dissipates when the information becomes "common knowledge," Govt. Br. 44, or "ha[s] been generally made public," Boehner Br. 28 n.9, has no basis in the statute, and provides no workable guidance for private parties or courts.

Contrary to Judge Ginsburg's apparent belief, none of this is to say that unlawfully intercepted information can be "launder[ed]" through third parties who did not participate in the initial interception. 191 F.3d at 480 (internal quotation omitted). The term "laundered" is a loaded one: it suggests complicity between the interceptor and the discloser. It goes without saying that anyone complicit in the underlying interception—regardless of whether that person actually participated in the act of interception—did not lawfully obtain the information. The traditional doctrines of conspiracy and aiding-and-abetting exist to address just this situation. *See, e.g., Liffiton v. Keuker*, 850 F.2d 73, 77 (2d Cir. 1988) (conspiracy to intercept protected communication); *United States v. Newman*, 490 F.2d 139, 142-43 (3d Cir. 1974) (aiding and abetting interception of protected communication). Here, however, it is uncontested that respondents were not complicit in the underlying interception, *see Bartnicki*, 200 F.3d at 115, just as Rep. Boehner's complaint "contains no allegation that [Rep. McDermott] directed the Martins' actions, or that he was otherwise complicit in their crime," *Boehner*, 1998 WL 436897, at *3. Accordingly, there is no basis for attributing the interceptors' culpability to respondents, Rep. McDermott, or any other subsequent recipient of the audiotapes, and thus no basis for departing from strict scrutiny.

Nor is there any basis to petitioners' suggestion that strict scrutiny applies only in cases where the disputed information was "released by the government itself." Govt. Br. 31-32; *see also* Boehner Br. 21-22. To the contrary, the *Daily Mail* Court expressly rejected that suggestion, holding that strict scrutiny applies to all bans on the disclosure of "lawfully obtained" information, and that whether the information was obtained

from government sources "is not controlling." 443 U.S. at 103. First Amendment rights, the *Daily Mail* Court explained, "cannot be made to rely solely on the sufferance of the government to supply . . . information." *Id.* at 104. The Court subsequently reaffirmed that point in *Butterworth*, applying strict scrutiny to an attempt to punish the disclosure of "information of which [a grand jury witness] was in possession before he testified," which was not obtained from the government. 494 U.S. at 632.

Indeed, any attempt to punish the disclosure of truthful and lawfully obtained information regarding matters of public concern—whatever its source—would create the anomaly that truthful speech would receive *less* protection than defamatory speech. Since *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), it has been black-letter law that the First Amendment does not permit punishment even for the publication of *false* and *defamatory* statements with respect to matters of public concern involving public officials or public figures absent a showing of actual malice. That heightened standard of culpability is necessary, this Court has explained, to preserve the vitality of public debate with respect to public officials and matters of public concern. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

The statutory provisions at issue here, however, authorize the imposition of liability for disclosure of intercepted communications based on a lesser *mens rea* requirement—knowledge or reason to know that the disclosed communication was unlawfully intercepted. *See, e.g.,* 18 U.S.C. § 2511(c). The imposition of liability here would thus lead to the anomalous result that a citizen would receive *lesser* protection for publishing truthful and lawfully obtained information about public figures than for publishing false and defamatory statements about them. The First Amendment neither requires nor tolerates any such anomaly. *See Fla. Star*, 491 U.S. at 539 (characterizing this anomaly as "perverse").

B. There Is No Basis for Subjecting the Statutory Provisions at Issue to Intermediate Scrutiny as Applied in These Cases Because They Impose Direct Prohibitions, Not Merely Incidental Restrictions, on Speech.

Notwithstanding the controlling *Butterworth/Florida Star/Daily Mail/Landmark* line of cases, petitioners argue that intermediate scrutiny applies for a host of different reasons. Intermediate scrutiny cannot possibly apply here, however, for the fundamental reason that such scrutiny governs laws that have "only an incidental effect on protected speech"—*not* laws that "directly and immediately" restrict First Amendment rights. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2456-57 (2000). Accordingly, this Court applies intermediate scrutiny to restrictions on expressive conduct and the like, but has never applied such scrutiny to a *complete ban* on *speech itself.* Such bans are at odds with the core protections of the First Amendment, and thus have always been subject to strict scrutiny. *See, e.g., City of Erie,* 120 S. Ct. at 1394 (plurality opinion) (emphasizing that intermediate scrutiny was appropriate because the challenged ordinance "does not effect a 'total ban' on protected expression"); *id.* at 1407 (Stevens, J., dissenting) (dissenting based on contrary view that "the ordinance is a total ban," and emphasizing that the Court had never "approved the use of [the secondary effects doctrine] to justify a total ban on protected First Amendment expression"). In addition to this general point, each of the five rationales advanced by petitioners for applying intermediate scrutiny is either inapplicable or invalid for additional reasons explained below.

