Nos. 99-1687 & 99-1728

In the Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
PETITIONERS

v.

FREDERICK W. VOPPER, AKA FRED WILLIAMS, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

FREDERICK W. VOPPER, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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A. Title III Is Subject To Intermediate Scrutiny

Respondents take issue with our submission (U.S. Br. 11-12, 20-28) that Title III's prohibition on the use and disclosure of illegally intercepted communications is subject to intermediate scrutiny. As we have explained, three reasons support our conclusion. First, the prohibition is content neutral, because it bars exploitation of *all* communications known to have been intercepted in violation of Title III, without regard to the communication's content, while permitting the identical content to be used or disseminated freely if it is not obtained from an unlawful interception. U.S. Br. 20-23. Second, Title III treats speech and non-speech uses of illegally intercepted communications identically; it thus does not single out speech for disfavored treatment. U.S. Br. 23-27. Third, Title III not only protects a legally recognized zone of privacy against technological intrusion, but also furthers First Amendment values by encouraging uninhibited interchange and discussion among private parties—interchange that would be chilled if every communication were subject to the threat of unrestricted use and dissemination following illegal interception. U.S. Br. 27-28. This Court and its members have recognized that those characteristics make intermediate scrutiny appropriate. See *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny"); *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("generally applicable laws do not offend the First Amendment simply because" of "incidental effects on [the press's] ability to gather and report the news"); *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911 (2000) (Breyer, J., concurring) (intermediate scrutiny proper where "constitutionally protected interests lie on both sides of the legal equation").

1. Respondents resist intermediate scrutiny by contending that Title III is content based, because assertedly it is

"hostile toward" messages that contain "supposedly private information," Yocum Br. 48, or has the "sole goal" of "suppress[ing] speech," *id.* at 46-47. See also WFAA-TV Br. 19-20. Those assertions overlook the fact that Title III bars use and disclosure of stolen communications whether or not they concern matters that might be labeled intimate or private. Title III's concern is not the content of the stolen speech, but the fact that it was unlawfully obtained by the use of electronic or mechanical eavesdropping devices. Respondents also overlook that Title III does not prohibit publication of the same information if it is not obtained through illegal interception, even if that information is highly private. Finally, respondents' claim that Title III has a speech-suppression purpose overlooks the fact that the prohibition extends to all exploitation of illegally intercepted communications, whether or not the prohibited uses are expressive. See U.S. Br. 24.[1]

Title III thus does not (Liberty Proj. Br. 6, 8, 13) seek to prevent "the disclosure of certain information to the public," or "reflect the government's preference for silence." Title III aims at the unlawful theft of communications in the first instance, and the exploitation of such stolen communications thereafter. And it does so not to regulate topic, viewpoint, or content, but rather because permitting the untrammeled exploitation of stolen communications increases the incentive to engage in unlawful interception in the first instance, and because the exploitation of stolen communications multiplies

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[1] The prohibition on non-expressive uses cannot be dismissed as a "minor aspect" (Liberty Proj. Br. 8) of Title III. The vast majority of use-and-disclosure cases involve non-expressive uses (*e.g.*, use by one spouse against the other to obtain an advantage in divorce) or disclosures made to permit such uses (*e.g.*, to the divorce lawyer). See Vopper Br. 38 n.24. In an appendix to this brief, we reproduce the list of private use-and-disclosure cases that were cited in the appendix to the Vopper Brief (at 9a-13a), together with parentheticals describing the relevant facts.

the intrusion on the right of conversational privacy that Title III protects. U.S. Br. 34-35.

2. Respondents and their amici argue that Title III is content based on its face because, "[t]o determine whether Title III applies," the communication's "'contents' must be assessed." Vopper Br. 25 n.16; Yocum Br. 48. This Court rejected precisely that argument last Term, declaring that it has "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies." *Hill* v. *Colorado*, 120 S. Ct. 2480, 2492 (2000). Content neutrality depends on whether the statute discriminates based on topic or viewpoint, *id.* at 2491, or was adopted "because of [agreement or] disagreement with the message," *Turner*, 512 U.S. at 642 (quotation marks omitted)—not on whether a court must examine the contents of the statement as part of the statute's enforcement.

The need to examine "content" under Title III requires only a comparison between the disclosure at issue and the underlying intercepted communication. That comparison does not involve a judgment that favors or disfavors disclosures on particular topics or viewpoints. Were it otherwise, copyright actions would be subject to strict scrutiny merely because a court must examine the expression to see if it appropriates copyrighted material; likewise, breach of contract actions would be subject to strict scrutiny because one must review the agreement to identify the promise that was made. See also *Hill*, 120 S. Ct. at 2492 (other examples). Indeed, if respondents were correct, the judicial order in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984)—which barred the newspaper from disclosing information obtained through discovery and thus required review of the newspaper's disclosures as part of enforcement—would have been subject to strict scrutiny; this Court upheld that order under an intermediate level of scrutiny. *Id.* at 32. Nor do the cases that respondents and amici cite support the contrary view.

Those cases instead show that strict scrutiny generally applies to statutes that discriminate on subject, viewpoint, or speaker, or that otherwise single out speech for unique sanction.[2]

3. Finally, respondents and their amici argue (Yocum Br. 46-47; WFAA-TV Br. 11-13) that Title III is not a law of general applicability, since it specifically identifies speech (disclosure) as falling within its prohibition. As Title III's plain terms indicate, however, it applies with equal force to all forms of exploitation, whether non-expressive ("use"), or expressive ("disclosure"). See U.S. Br. 25. The fact that First Amendment activity, such as publication or broadcast, may be involved in a particular case results in no different or additional sanction. Respondents and their amici are correct that Title III bars use and disclosure in separate subsections —use in 18 U.S.C. 2511(1)(d), and disclosure in 18 U.S.C. 2511(1)(c)—and that "disclosure" thus is not a subset of "use." Vopper Br. 28; Yocum Br. 45; WFAA-TV Br. 13-14.

