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 AMICUS CURIAE OF DOW JONES & COMPANY, INC. IN SUPPORT OF RESPONDENTS

FILED October 25th, 2000

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INTEREST OF *AMICUS CURIAE*

Dow Jones & Company, Inc., submits this brief *amicus curiae* in support of respondents. Dow Jones publishes *The Wall Street Journal*, a daily newspaper with a national circulation of approximately 1.8 million each business day, *WSJ.com*, a news website with over 500,000 paid subscribers, *Dow Jones Newswires*, a collection of real-time electronic news services, and other business-news publications, including *Barron's* and *Smart Money* magazines.[1] As such, its interest in this case is direct, immediate and on-going. The fundamental issues presented by this case—whether and under what circumstances the government may punish the publication of truthful, lawfully obtained information about a matter of public concern—arise most frequently in cases involving the press. Such cases often arise in the context of the statute involved here, the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 28 U.S.C. § 2510, *et seq.* *See, e.g.*, *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000); *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert. filed*; 99-1709, 68 U.S.L.W. 3868 (Apr. 25, 2000); *Keller v. Aymond*, 722 So. 2d 1224 (La. App. 3d Cir., 1998), *writs denied*, 742 So. 2d 551, 552 (La.), *cert. denied sub nom Central Newspapers, Inc. v. Johnson*, 120 S. Ct. 397 (1999); *Mayes v. Lin Television of Texas, Inc.*, 1998 WL 665088 (N.D. Tex. Sep. 22, 1998).

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[1] Letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Counsel for the parties did not author this brief in whole or in part. No person or entity, other than Dow Jones, made a monetary contribution to the preparation and submission of this brief.

Like most news organizations, Dow Jones frequently obtains by lawful means highly newsworthy information that may have been obtained or disseminated improperly by the source of that information or another party. *See, e.g.*, Rachel Zimmerman, "Choice Allies: Awaiting Green Light, Abortion-Pill Venture Keeps to Shadows," WALL ST. J., Sept. 5, 2000, at A1 (discussing secrecy surrounding one company's efforts to market RU-486, the so-called abortion pill, and detailing, based on "internal [company] documents reviewed by *The Wall Street Journal*," the plans of the company to manufacture, market and distribute RU-486, "one of the most controversial drugs ever to hit the U.S. market," once FDA approval was obtained). The rule advocated by petitioners would, if adopted by this Court, jeopardize newsgathering and encourage an increasing variety of government efforts to punish publication by the press of lawfully obtained, newsworthy, and truthful information.

SUMMARY OF ARGUMENT

This case is not, as the government and petitioners would have it, about "the receipt and sale of stolen property," U.S. Br. at 40, the "distribution of child pornography," Pet. Br. at 38 n.18, or the relationship between a "thief" and a "fence." Boehner Amicus Br. at 8. It is about truthful speech by the press concerning matters of public interest based on information lawfully obtained. The analogies in the parade of horribles offered by petitioners and their *amici* simply do not come to grips with the basic and unavoidable fact that the First Amendment specifically singles out for protection truthful speech about important public subjects because such protection is essential to democracy. Nor do petitioners correctly understand the notion of "privacy" as it relates to the dissemination of information in a free society.

1. Government-imposed sanctions, such as statutory and punitive damages or criminal penalties, for informing the public of lawfully obtained truthful information of concern to the public, absent a compelling governmental need, would disrupt the sensitive balance required by the Constitution.

The First Amendment establishes a balance in an "unruly contest" between the press, which seeks out and disseminates newsworthy information to the public, and the government, which sometimes seeks to protect the secrecy of newsworthy information. Alexander Bickel, *Domesticated Civil Disobedience: The First Amendment, from Sullivan to The Pentagon Papers*, THE MORALITY OF CONSENT 57 (1975). A fundamental assumption underlying this theory of the First Amendment is that the government may attempt to maintain the secrecy of information, but once that information is lawfully obtained, the press may publish it without fear of reprisal from the government absent the most extraordinary and compelling circumstances.

This precept is fundamentally different from those aimed at thwarting content-based regulation: It is a fundamental structural rule of our governmental system that is analogous to the bedrock ban on prior restraints. Government intervention to enforce the secrecy of newsworthy information lawfully obtained by the press must be treated as comparably suspect, a subject of the most intense judicial review.

To accept only "intermediate scrutiny" of such intervention, as petitioners and the government urge, would fatally undermine the very premise of the constitutional structure erected by the Framers. Rather than concerning itself with the lawfulness of its own conduct, and the accuracy and newsworthiness of information in its possession, the press necessarily would be forced to affirmatively aid government, business, public officials, and public figures in maintaining their secrets. The press would be required to investigate the conduct of its own sources and, upon concluding that a source might well have breached some law or duty in obtaining truthful information of significant public importance, somehow erase this data from its memory. Thus, the intermediate scrutiny test proposed by petitioners would inject intolerable uncertainty into decisions whether to publish—and perhaps even to investigate further—newsworthy information. This would be a dramatic

departure from existing law and the way the press is permitted, and indeed, expected to act. Obtaining and publishing information from sources who themselves are breaching a legal duty in providing the information to the press, are "paradigmatically 'routine newspaper reporting techniqu[es].'" *The Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (citation omitted). To authorize punishment of this traditional journalistic activity absent some compelling governmental need of "the highest order" would invite precisely the sort of timidity and media self-censorship that the First Amendment exists to prevent.

