No. 99-1687, 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.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS GLORIA BARTNICKI AND ANTHONY F. KANE, JR.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

I. STRICT SCRUTINY IS NOT WARRANTED

A. Telephone conversations and other communications covered by the statutes involved here concern every topic under the sun; and the statutes apply without regard to the viewpoints expressed or the subjects addressed by either the person who makes an intercepted communication or the person who discloses that communication. Thus the statutes are entirely free of content discrimination: they apply to a disclosure not because of the subject it addresses, but because it stems from an unlawful interception.

1. In an argument that amounts to little more than a play on words, respondents maintain that the statutes nevertheless should be considered "content-based" because liability turns on examining the "contents" of the radio broadcasts to determine whether an intercepted communication was disclosed. *See* Brief for Respondents Frederick W. Vopper, *et al.* ("Vopper Br.") 25 n.16; Brief for Respondent Jack Yocum ("Yocum Br.") 47-48. That contention is refuted by the numerous cases in which this Court has *not* applied strict scrutiny to statutes and orders under which liability turned on the contents of speech. *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987).

A law is not "content-based" merely because one must examine the contents of a communication to determine whether the law has been violated. *See Hill v. Colorado*, 120 S. Ct. 2480, 2485, 2491-93 (2000). Rather, a law is subject to strict scrutiny as content-based only if it discriminates with respect to *viewpoints*, or if it "place[s] a prohibition on discussion of *particular topics*, while others [a]re allowed." *Id.* at 2493 (emphasis added). *See* Brief for Petitioners Bartnicki and Kane ("Pet. Br.") 21-24.

The content-discrimination cases cited by respondents and their *amici* all fall into that category. In *Boos v. Barry*, 485 U.S 312, 316 (1988), the statute applied only to speech critical of a foreign government. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the fee for a parade permit was based on the extent to which an applicant's message was considered unpopular. In *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984), the statute was confined to "editorial opinion on 'controversial issues of public importance.'" In *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 and n.2 (1974), the statute applied only where a newspaper had assailed a candidate's personal character or official record. In *Butterworth v. Smith*, 494 U.S. 624 (1990), the statute applied only to information relating to the government's attempt to secure an indictment. In *Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105, 116-118 (1991), the statute applied only to works by a criminal concerning his crime. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993), the statute applied only to magazines of commercial content, on the theory that commercial articles are of "low[er] value" than articles on other subjects. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), the law favored magazines that discussed only sports, religion, and professional topics. In *Burson v. Freeman*, 504 U.S. 191, 197 (1992), the application of the statute "depend[ed] entirely on whether . . . speech wa[s] related to a political campaign." The same was true in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995).

Although in some of those cases the statutory restrictions applied to an entire category of subjects rather than to a single narrow topic, the statutes' selectivity nevertheless was such as to implicate the concern that underlies the content-neutrality doctrine—that, by restricting discussion of certain subjects, the government may be seeking to limit disfavored messages and thus to engage in "invidious thought-control."

Hill, 120 S. Ct. at 2493 (opinion of the Court) (quoting *id.* at 2504) (Scalia, J., dissenting). *See, e.g., FCC v. League of Women Voters*, 468 U.S. at 384 ("Congress appears to have sought . . . to limit discussion of controversial topics and thus to shape the agenda for public debate.")[1]

2. Similarly incorrect is respondents' theory that a law must be considered content-based if one of its concerns is the "communicative impact" of particular speech. Yocum Br. 48. *See also id.* at 24, 43; Vopper Br. 25 n.16. In *Seattle Times*, the challenged protective order was based on a determination "that dissemination of th[e] information would 'result in annoyance, embarrassment and even oppression,'" 467 U.S. at 37; but strict scrutiny was not applied. In *Harper & Row, Zacchini* and *San Francisco Arts & Athletics* as well, it was the substance of the prohibited communications that caused the harm the statutes were designed to avoid. That a restriction applicable to speech is based in part on avoiding the harm such speech would cause does not mean that the law warrants strict scrutiny, if the law is neutral as to both viewpoint and subject matter. *Cf. Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994) ("a regulation neutral on its face may be content based if its manifest

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[1] Similar concerns arise where the government seeks to dictate what information about its own activities may be published. That is the situation Professor Bickel characterized as giving rise to a "contest" between the government and the press. *See* Alexander M. Bickel, *The Morality of Consent* 68, 79-82 (1975). Of course, the case Professor Bickel described as exemplifying that "contest"—*New York Times Co. v. United States*, 403 U.S. 713 (1971)—was confined to the question of prior restraint. *See* Pet. Br. 19.