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[2] See, *e.g.*, *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (Son-of-Sam law subjected to strict scrutiny because it "singles out income derived from expressive activity for a burden the State places on no other income," and was "directed only at works with a specified content," *i.e.*, writings about the felon's crimes); *Burson* v. *Freeman*, 504 U.S. 191 (1992) (statute barring vote solicitation near polling stations but placing no burden on any other speech or solicitation); *FCC* v. *League of Women Voters*, 468 U.S. 364, 384 (1984) (statute banning "editorializing" on "matters of public concern" that discriminated among speakers—"singl[ing] out noncommercial broadcasters and den[ying] them the right to address their chosen audience" on those matters—reviewed carefully because it might "reflect[] an impermissible attempt to * * * control . . . the search for political truth") (quotation marks omitted); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 228, 230 (1987) (statute that taxes magazine based on the subjects of the articles requires strict scrutiny because "selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State"); *Leathers* v. *Medlock*, 499 U.S. 439, 453 (1991) ("differential taxation * * * does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas").

But the statute's scope and operation would be identical if Congress had barred all uses, "including" disclosure, in a single provision. See U.S. Br. 24-25. Congress's decision to bar non-expressive uses in one section and disclosures in another has no constitutional significance.

B. The *Florida Star* Line Of Cases Is Inapposite

Respondents also contend that Title III is subject to strict scrutiny even if it is generally applicable and content neutral. Respondents mainly rely (*e.g.*, Vopper Br. 20-21) on a line of cases culminating in *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), that apply the "*Daily Mail*" principle, *Smith* v. *Daily Mail Pub. Co.*, 443 U.S. 97 (1979)—that strict scrutiny applies to laws punishing the publication of truthful information, on matters of public significance, that was "lawfully obtained." *Florida Star*, 491 U.S. at 533, 541. Because the *Daily Mail* principle applies only when the information was "lawfully obtained," it has no application to cases such as this one in which the communication was not. As this Court explained in *Florida Star*, "[t]he *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n.8. To the contrary, when "sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Id.* at 534.[3]

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[3] Respondent Yocum argues (Br. 39-40) that the *Daily Mail* principle applies here because Congress did not also punish the *receipt* of the communication later disclosed. That argument overlooks the substance of Title III. Congress barred both the initial acquisition *and* any later disclosures of protected communications. Prohibiting the intermediate step of passive receipt would not add protection, given the difficulty of deterring the passive acquisition of information and the potential unfairness of so doing. In any event, it would make no sense that the level of scrutiny

Respondents contend (Vopper Br. 20, 22; Yocum Br. 41-42) that *Flordia Star* reserves only whether government may punish the unlawful interceptor's *own* disclosure. That contention cannot be reconciled with *Florida Star*'s language, which speaks of "punish[ing] * * * the ensuing publication" where the information "has been acquired unlawfully by a newspaper *or a source*," 491 U.S. at 535 n.8 (emphasis added and omitted); ordinarily, the newspaper that engages in the "ensuing publication" is understood to be a different entity than the "source" that acquired the information unlawfully in the first instance.

Respondents' argument also rests primarily on the incorrect assertion (Vopper Br. 21; Yocum Br. 39-40) that *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), and *Florida Star* necessarily resolved the issue, because the information in those cases was "disclosed" or "divulged" by the police or others "in violation of a statutory duty." Vopper Br. 21; Yocum Br. 39-40; McDermott Br. 7-8. But the speakers in those cases did not *obtain* the information unlawfully; nor did their sources. To the contrary, in those cases, a lawful custodian of information released it into the public domain. In that context, those seeking to protect their information can more carefully select and supervise those to whom they entrust it. See *Florida Star*, 491 U.S. at 534; U.S. Br. 31-32. Where communications instead are illegally seized by strangers through an unlawful intrusion into a protected zone of privacy, that means of protection is unavailable, because there is no entrustment. There is instead only an unlawful invasion, potentially by means (*e.g.*, a hidden bug) against which individuals cannot reasonably protect themselves. It is for that reason that this Court has reserved from the scope of the *Daily Mail* principle cases in which the information is "acquired unlawfully," see *Florida*

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would be lower if only Congress had prohibited not just willful interception and willful disclosures, but passive receipt as well.

Star, 491 U.S. at 535 n.8, rather than cases in which the information is disclosed unlawfully. Indeed, for similar reasons, this Court in *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469, 489 (1975), was careful to note that the information in that case (a rape victim's name) was acquired from court records, rather than from "a physical or other tangible intrusion into a private area." See also *Florida Star*, 491 U.S. at 533. The communication in this case, in contrast, was obtained through an intrusion into a legally recognized zone of privacy. See also p. 16, *infra*.

Moreover, the statutes at issue in the *Florida Star* line were not truly content neutral. For example, while Vopper relies (Br. 25-26) on *Butterworth* v. *Smith*, 494 U.S. 624 (1990), and *Landmark*, *supra*, the statutes in those cases sought to suppress information on particular topics (grand jury investigations in *Butterworth* and judicial misconduct proceedings in *Landmark*), with the manifest objective of preventing public dissemination of the substance of particular governmental proceedings. The remaining cases in the *Florida Star* line similarly addressed statutes that identified topics (*e.g.*, crime victim's name, identity of juvenile offender) on which reporting was prohibited. U.S. Br. 30-31. Nor were the statutes at issue in the *Florida Star* line laws of general applicability, since they applied solely to speech itself. U.S. Br. 30. See, *e.g.*, *Butterworth*, 494 U.S. at 627 & n.1 (making it unlawful to "disclose," "publish," or "communicate," but not barring other uses); *Landmark*, 435 U.S. at 831 n.1 ("divulge"). Title III, in contrast, is comprehensive, prohibiting *all* exploitation of illegally intercepted communications. In the First Amendment context, "comprehensiveness * * * is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill*, 120 S. Ct. at 2497. See also U.S. Br. 25-26.

