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.

BRIEF OF AMICUS CURIAE
THE LIBERTY PROJECT 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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INTEREST OF *AMICUS CURIAE*[1/]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, The Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, which restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. The Liberty Project has been particularly involved in defending the right to privacy, one of the most profound individual liberties and a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual. The Liberty Project is also dedicated to staunching the increasing tendency of legislatures, looking for more expeditious routes to deter and punish illegal conduct, to create laws designed to confiscate the spoils of illegal activity – laws that are used against the innocent as well as against criminals.

This case implicates each of these concerns – free speech, privacy, and a legislative effort to punish the innocent in order to deter illegal conduct by others – and requires the Court to determine the constitutional framework governing government attempts to regulate and punish private action in light of them. Because of The Liberty Project's strong interest in privacy, in protection of citizens from government overreaching, and in the freedom of all citizens to engage in expression without government interference, it is well situated to provide this

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1/ The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

Court with additional insight into the issues presented in this case.

SUMMARY OF ARGUMENT

The right to privacy is a right to be free from *government* intrusion. Freedom from intrusion by other private citizens is also widely valued and important. But, as a free society, we must be wary of relying on the government to protect us from each other when it does so by trampling on the freedoms guaranteed to all under the Constitution. The government embarks on a radical departure here in attempting to lower the bar for reviewing a complete ban of truthful speech on matters of public concern on the ground that the speech itself is harmful. Its proffered bases for justifying that ban are woefully insufficient and represent a disturbing and significant attack on First Amendment freedoms.

The government is, of course, entirely within its power to impose sanctions on those who use eavesdropping technology, or are co-conspirators or accessories after the fact by paying someone to eavesdrop. *See* 18 U.S.C. § 2511(1)(a). But the application of the statute here, which broadly criminalizes truthful speech on issues of importance to the community (such as school union negotiations) simply because *someone else* misbehaved in obtaining that information, is antithetical to longstanding principles of First Amendment jurisprudence.

1. Application of section 2511(1)(c) to ban truthful speech by innocent third parties in order to prevent the harms the government fears will be caused by the communication itself triggers exacting scrutiny. The government's attempt to pass this ban off as a harmless adjunct to legitimate conduct legislation is a gross mischaracterization. The most fundamental First Amendment values are at issue here because the government is attempting to ban speech because it does not

want that speech to be heard by anyone, anywhere, under any circumstances. When the government's aim is to silence would-be speakers from providing truthful information, its legislative impositions must be subjected to very careful review, regardless of whether the regulation applies to speech on a specific subject matter or speech on any subject and regardless of whether the government undertakes to ban only speech or chooses also to impose related regulations on non-speech activities. Part I.

2. The government has not asserted any interests sufficient to justify its sweeping censorship of speech on matters of public concern by those who have not engaged in any misconduct in acquiring the information.

a. The government's asserted interest in deterring speech that might have the effect of discouraging others from speaking has never been recognized as a justification for censorship and is fundamentally inconsistent with First Amendment protections. Part II.A.

b. Prohibiting speech on the theory that publicity might encourage a crime is also utterly inconsistent with longstanding First Amendment jurisprudence. Inducing someone to commit a crime by paying him, before or after the fact, is the type of involvement in criminal activity that can be legitimately made subject to sanctions, and often is. But imposing sanctions on pure speech because someone may commit a crime in the hope of media coverage is something entirely different. It is not consistent with our constitutional freedoms to permit the government to take the shortcut of pronouncing speech itself off limits as a means of deterring unlawful conduct by someone else entirely. Part II.B.

c. The government's asserted interest in encouraging the use of new technology provides no basis for intruding on

constitutional rights – which even the government admits are implicated here. Part II.C.

d. The government's asserted interest in safeguarding the feelings and positions of those spoken about is insufficient to justify the broad prohibition of the speech of innocent third parties that the government seeks to enforce here. Part II.D.

e. Finally, the government's decision to ban speech without considering various non-speech alternatives that would have been as effective, or more effective, in furthering its goals renders the application of the statute here invalid under any measure of First Amendment scrutiny. The government's decision to ban speech rather than to prohibit or restrict the sale of eavesdropping technology, or to require manufacturers of communication devices to incorporate or make available technologies that defeat eavesdropping, is not a choice the First Amendment permits. Part II.E.

ARGUMENT

I. APPLYING SECTION 2511(1)(c) TO SILENCE INNOCENT THIRD PARTIES IS NOT THE TYPE OF REGULATION THAT HAS EVER BEEN FOUND TO TRIGGER ONLY INTERMEDIATE SCRUTINY.