2. The law of privacy in the United States has, since its inception, respected this basic First Amendment limitation. In the context of a private suit for damages against the press, publication of truthful information of "public concern" does not implicate any legally cognizable privacy interest that overrides the First Amendment's protections. This "public concern" rule was endorsed by Warren and Brandeis in their 1890 article first formulating a privacy tort (Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)), and then uniformly adopted as a matter of common law throughout the Nation. This Court has looked to and incorporated this common-law principle into its First Amendment jurisprudence, and it plainly bars Ms. Bartnicki's and Mr. Kane's claims.

ARGUMENT

There is a constant and inevitable tension between an individual's desire for privacy and the rights of free speech and free press guaranteed by the First Amendment. *Florida Star*, 491 U.S. at 530. "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). As this Court recognized many years ago: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. [That risk] is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Id.*

This Court has repeatedly addressed the "collision between claims of privacy and those of a free press," *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975). And in each instance, without fail, the Court has applied the First Amendment to strike down efforts to punish publication, holding that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (report of juvenile court proceedings revealing identity of juvenile murder suspect); *see also, e.g.*, *Cox Broadcasting*, 420 U.S. 469 (report of judicial proceeding revealing identity of rape-murder victim); *Florida Star*, 491 U.S. 524 (report of criminal proceedings revealing identity of rape victim); *Butterworth v. Smith*, 494 U.S. 624 (1990) (disclosure of witness's own grand jury testimony concerning alleged improprieties in the state's attorney's office and sheriff's department).

The facts here call for straightforward application of the *Daily Mail* test. There is no dispute that the contents of the taped telephone call anonymously provided by Mr. Yocum to the radio stations accurately reflected information that was of public concern and significance. The tape revealed a

discussion between Ms. Bartnicki, a chief negotiator for the public teachers' union, and Mr. Kane, the local union president, about a divisive local political issue, teacher pay increases, and included inflammatory and seemingly threatening (even if meant only "rhetorically," Pet. Br. at 5) statements by Mr. Kane regarding school board members. Ms. Bartnicki and Mr. Kane are no longer seeking compensatory damages for *any* actual injury as a result of the disclosure of the tape. The broadcast portion of the tape itself involves discussions of union business, not the sort of "very private matters unrelated to public affairs" that this Court has previously suggested might theoretically, in some extreme and as yet unrealized circumstance, trump the First Amendment interest in dissemination of truthful information about public issues. *Cox Broadcasting*, 420 U.S. at 491. And it is undisputed that the radio stations, Mr. Yocum and the announcers did not participate in the illegal interception of the telephone call, which was "intercepted and recorded by an unknown person." *Bartnicki v. Vopper*, 200 F.3d 109, 113 (3d Cir. 1999), *cert. granted*, 99-1728, 68 U.S.L.W. 3789 (June 26, 2000).

Despite these facts, petitioners argue that this Court should cast aside the *Daily Mail* test and adopt instead an exceedingly elastic version of the "intermediate scrutiny" test. Essentially, petitioners ask the Court to allow Title III to be used as the basis for a statutory "privacy" tort that could be labeled "public disclosure of newsworthy public facts." But such a cause of action would be flatly contrary to (1) the basic structural underpinnings of the relationship between the government and the press as enshrined in the First Amendment; and (2) the "public concern" exception recognized by common-law privacy doctrine and mirrored in this Court's First Amendment cases.

I. The Constitutional Balance Between Freedom Of The Press And Government-Enforced Confidentiality Precludes Punishing Truthful Speech On Matters Of Public Concern Absent A Government Need Of The Highest Order

This Court's decisions in cases such as *Daily Mail*, *Florida Star*, and *Cox Broadcasting* reflect a clear limitation that the First Amendment places on the means the government may use to enforce the confidentiality of private or government communications and information. This overarching rule provides that, although the government may attempt to prevent unauthorized dissemination of confidential information, once truthful information regarding matters of public concern is lawfully obtained by the press, the press ordinarily cannot be penalized for publishing it. The press cannot be punished even though the government and the speakers involved wish, and otherwise would have been entitled, to keep the information away from the public.[2]

Professor Alexander Bickel referred metaphorically to this battle between the press and the government as an "unruly contest" that is integral to our democracy. Alexander Bickel, *Domesticated Civil Disobedience: The First Amendment,*

