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 FOR RESPONDENTS FREDERICK W. VOPPER, KEYMARKET OF NEPA, INC. AND LACKAZERNE,INC.

Filed October 25th, 2000

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Keymarket of NEPA, Inc., d/b/a WILK Radio and Lackazerne, Inc., d/b/a WGBI Radio respectfully incorporate the corporate disclosure statement contained in their Brief in Opposition to the petitions for writs of *certiorari*.

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QUESTION PRESENTED

Whether the First and Fourteenth Amendments to the United States Constitution preclude application of 18 U.S.C. §§ 2511(1)(c)&(d) and analogous provisions of Pennsylvania law to Respondents' dissemination of truthful information about a matter of public concern, which they acquired lawfully.

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STATEMENT OF THE CASE

Respondents Frederick W. Vopper, Keymarket of NEPA, Inc., and Lackazerne, Inc. ("the Media Respondents") supplement Petitioners' Statements of the Case as follows:

A. The Statutory Scheme

1. The question presented addresses the constitutionality, under the First Amendment, of the imposition of civil liability on Respondents pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510 *et seq.* ("Title III"), and the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5702 *et seq.*[1] Title III regulates the "interception"—i.e., the "acquisition of the contents"—of wire, oral or electronic communications. 18 U.S.C. §§ 2511(1) (a), 2510(4). "Contents" is defined as a communication's "substance, purport, or meaning." *Id.* § 2510(8).

Title III separately defines "wire," "oral," and "electronic" communications. *Id.* §§ 2510(1), (2)&(12). "Oral" communications include only those made by a person "exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* § 2510(2). The definitions of "electronic" and "wire" communications, the latter of which includes communications via cellular telephone, contain no such limitation.

The statute permits judicially authorized interception by law enforcement officers. *Id.* §§ 2516, 2518.[2] It prohibits,

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[1] The Pennsylvania statute is identical to Title III in all relevant respects. The discussion that follows therefore references Title III exclusively.

[2] Congress has exempted from Title III's prohibition of "interception" other categories of communications. *See, e.g.*, 18 U.S.C § 2511(2)(d) (not unlawful for person *not* acting under color of law to intercept, if such person is party to communication or party has consented, unless "for the purpose of committing any criminal or tortious act"); § 2511(2)(g)(ii)(II)

however, receipt in evidence in any court of the contents of any unlawfully intercepted communication. *Id.* § 2515.

The provisions of Title III at issue provide that, when a person "know[s] or ha[s] reason to know" that information was obtained through an unlawful interception, the intentional "disclos[ure]" or "use[]" of its "contents" is prohibited. *Id.* §§ 2511(1)(c) & (d). Originally, every violation of Title III was punishable by a fine of up to $10,000 and/or imprisonment up to five years. Pub. L. No. 90-351, § 802, 82 Stat. 197, 213 (1968). In 1986, however, Congress reduced the applicable penalties for several categories of offenders. *See* Pub. L. 99-508, § 101, 100 Stat. 1848, 1852 (1986). Thus, a first-time interceptor of, *inter alia*, "the radio portion of a cellular telephone communication," who was not acting "for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain," is subject only to a modest fine, provided that the intercepted communication is not scrambled or encrypted. 18 U.S.C. § 2511(4)(b)(ii).

Title III also authorizes persons whose protected communications "are intercepted, disclosed, or intentionally used" to bring a civil action against the violator. *Id.* § 2520(a). Prevailing plaintiffs are entitled to equitable relief, actual damages or statutory damages, punitive damages, attorneys' fees and costs. *Id.* §§ 2520(b)&(c)(2).

2. "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating

(not unlawful to intercept radio communication transmitted "by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public"); § 2511(2)(g)(v) (same with respect to co-users of frequency monitored by service provider if communication is not scrambled or encrypted); § 2511(4)(c) (exempting certain forms of interception unless undertaken "for purposes of direct or indirect commercial advantage or private financial gain").

on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 90-1097, at 66 (1968) ("1968 S. Rep."). As the Senate Report emphasized, "[t]he major purpose of Title III is to combat organized crime." *Id.* at 70; *see also, e.g., id.* at 75. In crafting Title III, Congress was principally concerned with preserving citizens' Fourth Amendment rights against unrestricted government eavesdropping. *See, e.g., id.* at 74-75. To the extent it addressed the subject of nongovernmental conduct at all, Congress sought to prevent private parties from what was generally described as "snooping." *Id.* at 224 (Sens. Dirksen, Hruska, Scott and Thurmond). In its applications beyond law enforcement, therefore, Congress expressed its interest in prohibiting the "private use of electronic surveillance, particularly in domestic relations and industrial espionage situations." *Id.* at 225; *see* 113 Cong. Rec. 21,769 (1967).[3]

3. By the mid-1980s, Congress had become particularly troubled by law enforcement's increased use of wiretapping. *See* H.R. Rep. No. 99-647, at 18-19 (1986) ("1986 H. Rep."). This, coupled with a concern that Title III might not prevent governmental electronic surveillance of certain new telecommunications technologies, *see id.* at 17-19, led Congress to conclude in 1986 that "[a]dditional legal protection is necessary to ensure the continued vitality of the Fourth

[3] *See also* President's Comm'n on Law Enforcement & Admin. of Justice, *The Challenge of Crime in a Free Society* 187-209, 202 (1967) (private persons were wiretapping "to acquire evidence for domestic relations cases, to carry on industrial espionage and counterespionage, to assist in preparing for civil litigation, and for personnel investigations"); Office of Technology Assessment, *Federal Government Information Technology: Electronic Surveillance and Civil Liberties* (Oct. 1985) at 32-33 (noting "much documentation of illegal private wiretapping, by private detectives and others for industrial espionage and in domestic relations matters") (emphasis deleted).

Amendment," *id.* at 19; *see also* S. Rep. No. 99-541, at 5 (1986) ("1986 S. Rep.").

Among the new technologies Congress placed within Title III in 1986 was cellular telephone service, which the Department of Justice ("DOJ") had maintained was not, in many circumstances, then covered by the statute, in part because its users typically had no reasonable expectation that their calls would be private. *See* 1986 H. Rep. 31; *Privacy in Electronic Communications: Hearing Before the Subcomm. on Patents, Copyrights & Trademarks of the Sen. Comm. on the Judiciary*, 98th Cong. 32 (1984) (testimony of Deputy Assistant Attorney General Keeney). Indeed, the legislative history reflects universal agreement that, in 1986, cellular telephone conversations could easily be intercepted. *See, e.g.*, 1986 H. Rep. 20, 32. DOJ and others, therefore, urged Congress to adopt a narrower approach than simply expanding the definition of "wire communications" to include cellular telephones in all circumstances. Specifically, DOJ urged Congress either (1) to include cellular telephony within Title III only when a call is encrypted, or (2) to limit the full reach of Title III's prohibitions in the case of cellular technology only to law enforcement officers. *See, e.g.*, *Electronic Communications Privacy Act: Hearings Before the Subcomm. on Courts, Civil Liberties & Admin. of Justice of the H. Judiciary Comm.*, 99th Cong. 226-27 (1985-86) ("1986 H. Hearings"). Nevertheless, at the urging of the cellular industry, and with DOJ's ultimate acquiescence, Congress simply amended Title III's definition of "wire" communications to include cellular telephony.

The record before Congress even as early as 1986, however, documented an array of available and affordable encryption and scrambling technology for cellular telephones, ranging from $7 voice-inversion integrated circuits to $40 microchips. *Id.* at 169, 333 (Association of North American

Radio Clubs).[4] As one critic observed, the cellular telephone industry seemed "to regard legal deterrence as a substitute for . . . taking steps to protect the privacy of . . . customers, especially if those steps cost money." *Id.* at 338.

The legislative history of the 1986 amendments, like the congressional record amassed in 1968, is virtually silent with respect to the statute's "use" and "disclosure" provisions, including the potential ramifications of their extension to cellular telephones. And, as had been the case in 1968, there is no suggestion that Congress anticipated that these provisions would be applied beyond the realms of law enforcement, commercial espionage, and domestic relations.[5]

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[4] *See also* 1986 H. Hearings 190-203, 354-56 (advertisements for security devices for cellular telephones then available to consumers); *id.* at 512 (statement of Uniden Corp.) ("[U]sers can select a level of security for their telephones which is commensurate with the economic value they place on the telephone messages they are likely to transmit."). In recent years, the security of cellular telephone conversations has been materially enhanced as service providers convert to digital from analog service. *See, e.g.*, Andrew R. Hull, *The Digital Dilemma: Requiring Private Carrier Assistance to Reach Out and Tap Someone in the Information Age - An Analysis of the Digital Telephony Act*, 37 Santa Clara L. Rev. 117, 130 & n.107 (1996). In addition, "commercially available encryption products" are now "being used to protect all sorts of electronic communications," including cellular telephone calls. Charles Barry Smith, *Current U.S. Encryption Regulations: A Federal Law Enforcement Perspective*, 3 NYU J. Legis. & Pub. Pol'y 11, 12-13 & n.5 (1999).

[5] *See, e.g.*, 1986 H. Hearings 4 (Sen. Leahy) (Title III intended to "protect private communications from interception by an eavesdropper, whether the eavesdropper is a corporate spy, a police officer without probable cause, or just a plain snoop."); *id.* at 25 (Rep. Moorhead) (discussing interceptions of "gossip" or "information that can be useful in the financial world and elsewhere"). When Congress enacted Title III in 1968, it established a Commission to study the statute's effectiveness. In its 1976 report, the Commission found that "[t]he large majority of illegal eavesdropping involves marital or family relations." *Electronic Surveillance: Report of the National Commission for the Review of Federal &*

Indeed, in a related context, Congress expressed its concern that Title III had served to restrict public debate in an unintended fashion. Specifically, prior to 1986, Title III made it unlawful to intercept a communication even where one party had consented, if the interception was for the purpose of committing an "injurious act." Pub. L. No. 90-351, § 802, 82 Stat. 197, 214 (1968). The phrase had been seized upon by subjects of unflattering news reports to hold liable under Title III journalists who had recorded their interviews. 1986 H. Rep. 39 (citing *Boddie v. American Broadcasting Co.*, 731 F.2d 333 (6th Cir. 1984)). Congress' deletion of the phrase in 1986 was intended to remove "the shadow of a finding that section 2511 has been violated by interceptions made in the course of otherwise responsible news gathering." *Id.* at 40.[6]

B. Statement of Facts

The telephone conversation at issue took place between Gloria Bartnicki and Anthony F. Kane, Jr., plaintiffs below, in

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State Laws Relating to Wiretapping & Electronic Surveillance xviii (1976); *see id.* at 160 (of cases studied by Commission, 68% involved marital wiretapping, 11% involved other domestic eavesdropping, 7% involved business firms and industrial espionage). Moreover, to the extent that Title III had been successful in reducing the incidence of illegal interceptions, the Commission observed that it was the result of the statute's "controls on the manufacture, sale, and advertising of [scanning] devices and its criminal sanctions for their use." *Id.* at xviii.