Respondents and their amici also cite a variety of other cases in an effort to prove that content-neutral laws of general applicability can be subject to strict scrutiny. See

Vopper Br. 27; WFAA-TV Br. 11-12; Liberty Proj. Br. 9-10. That effort fails. Many of the cases they cite involve statutes that were not content neutral or generally applicable.[4] Others do not address the level of scrutiny.[5] And still others involve laws that suppress "too much speech" by "foreclos[ing] an entire medium of expression" that is "uniquely valuable or important," *City of Ladue* v. *Gilleo*, 512 U.S. 43, 54, 55 (1994). Respondents, however, nowhere argue that Title III forecloses an entire (much less a "uniquely valuable") medium of expression, and do not claim that they often knowingly rely on illegally intercepted communications. See p. 20, *infra*. Finally, reliance on this Court's defa-

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[4] *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (cited Vopper Br. 27) is one such case. *Buckley*, this Court has explained, "stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner*, 512 U.S. at 658. The Court in *Buckley* also noted that the limitations at issue there could not satisfy the *O'Brien* test because "the interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns." 424 U.S. at 17. Thus, "[a]lthough the Act does not focus on the ideas expressed," it was, in the Court's view, "aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression." *Ibid.* No such governmental objective of readjusting political debate is present here. Moreover, the statute in *Buckley*, although "neutral as to the ideas expressed," was not neutral as to subject; it singled out for special limit the "political expression" that lies "at the core of our electoral process and of the First Amendment freedoms." *Buckley*, 424 U.S. at 39 (quotation marks omitted). Nor does *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988), support respondents' view. There, the Court held that the intentional infliction of emotional distress tort could not be invoked to punish speech because it provided no "principled standard" as to what speech was impermissible, *id.* at 55, and because the "outrageousness" standard was effectively content based because its "inherent subjectiveness" invited juries to impose liability based on the "adverse emotional impact" of the content, *ibid.* See pp. 16-17, *infra*.

[5] *E.g.*, Liberty Proj. Br. 9-10 (citing *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); and *Cox* v. *Louisiana*, 379 U.S. 536 (1965)). *Cox*, moreover, may have involved a content-based statute. See 379 U.S. at 551.

mation decisions is misplaced. Those cases do not purport to apply strict scrutiny, and in any event, defamation law, which addresses only statements about a person that injure reputation, is inherently content based and, far from being generally applicable, is wholly speech specific. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Title III, in contrast, is generally applicable and does not proscribe any particular sentiment or subject; it instead proscribes reliance on a particular unlawful source.

Respondents and their amici at bottom argue that their use of stolen communications should receive the same level of constitutional protection and scrutiny as would dissemination of their own original thoughts and viewpoints. That position cannot be reconciled with the Nation's copyright laws, which protect original authors while imposing liability for the publication of a misappropriated manuscript. See, *e.g.*, *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985). Nor can it be squared with the common law (see U.S. Br. 35 & n.10), which held the publication of a private letter without the author's consent—the functional equivalent of respondents' broadcast of a verbatim recording of Bartnicki and Kane's conversation—to be an actionable wrong from before this Nation was founded.[6] Stolen books and letters may be truthful in content, but the government may punish their dissemination, reproduction, or use, so long

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[6] *Birnbaum* v. *United States*, 436 F. Supp. 967, 979-980 (E.D.N.Y. 1977). See, *e.g.*, *Pope* v. *Curl*, 26 Eng. Rep. 608 (K.B. 1741) (enjoining publication of book of letters); *Thompson* v. *Stanhope*, 27 Eng. Rep. 476 (K.B. 1774) (familial letters); *Gee* v. *Pritchard*, 36 Eng. Rep. 670, 678 (K.B. 1818) (personal letters); *Folsom* v. *Marsh*, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (George Washington's letters); *Woolsey* v. *Judd*, 11 Super. Ct. (4 Duer) 379, 11 How. Pr. 49 (N.Y. Super. 1855). Accord G. Curtis, *A Treatise on the Law of Copyright* 94 (1847) (letter's author has right to "decide whether there shall be any publication at all"); E. Drone, *The Law of Property in Intellectual Productions* 130-131 (1879) ("right to withhold * * * expressed thoughts from publication is as inviolable as [the] right to publish them").

as it does not discriminate regarding topic or viewpoint. Title III does precisely that with respect to stolen conversations, like the one at issue here.[7]

C. Title III Satisfies Intermediate Scrutiny

Title III's bar on use and disclosure furthers three substantial governmental interests: it lessens the incentive to engage in illegal interceptions; it prevents the compounding of damage that occurs when such interceptions are used or disseminated; and it promotes frank and candid exchange (and the use of new communications technologies) by assuring those who speak in private that their words will not be intercepted and broadcast for all the world to hear.