1. Cases Addressing Laws of General Applicability Are Inapposite Because the Statutory Provisions at Issue Target and Prohibit Speech Itself.

Since the provisions at issue single out and prohibit the "disclos[ure]" of "information," they can hardly be characterized as general laws that only incidentally affect speech. Nonetheless, petitioners characterize them just so. In particular, they claim that intermediate scrutiny applies because "these statutes do not single out speech for any special prohibition; they proscribe *not only* publication, but any kind of 'use,'" and are thus "'controlled by . . . the . . . well-established line of decisions holding that *generally applicable laws* do not offend the First Amendment simply because their enforcement against the press has *incidental effects* on its ability to gather and report the news.'" Bartnicki Br. 20-21 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)) (emphasis added); Govt. Br. 23-27. This argument is flawed as a matter of statutory construction, constitutional law, and common sense.

Contrary to petitioners' suggestion, the statutes at issue do single out speech. In separate subsections, they separately prohibit three distinct categories of activities—(1) interception, (2) use, *and* (3) *disclosure* of protected communications. *See, e.g.,* 18 U.S.C. § 2511(1)(a, c, d). The linchpin of petitioners' argument is thus the unstated proposition that the express statutory prohibitions on the disclosure of information have no operative effect at all. Instead, petitioners insist, "[t]he statutory bar created by Section 2511(c) [on disclosure] and (d) [on use] is identical in scope and operation to a unitary, undifferentiated prohibition on use." Govt. Br. 24-25. Petitioners are not, however, free to rewrite the challenged provisions in order to defend them. Petitioners may prefer to defend a general prohibition on use rather than a specific prohibition on disclosure, but they may not defend a specific prohibition on disclosure by simply recasting it as a general

prohibition on use. Their attempt to write the specific prohibition on disclosure out of the statute violates the elementary canon that "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Moreover, even if the statutes did not specifically target disclosure (and hence speech) as well as use, it would still be impossible to conclude that their application in this case imposes only an "incidental burden" on speech. Intermediate scrutiny is appropriate only with respect to "generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech." *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990). Thus, a law that prohibits the destruction of draft cards can *incidentally* prevent anti-draft expression through the conduct of burning a draft card, *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); a law that prohibits camping in public parks can *incidentally* punish social protest through the conduct of camping in public parks, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984); a law that prevents public access to military bases can *incidentally* punish anti-military expression through the conduct of entering a military base, *United States v. Albertini*, 472 U.S. 675, 687-88 (1985); and a law that prohibits public nudity can *incidentally* punish erotic expression through the conduct of nude dancing, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-67, 571 (1991).

Petitioners' attempt to place this lawsuit within that line of cases is misplaced. At issue here is an attempt to prohibit speech, not expressive conduct. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating *the nonspeech element* can justify *incidental* limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376 (emphasis added). The only governmental interest here is an interest in prohibiting the disclosure of information—an interest that clearly relates to speech rather than nonspeech

conduct. As the *O'Brien* Court explained, a statute "aimed at suppressing communication could not be sustained as a regulation of noncommunicative conduct." *Id.* at 382 (citing cases); *see also United States v. Eichman,* 496 U.S. 310, 313-14 (1990) (subjecting statute proscribing flag-burning to strict scrutiny where the governmental interests involved related to the speech element of expressive conduct); *Arcara v. Cloud Books*, 478 U.S. 697, 706 n.3 (1986) ("[W]e have previously struck down generally applicable statutes that purport to regulate nonspeech" where "the 'nonspeech' which drew sanction was intimately related to expressive conduct protected under the First Amendment.") (citing cases; internal quotation omitted). Any attempt to punish the disclosure of information "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." *Cox Broad'ing Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (citing *O'Brien*, 391 U.S. at 376-77).