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[2] Like most states, Pennsylvania has a myriad of doctrines and laws—analogous to Title III—designed to preserve privacy and secrets. *See, e.g., A.M. Skier Agency, Inc. v. Gold*, 747 A.2d 936, 939 (Pa. Super. Ct. 2000) (describing the elements of a claim for misappropriation of trade secrets); *McGuire v. Shubert*, 722 A.2d 1087, 1092 (Pa. Super. Ct. 1998) (setting forth elements of claim for intrusion into seclusion); *Larsen v. Philadelphia Newspapers, Inc.*, 543 A.2d 1181, 1189 (Pa. Super. Ct. 1988) (publication of private facts). These doctrines and laws, however, have traditionally *not* been used to punish the press for publishing information it lawfully obtained from a source, even if that source may have originally obtained it unlawfully.

from Sullivan to The Pentagon Papers, THE MORALITY OF CONSENT 57, 82 (1975) (treated as authoritative by this Court in the related area of injunctions against publication, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 n.6 (1976)). Under the "rules" of this contest,

> [t]he government is entitled to keep things private and will attain as much privacy as it can get away with politically by guarding its privacy internally; but with few exceptions involving the highest probability of very grave consequences, it may not do so effectively. It is severely limited as to means, being restricted, by and large, to enforcing security at the source.

Id. at 79-80. The balance undoubtedly leads to frustrations on both sides. But there is no alternative consistent with constitutional values:

> It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable.

Id. at 80. The relationship between the press—by which Professor Bickel meant "anybody, not only the institutionalized print and electronic press" (*Id.* at 80)—and the government may thus be analogized to an "adversarial game" comparable to "the collision between prosecutor and defense in our system . . . of criminal justice." *Id.* at 81-82. Professor Bickel further observed:

> [A]s I conceive the contest established by the First Amendment, and as the Supreme Court of the United States appeared to conceive it in the Pentagon Papers case, the presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources. Those responsibilities rest chiefly elsewhere. Within self-disciplined limits and presumptively, the press is a morally neutral, even an unconcerned, agent as regards the provenance of newsworthy material that comes to hand; and within

> like limits and again presumptively, the press is not the judge or the definer of the national interest.

Id. at 81.

As articulated by Professor Bickel, the government may attempt to protect the secrecy of information. But the government has a monopoly on force, and unless restricted by the First Amendment, the government could use that force to *demand* that it prevail whenever tension arose between secrecy and disclosure. Without the balance of the First Amendment, and its insistence that disclosure be the prevailing interest absent powerful government reasons to the contrary, only government-authorized information would be disseminated to the public.

In the context of information of public concern, then, the press may publish what it learns, but its ability to obtain information is not unlimited. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986). Certainly, the government may seek to control invasions of privacy in communications, or seek to control the flow of sensitive information to third parties and the press.[3] But once truthful information of public concern is lawfully obtained by the press, no court may use its powers to restrain the press from publishing it, except perhaps in the most extreme and compelling circumstances, as explained by this Court's decision in the *Pentagon Papers* case and other prior restraint cases. *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

To be sure, this case presents the contest between the press and the government in a different context than that

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[3] For example, courts may, under appropriate circumstances, order documents and other discovery material to be kept under seal, even by members of the press. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

presented in the *Pentagon Papers* case. The information given to WILK and WGBI did not come from the government, and the government is not trying to restrain publication in advance, but rather to punish publication after the fact to achieve the goal of protecting individual privacy. But government has exerted its authority by enacting Title III, which identifies a particular type of information as subject to statutory confidentiality, and has authorized the courts to sanction disclosure and use of such information. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has been in fact exercised."). And it is to the government that Mr. Bartnicki and Mr. Kane have turned to punish the press for publishing to the public a conversation they claim was private, asking the district court to force the press to pay damages. Thus, the government has very much entered fray and has actively participated in altering the balance between secrecy and public disclosure of newsworthy information.

This Court in its *Daily Mail* line of cases and in other circumstances has been exceedingly careful to protect the press from such sanctions where the press breaks no law in obtaining the information, making clear that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without . . . fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940); *see also* Bickel, *supra*, at 67 ("It is unlikely to be held that the First Amendment allows the *in terrorem* effect of criminal prosecution to take away everything that protection against prior restraints is intended to give, and even in some circumstances more.").

The intermediate scrutiny test suggested by petitioners would dramatically alter the balance ordained by the Constitution and impermissibly chill the publication of newsworthy speech. Indeed, it would give the government the power, in the name of privacy or some other "important or substantial" governmental interest, Pet. Br. at 14-15, to

reverse the presumption in favor of publication and literally make the press' ability to publish newsworthy information depend on "the morals of its sources." Bickel, *supra*, at 81. It would inject enormous uncertainty into publishers' decisions and into First Amendment doctrine, not only in the relatively narrow context of Title III, but also in other areas of the law where legislatures and courts might attempt to erect similar prohibitions on dissemination of truthful, lawfully obtained information, engrafting new rules onto settled doctrines against trespass or other invasions of privacy.