Petitioners attempt to shoehorn Section 2511(1)(c) into various categories of laws requiring less than strict constitutional scrutiny by describing it alternatively as (1) a content-neutral regulation of speech, (2) a law of general application, and (3) a regulation unrelated to suppressing speech that incidently has the effect of suppressing it. But the application of section 2511(1)(c) here – to speakers who have not engaged in any misconduct in acquiring the information they wish to communicate, based on the government's desire not to have that information communicated – cannot be made to fit any of those categories. Imposing criminal sanctions and

civil liability simply for speaking the truth, because the government does not want that truth expressed publicly, is precisely the type of government action that has consistently been subjected to exacting scrutiny. Petitioners' contrary arguments do not take adequate account of salient characteristics of the regulation at issue and of this Court's First Amendment jurisprudence and thus are inconsistent with longstanding First Amendment doctrine.

A. That a Statute Applies to Speech Regardless of Subject Does Not Always Justify Lower Scrutiny.

Petitioners' suggestion that any regulation of speech that is not directed to a particular subject matter is subject at most to intermediate scrutiny is inconsistent with numerous decisions of this Court. For example, the application of defamation laws is significantly constrained by the First Amendment, not because defamation laws punish speech on any particular subject matter or speech advocating any particular viewpoint but because defamation laws specifically and purposefully suppress speech and threaten to deter truthful speech. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (false statements about public officials, absent malice, cannot constitutionally be punished, recognizing that: "Whatever is added to the field of libel is taken from the field of free debate.") (quotation and citation omitted); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

Similarly, even content-neutral taxes imposed speech are subject to strict scrutiny if they are imposed differentially on First Amendment activities, because they single out speech for an unnecessary burden. *See Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (invalidating tax on newspaper and motion picture advertisements); *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)

(invalidating tax on newsprint); *accord Leathers v. Medlock*, 499 U.S. 439, 446 (1991) (differential taxation "places such a burden on the interests protected by the First Amendment, that it is presumptively unconstitutional") (quotation and citation omitted).[2/]

Furthermore, this Court has expressly held that regulations that focus on the communicative impact of speech trigger strict scrutiny. In doing so, the Court has explained that when the government regulates speech because of concerns about the impact of that speech, the regulation requires strict scrutiny even if it is not directed at speech on any specific subject. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), for example, the Court applied exacting scrutiny to invalidate an ordinance imposing fees for demonstrations and parades, on any subject, based on the cost to the government of maintaining public order. The Court reasoned that the costs of maintaining order were costs associated with the public's reaction to the speech, *id.* at 134, and that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Id.* at 137. *See also Boos v. Barry*, 485 U.S. 312, 321 (1988) (a regulation justified by "the direct impact that speech has on its listeners" is content-based).

The application of the statute at issue here is similarly focused on the communicative impact of the speech that is prohibited. The government's interest in banning that speech

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2/ *Butterworth v. Smith*, 494 U.S. 624 (1990), also arguably falls within the same rubric. Although the statute at issue prohibited disclosure of only grand jury testimony, it prohibited disclosure of such testimony on any subject matter, and could therefore be classified as a content neutral restriction. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992). Nonetheless, the Court applied exacting scrutiny, and despite finding that the ban was likely to further certain state interests, 494 U.S. at 634, held the ban of truthful speech unconstitutional, *id.* at 635-36.

is to prevent listeners from learning what the speakers would say. *See, e.g.*, Gov. Br. 39 (stating the government's interest in preventing the information from being "disseminated to a wider audience"). That is not the type of regulation for which intermediate scrutiny has ever been held sufficient. Content-neutrality can be a relevant indicator that a regulation of, for example, sound trucks or media cross-licensing is not attempting to censor speech and will not likely result in silencing speakers. But when the government's concern is the public's reaction to the speech and its *aim* is censorship, this Court has always applied strict scrutiny – and it must do so here if the First Amendment is to maintain its vigor.

B. That a Statute Also Regulates Non-Speech Activities Does Not Always Justify Lower Scrutiny.

Petitioners' suggestion – that a statute's direct prohibition of speech is insulated from exacting scrutiny if the statute also regulates conduct – would also represent a significant departure from this Court's First Amendment jurisprudence. Although this Court has recognized that a law regulating general conduct can be applied to media businesses without triggering heightened scrutiny, this Court has never found that rational basis scrutiny is applicable to a law aimed specifically, like this one, at censorship. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), typifies the circumstances under which heightened scrutiny is not required for the enforcement of a law of general applicability. There, a newspaper was sued for breach of its voluntary agreement to maintain a source's confidentiality. The Court applied rational basis scrutiny in upholding the enforcement of that agreement, recognizing that "any restrictions that may be placed on the publication of truthful information are self-imposed." *Id.* at 671. The government

regulation at issue – contract law – reflected no government preference for silence.