The suggestion that these statutes are content-based because they are "hostile to messages that contain private content," Yocum Br. 49, misses the mark. An unlawfully intercepted communication is covered by the statutes without regard to whether it deals with a particularly "private" subject. This is why the statutes differ from the tort of "public disclosure of private facts." *See infra* at 7-8 and n. 8.

purpose is to regulate speech because of *the message it conveys")* (emphasis added). [2]

Furthermore, these statutes do not single out speech for any prohibition that does not apply to other uses of intercepted communications. *See* Pet. Br. 20-21. The debate whether, absent the specific disclosure prohibition in § 2511(1)(c), the "use" prohibition in § 2511 (1)(d) would have been construed to include disclosure, *see* Vopper Br. 28; Yocum Br. 45, misses the point: what matters is that, under these statutes, "disclosure" is treated *exactly the same* as any and every "use." *Compare, e.g., Simon & Schuster*, 502 U.S. at 119-120 (noting that the New York statute covered only profits of

[2] In cases involving the "secondary effects" doctrine, the application *vel non* of strict scrutiny may turn on whether the justification for a law is grounded in the impact of particular speech. That is because the doctrine comes into play where the government seeks to justify a law that "applie[s] only to a particular category of speech." *Boos v. Barry*, 485 U.S. at 320. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1882, 1885 (2000) (law applied only to television channels "primarily dedicated to sexually-oriented programming"). In that situation, if the argument is advanced that the facial non-neutrality of the law should not trigger strict scrutiny because "[the] *justification* [for the law] had nothing to do with [the affected] speech," *Boos*, 485 U.S. at 320 (emphasis added), the argument will fail if the justification for the law is in fact the communicative impact of the targeted speech. *See id.* (impact of criticism on foreign officials is not a "secondary effect" justifying a law restricting criticism of foreign governments).

A similar analysis applies where the question is raised whether a law that operates to restrict particular forms of expression may be justified as regulating *conduct*. *See City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000) (nude dancing); *United States v. Eichman*, 496 U.S. 310 (1990) (flag desecration); *Texas v. Johnson*, 491 U.S. 397 (1989) (same); *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (political expenditures). In all of those cases, the laws affected expression *only on certain subjects*. Consequently, a finding that the justification for the law was the harm caused by expression rather than by conduct properly would lead to the conclusion that the law was content-based. This is not such a case.

a crime obtained through publication rather than through other activities).[3]

B. None of the limited sets of circumstances that have been held to warrant strict scrutiny of *content-neutral* laws is present here.[4] For example, the cases invalidating selective taxation of newspapers, emphasized by several of the *amici*, involve *speaker*-discrimination, and "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect *when it threatens to suppress the expression of particular ideas or viewpoints*." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (emphasis added).

In the rare cases where a content-neutral statute has been closely scrutinized because it "suppress[es] too much speech," *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), the Court's concern has been "with laws that foreclose an entire medium of expression." *Id.* Even there, the concern has been limited to modes of expression that are "uniquely valuable or important." *Id.* at 54 (distinguishing bans on residential signs from bans on signs on public property).[5] Prohibiting

[3] Furthermore, the prohibitions involved here, to the extent that they apply to disclosures, are not justified solely by reference to the harm caused by disclosure, but also by the judgment that prohibiting disclosure and other uses will deter interception in the first place. *See* Pet. Br. 37.

[4] Several of the decisions cited by petitioners in this connection involved laws that were *not* content-neutral. For example, the statute in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 831 (1978), applied only to speech about charges of judicial misconduct. Laws limiting speech relating to an election, *see Buckley v. Valeo*, 424 U.S. 1 (1976) and *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897 (2000), can be seen as content-based. *See Burson, supra*; *McIntyre, supra*. They also present the separate problem discussed in note 5, *infra*.