[6] *See also* 1986 H. Hearings 52 (OTA statement):

> The fact that communications are to some degree open, whether intentionally or through "leakiness," helps enforce public accountability for the behavior of people and organizations. . . . For example, the investigative press, public interest groups, and even the Congress, itself, depend to some extent on open or leaky information flows to monitor for threats to the public interest in both the private and public sector. In this case, the danger may come from the accumulation of laws responding to the challenges of new information technology, covering issues ranging from intellectual property to wiretapping to computer crime.

May 1993. At the time, Kane was a teacher at Wyoming Valley West High School and served as president of the local bargaining unit of the Pennsylvania State Education Association ("PSEA"). J.A. 78-79.[7] Bartnicki was PSEA's "chief negotiator." J.A. 99. During their telephone conversation on the eve of a teachers' strike, Kane and Bartnicki talked about the gap between the percentage salary increase offered by the school district and that demanded by the teachers, *see* J.A. 78-80, 104-06, and Kane made the following statement directed to the local Board of Education:

> If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . .

J.A. 46.

The telephone conversation was tape recorded. An unknown person deposited a copy of the recording, without any markings to identify its origin, in the mailbox of a member of the School Board and another in the mailbox of Jack Yocum. J.A. 14, 114; Burns Dep. 16. Yocum, the president of an association of concerned taxpayers, promptly alerted several members of the Board to the tape's contents and, in fact, played the entire recording for them. J.A. 116. At least one School Board member had been informed about the tape and its contents at a local tavern before he was contacted by Yocum. Burns Dep. 12-14.

After learning the contents of the conversation, at least two members of the School Board became concerned for their

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[7] Deposition excerpts not included in the Joint Apendix ("J.A.") are identified by the deponent's last name and relevant page number, e.g., "Burns Dep. __." "App." refers to the Appendix to the Petition for a Writ of Certiorari filed by the United States in No. 99-1728. Citations to Petitioners' briefs in this Court in No. 99-1687 and No. 99-1728 are to "Plaintiffs' Brief at" and "U.S. Brief at," respectively.

physical safety. Warman Dep. 22, 38; Burns Dep. 15, 18. The negotiations had been characterized by unusual "animosity" on both sides, J.A. 139, including acts of unexplained vandalism,[8] threats of economic reprisals directed against taxpayers opposing the teachers' demands, *see* J.A. 139, 143-47, and other comments by both sides perceived as threats of violence, *see* Gaiteri Dep. 10-11; Olszewski Dep., Ex. 1, at 3; Bartnicki Dep., June 13, 1995 ("Bartnicki II"), at 27-28. The School Board discussed the tape's contents at its next meeting and formally requested a criminal investigation. Olszewski Dep. 5 & Ex. 1, at 1; McAndrew Dep. 17.

Yocum also provided copies of the tape to several local media entities, including at least one other radio station and two newspapers in addition to the Media Respondents. J.A. 83-84, 100, 117.[9] None of these media entities, including the Media Respondents, played any role in intercepting the Bartnicki-Kane conversation or in soliciting its contents from Yocum or from anyone else. J.A. 72, 118-19.

For three days, the Media Respondents made the contents of the conversation the subject of a public affairs program broadcast in the community affected by the controversy surrounding its public schools. Vopper Dep. 31, 37; Burns Dep. 20-21, 40; Warman Dep. 29-30. The program is hosted by Respondent Vopper, known to his listeners as "Fred

[8] A cinder block was thrown through the car window of one member of the teachers' negotiating team. Kane Dep., June 20, 1995 ("Kane II"), at 73; Olszewski Dep., Ex. 1, at 2. A School Board member had the tires of his car punctured. McAndrew Dep. 25.

[9] The record is unclear concerning both when Yocum in fact received the recording and when he provided a copy of it to the Media Respondents. *Compare* J.A. 72 *with* Yocum Dep. 30, 33-34, 54; Vopper Dep. 20-21; Warman Dep. 17-20; Burns Dep. 12-20. It is, however, undisputed that Yocum disseminated the contents of the conversation to the School Board and to others before any broadcast by the Media Respondents. *See, e.g.*, Warman Dep. 17-20; Burns Dep. 12-20.

Williams," *see* Vopper Dep. 6, who had for some time been an outspoken critic of the teachers and their negotiating demands. The programs were broadcast in connection with a significant news event—the announcement of an arbitrator's proposal to settle the ongoing dispute. J.A. 105.

During these three broadcasts, Vopper played the tape recording once in its entirety, played portions of it repeatedly, and discussed its contents with dozens of listeners and with two members of the School Board, who appeared as guests on the program. Vopper Dep. 31-32; Burns Dep. 40; Warman Dep. 29-30.[10] Throughout the broadcast discussion, Vopper expressed his strong disapproval of the tactics he believed were revealed by the tape's contents, called for both Kane and Bartnicki to resign, and urged the School Board not to be intimidated. Vopper Dep. 37.

Immediately following Vopper's initial broadcast, other local media disseminated the contents of the recording as well. At least two local television stations reported stories disclosing its contents and played portions of it later that day and evening. J.A. 86-88, 156; Kane I Dep. 32; Vopper Dep. 29-30. Two local newspapers published articles about the matter in their next editions, and one included a transcript of portions of the conversation. J.A. 85; Kane II Dep. 31.

Negotiations between the teachers and the School Board, and the resulting strike, had been a "regular subject of the local media" long before the broadcasts at issue. J.A. 40, 79, 130, 138-39, 141-42. As the Third Circuit observed, "[t]he public interest [in] and newsworthiness of the conversation broadcast and disclosed by the defendants are patent." App. 36a.

[10] *See* Defendants' Responses to Plaintiffs' Interrogatories No. 6; *see also* Vopper Dep. 31 (tape in its entirety played again in May 1994).

Bartnicki and Kane contend that their conversation was unlawfully intercepted and believe they know who did so. Kane Dep., Dec. 30, 1994 ("Kane I"), at 64-68; Bartnicki Dep., Dec. 30, 1994 ("Bartnicki I"), at 38-40, 95-96; Olszewski Dep., Ex. 1, at 4-5. On their behalf, PSEA requested a criminal investigation. Palutis Dep., Ex. 1. The District Attorney, however, declined to "expend significant resources" on the matter because, he concluded, they could be better devoted to investigating "murders and child abuse and other violent felonies." Olszewski Dep. 14, 38-39.[11]

In August 1994, Bartnicki and Kane, funded by PSEA, *see* Palutis Dep. 55, instituted this civil action against the Media Respondents, alleging that they had violated Title III by disseminating the contents of the conversation to the public. The Complaint did not name as defendants any of the other media entities that had publicly disseminated the same information within the same twenty-four hour period. J.A. 12-14, 133. Kane made this decision because he strongly objected to the criticism of him expressed by Vopper during the broadcasts, which he characterized as "ranting and raving, screaming." Kane I Dep. 125; *see also id.* 116-17; Kane II Dep. 22-23; J.A. 97-98. Similarly, Bartnicki objected to such criticism by the Media Respondents, but at the same time "appreciated" the "fair[ ] and accurate[ ]" manner in which other media entities had disclosed the content of her conversation with Kane. Bozinski Dep. 27.[12]

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[11] Neither Yocum nor the Media Respondents knew in fact that the Bartnicki-Kane conversation had been illegally intercepted or that their dissemination of its contents was unlawful. J.A. 114-5; Getz Dep. 41-43, 46. Indeed, it is undisputed that, prior to the broadcasts, Vopper contacted Pennsylvania Attorney General Earnest Preate, who informed him that the Media Respondents could lawfully disseminate the information they had innocently acquired. Vopper Dep. 21-23.

[12] The claim for punitive damages is premised on Kane's contention that Vopper "poked fun at me; he tried to incite people. . . . I don't think anybody has to be subjected to that. He called me a goon. He said, I was incompetent." Kane I Dep. 116.

Bartnicki and Kane make no claim in this case that they suffered any compensable injury. J.A. 93-95, 98, 130. At the time of the conversation, Kane was aware that his comments might be intercepted, J.A. 88-89, and Bartnicki had received express, written warnings from her cellular telephone provider that calls could be intercepted, J.A. 108, 151-52; Elison Dep. Ex. 2. Both, however, testified that they suffered injury to their reputations as a result of the Media Respondents' criticism of their conduct. *See, e.g.*, Kane I Dep. 96 ("I feel my reputation as a professional person in the community and a citizen of this community—I've been a good citizen—has been held up to ridicule . . . ."); Bartnicki I Dep. 48 (same).

C. Proceedings Below

Following extensive discovery, all parties moved for summary judgment. The district court denied these motions on the ground that, although "there exists a great likelihood that the conversation was inadvertently intercepted and recorded," thereby taking the subsequent dissemination of its contents "outside the scope" of Title III, the record also reflected "references within the conversation indicating the confidential nature of the conversation and the fact that it was being conducted via a cellular telephone," evidence that precluded summary judgment. App. 63a-64a. The district court also rejected the contention that the First Amendment prevented application of Title III to the Media Respondents, concluding that the statute is immune from constitutional scrutiny because its terms "apply equally to the general public and impose no further restrictions on the media." App. 66a (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)).