1. Respondents do not dispute the well-established principle that eliminating the outlets for, and potential benefits of, criminal activity decreases the incentive to engage in

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[7] Respondents' assertion (Yocum Br. 28-29; Vopper Br. 30 n.20, 49 n.31) that Title III bars the disclosure of *facts*, whereas statutory and common law copyright relate only to the form of *expression*, hardly assists their cause, since respondents appropriated expression by broadcasting an entire verbatim recording of the intercepted conversation. There is no reason for this Court to reach out beyond this case to decide Title III's applicability in the infrequent case that does not involve a tape recording (*i.e.*, a literal reproduction of expression). The Court repeatedly has eschewed broad pronouncements in this area, instead "relying on limited principles that sweep no more broadly than the appropriate context of the" case before it. *Florida Star*, 491 U.S. at 533. In this case, that principle is that government may constitutionally punish the publication of expression appropriated through illegal intrusions into a constitutionally recognized zone of privacy. Indeed, because respondents disseminated expression, they lack standing to challenge Title III on the ground that its prohibition may also extend to facts. See Bartnicki Reply Br. 15 n.13, 17-19. Nor can respondents rely on the doctrine of substantial overbreadth to challenge the statute "on its face because it also threatens others not before the court," *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). This suit involves only an *as applied* challenge; and the question certified by the district court asks only if liability can be imposed "for broadcasting the newsworthy *tape*," Pet. App. 76a (emphasis added). In any event, even as to facts, Title III is constitutional for the reasons given in this brief and in our principal brief.

criminal acts. See U.S. Br. 37-38, 40-42 (citing 2 W. R. LaFave & A. W. Scott, Jr., *Substantive Criminal Law* § 8.10(a), at 422 (1986); *New York* v. *Ferber*, 458 U.S. 747, 759-760 (1982); and *Osborne* v. *Ohio*, 495 U.S. 103, 109-110 (1990)). Respondents instead argue that the principle is inapplicable here because Congress did not rely on it in Title III's legislative history, Vopper Br. 37-38; and they dispute whether, in this context, eliminating the outlets for the fruits of illegal conduct will actually deter illegal interceptions, Vopper Br. 39; Yocum Br. 16-23.[8] As to the first argument, this Court does not require the legislative history to mention every rationale for purposes of intermediate scrutiny. See *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 70-71 & n.19 (1983); *Edenfield* v. *Fane*, 507 U.S. 761, 768 (1993). That should be especially true where, as here, the rationale is sufficiently obvious. No one disputes that Title III's exclusionary rule, 18 U.S.C. 2515, which proscribes the use of illegally intercepted communications as evidence, is designed to lessen the incentive to engage in illegal interceptions in the first instance. See Yocum Br. 22. It stands to reason that Section 2511(1), which proscribes all other means of exploiting such communications, serves the same purpose in the same way, *i.e.*, it decreases the incentive to engage in unlawful invasions by making the fruits of the violation not

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[8] Respondents distinguish the prohibitions in *Ferber* and *Osborne*, as well as the proscription on the receipt of stolen property, by noting that those prohibitions either do not bar speech at all or bar speech of "exceedingly modest" First Amendment value. Yocum Br. 21-22; Vopper Br. 39. Respondents misunderstand our position. We do not contend that *Ferber* and *Osborne* control this case; we contend only that they recognize that foreclosing outlets for the proceeds of criminal activity deters the underlying illegal conduct. Respondents also err by asserting (*e.g.*, Yocum Br. 12) that the government has not "adduce[d] any evidence" to support the deterrence rationale. Quite apart from the fact that the government has never been given the opportunity to present evidence, U.S. Br. 42 n.14, no evidence is required, since the connection between outlets for the fruits of illegal conduct and the incentive to engage in that conduct is obvious and borne out by this Court's cases.

merely unusable in court, but for any other purpose as well. See *Boehner* v. *McDermott*, 191 F.3d 463, 469-470 (D.C. Cir. 1999); *Fultz* v. *Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991).

Respondents also claim that, because the incentive to engage in unlawful interceptions is not always financial, Vopper Br. 39, or driven by a "market" for the illegal fruits, Yocum Br. 12-13, eliminating outlets for intercepted communications will not deter interceptions.[9] Respondents err. Whether or not one uses market terminology, the incentives for illegal interceptions—which can range from a desire to embarrass a disliked neighbor to the achievement of political ends—are undoubtedly increased if intercepted communications can be freely used and disclosed by others. In fact, the cases show that wiretappers often derive a benefit from third-party disclosure, whether that benefit is the elimination of a competitor or simple revenge.[10] Indeed, in this very case, the illegal interception may have been motivated by a desire to embarrass the union and thereby defeat its bargaining demands, and the interceptor's *own* unlawful disclosure of the tape—leading to its eventual publication—seems clearly motivated by that goal. Nor is respondent

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[9] Respondent Yocum incorrectly argues (Br. 13) that Title III's bar on "procur[ing] any other person" to intercept communications precludes a "market" or payment for illegally intercepted communications. To "procure" an illegal interception, however, one must "cause" or "induce" the interception before it occurs; payment after the fact by itself is insufficient. See *Black's Law Dictionary* 1087 (5th ed. 1979).

[10] See, *e.g.*, *Mayes* v. *LIN Television of Tex., Inc.*, No. 3:96-CV-0396-X, 1998 WL 665088 (N.D. Tex. Sept. 22, 1998) (illegal wiretap anonymously provided to plaintiff's political opponents, potentially by plaintiff's ex-wife); *Asmar* v. *Detroit News*, 836 F.2d 1347 (6th Cir. 1988) (Table) (anonymous tape recording revealing bribery by competing contractor sent to media); *Natoli* v. *Sullivan*, 606 N.Y.S.2d 504, 505 (Sup. Ct. 1993) (illegally taped call given to press to achieve "political, economic, personal and other advantage"); *Peavy* v. *WFAA-TV*, 221 F.3d 158 (5th Cir. 2000) (interception by feuding neighbor provided to media), petition for cert. pending, No. 00-69; *Forsyth* v. *Barr*, 19 F.3d 1527 (5th Cir.) (wiretap by neighbors with a "grudge" sent to police), cert. denied, 513 U.S. 871 (1994).

Yocum correct to assert (Br. 16) that interceptions cannot be deterred by barring use and disclosure because interceptions are not "targeted" at particular victims, or are generally motivated by voyeurism and not the possibility of later use. Review of the cases cited in the Vopper Brief Appendix (9a-13a), see App., *infra*, 1a-11a, demonstrates that most invasions are targeted and motivated by the possibility of later use.