The result would be a direct and significant intrusion on an important and "paradigmatically 'routine newspaper reporting techniqu[e].'" *Florida Star*, 491 U.S. at 538 (quoting *Daily Mail*, 443 U.S. at 103). Journalists regularly come into possession of information of great public interest from individuals who may well have violated a statute, a private contract, or some other legal or ethical duty either in obtaining the information or by disclosing it to the press. "Indispensable information comes in confidence from officeholders fearful of superiors, from businessmen fearful of competitors, from informers operating at the edge of the law who are in danger of reprisal from criminal associates, from people afraid of the law and of government—sometimes rightly afraid, but as often from an excess of caution—and from men in all fields anxious not to incur censure for unorthodox or unpopular views." Bickel, *supra*, at 84; *see also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (First Amendment bars punishment for publishing confidential information received from a source legally barred from divulging the information); *Pearson v. Dodd*, 410 F.2d 701, 705 (D.C. Cir. 1969) (declining to impose liability on the press for obtaining information from source who obtained the subject information through an improper intrusion). Indeed, some of the most celebrated and important news in our nation's history has been the product of just such information, including the articles on the Vietnam war at issue in the *Pentagon Papers* case, articles uncovering Watergate,

groundbreaking articles on the health hazards of tobacco, and many others. *See, e.g.*, Alix M. Freedman, "Inside 'the Soul of Marlboro,'" WALL ST. J., Oct. 18, 1995, at A1 (Pulitzer Prize winning article based on confidential industry documents detailing, among other things, how tobacco companies regulate nicotine delivery in cigarettes); *see also* John C. Grabow, CONGRESSIONAL INVESTIGATIONS 250 (1988) (discussing controversy in 1812 over "leaks from an executive session of the House of Representatives" to an Alexandria, Virginia newspaper).

Petitioners' proposed regime of imposing statutory civil or criminal penalties on journalists simply because they knew or should have suspected that their source broke the law in providing information of public concern not only would punish the exercise of this traditional journalistic technique, but it also would inevitably lead to self-censorship. "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Sullivan,* 376 U.S. at 278-79. This is especially true when a plaintiff seeks punitive damages, which "pose an acute danger of arbitrary deprivation of property," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994), are assessed in "wholly unpredictable amounts bearing no necessary relation[ship] to the actual harm caused," and "unnecessarily exacerbate[] the danger of media self-censorship." *Gertz v. Robert Welch,* 418 U.S. 323, 350 (1974).

A journalist who, for example, lawfully receives a copy of a taped phone call from an anonymous source that seems to indicate that the President of the United States or some other high-ranking official had committed a serious crime, but who has no way of knowing for sure whether the call had been illegally intercepted, would be faced with a serious dilemma. Under petitioners' rule, the first thing a journalist would have to do is to examine not the accuracy or news value of the information, but the morals of the source, or even of the source's source. *Cf. Peavy*, 221 F.3d at 170-71 (describing reporters' efforts to determine whether the source obtained the information lawfully). As petitioners recognize, it is

altogether possible that a conversation could under Title III be legally (but secretly) recorded by one party to the conversation and then provided to the press. Pet. Br. at 41 n.20 (noting that "Congress clarified the statutory provision that generally allows recording of a communication by a party to the communication without the consent of the other party, . . . so as not to 'place[] a stumbling block in the path of . . . scrupulous journalist[s].'") (quoting S. REP NO. 99-541, at 17 (1986)). If a journalist is unable to confirm that the source had taped the conversation legally, or suspects that the tape may have been made illegally, publication would be prohibited, as would using the information on the tape as a basis for seeking out additional information from independent sources, unless the journalist were willing to risk criminal and civil punishment. This rule inevitably "would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public." *Cox Broadcasting*, 420 U.S. at 496; *Florida Star*, 491 U.S. at 538 (same). And, if this Court were to adopt the sort of subjective, presumptively anti-publication, highly fact-dependent intermediate scrutiny test advocated by petitioners in this case, it would no doubt encourage all sorts of additional governmental efforts to punish or inhibit the publication of truthful, newsworthy speech based on lawfully obtained information.[4]

The constitutional safeguards of free speech and free press were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by

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[4] This concern is especially acute in the context of small towns, where there may be few media outlets, and where the publishers may not have the resources necessary to investigate the lawfulness of source conduct, or to finance litigation after publication. As a result, the material might not be published even if it were of great public concern and indisputably true.

the people." *Sullivan*, 376 U.S. at 269 (quotation omitted). The rule advocated by petitioners simply cannot be reconciled with this fundamental goal of the First Amendment.

II. Publication Of Truthful Information Of Public Concern Does Not Implicate A Legally Cognizable Privacy Interest That Trumps The First Amendment.

Deeply rooted common-law principles, incorporated into this Court's First Amendment privacy jurisprudence, also require rejection of petitioners' arguments.

A. The Common Law Has Always Barred Privacy Claims Based On Disclosure Of Truthful Information Of Public Concern.

Beginning in 1890, in the wake of publication of the celebrated Warren and Brandeis article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), a tort claim for invasion of privacy developed in the common law. The common-law principles of that tort provide an important backdrop for evaluating the First Amendment issues in this case. *See Cox Broadcasting*, 420 U.S. at 495.