Thereafter, the district court certified the constitutional issue for interlocutory review in the Third Circuit. App. 76a. The Third Circuit accepted the certification and reversed the district court's order denying summary judgment to Respondents. App. 1a, 42a. In so ruling, the Third Circuit "declined" to read *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), "as controlling." App. 13a. It concluded that, in *The Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989), this Court had "explicitly repudiated any suggestion that *Smith* answers the question whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny." App. 13a. The Court of Appeals, however, abandoned the district court's conclusion that *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), rendered the First Amendment inapplicable to Title III. *See* App. 15a-17a. Similarly, the Third Circuit rejected the contention that Title III "impose[s] only incidental burdens on expression." App. 18a. Nevertheless, the court concluded that Title III is "properly treated as content-neutral" and therefore subject to "intermediate" First Amendment scrutiny. App. 28a.

Ultimately, however, the Third Circuit determined that, as applied in this case, Title III fails to survive such scrutiny because it is not "'narrowly tailored to serve a significant governmental interest.'" App. 30 (citation omitted). Although the court acknowledged that the general "interest in protecting privacy" constitutes a "significant state interest," App. 32a, it concluded that the "connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best," App. 33a. Moreover, the Government had "offered nothing other than its *ipse dixit*" to buttress its otherwise "unsupported allegation that the statute is likely to produce the hypothesized effect." App. 33a, 34a. The court also expressed "concern[] that the

provisions will deter significantly more speech than is necessary to serve the government's asserted interest." App. 36a.[13]

SUMMARY OF ARGUMENT

Title III categorically prohibits the dissemination of the "contents"—i.e., "the substance, purport, or meaning"—of any communication intercepted unlawfully pursuant to its terms. 18 U.S.C. §§ 2510(8), 2511(1)(c)&(d). It does so even when the content so disseminated is entirely accurate and addresses a matter of significant public concern, when it has previously been disseminated by and to others, when the complaining party had no reasonable expectation that the intercepted conversation would remain private and has suffered no injury as a result of the dissemination, and when the disseminating party played no role, of any kind, in the unlawful interception.

Petitioners seek to apply Title III to two radio stations and the host of a public affairs program who engaged in pure speech and nothing more—the public dissemination of the contents of a telephone conversation in which two officials of a public school teachers' union apparently threatened to blow up the homes of members of the local School Board. The Media Respondents received the information from a third party who, like them, played no role in its initial acquisition. They disseminated it only after it had already been shared with others, including another radio station, two newspapers, and several members of the School Board. Within hours of their first broadcast, the same information was disseminated by several television stations and two local newspapers. Title III has been invoked only against them, however, in substantial part because the individual petitioners here seek to punish the criticism of their conduct that was part and parcel of the Media Respondents' broadcasts.

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[13] Judge Pollak dissented, concluding that Title III satisfied intermediate scrutiny as applied here. App. 50a-51a.

I. Application of Title III under these circumstances violates the First Amendment. The dissemination of truthful information about matters of public concern receives the full protection of the Constitution. The legislature may directly prohibit the dissemination of such information only in those rare instances when doing so is necessary to vindicate a governmental interest "of the highest order." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979). This fundamental principle has been consistently articulated in a series of cases, including *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Butterworth v. Smith*, 494 U.S. 624 (1990).

A. Application of the "*Daily Mail* principle" is not affected by the fact that a third party allegedly engaged in unlawful conduct when he or she acquired the information in the first instance. *Conduct*—including the interception of telephone conversations—can properly be regulated and prohibited by statute. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968). Nevertheless, where—as here—the parties before the Court engaged in no unlawful conduct of any kind, the First Amendment precludes the legislature from prohibiting the pure act of speech. The act of unlawful acquisition—which is itself conduct and not speech—remains subject to legislative prohibition. The information so acquired, however, is of obvious First Amendment value, provided it is accurate and addresses a matter of public concern. That information is not tainted and its value is not diminished when it is disseminated by someone who has engaged in no actionable conduct. A contrary rule, which would permit government to prohibit forever the dissemination of information by anyone because its initial acquisition was unlawful or improper, would fetter too much speech, including the expression at issue in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), and in *Florida Star*.

B. Application of the *Daily Mail* principle is not dependent upon whether Title III is deemed to be "content-based." That

inquiry is essential when determining whether legislation regulating the "time, place or manner" of expression violates the First Amendment, or in assessing whether "expressive conduct" may constitutionally be regulated. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *O'Brien*, 391 U.S. at 376. It has no proper role, however, where—as here—a legislative enactment constitutes a direct prohibition on the dissemination of pure speech. That conclusion is reflected in *Butterworth*, 494 U.S. at 624, in which the Court expressly applied the *Daily Mail* principle to a "content neutral" statute that directly prohibited the dissemination of information. *See also Buckley v. Valeo*, 424 U.S. 1 (1976); *Landmark*, 435 U.S. at 829. Whatever else this Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), may encompass, it does not transform a direct prohibition of speech into a "neutral law of general applicability." This is not a case, like *Cohen*, in which the press asserts that the First Amendment protects it from the application of generally applicable laws regulating conduct when its journalists gather the news, or in which a law regulating conduct has only an "incidental" impact on speech itself.

II. Application of Title III in this case cannot be squared with the *Daily Mail* requirement that its prohibition of speech be necessary to vindicate a governmental interest "of the highest order." The "personal privacy" interest asserted here—i.e., the individual petitioners' interest in discussing their negotiating strategies confidentially—does not rise to that level. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 (1975); *Florida Star*, 491 U.S. at 537. The remaining interests asserted—creating an additional disincentive for unlawful interceptions and fostering the development of new communications technologies—are, like the asserted privacy interest, legitimate subjects for government regulation. They are not, however, "of the highest order." *See Daily Mail*, 443 U.S. at 104-05; *Worrell News-*

papers of Ind., Inc. v. Westhafer, 739 F.2d 1219, 1223-24 (7th Cir. 1984), *aff'd*, 469 U.S. 1200 (1985).

III. A. Even if the *Daily Mail* principle does not otherwise apply, Title III's application in this case fails "intermediate" First Amendment scrutiny. Indeed, the principal interest asserted by the Government—protecting claimants such as Bartnicki and Kane from the additional injury allegedly caused by dissemination of the contents of their communications to the public—is directly "[ ]related to the suppression of free expression." *O'Brien*, 391 U.S. at 377. That fact, standing alone, renders Title III's application in this context constitutionally invalid. *See Buckley*, 424 U.S. at 17.

B. The asserted governmental interests, though by no means insubstantial, cannot properly be achieved in the manner at issue here because they are not advanced in a meaningful sense. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). In fact, unlike unlawful interception in the contexts of commercial espionage or divorce, there is no basis to contend either that there is a "market" for information so acquired or that it will "dry up" if dissemination is prohibited where, as here, the information involves a matter of public concern and money does not drive the "market" for it. The asserted necessity of Title III's prohibition on the dissemination of information is further undermined by Congress' conclusion that no such prohibition is necessary in analogous circumstances, including to secure the privacy of the mails. *See* 18 U.S.C. §§ 1702, 1708.

C. Title III is not "narrowly tailored" to serve any of the asserted interests without restricting First Amendment freedoms to a greater degree "than is essential." *O'Brien*, 391 U.S. at 377. All of the asserted interests can be vindicated more directly and effectively by legislating meaningful criminal penalties for the misconduct that the Government seeks to deter—the unlawful interception itself. Moreover, Congress may, as it has in related contexts, provide legislative

incentives for the development of new technologies, such as digital telephony and encryption, that serve to prevent interception, or provide disincentives for the development of technologies that permit interception in the first instance.

Most significantly, Title III prohibits the dissemination of considerably more speech than is necessary. Title III prohibits *any* discussion of the "substance, purport or meaning" of an intercepted communication by anyone, a restriction on free expression that extends well beyond the broadcast of a tape recording to encompass the critical public discussion of the information revealed in that recording at the core of the radio program at issue. The statute also prohibits Yocum's notification of School Board members that they may be in danger, any newspaper reporting about the School Board's subsequent request for a criminal investigation, and any local citizen's discussion of the subject across the dinner table. And, as this case demonstrates, Title III provides a powerful vehicle for private litigants (and prosecutors as well) to pick and choose among these various "disclose[rs]" and "use[rs]" to punish only those who have been critical of them or their conduct.

Under these circumstances, there is no merit to Petitioners' contention that competing First Amendment "interests" are at stake in this case. The First Amendment typically prohibits the legislature from enacting laws that compel unwilling speakers to talk, *see, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977), but no such governmental action is before the Court in this case. Rather, Title III purports to prohibit directly and absolutely the dissemination of information. Such a law cannot be saved from a finding that it is unconstitutional, at least in these circumstances, by an assertion that it is intended to protect against the infringement of First Amendment "interests" by nongovernmental actors. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

ARGUMENT

I. THE MEDIA RESPONDENTS' DISSEMINATION OF TRUTHFUL INFORMATION ABOUT A MATTER OF PUBLIC CONCERN IS PROTECTED BY THE FIRST AMENDMENT UNLESS ITS PROHIBITION IS NECESSARY TO VINDICATE AN INTEREST OF THE HIGHEST ORDER

The relevant provisions of Title III, on their face, prohibit any person from disclosing or using the "contents" of a communication he knows or has reason to know has been unlawfully intercepted. 18 U.S.C. §§ 2511(1)(c)&(d). The "contents" of a communication include any information concerning its "substance, purport, or meaning." *Id.* § 2510(8).

These prohibitions have been applied to the Media Respondents' dissemination of truthful information about a matter of public concern, despite the fact that they played no role in an unlawful interception. This case, therefore, is properly controlled by the "principle" announced in *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)—i.e., the legislature may not punish the dissemination of "truthful information about a matter of public significance" that has been lawfully obtained "absent a need to further a state interest of the highest order." *See Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

The "*Daily Mail* principle" proceeds from the premise that "truthful information about a matter of public significance" receives the full protection of the First Amendment. *The Florida Star v. B.J.F.*, 491 U.S. 524, 533-34 (1989). It follows from this Court's recognition that, even when "a matter of public significance" is not involved, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Daily Mail*, 443 U.S. at 102. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980) (even in commercial

speech context, "the First Amendment presumes that some accurate information is better than no information at all").

"[W]here discussion of public affairs is concerned," however, the protection of truthful speech is at its zenith. Under such circumstances, "[t]ruth may not be the subject of either civil or criminal sanctions," because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) ("speech of public concern is at the core of the First Amendment's protections") (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985)). Thus, the "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 previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (emphasis added).