Although this Court has thus repeatedly limited intermediate scrutiny to limitations on nonspeech conduct, as opposed to speech itself, the government (though not Bartnicki) nonetheless claims the opposite: that "the Court has extended th[e] intermediate scrutiny standard to particular First Amendment settings that involve the regulation of 'pure speech,'" as opposed to nonspeech conduct. Govt. Br. 19. But other than cases regarding *incidental restrictions* (as opposed to bans) on speech, the government cites only *Procunier v. Martinez*, 416 U.S. 396 (1974). That case, which predated *Eichman*, *Arcara*, and *Cox Broadcasting*, addressed "the appropriate standard of review for *prison* regulations restricting freedom of speech," in light of the federal courts' "broad hands-off attitude toward problems of prison administration." *Id.* at 404, 406 (emphasis added). Needless to say, the speech rights of free citizens are not limited to the speech rights of prisoners. And even in this obviously inapposite context, this Court has limited and overruled *Martinez* in part for applying

the wrong standard of review. *See Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

Petitioners fare no better in their attempt to analogize this case to *Cohen*. *See* Govt. Br. 26; Bartnicki Br. 21. That case held only that the First Amendment does not give the media any special exemption from general laws that do not target speech, and thus newspapers are not exempt from the general law of promissory estoppel. *See* 501 U.S. at 669-70. It did not involve a law that directly prohibited the disclosure of information, nor did it hold or suggest that such laws are subject to intermediate rather than strict scrutiny. Instead, *Cohen* merely held the First Amendment inapplicable because under promissory estoppel law (unlike under the wiretapping acts), "any restrictions that may be placed on the publication of truthful information are self-imposed." *Id.* at 671.

2. Cases Addressing Content-Neutral Laws Are Inapposite Because Content-Neutral Laws Are Not Invariably Subject to Intermediate Scrutiny.

Whether or not the wiretapping acts are content-neutral is ultimately irrelevant because the First Amendment protects against not only content-specific restrictions on speech, but also other vices, including flat prohibitions on speech. Nonetheless, petitioners argue that the direct statutory prohibitions on disclosure here are subject to intermediate scrutiny because they are content-neutral. *See* Govt. Br. 21-23; Bartnicki Br. 20-22. Indeed, petitioner Bartnicki purports to quote *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994), for the proposition that the dispositive question is "'whether a particular regulation is content-based [and hence subject to strict scrutiny] or content neutral [and subject only to intermediate scrutiny] . . . .'" Bartnicki Br. 20 (brackets in original). The problem with this "quotation" is that Bartnicki added the inaccurate material within the brackets. While it is true that content-based laws are invariably subject to strict

scrutiny, it is not true that content-neutral laws are invariably subject to intermediate scrutiny.

Rather, *Turner Broadcasting* holds that "the intermediate level of scrutiny [is] applicable to content-neutral restrictions *that impose an incidental burden* on speech." 512 U.S. at 662 (emphasis added). The Court has thus applied intermediate scrutiny to content-neutral limitations on the time, place, or manner of speech, *see, e.g., Hill v. Colo.*, 120 S. Ct. 2480, 2491-94 (2000), and to other incidental burdens, such as requirements that cable television operators make channels available to the public, *see Turner*, 512 U.S. at 643-44. But, as noted above, petitioners cite no case in which this Court applied such scrutiny to flat bans on speech itself outside of the prison context.

The reason for this lack of symmetry is straightforward: content discrimination is not the only vice addressed by the First Amendment. Just as "'[g]overnment action that stifles speech on account of its message'" calls for strict scrutiny, *Turner*, 512 U.S. at 641, so too does government action that stifles speech altogether. "To ensure the widest possible dissemination of information, and the unfettered interchange of ideas, the first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 n.13 (1994) (internal quotation omitted); *see also 44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 501 (1996) (plurality opinion) ("[C]omplete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information.") (internal citation omitted). The most sweeping and absolute bans on speech may be content-neutral, but that hardly insulates them from searching First Amendment review.

Thus, in *Butterworth* this Court applied strict scrutiny to invalidate a statute that prohibited grand jury witnesses from

disclosing their testimony (whatever its content) before that body. *See* 494 U.S. at 626, 632. Although the law was content-neutral, this Court invoked the general rule that "where a person lawfully obtains truthful information about a matter of public significance, we have held that state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 632 (internal quotations omitted).

3. The Means by Which Information Was Attained Is Irrelevant to the Proper Level of Scrutiny Because the Question is Whether the Acts Impose an Incidental Burden or a Flat Prohibition on Speech, Not How the Information Was Obtained.

As explained above, intermediate scrutiny applies to *incidental* restrictions on speech because such restrictions do not prevent speech altogether. Bartnicki nonetheless claims that "[t]his Court's decisions make it plain that a law which prohibits disclosure of material . . . because of the manner in which the material was obtained, is not subject to strict scrutiny." Bartnicki Br. 22. This Court has never said any such thing. *None* of the cases cited by Bartnicki even apply intermediate scrutiny.