[5] Laws limiting the amount of speech allowed in connection with an *election*, in addition to being content-based, *see supra* note 4, constitute a category where "quantity restrictions" on speech are of special concern. *Buckley*, 424 U.S. at 17-19, 39. *See also Meyer v. Grant*, 486 U.S. 414, 421-423 (1988) (noting that restrictions on circulation of initiative petitions may limit the ability to effectuate political change).

disclosure of unlawfully intercepted communications has nothing in common with those cases.

Respondents' suggestion that a law, no matter how content-neutral, must be subjected to strict scrutiny whenever it is applied to prohibit truthful speech on a matter of public concern has no basis in this Court's jurisprudence. *See, e.g.*, Vopper Br. 19. In the cases cited as support for that proposition, the Court was addressing laws that allowed the imposition of liability—generally by a jury—based on *disagreement with a speaker's message*. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) ("libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (to allow a jury to impose liability under "an 'outrageousness' standard" would allow them to do so "on the basis of [their] tastes or views, or perhaps on the basis of their dislike of a particular expression"); *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967) (New York privacy statute allowed liability for "fictionalization," based on findings of "factual errors, distortions and fanciful passages").[6]

[6] Respondents claim that "the restrictions in this case are in fact being applied in a content-based manner," Yocum Br. 49, because petitioners sued only these respondents, and not members of the media who subsequently discussed what Vopper had broadcast. *See* Vopper Br. 10, 13, 47-48; Yocum Br. 3, 10. That does *not*, however, represent a distinction based on the viewpoionts expressed by the various media entities. Rather, these respondents were sued for the simple reason that they, and only they, caused the intercepted communication to be broadcast. *See* Pet. Br. 6 n.2. In any event, it always is possible that disagreement with a speaker's message may play a part in causing a plaintiff to seek enforcement of a law the speaker has violated. (In defamation litigation, for example, that is *always* the case.) What matters is not a plaintiff's motive for filing suit, but whether the *standards of liability* turn on judgments about the defendant's message. That is not the case under these statutes. Indeed, the complaint in this action does not even refer to any statements made by the respondents regarding the taped conversation or anything else. All that is alleged is that Yocum "intentionally disclosed the tape" and that Vopper "intentionally disclosed and published to the public the entire contents of the private telephone conversation." JA 26-27.

Whatever level of scrutiny may be triggered by the application of *message-discriminatory* laws to truthful speech on matters of public concern,[7] there is *no* doctrine holding that truth is a defense, or even a trigger of strict scrutiny, where a *content-neutral* restriction is being applied. Cases such as *Seattle Times* and *Harper & Row* are quite to the contrary. And, in *Time, Inc. v. Hill*, the Court was careful to note that its holding with respect to the need to protect truthful speech from liability based on claims of "fictionalization" did not "intimate any view whether the Constitution limits state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices." 385 U.S. at 385 n.9. *See also Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 489 (1975) (distinguishing privacy torts that base liability on whether publicity is "offensive" by virtue of its subject matter from claims arising out of "a physical or other tangible intrusion into a private area").[8]

[7] This Court's decisions in the defamation cases do not articulate a standard of strict scrutiny, but rather seek to strike an "accommodation of the competing values at stake." *Gertz*, 418 U.S. at 348. In that context the government has only been required to show that a challenged law properly promotes a "legitimate" state interest. *Id. See also Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 757 (1985) (opinion of Powell, J.).

[8] Respondents observe that the tort doctrine of "public disclosure of private facts" does not impose liabililty for the publication of facts of public concern. *See* Vopper Br. 32; Brief *Amicus Curiae* of Dow Jones & Company at 15-19. That is simply because the gravamen of the tort is that information disclosed by the defendant was of such an intensely private nature that reasonable people would be offended by its publication. *See* Restatement (Second), Torts, § 652D. If the facts disclosed are public in nature, a "disclosure of private facts" claim fails because the facts are not

Counsel for one of the *amici* has elsewhere explained why protection of truthful speech is not the only value to be taken into account where interests of personal autonomy are at stake:

> [W]hen government acts to limit the untrammeled gathering, recording, or dissemination of data or statements about an individual, of course it inhibits speech—but it also vindicates the individual's ability to control what others are told about his or her life. Such control constitutes a central part of the right to shape the "self" that any individual presents to the world.
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> There can be no escape from continuing efforts to accommodate the value of uninhibited public discussion with the value of preserving control for individuals over what is known and said about them by and to others.
>
> Finally, there comes a point at which only this latter value plays a significant role in a case—at which such public discussion as occurs is wholly parasitic upon a clear invasion of an individual's right to retain control over personal information. Nothing in the Court's defamation decisions, and nothing in the three decisions coming closest to addressing the conflict between speech and privacy, remotely suggests that, when this point is reached, government must exalt an abstract right to know, here reduced to a right to gossip, above the deeper concerns of personhood.

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so "private" that publication is "regarded as beyond the pale of propriety." Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890). There is, however, no comparable common law doctrine that material obtained *through intrusion into private places* is fair game merely because the information is of public interest. *See, e.g., Shulman v. Group W. Productions, Inc.*, 955 P.2d 469, 494 (Cal. 1998) ("tapping a personal telephone line . . . could rarely, if ever, be justified by a reporter's need to get the story. Such acts would be deemed highly offensive even if the information sought was of weighty public concern.")

* * * *

> Both accommodating free speech values with those of informational autonomy, and defining the point at which only the latter are at stake, involve difficult judgments of degree. One helpful consideration, at least, is the extent to which the harm done by a statement is truly of a sort that "more speech" could not possibly cure.
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> In cases involving clear breaches of privacy, . . . the very idea that more talk could do anything but add insult to injury betrays a misunderstanding of the character of the harm.

Lawrence H. Tribe, *American Constitutional Law* 887-890 (2d ed. 1988).

Florida Star itself—the case on which petitioners place their greatest reliance—articulated a nuanced approach to First Amendment scrutiny, *not* an approach of "truthful speech above all." The statute in *Florida Star* was both content-based and speaker-discriminatory. *See* Pet. Br. 24-25. The Court there applied, as a "limited principle[ ] that swe[pt] no more broadly than the appropriate context of th[at] case," the rule that, "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). In justifying its decision to adopt that standard, previously articulated in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), the *Florida Star* Court explained that confining the *Daily Mail* standard to information "lawfully obtained" leaves the government "ample means of safeguarding significant interests upon which publication may impinge." *Id.* at 534. In particular, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition,

thereby bringing outside the *Daily Mail* principle the publication of any information so acquired." *Id.*

The Court observed as well that "the *Daily Mail* principle" would generally operate to protect the press only in disseminating "information which is already publicly available," *id.* at 535—as was the case in *Florida Star* itself.

Respondents are wrong to maintain that *Florida Star* should be read as mandating strict scrutiny of every restriction on disclosure of information except where the person making the disclosure violated some law in acquiring the information. *See* Vopper Br. 21-22; Yocum Br. 40-42. That is not a fair reading of this Court's opinion, which acknowledged the possibility of punishing "*the ensuing publication*" of information "acquired unlawfully by a newspaper *or by a source*," 491 U.S. at 535 n.8, and which indicated in broad terms that the government should be able to prohibit publication of "sensitive information [that] rests in private hands" without having to satisfy the *Daily Mail* test. *See* 491 U.S. at 534.

Cohen v. Cowles Media Co., 501 U.S. 663 (1991), also indicates that *Daily Mail* and *Florida Star* should not be read to make the level of First Amendment scrutiny depend on whether a defendant literally broke a law in obtaining information. The defendant newspaper in Cohen had broken no law when it obtained information after giving a promise of confidentiality, yet the Court stated that, because the newspaper ultimately "did not honor" its promise, it was "not at all clear" that the information had been obtained "lawfully" within the meaning of the *Daily Mail* standard, "at least for purposes of publishing it." 501 U.S. at 671.