Petitioners offer twin theories to support their contention that the *Daily Mail* principle does not govern this case. They assert that *Daily Mail* is inapplicable because the information at issue here was initially acquired through an unlawful interception. *See* U.S. Brief at 29. In addition, they contend that Title III's prohibition on dissemination is not governed by the *Daily Mail* principle in any event because it is "content-neutral" and because it constitutes a "'generally applicable law'" that has only an "'incidental'" impact on the press's "'ability to gather and report the news.'" Plaintiffs' Brief at 21 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)). Such contentions are without merit.

A. The Information At Issue Was "Lawfully Acquired" Within The Meaning Of *Daily Mail*

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 830 n.1 (1978), in violation of a criminal statute, an

unidentified person provided to a newspaper information about a confidential proceeding before Virginia's Judicial Inquiry and Review Commission. This Court held that the statute could not constitutionally be applied to the newspaper's subsequent disclosure of the same information. *Id.* at 845. In so holding, the Court indicated that it was not "concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." *Id.* at 837.

The following term, when it first articulated the "*Daily Mail* principle," the Court invoked *Landmark* to invalidate application of a criminal statute to a newspaper that had "relied upon routine newspaper reporting techniques" to secure the identity of a juvenile offender, which it then published in violation of that statute. *Daily Mail*, 443 U.S. at 103. Where, as in that circumstance, such "information is lawfully obtained," the Court held, "state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order." *Id.*

This holding, itself distilled from prior cases, was first identified as the "*Daily Mail* principle" in *Florida Star*, where, in violation of Florida law, a sheriff's department provided the identity of a woman who had been raped to a newspaper, which then published her name. *See* 491 U.S. at 526-27. The woman filed a civil action against both the sheriff's department and the newspaper, which the department settled prior to trial. *Id.* at 528. The "*Daily Mail* principle," this Court held, precluded the imposition of liability on the newspaper because it had "lawfully obtain[ed]" this accurate information about a matter of public concern. *Id.* at 533-34.

The Court noted that the *Daily Mail* principle does not necessarily apply "in cases in which information has been acquired unlawfully by a newspaper or by a source," and does not resolve whether, in such circumstances, "government may ever punish not only the unlawful acquisition, but the ensuing

publication as well." *Id.* at 535 n.8 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). That question, the Court observed, had been "reserved" in *Landmark*. 491 U.S. at 535 n.8. Thus, the Court indicated, where "sensitive information" resides not with public officials, but "in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the Daily Mail principle the publication of the information so acquired." *Id.* at 534.

Petitioners erroneously contend that this language implicitly holds that the *Daily Mail* principle does not protect the Media Respondents in this case because the information they disseminated was acquired unlawfully by someone else. The "lawfully obtained" requirement of the *Daily Mail* principle is derived, as *Florida Star* explained, directly from *Landmark*, in which the Court reserved only "the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." 435 U.S. at 837. Indeed, although *Landmark* is itself silent on the point, it stands to reason that whoever initially disclosed confidential information in that case did so in violation of a statutory duty imposed upon him as a participant in the Commission's proceedings. The police official who provided B.J.F.'s name to the newspaper in *Florida Star* did so in violation of an analogous duty. *See* 1975 Op. Fla. Att'y Gen. 075-203 ("A police chief who is the custodian of any such records containing such identifying information is obligated and charged with the duty by operation of law not to allow or permit public inspection or examination of such records."). Under Petitioners' construction of *Florida Star*, therefore, the newspapers in that case and in *Landmark* would enjoy no First Amendment protection for their own publications.

The issue actually "reserved" in *Landmark* and in *Florida Star* reflects this Court's consistent recognition that unlawful *conduct* is not itself protected by the First Amendment and

that, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The act of unlawful acquisition constitutes conduct that properly raises a question concerning whether dissemination by the same actor may be prohibited consistent with the First Amendment. The expression disseminated remains fully protected, however, at least when undertaken by a third party who has engaged in no unlawful conduct. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (plurality opinion of Stevens, J.). ("The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.").

Neither *Florida Star* nor *Landmark* purports to resolve under what circumstances, if any, the "nonconsensual acquisition" of information would warrant application of the statutes at issue in those cases to a source or a newspaper that itself engaged in such unlawful conduct. The cases cannot, however, reasonably be read to suggest that those who engage only in pure speech, and no unlawful conduct of any kind, are properly deprived of the First Amendment's protections because the information they disseminate was acquired unlawfully by someone else.[14]

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[14] This conclusion is not inconsistent with *Florida Star*'s citation to *New York Times Co. v. United States*, 403 U.S. 713 (1971), in which several justices "raised"—but the Court did not resolve—whether the government's interest in preserving national security justified prosecution of newspapers that had published information unlawfully acquired by their source, even when it was insufficient to validate a prior restraint. *See* 491 U.S. at 535 n.8. In that context, some courts have held that, although the "First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security,'" the judiciary often must "defer[] to the decisions of the political branches of government" in determining whether that governmental interest justifies the prohibition of truthful speech, even about matters of public concern. *United States v. Morison*, 844 F.2d 1057, 1081-82 (4th Cir. 1988) (Wilkinson, J., concurring).

Even if *Florida Star* did leave open the question now raised by Petitioners, the First Amendment must be construed in a manner that honors the line between protected truthful speech about matters of public concern, on the one hand, and unlawful conduct that is properly subject to regulation, on the other. Whether that line can constitutionally be drawn to expose a radio station or its source to criminal or civil sanctions for the dissemination of such information when they engage in unlawful conduct to acquire it is no more before the Court in this case than it was in *Landmark* or in *Florida Star*. Thus, unless the Court is prepared to recognize a new category of unprotected expression—i.e., speech unlawfully acquired at its inception—the dissemination of truthful information about matters of public concern, without more, must continue to take shelter under the *Daily Mail* principle. This Court has heretofore recognized no such category and has, to the contrary, both "narrowed the scope of the traditional categorical exceptions" for defamation, obscenity, fighting words, and the like, and cautioned that the unprotected categories must be "limited" to expression which is "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

The notion that "unlawfully acquired truthful speech about matters of public concern" falls beyond the scope of the Constitution, when untethered from any unlawful conduct by the speaker, is at war with this "firmly entrenched part of our

First Amendment jurisprudence." *R.A.V.*, 505 U.S. at 400 (White, J., concurring in judgment). As *Chaplinsky* itself recognizes, limited categories of unprotected speech exist solely because we are confident that they are at best of "slight social value as a step to truth." 315 U.S. at 572. The expression at issue here—accurate information about matters of public concern—is at the opposite end of the constitutional spectrum; it "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citation omitted). Petitioners' thesis, that such information is effectively and forever "tainted" upon its initial acquisition, such that any subsequent recipient may be prohibited from disseminating it further, cannot be reconciled with the "liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill*, 310 U.S. at 101-02.[15]

B. Application Of The *Daily Mail* Principle Is Not Affected By Whether The Statutory Prohibition Is "Content Neutral" Or Constitutes A Law Of "General Applicability"

Whether or not Title III is deemed to be "content-neutral" is of no relevance where, as here, the statute expressly pro-

[15] The common law has cabined the reach of the privacy tort of "intrusion upon seclusion," *Restatement (Second) of Torts* § 652B (1977), in an analogous manner. In the leading case of *Pearson v. Dodd*, 410 F.2d 701, 703-05 (D.C. Cir. 1969), the court rejected an intrusion claim asserted against journalists who had received and published the contents of documents stolen from a United States Senator's office without their assistance or prior knowledge. *Accord McNally v. Pulitzer Publ'g Co.*, 532 F.2d 69, 79 n.14 (8th Cir. 1976); *Bilney v. Evening Star Newspaper Co.*, 406 A.2d 652, 656 (Md. Spec. App. 1979); *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832, 842 (Kan. App. 1979); *Doe v. Mills*, 536 N.W.2d 824, 833 (Mich. App. 1995).

hibits the dissemination of information. The constitutionality of such legislation is governed by the *Daily Mail* principle.[16]

In *Butterworth*, for example, this Court invalidated a Florida statute that, without regard to its content, prohibited grand jury witnesses from disclosing their own testimony. Florida had argued that the statute was properly subject to intermediate scrutiny under the so-called *O'Brien* standard as set forth in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). *See* 494 U.S. at 631; Brief for Petitioners, *Butterworth v. Smith*, No. 88-1993, at 19. The Court, however, rejected the contention, and subjected the statute's direct prohibition on expression to scrutiny under the *Daily Mail* principle. *See* 494 U.S. at 632. Similarly, in *Landmark*, the Court held unconstitutional a statute that prohibited dissemination of any information regarding proceedings before Virginia's judicial review commission, without regard to its content.

[16] The dissemination prohibition contained in Title III is, in fact, "content-based." It prohibits, on its face, the dissemination of "any information concerning the substance, purport or meaning" of an intercepted communication. 18 U.S.C. § 2510(8). To determine whether Title III applies to a given communication, therefore, its "contents" must be assessed. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984). Moreover, the legislative justification rests, in significant part, on the impact of the communication's content on those to whom it is disseminated and the consequent injury it allegedly causes to those whose communications have been intercepted. *See, e.g.*, 1968 S. Rep. 90 ("The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication."). Where, as here, the legislative justification for restricting expression is a function of "[l]isteners' reactions" to it, "analysis of the measure as a content-based statute [is] appropriate." *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see Providence Journal Co. v. FBI*, 602 F.2d 1010, 1014 (1st Cir. 1979) ("The distinction between focussing on the content of information and on the manner of obtaining it blurs when the very manner of obtaining information carries such a likelihood of discovering private facts.").