In contrast, the law at issue here does reflect the government's preference for silence and is not, by any recognized definition, a law of general applicability. Section 2511(1)(c), on its face, prohibits speech. It expressly bans disclosure, or attempted disclosure, of certain communications. That express ban is wholly unlike the general contract law at issue in *Cohen v. Cowles Media*. That a separate provision of the statute, Section 2511(1)(d), additionally bans use of information gleaned from intercepted communications, does not change the nature or the purpose of the ban Congress enacted against speech. Further, conduct regulation is a particularly minor aspect of *this* statute. The primary use of recorded conversations by private individuals, and virtually the only use by an innocent acquirer, is disclosure.

The government attempts to support the opposite conclusion by referring to "industrial espionage" – in which, presumably, one person engages in eavesdropping on a private conversation and then provides the information learned to one of the participant's business competitors. Industrial espionage, however, by its very nature does not involve "innocent" disclosure or receipt of information. Either the competitor hires the eavesdropper in the first place or it pays for the information after the fact. In both cases, the third party' acquisition and use of the information is not innocent and is not analogous to the public disclosure of innocently acquired information on matters of public concern at issue here. Not surprisingly, petitioners present no examples of a use other than communication that might be made by an innocent acquirer. *See generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (recognizing that the burden

of even seemingly general laws may impermissibly fall on the exercise of constitutional rights).

Moreover, this Court has repeatedly reviewed specific applications of laws to speech activities under exacting scrutiny, even when – unlike here – the laws *could* fairly be characterized as laws of general applicability. Thus, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921 (1982), the Court held that the tort imposing liability for interfering with business relations could not constitutionally be enforced against the organizers of a political boycott, regardless of the damages caused the businesses that were boycotted. Similarly, in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Court limited the permissible applications of the tort of intentional infliction of emotional distress to constitutionally protected speech.

In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court ruled that a state law proscribing disturbances of the peace could not constitutionally be applied to punish peaceable civil rights demonstrators. Although considerable testimony indicated violence was about to erupt in reaction to the demonstration, the Court found that the innocent demonstrators could not be silenced – even under this law of general applicability – simply to further the government's interest in maintaining the peace. Even though silencing the demonstrators would have been an effective and easier means of keeping the peace, the First Amendment's guarantee of free speech required the government to choose a more arduous method – deploying city, sheriff's office and state police, firemen and fire trucks to keep the peace – instead. 379 U.S. at 550-51. Likewise, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) this Court ruled that an ordinance proscribing disorderly conduct could not constitutionally be applied to a provocative speaker, even

though silencing the speaker would have served the government's interest in maintaining order. *Id.* at 5.

More recently, this Court has subjected application of general public accommodations law to strict scrutiny when it intrudes on expressive association rights by requiring inclusion of a message to which the association objects on ideological grounds. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

All these laws are laws of general applicability. But use of these laws to intrude on First Amendment rights was recognized as a violation of the First Amendment, absent far more compelling state interests. Such exacting scrutiny is appropriate here, because the provision at issue here – by expressly punishing disclosure by third parties who are not involved in eavesdropping themselves – is both on its face, and in practical effect, a direct prohibition of speech.[3/]

C. That a Statute Has a Legitimate Ultimate Aim Does Not Justify Lower Scrutiny When the Statute Bans Protected Speech.

This Court's recognition that a more relaxed scrutiny is appropriate for regulations in which the government's purpose is "unrelated to the suppression of free expression," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), was not intended to govern – as petitioners would prefer it – whenever the government's ultimate goal is something other than pure censorship. Rather, this Court recognized the very different

3/ Petitioners' argument that the provision is subject to only intermediate scrutiny because it isolates speech based on its source begs the relevant questions. Laws banning disclosure of all information learned from the government, or from publications in foreign languages, would equivalently define the proscribed speech by its source. They would also be unconstitutional.

proposition that *O'Brien* scrutiny is appropriate when the government has not aimed at suppression of speech *even as a means* toward its ultimate end.

If *O'Brien* scrutiny were applicable to every law that serves an ultimate goal other than pure censorship, no speech restriction would ever trigger strict scrutiny. Every law that has ever been held invalid under the First Amendment could be described as serving an ultimate goal other than censorship. The government's interest in deterring defamation is to prevent economic loss and social embarrassment to the victim. The government's interest in silencing speakers who are angering an assembled crowd is to avoid harm to people and property. The government's interest in regulating charitable solicitation is to prevent fraud. Even the statute struck down in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), was aimed at preventing the crimes and violence that might follow advocacy of such tactics, not the advocacy for its own sake.

Thus, a law falls within *O'Brien*'s "unrelated to the suppression of free expression" category only when the government has not tried to suppress free expression *even as a means* to a different end. The laws at issue in *O'Brien* and much of its progeny prohibited only conduct. The constitutional issues arose only when someone engaged in that conduct for an expressive purpose. *See, e.g.*, 391 U.S. at 381-82; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

Although *O'Brien* scrutiny has since been applied to speech regulations, it has never been applied to regulations when the interest asserted to justify that regulation was to prevent communication of information because the communication in itself was thought to be harmful. To the contrary, *O'Brien* scrutiny has been found appropriate only for speech regulations that were not promulgated in order to

prevent communication. Thus, the cable must-carry regulations upheld in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), were not enacted because the government affirmatively wanted any non-broadcast programming silenced. To the contrary. To the limited extent the requirement to carry broadcast stations resulted in non-carriage of any other programming, it was an unfortunate byproduct of the government's attempt to safeguard broadcasters. The government had no interest in preventing cable operators from carrying non-broadcast programming. Indeed, its goals were even better served when cable operators used existing capacity, or expanded capacity, to carry both broadcast signals and all the cable programming they wish. 512 U.S. at 663.