That the government has not criminalized the receipt of particular information sometimes indicates that the government does not recognize a substantial interest in protecting the information from disclosure, or that the government is discriminating among speakers. *Florida Star*

was such a case; the information was disclosed by the government itself, and only "instrument[s] of mass communication" were prohibited from making further disclosure. Here, in contrast, the statutes prohibit every disclosure and use, by any person or entity, of unlawfully intercepted communications (provided, of course, that the defendant knew or had reason to know that the communication was unlawfully intercepted). By prohibiting all *disclosure*, the statutes prevent *receipt*; and by prohibiting every *use* of intercepted communications, the statutes effectively eliminate the *incentive* for receipt. Given all this, that the legislatures did not also make receipt, in and of itself, an offense is of no consequence. The suggestion that strict scrutiny should be required here merely because the legislatures did not take that additional and wholly unnecessary step—but that a lower level of scrutiny would apply if the legislatures *had* made "receipt" a separate offense, *see* Yocum Br. 40—has no principled basis.[9]

All things considered, the statutes as applied here "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify

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[9] That a government official may have violated a duty with regard to the handling of records in *Florida Star*, or that, in *Landmark Communications*, some participant in the judicial commission proceedings may have violated a nondisclosure obligation, *see* Vopper Br. 21, hardly establishes those cases as precedent for the proposition that it never matters whether information being published was originally obtained in violation of a law protecting confidentiality. *Florida Star* explicitly leaves that question open. And, to note only one sharp distinction between *Florida Star* and this case as regards the underlying breach of confidentiality, in *Florida Star* the Court reasoned that the effect of the failure of the Sheriff's Department to comply with the confidentiality statute was to "convey to [the media] that the government considered dissemination lawful, and indeed expected the [media] to disseminate the information further." 491 U.S. at 538-539. There is nothing comparable in this case.

application of the most exacting level of First Amendment scrutiny." *Turner Broadcasting*, 512 U.S. at 661.

II. THE STATUTES AS APPLIED SATISFY THE REQUISITE SCRUTINY

Respondents devote much of their argument to an attempted rebuttal of petitioners' contention that the statutory restrictions on disclosure are justified as a means of deterring interception. *See* Yocum Br. 11-23; Vopper Br. 38-40. Respondents' position on that subject is patently counterfactual,[10] and we adopt the Solicitor General's reply.

We focus instead on the other principal justification for the challenged provisions, as applied here—*viz*, that the broadcast of an intercepted communication, whether by the interceptor or by a recipient, "compounds the statutorily prescribed invasion of . . . privacy by adding to the injury of the interception the insult of . . . disclosure." *Gelbard v. United States*, 408 U.S. 41, 51-52 (1972). *See* Pet. Br. 34-36.

A. The Statutes Further Important Purposes

Citing *Florida Star*, *Daily Mail*, and *Cox Broadcasting*, respondents declare that this Court has given short shrift to

[10] Respondents declare that it is "purely speculative" to contend that "those who unlawfully intercept communications are difficult to identify and prosecute." Vopper Br. 39. But that proved true in this very case. (Although petitioners Bartnicki and Kane made what they described as a "wild guess" that a particular School Board member might have been involved in the interception, they had no evidence to establish this. *See* Kane Dep., Dec. 30, 1994, at 64-68; Bartinicki Dep., Dec. 30, 1994, at 38-40. The Board member denied having anything to do with the interception, Warman Dep. 17, 21-22, and respondents do not suggest that a fuller investigation would have succeeded in revealing the Board member as the culprit.) Similarly, respondent Yocum purports to doubt that a person who intercepts a communication could succeed in passing it anonymously to a third party, *see* Yocum Br. 17; but, if Yocum's own testimony about his acquisition of the tape is to be believed, that too is what happened in this very case.

interests in protecting privacy and confiden--tiality. *See* Vopper Br. 30-32. Respondents have misread the decisions.

In *Daily Mail* "there [wa]s no issue . . . of privacy." 443 U.S. at 105. Rather, the asserted state interest was one of "further[ing] [the] rehabilitation" of juvenile offenders. *Id.* at 104. In any event, the holding in *Daily Mail* was that, "even assuming the statute served a state interest of the highest order, it d[id] not accomplish its stated purpose," *id.* at 105, because it restricted only newspapers.

In *Florida Star*, the Court found nothing lacking in the "highly significant interests," 491 U.S. at 537, asserted by the government in support of protecting the anonymity of rape victims. On the contrary, the Court indicated that in proper circumstances, the interests at stake might well justify "punish[ing] publication of the name of a victim of a sexual offense." *Id.* at 541. The Court simply determined that the government had not established the "need" for a selective ban on media disclosure where "the government itself [had] provide[d] [the] information to the media." *Id.* at 537-538.