Petitioners have little to say about *Butterworth* and *Landmark*, beyond suggesting that those statutes "can be understood as not content neutral" because they were "justified by the interest in suppressing speech about the workings of a particular governmental proceeding," U.S. Brief at 31 n.9, or because the statute in *Butterworth* was "confined to information relating to the government's attempt to secure an indictment," Plaintiffs' Brief at 23 n.6. Such reasoning, however, would similarly yield the conclusion that Title III is "content-based," because its prohibition on dissemination is justified by the interest in suppressing a category of speech deemed by the legislature to be invasive of privacy or because it is confined to prohibiting dissemination of the anticipated content of a class of communications declared confidential by law. *See* note 16 *supra*. More importantly, Petitioners' own argument that Title III is content-neutral since it does not regulate "'speech because of [agreement or] disagreement with the message it conveys,'" U.S. Brief at 21 (citation omitted), applies equally to the legislation before this Court in *Butterworth* and *Landmark*.[17]

[17] Petitioners' observation that *Butterworth* does not foreclose legislation that prohibits the dissemination of information by those who assume a duty of confidentiality before they acquire it, *see* Plaintiffs' Brief at 23-24, is of no relevance to this case. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and similar cases do not contain any suggestion that speech may be prohibited so long as the prohibition turns on the "means by which the information had been acquired," Plaintiffs' Brief at 24. Rather, such cases stand for the different proposition that there is no First Amendment right to disseminate information that overcomes a prior agreement, oath or court order that such information would be provided in the first instance only if it is kept confidential. *See, e.g., United States v. Aguilar*, 515 U.S. 593, 606 (1995) ("[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public") (citing *Seattle Times*, 467 U.S. at 31; *Snepp v. United States*, 444 U.S. 507 (1980)).

Under Petitioners' reasoning, moreover, the Federal Election Campaign Act's limitation on independent expenditures, which applied broadly to all such expenditures regardless of the content of speech, was "content neutral." *See Buckley v. Valeo*, 424 U.S. 1 (1976); *see also Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in judgment) (describing *Buckley* as "striking down content-neutral limitations on financial expenditures"). Yet, this Court recognized that, because those limitations "impose[d] direct and substantial restraints on the quantity of political speech," they were properly subjected to strict First Amendment scrutiny. *Buckley*, 424 U.S. at 39; *see Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 903 (2000). Indeed, the Court expressly distinguished such direct prohibitions from those categories of cases in which intermediate scrutiny is appropriate, such as the regulation of the "time, place and manner" of expression or of conduct associated with speech. *See Buckley*, 424 U.S. at 17-18 (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949); *O'Brien*, 391 U.S. at 382). The "critical difference," the Court explained, is that, unlike the regulation of conduct or of the time, place or manner of speech, where it is often difficult to ascertain whether the regulation at issue is in fact aimed at suppressing expression, the statute in *Buckley* "impose[d] direct quantity restrictions" on speech itself. 424 U.S. at 18.[18]

[18] Even in cases in which intermediate scrutiny is the generally applicable standard, the Court has recognized that the constitutionality of blanket prohibitions on expression must be assessed more rigorously, whether or not they are "content-neutral." Thus, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), although the City relied on a "content-neutral justification for its ordinance" and this Court assumed that it was "free of impermissible content or viewpoint discrimination," it nevertheless held the ordinance unconstitutional because it "foreclose[d] an entire medium of expression." *Id.* at 49, 53, 55. Similarly, although government

Finally, the fact that Title III prohibits both the "disclosure" and "use" of information does not transform these provisions from direct prohibitions on expression to "laws of general applicability." U.S. Brief at 24-25 (citing *Cohen*, 501 U.S. at 671). Indeed, to avoid a statutory construction that fails to give independent meaning to each relevant provision, Title III's "use" prohibition must be construed as inapplicable to the "disclosure" of information that is the subject of a distinct statutory proscription. *See, e.g., Kungys v. United States*, 485 U.S. 759, 778 (1988); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Because the only issue raised by this case is the Respondents' dissemination of the contents of the Bartnicki-Kane conversation, only Title III's disclosure prohibition is implicated.[19]

Most importantly, however, Petitioners' argument misreads this Court's decision in *Cohen*. That case holds only that a law regulating conduct, which neither purports to prohibit speech nor to single out the press for disfavored treatment, comports with the First Amendment unless its impact on speech is more than "incidental." *See* 501 U.S. at 668-69.

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regulation of commercial speech is typically subject to intermediate scrutiny, this Court will "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 n.9.

[19] *Cf. Fultz v. Gilliam*, 942 F.2d 396, 400 n.4 (6th Cir. 1991) (noting that Title III's distinction "between disclosures and other uses that do not involve actual disclosure . . . leaves uncertain precisely what sort of conduct constitutes 'use'"). Although the issue is not before the Court in this case, Title III's prohibition on the "use" of truthful information about matters of public concern violates the First Amendment even outside the context of its dissemination. *See, e.g., Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 223 (6th Cir. 1996) (striking down under First Amendment trial court order enjoining *Business Week* from "using" confidential discovery materials that "it obtained unlawfully"); *accord Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 746 (E.D. Mich. 1999); *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 262 (E.D. Va. 1995).

Thus, in *Cohen*, this Court rejected a claim that enforcing the law of promissory estoppel in the context of a reporter's broken promise of confidentiality to a source would violate the First Amendment by interfering with the press' ability "to gather and report the news." *Id.*

Whatever relevance *Cohen* may properly have outside this context, it does not preclude application of the First Amendment to a statute that itself contains a direct prohibition of speech, regardless of how "comprehensive" the legislative scheme may otherwise be. *See, e.g., Buckley*, 424 U.S. at 58 (statute that limits contributions and expenditures, used for speech as well as for other purposes, unconstitutional); *Lind v. Grimmer*, 30 F.3d 1115, 1118, 1119 (9th Cir. 1994) (*Cohen* "irrelevant" to statute "intended to impose direct and significant restrictions on speech"). For this reason, the statute at issue in *Butterworth* would not have been saved by the inclusion of a prohibition on the "use" of grand jury information; neither could a listener to the Media Respondents' broadcasts properly be prosecuted for "using" the unlawfully intercepted information in deciding to vote against those School Board candidates who had supported the teachers.

The Government apparently recognizes that its reliance on *Cohen* proves too much, conceding that the First Amendment claim there involved only "an incidental impact on news-gathering and reporting," while this case involves a statute that has "direct application to speech." U.S. Brief at 26 n.8. In short, *Cohen* does not purport to hold that a "generally applicable" prohibition of speech, as applied in the circumstances of this case, is exempted from the *Daily Mail* principle. *See Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972) (distinguishing laws having "incidental" impact on

press from direct legislative "restriction on what the press may publish").[20]

II. AS APPLIED IN THIS CASE, TITLE III DOES NOT VINDICATE AN "INTEREST OF THE HIGHEST ORDER"

Title III's prohibition of the expression at issue can survive constitutional scrutiny under the *Daily Mail* principle only if it is necessary to vindicate a governmental interest of "the highest order." 443 U.S. at 103. As the section that follows demonstrates, *see* Part III *infra*, the statute cannot survive even intermediate First Amendment scrutiny as applied here. Its application in this case violates the First Amendment for the additional reason that, while the "legitimacy and

[20] The individual petitioners make an analogous argument that *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), support the proposition that "the right of the media to gather and report news does not create a privilege to violate laws applicable to all citizens." Plaintiffs' Brief at 16. Neither the Copyright Act nor the common law right of publicity, however, purport to prohibit the dissemination of facts or ideas. Rather, as the Court explained in *Harper & Row*, the "idea/expression" dichotomy at the heart of the Constitution's protection of copyright strikes "'a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting the author's expression.'" 471 U.S. at 556 (citation omitted). Similarly, in *Zacchini*, the Court noted that it is "evident" that the "state law right of publicity would not serve to prevent respondent [television station] from reporting the newsworthy facts about petitioner's act." 433 U.S. at 574. In this case, in contrast, Title III prohibits the dissemination of any information derived from an intercepted communication, including any news report describing its "substance, purport, or meaning." 18 U.S.C. §2510(8). Neither *Harper & Row* nor *Zacchini* turns on a judicial determination that the laws at issue "apply to all citizens" and both cases take pains to emphasize that such laws do not work to prohibit the dissemination of information. *See Harper & Row*, 471 U.S. at 558.

importance of the congressional goal[s]" undergirding Title III cannot be doubted, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), they do not constitute governmental interests "of the highest order" when applied to prohibit truthful speech about matters of public concern.

This Court has heretofore applied the *Daily Mail* principle, and its progenitors, to invalidate a variety of laws that served important governmental interests. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488 (1975), the Court recognized that the last "century . . . experienced a strong tide running in favor of the so-called right of privacy," but held that it was insufficient to justify application of a statutory prohibition on the publication of the identity of a rape victim. In *Daily Mail* itself, the Court acknowledged the "'State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender.'" 443 U.S. at 104 (citation omitted). Nevertheless, it concluded that the "magnitude of the State's interest" was "not sufficient to justify application of a criminal penalty" to truthful speech about a matter of public concern. *Id.*

In *Florida Star*, the Court considered "highly significant" three governmental interests asserted in support of a statute prohibiting publication of the identity of a rape victim: "the privacy of victims of sexual offenses; the physical safety of such victims, . . . ; and the goal of encouraging victims of such crimes to report these offenses." 491 U.S. at 537. Nevertheless, while the Court expressly refrained from holding that "there is no zone of personal privacy within which the State may protect the individual from intrusion by the press," it concluded that the requisite "state interest of the highest order" was not "satisfactorily served by imposing liability" in *Florida Star*. *Id.* at 541.

Whether "personal privacy" can ever constitute an interest of the "highest order," the Court's case-specific approach to the issue, as well as the genesis of the *Daily Mail* principle

itself, lead to the conclusion that the interests asserted here do not rise to that level. First, this case involves the assertion of a privacy interest, not by the victim of a violent sexual assault, but by participants in a telephone conversation about the public's business. The fact that they hoped, or even expected, that their discussion would remain confidential does not constitute an "interest of the highest order." The analogous common law tort "has long recognized" that "[w]hen the subject matter of the publicity is of legitimate public concern, there is no invasion of privacy," even when the dissemination of allegedly "private" information "would be highly offensive to a reasonable person." *Restatement (Second) of Torts* § 652D, cmt. D (1977).[21] In *Cox Broadcasting*, this Court looked to the *Restatement* and its analogous conclusion that "the interest in privacy fades when the information involved already appears on the public record," to inform its judgment that the plaintiff there had not alleged a privacy interest of sufficient magnitude to overcome "the public interest in a vigorous press." 420 U.S. at 494-95. Where, as here, the information at issue addresses a matter of public concern, whatever privacy interest the individual petitioners possess is similarly not one of the "highest order." *See Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967).[22]

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[21] *Accord Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1404 (8th Cir. 1997); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993); *Gilbert v. Medical Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 274 (5th Cir. 1989).