The "central thesis" of the Warren and Brandeis article was "that the press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for the alleged abuses." *Cox Broadcasting*, 420 U.S. at 487.[5] The privacy tort is usually

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[5] While petitioners have tried to cast this case as presenting an issue unique to the age of modern communications, concerns about the press' ability to obtain and widely disseminate information about individuals are not new. Warren and Brandeis, for example, expressed the same concerns regarding the journalists of their day: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the

[Footnote continued on next page]

recognized to have four possible "branches": (1) intrusion upon one's physical solitude or seclusion; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation of one's name or likeness. *Id.* at 493 & n.22; RESTATEMENT (SECOND) OF TORTS § 652A (1977). Petitioners' claim against respondents for allegedly disclosing the contents of the taped telephone call is most analogous to a claim under the second branch—public disclosure of private facts.[6]

But Warren and Brandeis recognized that "[t]he right of privacy does not prohibit *any publication* of matter *which is of public or general interest.*" Warren & Brandeis, 4 HARV. L. REV., at 214 (emphasis added). This "public concern" exception to common-law privacy protections has been widely recognized. For example, Dean Prosser, in his famous 1960 article, emphasized that "the press has a privilege, *guaranteed by the Constitution*, to inform the public about those who have become legitimate matters of public interest." William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 411 (1960) (emphasis added). As stated by Prosser, "[t]he privilege of giving publicity to news, and other matters of public interest, arises out of the desire and

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resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers." Warren & Brandeis, 4 HARV. L. REV., at 196.

[6] Although petitioners argue that punishing respondents is warranted to deter the *interception* of telephone calls—an act that is analogous to the "intrusion" branch of the common-law privacy doctrine—they do not allege that respondents themselves engaged in such conduct, relying instead solely on the allegation that respondents illegally *disclosed* the taped contents of the call after it had been delivered to respondent Yocum by an "unknown person."

the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them." *Id.* at 412.[7]

To provide the greatest latitude to free speech and the free press, the concept of what is viewed as "newsworthy" or of "public significance" has always been viewed extremely broadly. *See id.* at 413 ("In determining where to draw the line the courts have been invited to exercise nothing less than a power of censorship over what the public may be permitted to read; and they have been understandably liberal in allowing the benefit of the doubt."); *see, e.g., Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981) (newsworthiness concept "properly restricts liability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press to properly exercise effective editorial judgment").

As early as 1894, in *Corliss v. E.W. Walker Co.*, 64 F. 280 (D. Mass. 1894), a federal court dismissed an action brought by a famous inventor who had claimed that the publication of his photograph, obtained from the inventor's wife, had violated his privacy rights. The court held that "[a] private individual should be protected against the publication of any portraiture of himself, but where an individual becomes a public character the case is different. A statesman, author,

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[7] *See also* Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1255-69 (1976) (discussing common-law and constitutional principle that there can be no liability where the matters truthfully disclosed are "newsworthy"); Jonathan D. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 442 (1996) ("Once a fact is deemed newsworthy, First Amendment interests in speaking the truth about it are held universally to override the attendant incursion into the plaintiff's privacy rights[.]").

artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public." *Id.* at 282. Since then, numerous courts have recognized that "the right of privacy does not include protection from publication of matter of legitimate public or general interest," *Elmhurst v. Pearson*, 153 F.2d 467, 468 (D.C. Cir. 1946), and that the "right to be let alone" "must be accommodated to the need for reasonable latitude for the selection of topics for discussion in newspapers. That right of the press, likewise supported by constitutional guarantees, is crucial to the vitality of democracy." *Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966) (citation omitted).

Thus, for example, in *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), the D.C. Circuit strongly endorsed the right of the press to publish truthful information of public concern in the face of a privacy claim. In *Pearson*, two former employees of then Connecticut Senator Thomas Dodd entered the Senator's office without his authority, and made copies of numerous documents damaging to Dodd. The former employees gave copies of these documents to prominent newspaper columnists Jack Anderson and Drew Pearson, who published articles containing information taken from the Dodd documents. *Id.* at 703. Dodd then sued Pearson and Anderson for invasion of privacy.

The D.C. Circuit rejected Senator Dodd's claim, emphasizing that "[i]t has always been considered a defense to a claim of invasion of privacy by publication . . . that the published matter complained of is of general public interest." *Id.* (citing Warren & Brandeis, 4 HARV. L. REV., at 214-16). Summarily disposing of the "publication of private facts" facet of the case, the court concluded that the material "clearly bore on appellee's qualifications as United States Senator, and as such amounted to a paradigm example of published speech not subject to suit for invasion of privacy." *Id.* (footnote omitted).

The court also rejected Senator Dodd's "intrusion" claim, which was premised on the notion that the defendants had

intruded on the Senator's privacy by illegally obtaining the information from his files rather than by publishing it. The court concluded that "[i]f we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far." *Id.* at 705.