Respondents also err when they assert (Vopper Br. 42; Yocum Br. 36) that Congress could achieve its goals by prosecuting wiretappers more vigorously. Congress specifically found that wiretapping is often a clandestine and difficult-to-detect enterprise, U.S. Br. 37-38 & n.12—a conclusion that remains true given the breathtaking technologies through which conversational privacy may now be breached—whereas follow-on uses are easier to detect and redress. Compare *Ferber*, 458 U.S. at 760 (government may deter the "low-profile, clandestine industry" that produces child pornography by attacking the more "visible apparatus of distribution").[11] Respondents' view would permit illegally intercepted communications to be "laundered" and disseminated on a large scale, as happened here. Without individuals (and institutions) willing to participate in that dissemination, wiretappers could rarely achieve such anonymous mass dissemination themselves. See *Boehner*, 191 F.3d at 471.

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[11] Respondent Vopper suggests (Br. 42 n.27) that it is no more difficult to detect and prosecute unauthorized interceptors—who may use remote electronic means of surveillance—than those who physically invade the home or other locations. That assertion is directly contradicted by the President's 1967 Commission on Law Enforcement and Congress's express findings. See U.S. Br. 37 & n.12. Respondent Vopper's sole authority for his contrary claim, moreover, is a newspaper article discussing the investigation of computer viruses. Those who have considered the issue of unlawful interceptions consider them unusually difficult to detect. See C. Kaplan, *Spies Like Us*, Newsday, June 10, 1990, at 80 ("evidence to prompt an investigation can be hard to get," because "there's almost no way the government can know that [it] is happening").

While Yocum speculates otherwise (Br. 18), he never explains how the unidentified wiretapper who intercepted the conversation here could have disseminated it by himself to tens of thousands of radio listeners in the local community, particularly without increasing the likelihood of apprehension. Nor does it matter that relatively unsophisticated wiretappers—primarily individuals who record a spouse's conversation and try to use it in a divorce proceeding—often make no effort to disguise their conduct. See Vopper Br. 39-40 & n.25. Congress may address the actions of sophisticated actors as well.

Finally, noting Congress's desire to make wire and electronic communications as secure as the mails (U.S. Br. 4), respondents argue that Title III's prohibition on use and disclosure is unnecessary. Yocum argues that, because this Nation's mail theft statutes "contain no analogous prohibition" on disclosure, he "lawfully could have disclosed" a "copy of a letter stolen from the mails." Yocum Br. 20; see Vopper Br. 41-42. That assertion is simply incorrect. Common law copyright long has barred the dissemination of stolen letters. See p. 9 & note 6, *supra*. Respondents thus would have been no less subject to suit for reproducing the entirety of a stolen letter between Bartnicki and Kane than they are for reproducing the entirety of the stolen telephone conversation under Title III. Nor does Title III's use and disclosure prohibition stand "basically alone" (Yocum Br. 15) in American law. The prohibition not only has a venerable antecedent in the common law treatment of private letters, but it also stands alongside more than three dozen state statutes with similar prohibitions, U.S. Br. 37, and the statutes of nations sharing our legal traditions, *e.g.*, Criminal Code, R.S.C. ch. C-46, § 193(1) (Can. 1985); Telecommunications (Interception) Act of 1979, § 63 (Austr.). In any event, any difference between the treatment of mail theft (which requires a physical invasion) and technological incursions into wire and electronic communications (which can be con-

ducted from a remote location, see U.S. Br. 37-38 n.12), is easily explained by the greater difficulty of detecting and prosecuting the latter. See p. 13 & note 11, *supra*.

2. Title III's prohibition on the use and disclosure of illegally intercepted communications also minimizes the injury caused by those illegal interceptions that do occur. U.S. Br. 34, 39. As this Court has explained, the disclosure of illegally intercepted communications "compounds the statutorily proscribed invasion." *Gelbard* v. *United States*, 408 U.S. 41, 52 (1972). The mere threat of widespread dissemination, moreover, chills free expression in private conversation. U.S. Br. 34-35.

Respondents argue that those compounded injuries result from the "communicative impact" of speech and, therefore, are neither content neutral nor "unrelated to the suppression of free expression." See, *e.g.*, Vopper Br. 25 n.16 (justification rests "on the impact of the communication's content" on listeners "and the consequent injury" to the victims of interception); Yocum Br. 25, 27. Those arguments echo respondents' mistaken claims regarding content neutrality. Title III is not concerned with the content of a communication, and the impact of such content on listeners is irrelevant. See pp. 2-4, *supra*. The disclosure in this case, for example, was proscribed without regard to the public's reaction, and liability would in no way depend on the existence, nature, or scope of communicative impact or listener reaction. Nor does Title III have the goal of "protecting people from the embarrassment" of disclosure, Liberty Proj. Br. 23-24. Title III would not have proscribed disclosure of the communication here if it had been obtained by lawful means. Title III thus is indifferent to communicative impact; it is the impact of the unlawful source that is Title III's focus.[12]

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[12] Nor does it matter that Title III's legislative history identifies particular examples of private matters that, if disclosed, might cause par-

Respondent Yocum errs similarly when he asserts (Br. 27) that Title III's prohibition is justified by communicative impact because it "rests on the sense of 'violation' that arises from the disclosure of one's communication." The sense of violation that is relevant under Title III does not result from *communicative* impact, but rather from the impact of there having been an *invasion* into a zone we rightfully expect to be private, *e.g.*, into private telephone conversations that everyone is "entitled to assume * * * will not be broadcast to the world." See *Katz* v. *United States*, 389 U.S. 347, 352 (1967). Any invasion into that zone is rendered more serious and more chilling of speech when additional people eavesdrop in the first instance, regardless of the communication's content or the listeners' reaction; and the same is true when additional people are enabled to "eavesdrop" after the fact by the conversation's later publication. Thus, far from being justified by communicative impact, Title III is justified by the invasive and chilling effect of having additional eavesdroppers invade conversational privacy—whether in the first instance or on a time-delayed basis through rebroadcast—wholly apart from the communication's content or anyone's reaction to it.