In *Cox Broadcasting*, the Court, after noting the "impressive credentials for a right of privacy," 420 U.S. at 489, pointed out that the case before it was not grounded in "a physical or other tangible intrusion into a private area," *id.* Moreover, like *Florida Star*, the decision turned on the determination that, "[b]y placing the information in the public domain on official court records," the State "must be presumed to have concluded" that confidentiality was not vital. *Id.* at 495. The Court added that if a government wishes to prevent publication of certain information, it should take steps to "avoid public documentation or other exposure of private information." *Id.* at 496.

Congress and the Pennsylvania legislature had powerful legitimate reasons for protecting individuals from having their private conversations intercepted through electronic

surveillance. *See* Pet. Br. 30.[11] And it is perfectly clear that disclosure of an unlawfully intercepted communication "compounds" the injury the legislatures properly acted to prevent. *Gelbard*, 408 U.S. at 51-52. *See* Pet. Br. 35.[12] As one of respondents' *amici* puts it, "[s]ociety cares about preventing the initial interception of confidential communications in significant measure because we do not want the content of those communications to be made public." Brief *Amicus Curiae* of the American Civil Liberties Union at 20.

Consequently, the first prong of the intermediate scrutiny test—whether the law, as applied, "furthers an important or substantial governmental interest," *Turner Broadcasting System*, 512 U.S. at 662 (1994)—is satisfied here.

[11] The suggestion that Congress was concerned only with industrial and domestic relations espionage, *see* Vopper Br. 3, 5, 37, is incorrect. *See, e.g.*, S. Rep. No. 90-1097, 90th Cong., 2d Sess. 67 (1968) (discussing need to prevent interception and subsequent use of communications relating to "personal, marital, religious, political, or commercial concerns").

[12] Respondents note that at common law, it generally is not considered tortious for a third party to disclose information obtained by another's intrusion. *See* Vopper Br. 24 n.15. The common law *does*, however, recognize that disclosure compounds the injury of an intrusion. *See* Restatement (Second) § 652D, Cmt. A ("disclosure of the information . . . obtained [through intrusion] will certainly add to the amount of damages"); *Schulman*, *supra* note 8, 955 P.2d at 496 n.18; *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971). Because the intrusion tort reaches every kind of intrusion that "would be highly offensive to a reasonable person," Restatement § 652B, it is unsurprising that the common law does not make the media liable for disclosing information obtained by a source through any means that might be deemed "intrusive." This does *not* undercut the considered judgment of Congress and state legislatures, in the narrow and specific context of wiretapping statutes, that the media should not be free to broadcast what it knows, or has reason to know, is an illegally intercepted communication.

B. The Governmental Interests Are Unrelated to the Suppression of Free Expression

The second prong of the intermediate scrutiny test—that "the governmental interest is unrelated to the suppression of free expression," *id.*, also is satisfied.

Respondents argue that the mere fact that the statutes' purpose is, in part, to prevent harm caused by speech amounts to "the suppression of free expression." *See* Vopper Br. 34-36. Such a simplistic notion would wipe from the books, *inter alia*, all protective orders, copyright laws, and laws prohibiting fraud, defamation and blackmail. That is not what intermediate scrutiny dictates. In this context, "suppression of free expression" refers to efforts to restrict *disfavored messages*. *See United States v. O'Brien*, 391 U.S. 367, 382 (1968) ("a statutory phrase which punished people who expressed their 'opposition to organized government'" would be "aimed at suppressing communication").