[22] In *Florida Star*, the Court's refusal to "rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim" might satisfy the First Amendment, 491 U.S. at 537, properly reflects the fact that, while such a publication in the context of "'discussion of public affairs'" is protected by the First Amendment, the disclosure of "'purely private'" information for its own sake raises a different constitutional issue, *id.* at 532-33 (quoting *Garrison v. Louisiana*, 379 U.S. at 72). The Court's reference to the "nonconsensual acquisition" of "sensitive information," 491 U.S. at 534, similarly reflects a recognition that the publication of unlawfully acquired private facts unrelated to a matter of public concern does not necessarily shelter under the *Daily Mail* principle.

Second, *Daily Mail*'s requirement that the Government articulate an "interest of the highest order" in circumstances such as these is based on the premise that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." 443 U.S. at 102. The requirement, therefore, flows from the Court's conclusion that the resolution of such cases does not "turn on whether" the prohibition at issue in a given case is viewed as a "prior restraint" or as "a penal sanction for publishing lawfully obtained, truthful information," because "even the latter action requires the highest form of state interest to sustain its validity." *Id.* at 101-02.

Thus, the *Daily Mail* principle recognizes that "infringement upon First Amendment rights may be justified" where the government seeks to prohibit the dissemination of truthful information about matters of public concern, "but only in exceptional cases" such as:

> when the country is at war, when a sovereign seeks to protect the primary requirements of decency by prohibiting obscenity, and when the security of community life is threatened by incitements to acts of violence and the overthrow by force of an orderly government.

Worrell Newspapers of Ind., Inc. v. Westhafer, 739 F.2d 1219, 1223 (7th Cir. 1984) (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *New York Times Co.*, 403 U.S. at 714), *aff'd*, 469 U.S. 1200 (1985). *See also Florida Star*, 491 U.S. at 532 (declining "to hold broadly that truthful publication may never be punished consistent with the First Amendment"

because of possible "future . . . scenarios" such as "'publication of the sailing dates of transports or the number and location of troops'") (quoting *Near*, 283 U.S. at 716). None of the interests asserted in support of Title III's application in this case "reach[es] the level" contemplated by this Court in *Daily Mail*.

III. AS APPLIED IN THIS CASE, TITLE III DOES NOT SURVIVE INTERMEDIATE SCRUTINY

Even assuming that the *Daily Mail* principle does not govern this case, Title III's application here does not satisfy any level of heightened First Amendment scrutiny, including the "intermediate" scrutiny urged by the Government. As articulated by this Court in *United States v. O'Brien*, 391 U.S. at 376, intermediate scrutiny inquires whether the governmental action at issue "furthers an important or substantial governmental interest," whether that interest is "unrelated to the suppression of free expression," and whether the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Put differently, intermediate scrutiny requires an examination of whether the statute at issue is "narrowly tailored to serve a significant governmental interest," *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), whether "the recited harms" identified by the legislature "are real, not merely conjectural," whether application of the challenged "regulation will in fact alleviate these harms in a direct and material way," *Turner Broadcasting Sys. v. FCC*, 512 U.S. 662, 664 (1994), and whether the burden the regulation places on speech is "substantially broader than necessary" to vindicate the interest asserted, *Ward*, 491 U.S. at 800.

A. Title III's Dissemination Prohibition Is Directed To The Suppression Of Free Expression

On its face, Title III purports to preclude the dissemination of information, not to regulate conduct as in *O'Brien* or the "time, place or manner" in which speech can take place, as in *Ward*. Its restrictions on speech are not, as the *O'Brien* test presupposes, "incidental"—they are both direct and absolute. And, they are justified, in substantial part, by the Government's asserted interest in "protect[ing] against the aggravated injury to privacy that occurs when illegally intercepted communications are then exploited or publicly disseminated." U.S. Brief at 13-14. This interest is directly "[]related to the suppression of free expression," *O'Brien*, 391 U.S. at 377, because it seeks to protect against harm caused by dissemination of the contents of assertedly "private" communications to third parties.

As this Court recognized in *Buckley*, where even one interest served by legislation "involve[s] 'suppressing communication,'" the *O'Brien* standard cannot be satisfied. 424 U.S. at 17. There, the "interests served" included "restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns." *Id.* The Court held that, unlike *O'Brien*, where the government's interest "in the preservation of draft cards was wholly unrelated to their use as a means of communication," the asserted interest in *Buckley*, even if the expenditure of money at issue there was deemed to be "conduct" and not "speech," "'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.'" 424 U.S. at 17 (quoting *O'Brien*, 391 U.S. 382). Thus, the Court held, the statute would fail intermediate scrutiny under *O'Brien*. *See* 424 U.S. at 17.

In this case, where the Government seeks to apply Title III to those who engaged in no unlawful conduct, its interest is

focused squarely on "the communication" and it arises precisely because the communication is "itself thought to be harmful." *Id.*; *see* 1968 S. Rep. 90. As in *Buckley*, the Government's asserted interest in this case "involve[s] 'suppressing communication,'" and it therefore fails intermediate scrutiny under *O'Brien*. 424 U.S. at 17.

B. As Applied In This Case, Title III Does Not Advance The Government's Asserted Interests In A Direct And Material Way

The Government necessarily contends that application of Title III to the dissemination of information addressing matters of public concern, by those who engage in no unlawful conduct to acquire it, is "essential" to further its asserted interests. *See* U.S. Brief at 13-14. That contention finds no support in the legislative history and is based entirely on "assertion and conjecture." *Landmark*, 435 U.S. at 841. The Government, therefore, cannot meet its burden of demonstrating that "'the regulation will in fact alleviate these harms in a direct and material way.'" *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (citation omitted).

At issue here is application of the statutory prohibition to dissemination of accurate information about matters of public concern by those who played no role in the interception itself. There is no suggestion in the legislative history that Congress determined that application of Title III in these circumstances serves to advance the asserted interests. Indeed, there is precious little discussion about sections 2511(1)(c)&(d) at all and even less about their role in prohibiting private parties, rather than the government itself, from using and disclosing the contents of unlawfully recorded communications.[23]

[23] *See* pp. 2-3 *supra*. The Government attempts to find support for the contrary proposition in the 1968 Senate Report's passing observation that

"Particularly in the light of the absence of any detailed findings by Congress," it is difficult to conclude that Title III's application to expression of the kind at issue here is "narrowly tailored if that requirement has any meaning at all." *Reno*, 521 U.S. at 879. This is especially so where, as here, the statute is directed primarily at a different problem and its attempt to address both governmental and private eavesdropping in a single statutory scheme is so riddled with exceptions, *see* note 2 *supra*, that it has resulted in a law the construction of which "is fraught with trip wires." *Forsyth v. Barr*, 19 F.3d 1527, 1543 (5th Cir. 1994); *see United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998) ("When the Fifth Circuit observed that the Wiretap Act 'is famous (if not infamous) for its lack of clarity' it might have put the matter too mildly.") (quoting *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457, 462 (5th Cir. 1994)). *See also Florida Star*, 491 U.S. at 540 (exceptions to statutory proscription "raise[ ] serious doubts about whether Florida is, in fact, serving . . . the significant interests" it asserts).

To the extent that Congress did consider communications unlawfully intercepted by private parties, its attention was not on accurate, newsworthy information, but rather on trade secrets and the details of matrimonial discord. *See* pp. 3, 5 &

"'[o]nly by striking at all aspects of the problem can privacy be adequately protected.'" U.S. Brief at 5 (quoting 1968 S. Rep. 69). The quoted passage, however, reflects a focus by Congress not on one who disseminates information, but on an entirely different player:

> It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attack must also be made on the possession, distribution, manufacture, and advertising *of intercepting devices*. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy adequately be protected.

1968 S. Rep. 69 (emphasis added).

notes 3, 5 *supra*.[24] In fact, Congress recognized that dissemination of information about matters of public concern serves important purposes and should not be inadvertently prohibited by Title III. *See* 1986 H. Rep. 39-40 (prospect that Title III would be "violated by interceptions made in the course of otherwise responsible newsgathering" is "inconsistent with the guarantees of the First Amendment").

The Government's failure to distinguish between accurate information about matters of public concern, which is entitled to the full protection of the First Amendment, on the one hand, and proprietary or purely private information, on the other, distorts its application of intermediate scrutiny in material ways. Thus, the Government asserts that the legislative purpose in prohibiting the dissemination of intercepted communications can be analogized to the deterrent effect of statutes that sanction the possession of child pornography or that prohibit the receipt of stolen property. *See* U.S. Brief at 40-41. Reliance by Petitioners on *Osborne v. Ohio*, 495 U.S.

[24] The Government, albeit not in this Court, has effectively conceded as much, explaining that the Florida couple that intercepted the telephone "conference call among Speaker of the U.S. House of Representatives Newt Gingrich and other Members of Congress" at issue in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (Apr. 25, 2000) (No. 99-1709), would only be charged with an "infraction," which resulted in a $500 fine, in significant part because the interception was not undertaken "for purposes of direct or indirect commercial advantage or private financial gain." Department of Justice, Press Release, Apr. 23, 1997, at 1. A search of the Westlaw database indicates that, of the approximately 160 reported decisions concerning alleged violations of the interception, disclosure and use provisions of Title III from 1968 through October 21, 2000, some 75% arose in either the law enforcement, commercial or domestic relations contexts. *See* Appendix *infra*. *See also* Milo Geyelin & Christi Harlan, *Lawyer is Convicted of Employing Evidence Wiretapped by His Client*, Wall St. J., Oct. 22, 1991, at B10 (reporting that "nearly 80% of illegal electronic surveillance, including wiretapping, occurs in divorce cases").

103 (1990), and *New York v. Ferber*, 458 U.S. 747 (1982), *see* U.S Brief at 40-41, Plaintiffs' Brief at 37-38, is misplaced, however, because the statutes at issue in those cases regulated child pornography, a category of speech that, unlike the truthful expression about matters of public concern at issue here, is not entitled to protection under the First Amendment at all, *see, e.g., Ferber*, 458 U.S. at 763-64.