For those reasons, Amicus Liberty Project is incorrect to assert (Br. 20) that, if Title III were upheld, Congress could

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ticular harm to victims of unlawful interceptions. See Yocum Br. 48 (noting Congress's concern that "[e]very spoken word relating to each man's personal, marital, religious, political, or commercial concerns" might be intercepted and exposed); WFAA-TV Br. 20-21. Those are just examples of the sorts of speech that might be intercepted; the legislative history indicates Congress's awareness that illegal interception is used in other contexts as well. See *Hearings on Invasion of Privacy Before the Subcomm. on Administrative Practice and Procedure of the Sen. Judiciary Comm.*, 89th Cong., 1st Sess. Pt. 5, at 2261 (1966) (three major areas of widespread private electronic surveillance were "(1) industrial (2) divorce cases, and (3) politics"). Most important, Congress never suggested that it was concerned solely with those subjects, and it passed a law covering all intercepted communications, regardless of content.

also bar "critical" or "vicious reviews" that might "deter authors from writing." The rationale underlying *that* bar would be content based, because it would depend on the listeners' reaction to the review's message, and not (like Title III) on the injury caused by *the unlawful source*. For the same reason, respondents' reliance (Vopper Br. 25 n.16) on *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992), is misplaced. In that case, this Court invalidated a parade permit ordinance where fees were assessed based on the likelihood of hostile crowd reaction; the "[l]isteners' reaction to speech," the Court explained, "is not a content-neutral basis for regulation." See also *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). Title III, in contrast, is indifferent to listener reaction. Its prohibition instead is justified—without respect to the communication's content or the way listeners respond—by the chilling effect that illegal interception and disclosure has on the willingness of people to communicate in the first instance.[13]

3. Finally, respondents assert that Title III is not "narrowly tailored." There are, they contend, alternative means of preserving conversational privacy, such as use of digital wireless telephones. Yocum Br. 13-14 & nn.5-8; Vopper Br. 44-45. But the rule respondents propose—that the First Amendment guarantee their right to publish the contents of stolen conversations so long as they did not encourage or participate in the initial illegal interception—is not linked to the nature of telephone technology. To the contrary, it would prevent Congress from barring disclosure even where there are no reasonable means of preventing intrusion, such

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[13] Nor can the government's interest in promoting private (rather than public) communication be dismissed (*e.g.*, Liberty Proj. Br. 13 n.4, 16) as illegitimate. In *Harper & Row*, this Court recognized the right *not* to speak publicly—whether or not in anticipation of later release—as a "countervailing First Amendment value" to speech in its "affirmative aspect." 471 U.S. at 559, 560. See also p. 9 & note 6, *supra* (common law copyright protects right not to publish).

as where the wiretapper invades the home and plants a bug; uses a laser listening device on a window to hear conversations inside; or pierces a state-of-the-art computer "firewall" to intercept private e-mails. See U.S. Br. 37 & n.12.

In any event, respondents misunderstand wireless telephone technology. While they praise the modern digital telephone, this case concerns an interception that occurred in *1993*, at a time when digital telephones were expensive and not supported in most areas.[14] Even today, almost half of all wireless telephone users still rely on analog technology, Yocum Br. 14 n.7, and many have no choice: 50% of this Nation's land (containing over ten percent of its population) is not covered by a digital network.[15] The current availability of superior (although not foolproof) technology to urban dwellers does not deprive Congress of its power to protect the conversational privacy of those who live in (or visit) rural areas. And the fact that privacy-preserving technology may be superior to privacy-invading technology at any moment cannot prevent Congress from legislating in case the tables are turned. Even now, "digital cellular and PCS are not immune from eavesdropping," H.R. Rep. No. 725, 106th Cong., 2d Sess. 10 (2000), and the privacy of those technologies is increasingly under attack.[16]

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[14] Contrary to Vopper's claim (Br. 4-5), the evidence before Congress when it amended Title III in 1986 hardly demonstrated "an array" of affordable privacy-protection devices. The evidence showed effective alternatives to be "very costly" and available only "down the road." *Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Sen. Judiciary Comm.: Electronic Communications Privacy Act*, 99th Cong., 1st & 2d Sess. 39, 103, 206-207 (1985-1986).

[15] Compare *Fifth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, FCC No. 00-289 (Aug. 3, 2000), at F-2 (Map 1 showing wireless coverage) with *id.* at F-3 through F-6 (Maps 2-5 showing coverage of digital technologies, TDMA, CDMA, GSM, and iDEN).

[16] H.R. Rep. No. 24, 106th Cong., 1st Sess. 2 (1999); J. Sandberg, *Weakness Is Found in Digital Phone System*, Wall St. J. Europe, Apr. 14, 1998, at 8; *Cryptographers Crack Digital Cellular Code*, Communications

Alternatively, respondents argue that Title III's prohibitions are overinclusive because they prohibit the dissemination of matters that are not truly "private or personal," Yocum Br. 26, and may apply to some members of the public who do not care if their calls are intercepted, *id.* at 25 n.13. If the statute limited itself to personal matters, however, respondents would surely argue that the statute is content based. In any event, respondents' claim of overinclusiveness stems from their failure to grasp Title III's purpose, which is not to protect "private or personal" facts, but to protect a zone of conversational privacy. In that respect, Title III is perfectly tailored. If the communication is obtained from that zone through an unlawful interception, it is subject to Title III's strictures; but if it is obtained by other means, *e.g.*, if it is overheard because one participant is speaking in public, Yocum Br. 25, it is not. Nor does Title III apply to speech that already has been broadly disseminated, Vopper Br. 45; Yocum Br. 37. Consistent with Title III's legislative history, U.S. Br. 44, the term "disclose[]" in Section 2511(1)(c) includes a requirement that the matter previously not be publicly known. See *Black's Law Dictionary* 417 (5th ed. 1978) (defining "disclose" as to "bring into view by uncovering").[17]