Similarly, the trademark-like statute upheld in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), also was not enacted because the government wanted to preclude information or opinion about the Olympics from reaching the public. The statute simply limited trade name and advertising usage of the word "Olympics" to the Commission responsible for the United States's participation in the international events, so that the Commission could reap the commercial benefits of its investment. The government had no interest in placing any limits on any message about the Olympics or any other athletic contest. *Id.* at 536.

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), is not to the contrary. In *Seattle Times*, this Court recognized the unremarkable proposition that when the government wields its police power to intrude on the privacy rights of its citizens it can attempt to ensure that the intrusion is not broader than justified. The only information subject to the rule upheld in *Seattle Times* was information acquired by using the government's police power – through the judicial discovery

process. Indeed, restrictions on the use of information litigants acquire on their own have long been considered invalid. *See, e.g., Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963) (ordering litigants not to use documents or information obtained before discovery violates "their First Amendment rights to disclose such documents and information free of governmental restraint"); *Schlaifer Nance & Co. v. Estate of Warhol*, 742 F. Supp. 165, 166 (S.D.N.Y. 1990) (inherent power does not permit courts to restrict use of information innocently obtained from third parties without the use of judicial process); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074 (1988) (same).[4/]

In contrast, the case at bar is fundamentally different from *O'Brien* and progeny, because the government is regulating speech on the ground that "the communication . . . is itself thought to be harmful." *O'Brien*, 391 U.S. at 382 (relying on the critical difference between such regulations and the regulation at issue in the case before it). The government enacted section 2511(1)(c) because it objected to the disclosure of certain information to the public.[5/] As the government itself

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4/ Although the copyright laws have not been considered subject to *O'Brien* scrutiny, they demonstrate the same absence of any government interest in censoring speech. The government's purpose in providing property rights to original authors through copyright is unrelated to censorship. Copyright is intended to encourage authors to create works and distribute them to the public. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 545 (1985); *see also Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (securing performers' right of publicity, like copyright, encourages artists to create and publicly perform their work). Moreover, copyright does not prohibit disclosure of any information or ideas in a protected work.

5/ Section 2511(1)(c) prohibits both disclosure of an entire conversation and disclosure of any facts learned from a recording of such a conversation because it expressly prohibits the disclosure of "the contents"

acknowledges, a key government purpose here is to silence those who might otherwise publish the recorded conversation "to a wider audience." Gov. Br. 39. In other words, the government's concern is triggered by the *communicative impact* of such disclosures. It is attempting to prevent a wider audience from learning the content of such conversations and reacting accordingly to the discomfort or inconvenience of the participants. *See id.* at 34-35, 39. Thus, the regulation can be upheld only if it satisfies exacting scrutiny.

II. THE GOVERNMENT'S ASSERTED INTERESTS ARE INSUFFICIENT TO OVERRIDE INNOCENT DEFENDANTS' CONSTITUTIONAL RIGHTS.

The interests the government asserts here are insufficient to justify its broad censorship of truthful speech on matters of public concern. It has long been recognized "that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quotation and citation omitted). "The First Amendment affords the broadest protection" to such speech. *Id.* The government's asserted interests, however legitimate, are not so substantial as to overcome the First Amendment rights of those who have not wrongfully acquired the information they wish to publish.

A. Encouraging Private Speech

The government's asserted interest in encouraging people to engage in highly private conversations is very different from the pro-speech government interests this Court has previously recognized in reviewing First Amendment challenges to government actions. The government interests previously recognized as promoting pro-speech values are government

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of such conversations. *Cf.* Bartnicki Br. 17.

interests in encouraging the wide dissemination of information and opinions – not the encouragement of private conversations.

Thus, in *Turner I*, the Court recognized that regulations aimed at "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." 512 U.S. at 663. The Court found that the government, in enacting those regulations, was acting to further a longstanding policy in encouraging "the widest possible dissemination of information." *Id.* (quotation and citation omitted). The Court has also recognized that a public university acts to further the values of the First Amendment when its purpose is "facilitating the free and open exchange of ideas by, and among, its students" by subsidizing student groups and activities. *Bd. of Regents v. Southworth*, 120 S. Ct. 1346, 1354 (2000); *id.* at 1360 (Souter, J., concurring).