In *Zerilli v. Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980), the D.C. Circuit likewise refused to endorse a private claim for damages based on publication of truthful facts that were allegedly obtained illegally by a newspaper's source. In *Zerilli*, the Department of Justice was alleged to have illegally "bugged" the plaintiffs' office in the early 1960's, during which federal authorities intercepted certain communications between the plaintiffs and others. In 1976, several federal agents allegedly disclosed the contents of some of these communications to *The Detroit News*, which then published the material in a series of articles entitled "Organized Crime in Detroit." *Id.* at 218. The plaintiff brought a *Bivens* claim not only against the federal officials for the unlawful bugging, but also against the newspaper, asserting, among other things, that it had effectively conspired with the federal officials in violating the plaintiffs' Fourth Amendment rights by publishing the contents of the supposedly illegal wiretaps. The court rejected the plaintiffs' claim against the newspaper, concluding that "finding the newspaper liable in the present case would amount to holding a newspaper liable in damages for uncovering and publishing information that it deems newsworthy." *Id.* at 224.

The fundamental principle that publication of truthful information of public concern does not violate an individual's privacy rights remains the law today. In *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), for example, the plaintiff, who had been a candidate for Captain of the Washington, D.C. police force, sued the Fraternal Order of Police, *The Washington Post*, and NBC for invading his privacy by publishing the true story that he

had initially tested positive for marijuana use. The court rejected the plaintiff's "publication of private facts" claim, holding that the matters disclosed were "squarely" of public concern. *Id.* at 517. The court further held that because the plaintiff was a public official, the concept of "newsworthiness" had to be viewed exceedingly broadly, including all matters "'which might touch on [the] official's fitness for office.'" *Id.* (quoting *Gertz*, 418 U.S. at 344-45). Citing the RESTATEMENT, the Court ruled that "with public officials, 'the legitimate interest of the public . . . may include information as to matters that would otherwise be private.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. e (1977)); *see also, e.g., Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998) (holding that "newsworthiness" is a "complete bar to common law liability" under the "publication of private facts" tort) (citation omitted); RESTATEMENT (SECOND) OF TORTS, § 652D (1977) (to impose liability for publication of private facts, plaintiff must prove that the published material "is not of legitimate public concern").

In short, "state privacy tort actions have been effectively squashed in nearly every instance when they have come into conflict with the constitutional guarantee of free press[,]" *i.e.*, where they have involved truthful, newsworthy disclosures. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1387-88 (1992).

B. This Court Has Incorporated Into Its First Amendment Jurisprudence The Common-Law Privilege Against Privacy Claims Based On Publication Of Truthful Information of Public Concern.

The foregoing common-law principles are directly relevant in deciding whether privacy interests are sufficiently compelling to override the First Amendment. This Court has looked to and incorporated these principles into its First Amendment jurisprudence. It has done so to determine whether the government's asserted interests are sufficiently compelling, and whether the "need" to protect those interests

is sufficiently important, to warrant restricting or punishing speech.

The Court has expressly recognized "that since Warren and Brandeis championed an action against the press for public disclosure of truthful but private details about the individual which caused emotional upset to him," "it has been agreed that there is a generous privilege to serve the public interest in news." *Time, Inc.*, 385 U.S. at 383 n.7 (citing twenty-two "representative cases in which the State 'right of privacy' was held to give way to the right of the press to publish matters of public interest"). In every instance that the Court has been required to resolve "the conflict between truthful reporting and state-protected privacy interests," *Florida Star*, 491 U.S. at 530, the Court has found that the published information was of public concern and that therefore its publication could not be subjected to punishment.

The Court's incorporation of the common-law "public concern" privilege into its First Amendment jurisprudence can be traced back at least as far as *New York Times v. Sullivan*, which relied upon the common law in holding that a public official who sues for defamation must prove that the defendant acted with "actual malice"—subjective knowledge that a statement is false or reckless disregard of falsity. *See Sullivan*, 376 U.S. at 269-82 (relying on *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942) (rejecting libel claim of congressman concerning article in *Washington Times-Herald*, holding that the "interest of the public" in the information, even if erroneous, outweighed the congressman's reputational interest)). The same year it decided *Sullivan*, the Court held in another defamation case that "[t]ruth may not be the subject of either civil or criminal

sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).[8]

Guided by its defamation cases, the Court three years later in *Time, Inc. v. Hill* extended the actual malice standard to "false light" invasion of privacy claims that involved matters of public concern. 385 U.S. at 388. In doing so, the Court, echoing the courts at common law, broadly defined the public concern standard to "'embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *Id.* (quoting *Thornhill*, 310 U.S. at 102).