Today, Mar. 21, 1997; P. Rubin, *Sure It's Secure—But Is It Really Safe? Encryption Algorithms for CDMA and TDMA Are Proving Disturbingly Easy to Crack*, tele.com (McGraw Hill May 1, 1997) (avail. 1997 WL 18325455) (noting that "researchers cracked the messaging encryption algorithm used in U.S.-based CDMA and TDMA digital cellular networks"; current technology does not "protect a digital cellular user against a well-funded adversary").

[17] Respondent Yocum (Br. 31) notes that Title III prohibits disclosure of unlawfully intercepted communications even to the police, notwithstanding society's compelling interest in preventing crime. That is an odd point for respondent to make, since he did *not* take the tapes to the police. And while Title III does reflect Congress's deliberate preference for preserving the privacy of communications over disclosure even for important and socially valuable purposes (see U.S. Br. 24), the traditional defense of "necessity" privileges conduct that is necessary to protect lives where (as

Finally, respondents argue that Title III is unconstitutional because it may "chill" the reporting of matters of public concern. The claim is overstated. Even though Title III has been in place for 32 years, respondents cite not one instance in which any responsible news agency has been chilled with respect to its reporting; nor does it appear that the zeal of news reporting has been adversely affected. See *Branzburg* v. *Hayes*, 408 U.S. 665, 693 (1972) (declining to recognize First Amendment source privilege for reporters where "the evidence fails to demonstrate there would be significant constriction of the flow of news" absent the privilege). Moreover, while respondents' claims (*e.g.*, Yocum Br. 32; Vopper Br. 45) are based on Title III's supposed breadth, respondents give insufficient weight to Title III's scienter requirement. See U.S. Br. 45-46. Title III's prohibition applies only to those who either have actual knowledge of the nature of the interception or actual knowledge of facts that make those origins "so highly probable that" one should assume such to be true. Restatement (Second) of Torts § 12, cmt. a (1965). Indeed, the facts surrounding the interception must be apparent, because Title III imposes no duty of inquiry. *Ibid.*; U.S. Br. 45-46. Consequently, Title III does not deter (and for the past three decades has not deterred) the press from reporting the news. Far from requiring reporters to research sources for fear of illegality, it merely requires them to refrain from use if they know or all but know that the source was an unlawful interception.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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here) the defense is not foreclosed by statute. 1 LaFave & Scott, *supra*, § 5.4, at 627-629.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000

APPENDIX

Use and Disclosure Cases—18 U.S.C. 2511(1)(c), (d)
(listed in Vopper Br. App. 9a-13a)

1. *Asmar* v. *Detroit News, Inc.*, Nos. 87-1037 & 1150, 836 F.2d 1347 (6th Cir. 1988) (Table) (anonymously recorded call of conversation revealing bribery by competing contractor sent to newspaper and government contractor).

2. *Bartnicki* v. *Vopper*, 200 F.3d 109 (3d Cir. 1999).

3. *Bast* v. *Cohen, Dunn & Sinclair, PC*, 59 F.3d 492 (4th Cir. 1995) (suit arising out of dissolution of extramarital affair and business relationship, during which one partner allegedly recorded telephone conversations of another without consent).

4. *Beiter* v. *Kitto*, No. 99-1020-KL, 2000 WL 884706 (D. Or. July 5, 2000) (cordless telephone conversations intercepted by neighbors and disseminated to other neighbors, who used the contents to harass plaintiffs).

5. *Berry* v. *Funk*, 146 F.3d 1003 (D.C. Cir. 1988) (suit by former Acting Assistant Secretary of State against State Department officials for monitoring phone calls routed through the Department's Operations Center, and for using and disclosing the contents of the calls in investigation during the Clinton passport probe).

6. *Boddie* v. *American Broadcasting Cos., Inc.*, 881 F.2d 267 (6th Cir. 1989) (suit under pre-1986 version of Title III against broadcaster, reporter, and producers of television news program that aired secretly videotaped interview with plaintiff after she consented to an off-camera interview).

7. *Boehner* v. *McDermott*, 191 F.3d 463 (D.C. Cir. 1999) (suit by Republican Member of Congress against Democrat Member of Congress after Florida couple, using a mobile police scanner and tailing plaintiff's car, recorded a cellular telephone call containing politically damaging information and gave copies of the tape to defendant, who in turn released it to the press).

8. *Brooks* v. *American Broadcasting Cos., Inc.*, 999 F.2d 167 (6th Cir. 1993) (suit arising out of alleged "ambush" interview by Geraldo Rivera; motion for leave to add Title III claim properly denied because there was no unlawful interception within the meaning of Title III).

9. *Campbell* v. *Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998) (ex-husband secretly recorded plaintiff's phone conversations with daughter and disclosed contents to his lawyer and daughter's counselor, both of whom disclosed and used the calls' contents in custody proceedings).

10. *Chandler* v. *United States Army*, 125 F.3d 1296 (9th Cir. 1997) (suit by Army Captain after being disciplined based on recordings of illegally intercepted conversations recorded by plaintiff's wife and disclosed to Army officials, who in turn used them to investigate and discipline plaintiff).

11. *Davis* v. *Zirkelbach*, 149 F.3d 614 (7th Cir. 1998) (police and city officials used contents of a phone call, which had been secretly recorded by plaintiff's employer, to persuade witness to cooperate in their investigation of plaintiff's narcotics trafficking).