The allegedly "pro-speech" interest asserted by the government here is wholly different. It is not aimed at encouraging the "uninhibited, robust and wide-open" debate on public issues that is at the heart of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. at 270. To the contrary, it "advances . . . the choice *not* to speak publicly," and attempts to prevent information from being "disseminated to a wider audience." Gov. Br. 34, 39.

It is far from clear that such a goal furthers any *First Amendment* value at all – as opposed to another type of interest altogether. Indeed, the doctrines petitioners raise in support are entirely different. For example, the right not to speak recognized in *Wooley v. Maynard*, 430 U.S. 705 (1977), was a right not to be required to convey an ideological message which was repugnant to one's own beliefs. *Id.* at 707; *accord Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997); *cf.* Gov. Br. 34. Neither of the individual petitioners

were required by anyone to convey any message they found ideologically repugnant. To the contrary, they voluntarily chose not to remain silent and they voluntarily chose the subject matter of the conversation and the points of view they espoused. Thus, the government's prohibition of speech even by innocent third parties is scarcely justified by any need to protect *Wooley v. Maynard* type values.

Petitioners' comparisons to doctrines recognizing property rights in speech activities are equally unavailing. The principle underlying copyright is that providing authors with the right to control distribution, and therefore charge for it, provides an incentive for them to create works and distribute them to the public. Although relying on property principles therefore necessarily permits authors to choose not to distribute their work for a limited time period, the government has little interest in encouraging secret expression. To the contrary, the government's interest is to encourage *public* expression. "[C]opyright is intended to increase and not to impede the harvest of knowledge." *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 545 (1985); *id.* at 545-46 (noting that copyrights foster the original works "that provide the seed and substance of this harvest.").

Similarly, in recognizing Zacchini's right to publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court explained that the value of the protection was to provide "an economic incentive for him to make the investment required to produce a performance of interest to the public." *Id.* at 576 (noting that the "same consideration underlies the patent and copyright laws"); *cf.* Bartnicki Br. 17. The Court further justified its decision on the ground that "neither the public nor [the broadcaster] respondent will be

deprived of the benefit of [Zacchini's] performance" as long as Zacchini is properly compensated. 433 U.S. at 578.[6/]

Importantly, it has long been understood that the government's power to create property rights even for the purpose of encouraging *public* speech is limited by the First Amendment. Thus, copyright law survives First Amendment challenges because it does not restrict publication of either the facts or the ideas that are contained in a copyrighted work. *Harper & Row*, 471 U.S. at 560. Similarly, *Zacchini* made clear that the media remains free to report the event. 433 U.S. at 569. And *San Francisco Arts & Athletics* made clear that it was only upholding a restriction on the use of trade names as a designation of source. Everyone, however, remains free to refer to organizations by their trade names in writing about them. 483 U.S. at 536 n.14. In contrast, the statute challenged here prohibits disclosure of "the contents" of any covered communication – *i.e.*, the subject matter, the ideas expressed, the facts asserted, etc. 18 U.S.C. § 2511(1)(c).

Even if protecting secret conversations is legitimately a *speech* interest – rather than some other interest – it can only be regarded as a relatively weak one that does not outweigh the interests of other speakers to report on matters of public concern, when they have engaged in no misconduct to acquire the information. Those speakers' constitutional right to discuss

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6/ The right to exclude urged by *amicus* Boehner has *not* been recognized as a right under the speech clause. It has been recognized as a right under the assembly clause when inclusion would send a message to the public contrary to an association's beliefs. That value is not at issue here, where the participants object to their actual beliefs being expressed to the public and where they remain in unfettered control of what that message will be. *See* Boehner Br. 5 (citing only freedom of association decisions – *California Democratic Party v. Jones*, 120 S. Ct. 2402 (2000), and *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000)).

matters of public concern has long been recognized as "the core value of the Free Speech Clause of the First Amendment." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968).

Essentially, petitioners' "pro-speech" argument boils down to banning speech because it might discourage others from speaking. Permitting the government to ban speech on that basis would be a precipitous departure from First Amendment jurisprudence that could be wielded against much of the speech this Court has carefully safeguarded under that Amendment's auspices. Speech by some often discourages speech by others. Politically motivated boycotts have been aimed at discouraging the speech activities of the owners. *See, e.g.,* Jill Stewart, *Free This Man: Can Black Conservatives Speak Their Minds in America?*, New Times (L.A.), July 3, 1997 (article about boycott of companies that sponsored a radio talk show). Labeling a position "racist" or "sexist" or "Communist" is intended to constrain the speech of those accused, and often does. Loud, fierce, or sarcastic speech often encourages the rest of us to suppress our own views rather than responding. Thus, if petitioners' "pro-speech" argument prevails, then the principle that the First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp" speech, *New York Times Co. v. Sullivan*, 376 U.S. at 270, is no longer secure. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1107-10 (2000) ("*Volokh*").