Instead, those cases stand for various, inapposite propositions. As explained in greater detail below, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), is merely one of many cases holding that *no* First Amendment scrutiny applies to the disclosure of information obtained pursuant to a concomitant duty of confidentiality, such as information a litigant obtains under a protective order in civil discovery. *See infra* Part C.2.

The copyright cases likewise hold that "[c]opyright laws are not restrictions on freedom of speech" subject to *any* First Amendment scrutiny because—unlike the wiretapping acts—they prohibit only the copying of the specific form of

"expression," not the disclosure of the underlying "facts or ideas." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556, 547 (1985); *see also id.* at 556 ("No author may copyright his ideas or the facts he narrates."); *id.* ("Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed.") (internal quotation omitted); *Zacchini v. Scripps-Howard Broad'ing Co.*, 433 U.S. 562, 574 (1977) (holding that the First Amendment protects "the reporting of events" but not "an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid"). Rep. Boehner thus errs by insisting that the copyright cases are "on all fours with the instant case," because "[l]ike the copyright laws, the Act does not limit the disclosure of any 'facts' or 'ideas,' just the content of the phone calls themselves." Boehner Br. 9-10. It is precisely because the wiretapping acts prohibit disclosure of the "content" of the communications that, unlike the copyright laws, they *do* limit the disclosure of "facts."

In any event, neither of these sets of cases holds that "a law which prohibits disclosure of material . . . because of the manner in which the material was obtained, is not subject to strict scrutiny," as Bartnicki asserts. Bartnicki Br. 22. Nor does either set of cases even address the level of scrutiny that applies to a ban on the disclosure of information that was not obtained under a concomitant duty of confidentiality. And neither set of cases even applies intermediate scrutiny.

4. Intermediate Scrutiny Does Not Apply Whenever the Government Can Identify a Legitimate Governmental Interest Unrelated to the Suppression of Speech Because the First Amendment Exists Precisely in Order to Elevate Speech Interests Above Other Interests.

The whole point of the First Amendment, of course, is to prevent the government from restricting speech to advance other interests. Nonetheless, the government outflanks

Bartnicki's manner-of-acquisition argument by advancing the even bolder claim that intermediate scrutiny should apply *whenever* Congress acted for a supposedly benevolent purpose. In particular, the government argues that intermediate scrutiny should apply whenever "the law is not hostile to a particular message and does not seek to curtail the communicative impact of the expression." Govt. Br. 19; *see also, e.g., id.* at 11 ("Where, as here, a generally applicable law burdens speech not for the purpose of excising ideas or information from public or private debate, but instead to promote legitimate regulatory aims unrelated to the communicative impact of the regulated activity, the Court applies at most an intermediate level of scrutiny.").

It is not the law, however, that the government can defeat the application of strict scrutiny by simply articulating some statutory purpose unrelated to the suppression of free speech. The government cites no case for that breathtakingly broad proposition, and for good reason: it would be the rare statute that could not be justified by some such purpose. In *Daily Mail*, the government undoubtedly had a legitimate interest in protecting the privacy of juvenile delinquents. 443 U.S. at 104. In *Florida Star*, the government undoubtedly had a legitimate interest in protecting the privacy of rape victims. 491 U.S. at 537. In *Landmark*, the government undoubtedly had a legitimate interest in protecting the reputations of judges. 435 U.S. at 841. And in *Butterworth*, the government undoubtedly had a legitimate interest in protecting the privacy of grand jury proceedings. 494 U.S. at 629-30. In none of these cases, however, did the existence of these interests preclude the application of strict scrutiny altogether; rather, in all of these cases, the Court assessed these governmental interests in the course of the strict scrutiny analysis. Especially given the public importance of the communications at issue, the *Bartnicki* and *Boehner* cases hardly warrant different treatment.

5. Intermediate Scrutiny Does Not Apply Whenever "Constitutionally Protected Interests Lie On Both Sides of the Legal Equation" for the Same Reasons that it Does Not Apply Whenever Legitimate Governmental Interests Lie on Both Sides of the Legal Equation.

Just as all countervailing governmental interests can be considered in the course of strict scrutiny analysis, so too can countervailing constitutional interests, including First Amendment interests. The government nonetheless contends that intermediate scrutiny should apply because "'constitutionally protected interests lie on both sides of the legal equation.'" Govt. Br. 27 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911 (2000) (Breyer, J., concurring)). But to note that there are speech interests on both sides of the equation is simply to pose the issue in this case, not to resolve it.