From the outset, the Court's privacy jurisprudence regarding *true* speech embraced a "public concern" privilege

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[8] Inasmuch as the speech now before the Court was indisputably true, petitioners' arguments would produce precisely the "perverse" anomaly envisioned by the Supreme Court in *Florida Star*, and recognized by the United States here (*see* U.S. Br. at 46-47), where "truthful publications . . . are less protected by the First Amendment than even the least protected defamatory falsehoods: those involving purely private figures[.]" *Florida Star*, 491 U.S. at 539. In such cases, where matters of public concern are at issue, truth is an *absolute* defense and the plaintiff has the burden of proving falsity. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). And in such a case, even if the plaintiff proves the speech is false, the plaintiff, at a minimum, must also show, with "convincing clarity," actual malice to obtain presumed or punitive damages, *Gertz*, 418 U.S. at 342, and the jury's verdict is subject to independent, *de novo* review by the trial court and on appeal. *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485 (1984). The United States' suggestion, at 46, that courts may someday find it necessary to read these requirements into Title III to save it from being invalidated under the First Amendment speaks for itself in this regard.

that both followed logically from *Sullivan* and *Time, Inc.* and, in significant part, looked to and mirrored common-law privacy doctrine. In *Cox Broadcasting*, for example, the father of a rape-murder victim brought an invasion of privacy action against a broadcasting company for disclosing in a news report his daughter's identity, which the broadcaster had learned from judicial records open to the public, in violation of a Georgia statute. 420 U.S. at 492. The Court, however, held that the First Amendment prohibited such a claim, emphasizing the "'public interest, secured by the Constitution, in the dissemination of the truth'," *id.* at 491 (quoting *Garrison*, 370 U.S. at 73), and that the broadcast involved a matter of *public* concern, as opposed to revelation of "very private matters unrelated to public affairs." *Id.* at 491.

Citing, among other things, the Warren and Brandeis article, the Court noted "a strong tide running in favor of the so-called right of privacy." *Id.* at 488. But despite these "impressive credentials for a right of privacy," *id.* at 489, the Court pointedly observed that the plaintiff's claim in *Cox Broadcasting* would have failed at common law. *Id.* at 493-95. The Court found the fact that the publication at issue was privileged as a matter of common-law privacy doctrine to be "compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press." *Id.* at 495.

The Court's subsequent privacy cases have even more forcefully articulated a constitutional "public concern" privilege protecting the publication of truthful information. In *Daily Mail*, the Court for the first time synthesized its prior rulings into a succinct principle of strict First Amendment scrutiny: that publication of lawfully obtained and truthful "information about a matter of public significance" cannot be punished "absent a need to further a state interest of the highest order." 443 U.S. at 103. *Daily Mail* involved a criminal prosecution of a newspaper which learned of a shooting at a junior high school by monitoring a police band radio frequency, obtained the name of the alleged

juvenile assailant by interviewing witnesses, police and the prosecutors, and then published the juvenile's identity in violation of a West Virginia statute. In ruling that application of the statute violated the First Amendment, the Court squarely rejected the argument, made here by petitioners, Pet. Br. at 43, that the strict scrutiny test applied only in "situations where the government itself provided or made possible press access to the information." 443 U.S. at 103. Instead, the Court held that strict scrutiny applied because "respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferances of government to supply it with information." *Id.* at 103-04.

The Court's decision in *Florida Star*, 491 U.S. at 532, further illustrates the broad sweep of the First Amendment "public concern" privilege. Because the news article related to a matter of public concern—criminal proceedings regarding a rape—the Court struck down the imposition of $75,000 in compensatory and $25,000 in punitive damages against *The Florida Star* newspaper for publishing the name of a rape victim in violation of a Florida statute, even though the privacy interests at stake were "highly significant" and the actual injury to the plaintiff was a "tragic reality."[9] The

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[9] 491 U.S. at 537 ("At a time in which we are daily reminded of the tragic reality of rape, it is undeniable that these are highly significant interests."); *id.* at 528 (plaintiff testified that "she had suffered emotional distress from the publication of her name. She stated that she had heard about the article from fellow workers and acquaintances; that her mother had received several threatening phone calls from a man who stated that he would rape B.J.F. again; and that these events had forced B.J.F. to change her phone number and residence, to seek police protection, and to obtain mental health counseling."); *see id.* at 542 (White, J., dissenting).

Court struck down application of the statute in part because it failed to incorporate protections and defenses that govern "claims based on the common-law tort of invasion of privacy." *Id.* at 539.

To be sure, the Court left open the possibility that in some future circumstance, a governmental interest might be so compelling and the need might be so "overwhelming[]" that it would sustain a punishment against a newspaper for publishing truthful information. *Id.* at 537. The Court's analysis, however, suggested that it would only consider doing so in extraordinary circumstances not even remotely present here—to punish the publication of purely private facts of no public interest that did severe harm to a private individual, *id.* at 532-33 & 537, or to punish the publication of information that directly, immediately, and irreparably injured national security. *Id.* at 532 (citing the prior restraint case of *Near v. Minnesota*, 283 U.S. 697, 716 (1931), which hypothesized that only extreme circumstances such as "'publication of the sailing dates of transports or the number and location of troops'" during war might possibly warrant such a restraint).