Any suggestion by petitioners that private speech should be regarded as a property right simply begs the First Amendment question rather than answering it. That copyright and publicity rights, under specific circumstances, have been upheld against First Amendment challenges does not mean that anything designated a property right will or should automatically obtain

the same result. For example, states have viewed individuals and businesses as having a property interest in their reputations. *See, e.g., Marrero v. City of Hialeah*, 625 F.2d 499, 514 (5th Cir. 1980) (business reputation is a property interest under Florida law); *Nossen v. Hoy*, 750 F. Supp. 740, 743 (E.D. Va. 1990) (individual reputation is a property interest under D.C. and Virginia conversion law). Nonetheless, those "property" interests must give way when they intrude on First Amendment rights. *See, e.g., Hepps*, 475 U.S. at 768-69; (determining "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment") (quotation and citation omitted); *New York Times Co. v. Sullivan*, 376 U.S. at 279-80. Similarly, freedom from interference with business relations is a property right, but it necessarily gives way when enforcement of that right would improperly deprive others of their free speech rights. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. at 921 (organizers of political boycott cannot be held liable for damages for interfering with business relations because peaceful boycott is protected exercise of free speech).

If the discouragement of speech *by speech* can be regarded as the evil to be overcome, through designation of a property interest or otherwise, the guarantee of free speech will become so drastically curbed as to be unrecognizable. The government, for example, could impose criminal and civil sanctions on authors and publishers of unauthorized biographies on the ground that they have violated property rights the subjects have in the details of their lives. *See Volokh* at 1064. Indeed, the government could punish anyone who reviewed a book without express permission from the author or anyone who reported the contents of a candidate's remarks at a fundraising luncheon.

Although this particular statute is limited to technologically intercepted conversations, the theory urged by

petitioners is not. It is just as arguable that the prospect of critical, even vicious, reviews deters authors from writing and that candidates will speak more candidly among supporters if assured that their remarks will not be reported more broadly. If the government is privileged to censor speech whenever that speech might discourage others from speaking freely, there will be little left of the Framers' guarantee. The government's so-called "pro-speech" interest, therefore, cannot provide a basis for upholding the statute's punishment for engaging solely in speech activities.

B. Deterring Interception

The government's suggestion that punishing the speech of innocent acquirers will deter others from unlawfully intercepting conversations – even if it were true – would not justify the suppression of the speech rights at issue here. The purported precedents on which petitioners rely establish the very different proposition that deterrence is a sufficient interest when no or virtually no speech interests are burdened. Thus, receiving stolen goods may be punished providing the legislature's decision to do so is not utterly irrational. No First Amendment interests are implicated.

Petitioners' reliance on *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990), as providing precedent for the statute at issue here is equally unavailing. The Court did not hold in those cases that deterrence of any unlawful activity was an interest sufficient to outweigh core First Amendment rights. To the contrary, the Court held that the First Amendment interests claimed in those cases were "exceedingly modest, if not *de minimis*," 458 U.S. at 762; 495 U.S. at 108.

Moreover, the Court found that the government interest in deterring the particular crime at issue – sexual exploitation and

abuse of children – "constitutes a government objective of surpassing importance." 458 U.S. at 757. The dangerousness and particularly reprehensible nature of sexual exploitation of children justified a speech ban that other deterrence rationales have not justified. *Compare Stanley v. Georgia*, 394 U.S. 557 (1969) (invalidating law outlawing the private possession of obscene material because state had little interest in controlling what an adult viewed in his own home) with *Osborne v. Ohio*, 495 U.S. at 108 (upholding law outlawing the private possession of child pornography "because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*").

These cases demonstrate that the government's alleged deterrence interest is woefully insufficient to justify the statute at issue here, which prohibits speech on matters of public concern. That speech is not a *de minimis* First Amendment value, it is "the core value of the Free Speech Clause." *Pickering*, 391 U.S. at 573. The only deterrence interest that has been recognized as sufficient to censor *that* speech is imminent violence. *See, e.g., Brandenburg v. Ohio*, 395 U.S. at 447. In contrast, the illegal eavesdropping the government seeks to deter here, although certainly objectionable, does not involve the danger of violence or child abuse, and can scarcely be considered a government objective of surpassing importance. Thus, under current First Amendment doctrine, an interest in deterring unlawful interception by punishing innocent third parties – even if there was some basis to believe it would be effective – is insufficient to justify the ban on speech imposed here.

Moreover, the underlying rationale of the government's argument is particularly disturbing because it punishes speech based solely on the predicted effect of publicity on a criminal's motivation to commit a crime. Under that logic, the media

could be prohibited from reporting about crimes, in the interest of deterring copycat crimes. Likewise, the media could be prohibited from covering political protests in which the protestors block thoroughfares or trespass or resist arrest or commit acts of vandalism. Certainly, protests are motivated in large part by the potential of media coverage to spread the protesters' message. If the media are not permitted to report on or show videotape of protests that involve any infraction of the law, arguably protestors would be less likely to commit such infractions.