Similarly, the Government's analogy to statutes criminalizing the receipt of stolen goods overlooks both the dispositive constitutional distinction between wholly unprotected conduct and the protected speech at issue here, and the fact that, because money drives the market for stolen goods, eliminating the buyer will of necessity have a direct impact on the seller in that context. While the analogy may be apt in circumstances actually considered by Congress—such as commercial espionage—in which money provides a financial incentive for disclosure, *see* U.S. Brief at 24, there is no basis to contend, and Congress certainly did not purport to conclude, that the same incentives apply to the dissemination of information about matters of public concern.

The Government makes the same error when it contends that Title III's prohibition on the dissemination of information is essential because those who unlawfully intercept communications are difficult to identify and prosecute. This observation may be accurate as applied to the practitioners of industrial espionage and the like, although the reported prosecutions and civil actions alleging violations of Title III's interception provision at least raise legitimate questions about even that.[25] Such a contention is, however, purely speculative in the context of the dissemination of information about

[25] Indeed, of the 63 reported decisions addressing alleged violations of 18 U.S.C. §§ 2511(1)(c)&(d), in only five is there any suggestion that the identity of the interceptor could not be ascertained. *See* Appendix *infra*.

matters of public concern, as demonstrated by the facts of all three relevant cases recently decided by the courts of appeals. In *Boehner v. McDermott*, the Florida couple that intercepted the telephone conference call at issue there was both identified and prosecuted. In *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), the neighbor who intercepted the cordless telephone calls at issue there was identified as well. And, in this case, although Bartnicki and Kane both advised the local District Attorney that they believe they know who intercepted their conversation, he declined to "expend significant resources" on the matter. Olszewski Dep. 38. The Government's attempt to justify the statute as a "loophole closing provision" that is necessary "to prevent circumvention" of its prohibition on interception, cannot therefore be squared with the First Amendment. *Buckley*, 424 U.S. at 44; *see United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1895 (2000) (Thomas J, concurring) ("The 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government.").

Petitioners' "related" argument—that Title III's prohibition on the dissemination of information in these circumstances reflects Congress' interest in "foster[ing] development of new technologies, such as cellular phones, . . . by assuring the public that [they] will be as secure as the mails," U.S. Brief at 14—is doubly flawed. First, the explosive growth of technologies such as wireless and cordless telephony—both before and after Congress acted to declare that its users have an enforceable expectation of privacy—cannot be disputed.[26]

[26] *See* Hull, *supra* note 4, at 130. Prior to 1986, several courts had held that the users of cellular telephones did not have a reasonable expectation of privacy in such communications. *See, e.g., Edwards v. State Farm Ins. Co.*, 833 F.2d 535, 539 (5th Cir. 1987). Despite the absence in the context of cellular telephony of the "high level of protection" afforded to first class mail, "American citizens and American businesses [we]re using these new forms of technology in lieu of, or side-by-side with, first class mail and common carrier telephone services." 1986 S. Rep. 5.

This growth rebuts the speculative contention that the possibility that such communications may be intercepted (much less that their contents may be disseminated when they reveal matters of public concern) will have a material impact on either the continued development of such technologies or on the eagerness of consumers to make use of them. Indeed, this Court addressed a virtually identical contention in *Reno*, 521 U.S. at 885, where the Government similarly argued that the Communications Decency Act was necessary to "foster[] the growth of the Internet." The Court properly found the argument to be "singularly unpersuasive," *id.*, a conclusion equally applicable to the analogous contention here with respect to "cellular phones, e-mail, and other computer communications," U.S. Brief at 14:

> The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

521 U.S. at 885.

Second, the Government's interest in "assuring" that wireless telephony is "as secure as the mails," U.S. Brief at 14, cannot reasonably encompass Title III's prohibition on the dissemination of information for the simple reason that there is no analogous prohibition contained in the "elaborate system of regulation" that surrounds the postal service. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453

U.S. 114, 123 (1981). Although federal law prohibits both the theft of mail and the obstruction of correspondence sent via the Postal Service, *see* 18 U.S.C. §§ 1702, 1708, it does not prohibit the disclosure or other use of its contents by private parties, nor does it authorize a private right of action in such circumstances. *See, e.g., Sciolino v. Marine Midland Bank-Western*, 463 F. Supp. 128, 130-31 (W.D.N.Y. 1979). Indeed, unlike Title III, the statutory scheme governing the mails prohibits the "receipt" and "possession" of unlawfully acquired mail, although only when the recipient "know[s] the same to have been stolen." 18 U.S.C. § 1708. Moreover, under the statutory prohibition of "obstruction of correspondence," a person "who received stolen mail but who did not participate in the theft cannot violate" the statute in any event. *United States v. Ashby*, 771 F.2d 392, 393-94 (8th Cir. 1985) (construing 18 U.S.C. § 1702).[27] Despite the failure of Congress to prohibit dissemination of the contents of unlawfully acquired mail, "the Postal Service is so much a fact of our daily lives that the mail patron watching for the mailtruck, or the jobholder returning from work looking in his letterbox before he enters his house, are commonplaces of our society." *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 124; *see Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 758

[27] The Government suggests that, because "electronic intrusions into modern communications—unlike intrusions into letters—can be accomplished without the physical access that ordinarily permits prevention and detection, the need for legal protection against unauthorized disclosure in this context is even greater." U.S. Brief at 37. There is no support for this proposition, and the Government offers none. Indeed, press accounts suggest that modern law enforcement is equally well equipped to investigate the clandestine theft of a letter from a mailbox and the work of a computer hacker. *See, e.g.*, David Johnston, *17-Year Search, an Emotional Discovery and Terror Ends*, N.Y. Times, May 5, 1998, at A24; Chris Taylor, *How They Caught Him; Tracking the Hacker Who Hatched the Melissa Virus*, Time, Apr. 12, 1999, at 66.

(1996) (opinion of Breyer, J.) ("we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as some indication that more restrictive means are not 'essential'").[28]

C. Title III Is Not Narrowly Tailored To Further The Asserted Interests Without Prohibiting The Dissemination Of More Speech Than Is Necessary

The Government has also failed to provide any support for its contention that the statutory prohibition on dissemination, as applied to the publication of a newsworthy matter of public concern by an innocent recipient of the communication, is narrowly tailored to further the asserted governmental interests without "burden[ing] substantially more speech than is necessary." *Turner Broadcasting Sys.*, 512 U.S. at 662. In fact, Title III does not simply "burden," it *prohibits* more speech than is "necessary" or "essential" to achieve the asserted legislative purposes. *See Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 216 (1997) ("'[T]he essence of narrow tailoring [is] focus[ing] on the source of the evils the [Government] seeks to eliminate [without] significantly restricting a substantial quantity of speech that does not create the same evils.'") (citation omitted).

[28] Similarly, although "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings," *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979), neither Congress nor the judicial branch has deemed it "necessary" to protect the secrecy of such proceedings by prohibiting the disclosure of "matters occurring before the grand jury" by persons other than the participants themselves, Fed.R.Crim.P. 6(e). While such persons acquire information in the first instance with the understanding that they may not lawfully disclose it, and may therefore be prosecuted for violating that trust, *see, e.g., In re Sealed Case*, 192 F.3d 995 (D.C. Cir. 1999), there is no analogous prohibition on the dissemination of information about grand jury proceedings by others, including the press, *see, e.g., United States v. Smith*, 123 F.3d 140 (3d Cir. 1997); *In re Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990).

First, the legislative history not only fails to articulate any basis for the Government's contention that prohibiting dissemination in this context is essential to preventing unlawful interception in the first instance, it cannot reasonably be squared with Congress' decision to limit to a nominal fine the criminal penalties to be imposed on those who, in circumstances such as these, in fact intercept protected communications. *See* 18 U.S.C. § 2511(4)(b)(ii); *see also Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."). Enhancement of those criminal penalties to include at least the prospect of incarceration would, it can reasonably be assumed, have a more direct impact on illegal interceptions than the prohibition on dissemination at issue here. *See, e.g., Boehner v. McDermott*, Civ. No. 98-594 (TFH), 1998 WL 436897, at *3 (D.D.C. July 28, 1998) (subsequent history omitted) (deterrent value of $500 fine imposed on interceptors in that case was "almost laughable").

Second, Congress may require, or provide legislative incentives for, the development of new technologies that serve to prevent interception. *See, e.g.*, 47 U.S.C. § 1002. Indeed, interception of calls made on the cellular telephone used by Bartnicki in this case, which employed wireless technology that is rapidly becoming obsolete, would not have been possible if the signal had been sent digitally.[29] Similarly,

[29] Time Division Multiple Access service, for example, permits a cellular service provider "to divide up the signal into tiny fractions of a second . . . which greatly reduces any chance for the radio hobbyist to intercept cellular telephone conversations." Fred Ulricht, *All-digital Cellular Provides Greater Security*, Birmingham Bus. J., Nov. 16, 1998, at 15. The Global System for Mobile Communication uses a 64-bit encryption algorithm (reduced to 56 bits by some service providers) to enhance voice privacy. Ann Harrison, *Cellular Phone Encryption Challenged*, Computerworld, May 24, 1999, at 67. Almost 50% of all U.S. subscribers currently have digital cellular service. "Frequently Asked Questions and Fast Facts," at http://www.wow-com/consumer/faqs/faq general.cfm (visited Oct. 16, 2000).

Congress could require, or provide incentives for the wireless telephone industry to manufacture voluntarily, equipment that has the capacity to encrypt wireless calls so that they may not be intercepted. *See, e.g., Shubert v. Metrophone, Inc.*, 898 F.2d 401, 403, 405 (3d Cir. 1990). By the same token, Congress may legislate to create disincentives for the creation of technologies that permit interception, such as authorizing private actions against those who manufacture or sell scanners and other interception devices. *See, e.g., Flowers v. Tandy Corp.*, 773 F.2d 585, 589 (4th Cir. 1985).

Most importantly, Title III's lack of narrow tailoring results in the prohibition of too much speech. On its face, the statute prohibits the dissemination of information derived from an intercepted communication even when it has already been broadly disseminated. The Government is undoubtedly correct that Congress did not intend this result, *see* U.S. Brief at 44 (citing 1968 S. Rep. 93); indeed, the legislative history similarly contains no suggestion that Congress intended to prohibit the dissemination of truthful information about matters of public concern, *see* pp. 3, 5 *supra*. The fact remains, however, that the statute as written applies in both circumstances and prohibits the dissemination of information that is already "public information." In this case, several members of the School Board, as well as other news organizations, had either heard the tape or had been informed of its contents *prior to* the time the Media Respondents shared them with the rest of the community. Application of Title III in these circumstances violates the First Amendment. *See Cox Broadcasting*, 420 U.S. at 496.