Unlike *Nixon*, this case involves a flat ban on speech. Contrary to the government's contention, this Court has always subjected such bans to strict scrutiny, even where they are defended as necessary to promote "constitutionally protected interests" in free speech or privacy. In *Landmark*, for example, this Court applied strict scrutiny to invalidate a prohibition on the disclosure of information involving confidential judicial disciplinary proceedings, notwithstanding the undisputed state interest in fostering free and open discussion in those proceedings. *See* 435 U.S. at 840-41. Indeed, the government's argument that it may ban speech in order to protect speech is nothing short of Orwellian: the First Amendment does not allow the government to silence one speaker in the name of enhancing the speech of others.

C. There Is No Basis for the Argument Advanced by Petitioners' *Amici* that Respondents' and Rep. McDermott's Disclosures Lie Outside of the First Amendment Altogether.

1. The Argument that Respondents and Rep. McDermott Did Not Engage in Speech is Wrong Because the Disclosure of Information Has Always Been Held To Be Speech.

Apparently recognizing that there is no basis for applying intermediate scrutiny, petitioners' *amici* take a different tack: they argue that disclosure of the contents of an audiotaped conversation is not protected speech at all, and thus is not entitled to *any* protection under the First Amendment. *See* Boehner Br. 3-4; Cell. Telecomms. Ind. Ass'n Br. 9-11. Rep. Boehner argues, for example, that "while the parties will debate the appropriate level of scrutiny to be applied in this challenge to the Act's constitutionality, the essential point is that there is *no* First Amendment right to distribute someone else's pilfered speech." Boehner Br. 3 (emphasis added). He goes on to explain that his argument is premised on the notion that there is no "First Amendment right to publicly disclose *someone else's stolen private speech* that is even roughly analogous to the right to engage in one's *own* speech." *Id.* at 4 (emphasis added).

The premise of this argument—that respondents only disclosed "someone else's speech," and did not speak themselves—is manifestly incorrect. Indeed, this is merely a repackaging of the argument, advanced by Judge Randolph in his *Boehner* opinion, that the *Boehner* case is not about speech at all, but rather about Rep. McDermott's alleged "conduct in delivering the tape." *Boehner*, 191 F.3d at 467. According to Judge Randolph, Rep. McDermott did not "exercis[e] his freedom of speech when he gave copies of th[e] tape to the newspapers" because the speech on the tape "is not McDermott's." *Id.* at 466-67.

It is bedrock First Amendment law, however, that the dissemination of other people's speech is itself speech. That is why booksellers and pamphleteers have First Amendment rights even though they did not write the books or pamphlets. *See, e.g., Marcus v. Search Warrants,* 367 U.S. 717, 729-31 (1961); *Schneider v. N.J.*, 308 U.S. 147, 160-62 (1939). If a merchant engages in protected speech, not unprotected conduct, by selling a book (or an audiotape or videotape), it necessarily follows that respondents and Rep. McDermott engaged in protected speech, not unprotected conduct, by allegedly disclosing the disputed audiotapes. Needless to say, a book on tape is just as entitled to protection as a book on paper, and it does not matter who wrote the book or whose voice is on the tape.

Indeed, by their express terms, the wiretapping acts prohibit the disclosure of information: they penalize anyone who "intentionally *discloses* . . . to any other person the *contents* of any wire, oral, or electronic communication, knowing or having reason to know that the *information* was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." *E.g.*, 18 U.S.C. § 2511(1)(c) (emphasis added). This is necessarily speech, not conduct: petitioners and Rep. Boehner did not sue for the mere act of passing out a tape, but instead for the alleged "disclosure" of "information." As Judge Sentelle emphasized in his *Boehner* dissent, "[w]hat made [Rep. McDermott's] conduct punishable under the statute was the information communicated on the tapes. He could have provided the two newspapers with all the tapes in Washington on a given day and incurred no liability but for the speech contained on the tapes." 191 F.3d at 484. "If the act[] of 'disclosing'. . . information do[es] not constitute speech, it is hard to imagine what does fall within that category . . . ." *Bartnicki*, 200 F.3d at 120. Notwithstanding Rep. Boehner's rhetorical flourishes both this case and the *Boehner* case are about speech, not stolen property. *Cf. Dowling v. United States*, 473 U.S. 207, 216 (1985).