The line between inducing someone to break a law by paying them and "inducing" by reporting the news – which may affect the behavior of readers, subjects of stories, and suppliers of information – is critical. In a criminal law sense, there is a pivotal difference with respect to *mens rea*. But more importantly, it is inconsistent with the First Amendment's guarantee of free speech to permit the government to silence speakers based on the effect of their speech on others, absent truly exigent circumstances. *See, e.g., Cox v. Louisiana*, 379 U.S. at 550-51; *Terminiello*, 337 U.S. at 5; *Brandenburg v. Ohio*, 395 U.S. at 447.[7/] No such exigent circumstances exist

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7/ Petitioners are incorrect that there is no difference between imposing sanctions on those who are actually involved in unlawful interception of conversations and imposing sanctions on innocent third parties. In the former instance, an interceptor sanctioned for revealing taped conversations is being denied the fruits of his criminal conduct – just as bank robbers are justly denied the proceeds of their robberies without triggering any Takings Clause concerns. But punishing speakers for publishing information when they did not engage in any misconduct in acquiring that information, cannot be regarded as anything other than punishment for speech. And a complete ban on that speech, as here, has consistently been recognized as implicating serious First Amendment concerns.

here, and nothing in the text or the purpose of the statute limits its application to exigent circumstances.

The government's assertion that its deterrence interest justifies this statute is as destructive of the First Amendment's guarantee as its assertion of its so-called "pro-speech" interest. Thus, even if the government had been able to support its speculation that punishing innocent third parties will deter unlawful interception by others, that interest cannot justify punishing those who engage solely in speech activities – especially when the speech addresses matters of public concern. "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988).

C. Encouraging Use of New Technology

The government certainly cannot rely on its asserted interest in encouraging the use of new technology as sufficient to justify punishing pure speech on matters of public concern. If a government interest in particular technological or commercial developments could justify the government's disregard of its citizens' First Amendment rights, then the government could ban conversation by means of traditional telephones in order to encourage the use of new wireless technology. Or it could ban theater, movies, and books in order to encourage the use of the new internet technologies. Virtually nothing would be left of the fundamental rights preserved to the people by the Constitution. That interest is plainly insufficient to save the application of the statute at issue here.

D. Limiting Additional Harms

Essentially the government's interest here is in protecting people from the embarrassment or other consequences of having those to whom they do not intend to speak candidly learn what they said when speaking with someone to whom

they did. The government's interest in protecting the privacy of its citizens against the intrusion of other citizens is not directly involved here, where the statute is being used to punish speakers who did not participate in any intrusion.[8/]

The potential harms that the government seeks to prevent are similar to the harms the government seeks to prevent when it enacts laws proscribing publication of truthful, but preferably confidential, information – such as the names of juveniles arrested for criminal offenses or the preliminary investigations of judges for alleged misconduct. In those contexts, this Court has held that punishing such speech "requires the highest form of state interest to sustain its validity." *Smith v. Daily Mail Publ'g. Co.*, 443 U.S. 97, 102 (1979). "[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.*

This Court did not find the government's interest in protecting juveniles from such publication sufficient to justify punishing speech even in that specific, considered context. The government has an even weaker interest here, where it has

8/ This issue also does not involve, as individual petitioners would have it, Bartnicki Br. 30, either the right to be let alone – which is a right to be free from *government* intrusion – or an interest in being free from intrusive *conduct* – which was the concern motivating the regulation upheld in *Hill v. Colorado*, 120 S. Ct. 2480 (2000). *Hill v. Colorado* did not recognize *any* government interest in protecting people from *speech*. To the contrary, the regulation upheld in *Hill v. Colorado* was upheld because it did not prevent protesters from speaking their minds to their intended audience at the times they chose to speak, but was instead a time, manner, place restriction that mandated a limited distance interval between speakers and listeners who wished to avoid closer contact. That decision provides no support for the decision petitioners seek here. Section 2511(1)(c) is a complete ban, not a time, manner, place regulation. It prohibits anyone, however innocent of the interception itself, from conveying any material covered by the statute under any circumstances.

simply legislated a broad proscription of speech without regard to the nature of the information at issue or the likelihood that anyone would actually be harmed by its publication.[9/]

The fact that the source of the information is someone who broke the law in obtaining or divulging it does not, in the absence of misconduct by the publisher, change the calculus, as this Court determined in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). There, the newspaper subjected to punishment for publishing accurate information had not engaged in any misconduct itself, but it knew the source of the information had almost certainly committed a misdemeanor in divulging that information to the newspaper. 435 U.S. at 832. This Court found a constitutionally significant distinction between punishing the speech of someone who illegally acquired the information and punishing the speech of someone who later received and published that information without participating in the illegal acquisition. *Id.* at 837. Assuming for purposes of decision that preserving the confidentiality of this information served the state's interests, the Court ruled that the state's interests were insufficient to justify punishing innocent third parties for publishing accurate information on matters of public concern. *Id.* at 841.