In addition, Title III applies not only when any privacy interest has "fade[d]" because the information "already appears on the public record," *Florida Star*, 491 U.S. at 532 n.7, but also when there is no privacy interest at all. In this regard, Title III creates an unrebuttable presumption that the participants in wireless and cordless telephone conversations have a reasonable expectation of privacy in them. *But see* p. 4 *supra*. Thus, Title III authorizes a participant in such a conversation who has no expectation of privacy at all – because he makes the call in a public place where he knows it will be overheard, or voluntarily repeats its contents to others – to maintain a civil action against a third party who has reason to believe it was illegally intercepted. Indeed, in this case, Kane testified that he believes "everything we do is taped" and Bartnicki received express warning from her cellular provider that her calls could be intercepted. *See* p. 11 *supra*. Nevertheless, Title III authorizes them to sue for statutory damages, despite the fact that they do not claim in this case that they suffered any "actual injury." *See Gertz v. Robert Welch, Inc.* 418 U.S. 323, 349-50 (1974).

In this case, moreover, the district court held that the statutory prohibition on dissemination is applicable to persons whose only "reason to know" that a communication has been unlawfully intercepted is the unadorned fact that a tape recording of it exists and it contains information about matters of public concern that the participants would prefer not be made public. *See* App. 10a. [30] As even the district

[30] As the district court's decision in this case illustrates, the lower courts have not embraced the Government's proposed construction of the statute's "reason to know" requirement. *Compare* U.S. Brief at 45 ("reason to know" implies no duty to "investigate or to discover additional facts") (citing *Restatement (Second) of Torts* § 12 cmt. a (1965)) *with* App. 10a (district court decision quoted in text *supra*). *See also Peavy*, 221 F.3d at 178-79; *United States v. McIntyre*, 582 F.2d 1221, 1225 (9th Cir. 1978); *Williams v. Poulos*, 11 F.3d 271, 284 (1st Cir. 1993).

court recognized, however, in this case "there exists a great likelihood that the conversation was inadvertently intercepted and recorded," App. 64a, which would render the interception itself, and the Media Respondents' subsequent dissemination of its contents, entirely lawful. *See, e.g., Sanders v. Robert Bosch Corp.*, 38 F.3d 736, 742-43 (4th Cir. 1995). Nevertheless, the fact that the Media Respondents could not eliminate the possibility that the conversation was unlawfully intercepted placed them in jeopardy of violating the statute and deters them—and those similarly situated—from speaking even in those instances when the interception itself turns out to be entirely lawful.

Under the "reason to know" standard, any person who heard the recording at issue on the radio and then disclosed a portion of its contents across the dinner table would have as much "reason to know" it had been intercepted unlawfully as did the Media Respondents here. The statutory prohibition applies to dissemination of "the substance, purport or meaning" of the intercepted conversation, not simply playing the tape recording of it verbatim. 18 U.S.C. § 2510(8). Accordingly, beyond Yocum's transmission of the recording to the Media Respondents, and their dissemination of its contents to the public, Title III also prohibits Yocum's efforts to alert members of the School Board that they might be in danger, as well as the Board's subsequent discussion of the issue. "Not only is this not narrow tailoring, this is not tailoring of any sort." *Boehner*, 191 F.3d at 485 (Sentelle, J., dissenting).

And, even if Title III is not deemed to be "content based" on its face, it undeniably affords civil litigants and criminal prosecutors alike discretion to invoke it in an invidious manner. *See Butterworth*, 494 U.S. at 635-36. As this case illustrates, the individual petitioners have instituted civil litigation against the Media Respondents – and not other media outlets whose coverage they "appreciated" – in

substantial part because they object to the criticism of their conduct expressed by Vopper during his broadcasts and believe that such criticism injured their reputations. *See* pp. 10-11 & note 12 *supra*. Even laws of general application cannot properly be invoked in this manner to circumvent the First Amendment protections articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). A statutory scheme that is directed at expression itself and permits the same result "burden[s] substantially more speech than is necessary." *Ward*, 491 U.S. at 799.

Finally, there is no merit to the Petitioners' contention that "'constitutionally protected interests lie on both sides of the legal equation.'" U.S. Brief at 27 (quoting *Nixon*, 120 S. Ct. at 911 (Breyer, J. concurring)). The First Amendment protects against governmental action, not the action of private parties. *See e.g., Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972). Thus, the First Amendment would typically prohibit the legislature from enacting laws that compel the disclosure of communications by those who wish to keep their contents secret. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (New Hampshire may not "constitutionally *require* an individual to participate in the dissemination of an ideological message") (emphasis added). It does not, however, provide a *constitutional* basis for government to prohibit others from speaking. *See Turner Broadcasting Sys.*, 512 U.S. at 685 (O'Connor, J., concurring in part, dissenting in part) ("it is government power, rather than private power, that is the main threat to free expression").

That is the lesson of *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974), in which this Court rejected the contention that an "interest," purportedly derived from the First Amendment, in securing access to newspapers justified a Florida statute that compelled "editors or publishers to publish that which reason tells them should not be published."

The vice of the statute at issue in *Tornillo* was that it sought to achieve its ends through "governmental coercion" of some speakers. *Id.* at 254. For the same reason, although Congress may otherwise legislate to protect the right "'*not* to speak publicly,'" *Harper & Row*, 471 U.S. at 559 (citation omitted), it may not do so by affirmatively coercing others to remain silent.[31] "Regardless of how beneficent-sounding the purposes of controlling" speech may be, in this context, as in all others, we "remain intensely skeptical about those measures" that would "make the government the censor of what the people may read and know." *Tornillo*, 418 U.S. at 259-60 (White, J., concurring).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[31] *Harper & Row* is not to the contrary. There, the Court considered the unique role of the Copyright Act, which embodies rights granted by the Constitution itself, *see* 471 U.S. at 558 ("the Framers intended copyright itself to be the engine of free expression"), and does so in a manner that "'strike[s] a definitional balance'" that incorporates First Amendment interests, *id.* at 556 (citation omitted). Indeed, the Court in *Harper & Row* emphasized that the limited "right not to speak" embodied in the Copyright Act would not "sanction abuse of the copyright owner's monopoly as an instrument to suppress facts." *Id.* at 559.

APPENDIX

APPENDIX

18 U.S.C. § 2511(1)(a)

1. *Abbott v. Village of Winthrop Harbor*, 205 F.3d 976 (7th Cir. 2000).
2. *Alire v. Bell*, 100 F.3d 967 (10th Cir. 1996).
3. *Amati v. City of Woodstock*, 829 F. Supp. 998 (N.D. Ill. 1993).
4. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977).
5. *Archer Daniels Midland Co. v. Whitacre*, 60 F. Supp. 2d 819 (C.D. Ill. 1999).
6. *Arias v. Mutual Cent. Alarm Serv., Inc.*, 202 F.3d 553 (2d Cir. 2000).
7. *Arnold v. Dubach*, 1992 WL 223806 (D. Kan. Aug. 17, 1992).
8. *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492 (4th Cir. 1995).
9. *Beiter v. Kitto*, 2000 WL 884706, (D. Or. July 5, 2000).
10. *Berger v. Hanlon*, 188 F.3d 1155 (9th Cir. 1999).
11. *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998).
12. *Bianco v. American Broadcasting Cos.*, 470 F. Supp. 182 (N.D. Ill. 1979).
13. *Blake v. Wright*, 179 F.3d 1003 (6th Cir. 1999).
14. *Boddie v. American Broadcasting Cos.*, 881 F.2d 267 (6th Cir. 1989).
15. *Breest v. Dubois*, 1997 WL 449898 (Mass. Super. Ct. July 28, 1997).

16. *Briggs v. American Air Filter Co.*, 455 F. Supp. 179 (N.D. Ga. 1978).
17. *Brooks v. American Broadcasting Cos.*, 999 F.2d 167 (6th Cir. 1993).
18. *Brown v. Waddell*, 50 F.3d 285 (4th Cir. 1995).
19. *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989).
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41. *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991).
42. *Gaubert v. Gaubert*, 1999 WL 10384 (E.D. La. Jan. 7, 1999).
43. *Gentry v. E.I. DuPont de Nemours & Co.*, 1987 WL 15854 (Tenn. Ct. App. Aug. 18, 1987).
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79. *Perfit v. Perfit*, 693 F. Supp. 851 (C.D. Cal. 1988).
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93. *Smith v. Bradley*, 53 F.3d 332 (6th Cir. 1995).

94. *Smith v. City of Hartford*, 2000 WL 1058877 (Conn. Super. Ct. July 14, 2000).

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96. *Stockler v. Garratt*, 974 F.2d 730 (6th Cir. 1992).

97. *Sussman v. American Broadcasting Cos.*, 971 F. Supp. 432 (C.D. Cal. 1997).

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18 U.S.C. § 2511(1)(c)&(d)

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* Indicates cases in which the identity of the interceptor could not be ascertained.

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32. *Leach v. Byram*, 68 F. Supp. 2d 1072 (D. Minn. 1999).
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37. *Natoli v. Sullivan*, 606 N.Y.S.2d 504 (N.Y. Sup. Ct. 1993).

38. *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991).

39. *Noel v. Hall*, 2000 WL 1364227 (D. Or. Sept. 15, 2000).

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41. *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998).

42. *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984).

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49. *Sands v. Crist*, 892 F.2d 1046 (9th Cir. 1989).

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51. *Sheinbrot v. Pfeffer*, 1995 WL 432608 (E.D.N.Y. July 12, 1995).

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53. *Spetalieri v. Kavanaugh*, 36 F. Supp. 2d 92 (N.D.N.Y. 1998).

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57. *Williams v. Poulos*, 11 F.3d 271 (1st Cir. 1993).

58. *Zerilli v. Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980).

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61. *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978).

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63. *United States v. Newman*, 476 F.2d 733 (3d Cir. 1973).

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