As Congress recognized, protecting private conversations from being intercepted and disclosed *promotes* free expression. *See* Pet. Br. 30-34. Petitioners argue that an interest in enabling persons to speak freely cannot justify prohibiting others from speaking. That point may hold where statutory distinctions are content-based—as, for example, in the hypothetical example of a law that prohibits critical reviews in order to encourage authors. *See* Brief of *Amicus Curiae* Liberty Project at 19-20. But *Harper & Row* shows that petitioners' point does *not* hold where speech is "suppressed" only because it has been *stolen*. Otherwise, it would be unconstitutional to prohibit disclosure of an intercepted communication even by the interceptor himself.[13]

[13] Nor can *Harper & Row* be distinguished on the ground that what was at issue there was only the publication of verbatim expression rather than of underlying facts. *See* Yocum Br. 30 n.20, 28-29; Vopper Br. 49 n. 31. That same situation is presented in this case. Although other applications

C. The Statutes Are Adequately Tailored

The final requirement of intermediate scrutiny is one of tailoring, which is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner Broadcasting*, 512 U.S. at 662.

1. Respondents avoid discussing how that test plays out as applied to the conduct at issue in this case—distributing and broadcasting the tape of a private telephone conversation—preferring instead to focus on *other* cases that might arise under the statutes, involving scenarios ranging from calls not made in private, *see* Yocum Br. 25, to broadcasts made after a communication has "already been emblazoned on the front page of every newspaper in the country," *id.* at 26, to broadcasts of a call about "something as mundane as a grocery list," *id.*, to circumstances where "the parties to the communication approve or even *encourage* the disclosure," *id.* at 30 (emphasis in original), to situations where the media mention facts derived from an intercepted communication without broadcasting the communication itself, *id.* *See also* Vopper Br. 13, 45-46.

a. To the extent that the statutes would apply to those hypotheticals, such applications would be constitutional. Private persons have a legitimate interest in not having even their "grocery lists" broadcast over the radio for the delectation of the general public; and for the legislatures to

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of the statute—*not* properly at issue here, *see infra* at 17-19—might involve the disclosure of facts derived from an intercepted communication rather than a broadcast of the communication itself, "the party may disseminate the identical information . . . as long as the information is gained through [other] means." *Seattle Times*, 467 U.S. at 34. Furthermore, in *Harper & Row* itself, the *fact* of precisely how President Ford had characterized the historical events described in his memoirs was what The Nation thought it vital to publish, and this was held properly prohibited. *See Harper & Row*, 471 U.S. at 556.

have made the application of the statutes depend on case-by-case assessments of the degree to which a communication contains information of a particularly confidential nature would have been to undo the statutes' content-neutrality.

b. But, it is far from clear whether the scenarios conjured up by respondents would even violate the statutes. For example, to "disclose" is to reveal something *unknown*. *See Black's Law Dictionary* 551 (4th ed. 1968) (definitions of "disclose" and "disclosure"). That no doubt explains why Congress understood that Title III would *not* reach the publication of material that already is common knowledge. *See* Pet. Br. 18.

There is no occasion in this case to sort out which of the various scenarios posited by respondents would violate the statute, or to proceed to determine the constitutionality of the hypothesized applications. Respondents challenged the statutes *only as applied to them, see* Answers (JA 19-23, 31-37), and the questions certified for appeal were limited accordingly. *See* Pet. App. 76a. In their briefs to the Court of Appeals, respondents took pains to emphasize that *only* their conduct in "providing" (Yocum) and "broadcasting" (Vopper) the "newsworthy tape" was at issue. Neither in those briefs nor in the Third Circuit's decision is there the slightest mention of the statutes' potential application to other situations such as respondents now wish to debate. On the contrary, the Third Circuit emphasized that the question before it was confined to "the unique facts and circumstances of this case." Pet. App. 14a.

"The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). That rule, to be sure, allows an exception for "facial overbreadth

adjudication." *Id.* at 615. But "[a]pplication of the overbreadth doctrine in this manner is, manifestly, strong medicine . . . employed by the Court sparingly and only as a last resort." *Id.* at 613. In particular, overbreadth analysis comes into play only where a party has "assert[ed] a facial challenge" to a statute. *Renne v. Geary*, 501 U.S. 312, 323 (1991). *See also id.* at 328 (White, J., dissenting) ("The courts below erred in treating respondents' challenge . . . as a facial challenge . . . [because] they challenged only *the application* of [the statute]") (emphasis in original).[14]

This is a particularly proper context in which to apply the rule that a party asserting an "as applied" challenge cannot raise other possible applications of a statute. "The sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Florida Star*, 491 U.S. at 533.