C. Broadcast Of The Tape Did Not Implicate Any Legally Cognizable Privacy Interest Sufficient To Trump First Amendment Protections

Here, because the tape of the telephone call was clearly of public concern, the radio stations' broadcast of it simply did not implicate any legally cognizable privacy interest that overrides the First Amendment. Accepting all of their allegations as true, Ms. Bartnicki and Mr. Kane would have no common-law claim for invasion of privacy against respondents, and that fact is "compelling" evidence that it is not necessary to punish respondents' broadcast of the tape to vindicate a governmental interest of the highest order. *See Cox*, 420 U.S. at 496. Since the information is about a matter of public concern, petitioners, as with Senator Dodd in the *Pearson* case, would be barred from bringing a common-law "public disclosure of private facts" claim.

Nor could petitioners bring a common-law "intrusion" claim against respondents, who received the tape from an unknown person. Liability for intrusion generally attaches only where a defendant "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns [and] . . . the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977). There is no claim in this case that the radio stations participated in any way in the interception of the telephone call or engaged in otherwise intrusive conduct, just as there was no allegation that the journalists in *Pearson* had broken into Senator Dodd's office.[10] That is why petitioners' "Peeping Tom" (Pet. Br. at 35) and "multiple eavesdroppers" (U.S. Br. at 39) analogies are so inapt: respondents did not "look through a key hole [a Peeping Tom] had made," Pet. Br. at 35, "listen in on a

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[10] *See also Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 719 (4th Cir. 1991) (there can be no liability for intrusion where the media defendant "played no role in leaking the letter" that formed the basis of its story, and which had been provided by a source "in violation of government policy."); *Bilney v. Evening Star Newspaper Co.*, 406 A.2d 652, 656 (Md. Ct. Spec. App. 1979) (no intrusion claim where newspaper secured confidential student transcripts from source, because "the information, though perhaps emanating *ultimately* from confidential University records, was not obtained by any personal act of invasion or intrusion" by the newspaper) (emphasis in original); *Sheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1526 (E.D. Pa. 1990), *aff'd*, 946 F.2d 202 (3d Cir. 1991) (rejecting claim that press unlawfully received confidential police report through a conspiracy with unnamed police sources, on ground that reporter who simply copies information contained in the report "would not be a receiver of stolen goods.").

conversation," or otherwise intrude upon the petitioners' solitude, seclusion, private affairs or concerns.

Although petitioners claim that it is "difficult to conceive of a more fundamental assault on individual privacy" than the broadcast of the tape of Bartnicki's and Kane's discussion "of their strategy regarding a labor dispute," Pet. Br. at 30, they do not even claim that they suffered any actual injury from the broadcast. Indeed, it would make a mockery of both the First Amendment *and* the right of privacy if petitioners, union officials who voluntarily involved themselves in a public controversy and who allege no actual harm, were to be permitted to collect damages in this case, while the private-figure plaintiff in *Florida Star*, who testified in detail regarding the actual injury she suffered when it was publicly disclosed that she had been raped, was barred from recovery.

For similar reasons, petitioners' effort to justify Title III by claiming that disclosure by the press of the contents of the call "magnified" and "compound[ed]" the harm caused by the interception, U.S. Br. at 39, 43; Pet. Br. at 35, ignores the fact that petitioners do not contend that they suffered any actual injury from the interception itself. Moreover, even assuming that they had, because the information disclosed by the radio stations did not relate to private matters but to matters of public concern, the *broadcast* of that information did not inflict any harm on petitioners' "privacy" as that concept has long been understood under the common law and the Constitution.

Finally, petitioners argue that it is necessary to punish the radio stations for broadcasting the tape on the remote possibility that it will "'dry up the market' for unlawful intercepted communications" and thereby deter illegal interceptions of cellular telephone calls. Pet. Br. at 16; U.S. Br. at 14 ("Only by removing the 'market' for illegally intercepted communications could Congress effectively deter the underlying misconduct."). But the First Amendment prohibits imposing punishment of respondents' truthful speech as a mechanism for deterring illegal conduct—the

"illegal surveillance itself" (U.S. Br. at 37)—that respondents themselves are not even accused of committing. *See Landmark Communications*, 435 U.S. at 837, 840-41 (refusing to uphold punishment against a newspaper, a "stranger[] to the inquiry," that received an illegal leak from a confidential judicial disciplinary proceeding and rejecting argument that punishing paper was needed to "minimize" the "harmful consequences" of the leak and to ensure that "the guarantee of confidentiality is more than an empty promise").

Moreover, petitioners offer no evidence to support their speculative theory of deterrence. To the contrary, petitioners admit that their claim in this regard is "unprovable." Pet. Br. at 38 n.18. In the end, this argument is based on "little more than assertion and conjecture," which is insufficient to justify punishment of truthful speech—under strict scrutiny, *Landmark Communications*, 435 U.S. at 841 ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."), as well as under the intermediate scrutiny test advocated by petitioners in this case. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.") (quotation omitted); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) ("regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose'") (citation omitted).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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October 25, 2000