Even in reaching a proper balance between defamation laws – which outlaw false speech that is not itself valued under the First Amendment – and the First Amendment, this Court has drawn a similar line. When the subjects of defamatory speech are, like individual petitioners, involved in a public

9/ Indeed, private comments on matters of public concern are most likely to embarrass the person who made them only when they suggest that the person's public statements have been consistently false. The government cannot be said to have a strong interest in protecting the ability of those involved in important issues of public policy to lie.

controversy, the speech is punishable only if the speakers have deliberately engaged in defaming someone – *i.e.*, if they publish information as if it were true when they knew it was false or recklessly disregarded evidence that it was. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. at 279-80; *Curtis Publ'g. Co. v. Butts*, 388 U.S. 130 (1967). Similarly, here, where the government is seeking to prevent similar harms – embarrassment and negative social or business ramifications – speakers should only be subject to punishment if they were deliberately involved in the unlawful interception.

If the rule were otherwise, and speakers could be punished for truthful speech on matters of public concern in order to protect people from embarrassment and social or business ramifications – much of current First Amendment doctrine would have to be revised. For example, the accommodation of defamation laws and the First Amendment would be unnecessary because currently non-actionable defamation is just as likely to cause its subjects embarrassment and negative ramifications as actionable defamation. *See, e.g.,* Bartnicki Br. 17 (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511-12 (1991), for its recognition that falsity can injure the subject by indicating a negative trait). Similarly the protections accorded parody would be unnecessary because parody also causes its subjects embarrassment and possible negative ramifications. *Cf. Hustler Magazine v. Falwell*, 485 U.S. at 53-55; *see also NAACP v. Claiborne Hardware*, 458 U.S. at 910 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action").

Governments could also choose to protect their citizens from criticism. At the very least, a right of reply would be justified. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). But so would flat-out censorship. It cannot be doubted that public criticism stings. And the practical

ramifications can be severe: theatrical plays close; candidates are defeated at the polls; businesses lose market share or fail altogether.[10/]

Whether there may be specific types of information about private individuals that are so sensitive, and of so little public concern, that the government's interest in helping citizens shield it from public view would meet the requisite standard is not presented here. This statute broadly sweeps in every possible subject of conversation, including matters of legitimate public concern – such as the school union negotiations discussed in the conversation at issue in this case. And as this Court has long recognized: "Broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963); *accord Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980).

To permit such blanket prohibitions of speech as a prophylactic in order to safeguard the feelings and positions of the subjects of that speech – regardless of the specific interests at issue and regardless of the speaker's conduct – requires a

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10/ Individual petitioners' attempt to draw a line permitting publication of information that has become public knowledge, Bartnicki Br. 18, not only is without support in the text of the statute itself, it fails to solve the problems of any party. Permitting speakers to discuss information relevant to issues of public importance only when a substantial number of others already know the information still deprives speakers of significant First Amendment rights. And those overheard remain vulnerable to the "magnified harm," Gov. Br. 39, that repetition to a wider audience is said to present. Nor does the suggested line further any of the government's other asserted interests. At the same time, such a line would leave would-be speakers in the dicey position of determining when information is sufficiently public to be "safe." Here, for example, respondent Vopper was far from the first to divulge the contents of individual petitioners' conversation.

drastic transformation of the First Amendment guarantee of free speech. If the Constitution is to continue to protect "free and unhindered debate on matters of public importance," *Pickering*, 391 U.S. at 573, the government's asserted interest in protecting people's feelings and positions must be found insufficient to justify the broad proscription of truthful speech at issue here.

E. Non-Speech Alternatives

Compounding the incursion on First Amendment rights here is the government's utter failure to try or consider non-speech alternatives. The government did not impose a speech ban on innocent third parties after years of attempting to prosecute the miscreants who were actually intercepting private conversations. The government subjected innocent third parties to criminal and civil sanctions from the beginning, without waiting to determine whether a more focused restriction on actual wrongdoers would prove sufficient. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (concluding that the state "had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech").

Second, the government failed to properly consider technological alternatives to safeguard private conversations without muzzling innocent third parties. For example, the government could have required manufacturers to equip communication devices with encryption or other technologies that would render them secure for conversation in the first place. Indeed, simply in response to market demands, manufacturers have all but eliminated the risk of eavesdropping on cellular telephone conversations with now well-established digital technologies. In addition, the government could have outlawed or restricted the sale of equipment used to intercept private conversations in the first place. The government's

election to ban speech instead, without an adequate consideration of the alternatives, is reason alone to invalidate the application of section 2511(1)(c) to innocent third parties. The First Amendment prohibits the government from making censorship its regulation of first resort. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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