Of course, all speech necessarily entails some incidental conduct, such as moving one's lips, hitting keys on a computer keyboard, or distributing a pamphlet, book, audiotape, or videotape. But a statutory prohibition on speech is not transformed into a statutory prohibition on conduct simply because a particular instance of speech involves some conduct. "[A]lthough it may be possible to find some kernel of conduct in almost every act of expression, such kernel of conduct does not take the defendants' speech activities outside the protection of the First Amendment." *Bartnicki*, 200 F.3d at 120. Indeed, Judge Randolph himself suggested that a different result might obtain "if, for instance, McDermott violated § 2511(1)(c) by reading a transcript of the tape in a news conference." *Boehner*, 191 F.3d at 467. But there is no constitutionally significant difference between disclosing information by moving one's lips and disclosing that same information by handing over an audiotape. The disclosure of information is still speech, regardless of the *manner* in which it is disclosed.

2. The Argument that the Government May Impose Duties of Confidentiality At Will Is Wrong as Long as There Is a First Amendment.

Finally, and most radically, Rep. Boehner argues that the government is free to prohibit the disclosure of information at will by merely imposing a "duty of nondisclosure." *See* Boehner Br. 22. According to Rep. Boehner, "even assuming the tapes in these cases were 'lawfully obtained' . . ., the Act may nonetheless impose a duty of nondisclosure on all those who receive the tapes." *Id.* He goes on to assert that "[s]uch a duty of nondisclosure would be fully constitutional because, as in *Seattle Times*, the defendant's access to the tape was a 'matter of legislative grace,' since Congress 'granted' access by refraining from penalizing receipt, thus allowing the information to be 'lawfully obtained.'" *Id.*

Needless to say, that is not and cannot be the law. The cases cited by Rep. Boehner stand for the proposition that the

government can punish the disclosure of truthful and lawfully obtained information by persons who obtained that information pursuant to a concomitant duty of confidentiality, such as sensitive information obtained by a federal employee in the course of his employment, *see, e.g., United States v. Aguilar,* 515 U.S. 593, 605-06 (1995), or by a litigant in the course of civil discovery, *see, e.g., Seattle Times*, 467 U.S. at 37. But the government cannot, except in extraordinary cases that satisfy strict scrutiny, punish the disclosure of truthful and lawfully obtained information by persons who did not assume and then breach such a duty. *See, e.g., Aguilar*, 515 U.S. at 606 (distinguishing the *Florida Star* line of cases on the ground that they do not apply "[a]s to one who voluntarily assumed a duty of confidentiality"); *Butterworth,* 494 U.S. at 631-32 (distinguishing *Seattle Times* on this ground). Indeed, that is the very point of the *Butterworth/Florida Star/Daily Mail* line of cases. Rep. Boehner's assertion that Americans receive information "as a matter of legislative grace" whenever the government is kind enough to "refrain[] from penalizing receipt," Boehner Br. 22, has no place in a free society.

Nor does it make any difference whether the defendant is a "public official." Although Rep. Boehner would use *Aguilar* to construct a "public official" exception to the First Amendment, *see id.* at 28-30, neither that case nor any other supports such an exception. Indeed, this point makes no sense: Rep. Boehner begins by invoking his privacy interests, but ends by claiming that the communication addressed such "important matters of state" that it is protected under the Speech or Debate Clause of the United States Constitution. *Id.* at 6. If anything, the fact that the communication in *Boehner* involves the public acts of public officials only underscores the First Amendment problems with attempting to punish its disclosure. *See supra* p. 6.

As noted above, *Aguilar* merely held that the defendant there, a federal judge, could be punished for the disclosure of information he had obtained pursuant to a concomitant duty of

confidentiality. *See* 515 U.S. at 605-06. Unlike Judge Aguilar, Rep. McDermott breached no such duty here. Election to Congress and service on the Ethics Committee entail no general duty of confidentiality. To the contrary, Members of Congress (unlike judges) routinely receive information from sources of all kinds and disclose it to their constituents and the media. Significantly, the audiotape at issue here was not official material obtained pursuant to a duty of confidentiality. Instead, it was allegedly received from private citizens, the Martins. Thus, Rep. Boehner's argument that Rep. McDermott obtained the tape pursuant to a concomitant duty of nondisclosure relating to his position as a Member of Congress is groundless.

CONCLUSION

For the foregoing reasons, this Court should affirm the Third Circuit's judgment, and vacate and remand the *Boehner* case for reconsideration in light of that disposition.

Respectfully submitted,

FRANK CICERO, JR.
Counsel of Record
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

CHRISTOPHER LANDAU
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000