An overbreadth challenge would fail anyway. "This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied." *Parker v.*

[14] *Cf. Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 623 (1996) (Court would decide only the narrow issue presented by the petitioner's "'as applied' challenge"); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 883 (1997) (noting distinction between a facial challenge and "an 'as-applied' challenge").

Contrary to respondents' apparent assumption, *see* Vopper Br. 45; Yocum Br. 25, the inquiry into whether a challenged law "burden[s] substantially more speech than is necessary to further the government's legitimate interests," *Turner Broadcasting*, 512 U.S. at 662, does not convert every "as applied" challenge into an overbreadth challenge. *Turner Broadcasting* was a facial challenge. *See also Ward v. Rock Against Racism*, 491 U.S. 781, 793-795 (1989) ("a facial challenge"); *Hill*, 120 S. Ct. at 2485 (complaint alleged that the statute was "facially invalid").

Levy, 417 U.S. 733, 760 (1974). The conduct at issue in this case—distributing and broadcasting a tape of an unlawfully intercepted conversation—falls within "a whole range of easily identifiable and constitutionally proscribable . . . conduct," *id.* (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 581 (1973)), which the statutes properly prohibit.

2. There is no force to respondents' suggestions that, instead of prohibiting disclosure of intercepted communications, the legislatures should have sought to reduce the frequency of interception by imposing stiffer penalties or by encouraging technology that makes interception more difficult. *See* Vopper Br. 44-45. To pass constitutional master, the statutes "need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broadcasting*, 512 U.S. at 662. The steps proposed by respondents would not eliminate interceptions.[15] In any event, there is a legitimate interest in protecting the security and privacy of telephone conversations conducted even by the tens of millions of people who have not replaced their analog telephones with digital models, *see* Yocum Br. 14 n. 7—to say nothing of the *other parties* to such conversations, who have no way of knowing what kind of phone is on the other end of a call. *See* Pet. Br. 29.

3. Finally, these statutes—very much *unlike* the statute in *Florida Star*, *see* 491 U.S. at 539—contain a meaningful scienter requirement. *See Hill*, 120 S. Ct. at 2495 (scienter requirement indicates statute is narrowly tailored). The "reason to know" requirement, given its ordinary meaning, *see* Pet. Br. 44, is more demanding than mere "fault," which is all that is required in *content-based* defamation actions brought by private individuals, even with respect to speech on matters of public concern. *Gertz*, 418 U.S. at 347. Indeed,

[15] "[D]igital cellular . . . [is] not immune from eavesdropping." H. Rep. No. 106-725, 106th Cong., 2d Sess. 10 (2000). Moreover, digital service is not available in much of the country.

the "reason to know" standard is not appreciably less protective of the media than the "reckless disregard" requirement that applies to defamation actions brought by "public officials" and "public figures"—a requirement we do not believe is warranted here, but which the courts could apply if and where called for under these statutes.[16]

For all of these reasons, the statutes as applied here satisfy intermediate scrutiny. Indeed, they would satisfy even strict scrutiny.

CONCLUSION

The decision of the Court of Appeals should be reversed.

[16] In defamation actions, "public officials" and "public figures" are required to prove actual malice because, by virtue of their public roles, they both assume the risk of attacks on their reputation and have access to the media to respond to such attacks. *Gertz*, 418 U.S. at 344-345. Public figures do *not* assume the risk of electronic surveillance; and to suggest that they should simply avail themselves of the media to respond to disclosures of their intercepted private communications would "betray[ ] a misunderstanding of the character of the harm" worked by such disclosure. Tribe, *supra* at 890. In any event, whether petitioners are "public figures" has not been determined. *See, e.g, Lyons v. New Mass Media, Inc.*, 453 N.E. 2d 451 (Mass. 1983) (whether union president was public figure turned on facts not fully developed). If it were determined that these statutes constitutionally could be applied only upon proof that a defendant acted with reckless disregard of whether a communication was unlawfully intercepted, the courts could construe the statutes as incorporating such a limitation, notwithstanding that it does not appear on the face of the statutes. *See Linn v. Plant Guard Workers*, 383 U.S. 53, 64 (1966) (construing National Labor Relations Act to incorporate actual malice standard); *Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974) (same re federal labor-management executive order).

Respectfully submitted,

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