12. *Deal* v. *Spears*, 980 F.2d 1153 (8th Cir. 1992) (liquor store employee sued employers, who had secretly installed a recording device on the store's phone to confirm suspicions

that plaintiff was involved in a store robbery, but instead discovered and disclosed plaintiff's extramarital affair).

13. *Desilets* v. *Wal-Mart Stores, Inc.*, 171 F.3d 711 (1st Cir. 1999) (suit by employees against employer based on management's covert recording of night-shift phone conversations).

14. *Dorris* v. *Absher*, 959 F. Supp. 813 (M.D. Tenn. 1997) (suit by employees after supervisor secretly recorded personal in-office conversations and attempted to use them to terminate the employees).

15. *Epps* v. *St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986) (suit by emergency medical workers against hospital and co-workers after plaintiffs' phone conversation was recorded by another employee using the ambulance dispatch console and the contents were disclosed and used).

16. *Farberware, Inc.* v. *Groben*, No. 89 Civ. 6240(PKL), 1995 WL 590464 (S.D.N.Y. Oct. 5, 1995) (no facts provided; default judgment).

17. *First* v. *Stark County Bd. of Comm'rs*, No. 99-3547, 2000 WL 1478389 (6th Cir. Oct. 4, 2000) (suit by Sheriff's Department dispatchers after contents of conversation among dispatchers—automatically recorded by emergency call system—were used in a disciplinary proceeding).

18. *Forsyth* v. *Barr*, 19 F.3d 1527 (5th Cir. 1994) (suit by plaintiff police officers after their intercepted conversations with an informant were used and disclosed in an internal affairs investigation; calls were intercepted by the informant's neighbors, who had been feuding with the informant).

19. *Freeman* v. *Ramada Inn, Inc.*, No. 83-3912, 805 F.2d 1034 (6th Cir. 1986) (Table) (suit by convicted robber against

police and hotel; hotel had rerouted call placed by robber to his accomplice (a hotel guest) to a police officer, and the call's contents were later used in prosecuting the robber).

20. *Fultz* v. *Gilliam*, 942 F.2d 396 (6th Cir. 1991) (suit against ex-husband, who had recorded plaintiff's phone conversations with her boyfriend and played the tapes for her brother, the couple's pastor, and their daughter).

21. *Gaubert* v. *Gaubert*, No. 97-1673, 1999 WL 10384 (E.D. La. Jan. 7, 1999) (suit against ex-husband for recording wife's conversations on home phone and disclosing contents to their children and others).

22. *Gentry* v. *E.I. DuPont De Nemours and Co., Inc.*, No. CA- 765, 1987 WL 15854 (Tenn. Ct. App. Aug. 18, 1987) (suit by night janitor against employer after plaintiff was disciplined for receiving a personal phone call from a union organizer at work, in violation of company policy; call had been inadvertently recorded by defendant's telephone answering machine).

23. *Goode* v. *Goode*, No. 99-423-SLR, 2000 WL 291541 (D. Del. Mar. 14, 2000) (suit by ex-wife against ex-husband and his lawyer for intercepting and recording their phone conversations, and for disclosing and using the contents of those communications in divorce proceedings; suit dismissed because Title III permitted husband, as party to the communications, to record them).

24. *Griggs-Ryan* v. *Smith*, 904 F.2d 112 (1st Cir. 1990) (suit by tenant against landlady with whom he shared telephone line, after landlady listened to phone call implicating tenant in drug trafficking and disclosed the contents to the authorities; plaintiff held to have consented to monitoring, since he had been told that all calls were monitored).

25. *Hatchigan* v. *International Bhd. of Elec. Workers, Local Union No. 98*, No. 87-7131, 1990 WL 2795 (E.D. Pa. Jan. 17, 1990) (recording of phone conversations between union officer and union member concerning wage dispute; court held that no illegal interception had occurred, since a party to the conversation had made the recording).

26. *Hodge* v. *Mountain States Tel. and Tel. Co.*, 555 F.2d 254 (9th Cir. 1977) (suit against phone company for installation of pen register at behest of police properly dismissed because Section 2511(1) does not apply to pen registers).

27. *Janecka* v. *Franklin*, 684 F. Supp. 24 (S.D.N.Y. 1987) (suit by ex-wife against husband for recording telephone conversations between her and their minor children).

28. *Kempf* v. *Kempf*, 868 F.2d 970 (8th Cir. 1989) (suit by ex- wife against former husband who had recorded calls between wife and those with whom she was having extra-marital affairs, and who had used the recordings in dissolution proceedings).

29. *Kirkland* v. *Franco*, 92 F. Supp. 2d 578 (E.D. La 2000) (suit by ex-wife against husband who, suspecting marital infidelity, had recorded her telephone calls during the marriage, confronted her with the tapes, and then discussed them with her pastor, employer, mother, and during a child-custody hearing).

30. *Kratz* v. *Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979) (suit by wife and her lover against her husband and his lawyer, where husband had tapped the household telephone to gather information on alleged infidelity and had used the tape to gather information for divorce proceeding).

31. *Kreish* v. *Michigan Bell Tel. Co.*, No. 94-2130, 57 F.3d 1069 (6th Cir. 1995) (Table) (suit alleging telephone company had disclosed contents of plaintiff's conversations to others; summary judgment granted based on lack of evidence).

32. *Leach* v. *Byram*, 68 F. Supp. 2d 1072 (D. Minn. 1999) (during dispute concerning dissolution of a family business, father intercepted plaintiff son's portable telephone conversations, recorded them, and turned them over to his attorney; son sued father's attorney, who used and relied on the recordings in a letter to the son's attorney).

33. *Lizza* v. *Lizza*, 631 F. Supp. 529 (E.D.N.Y. 1986) (suit by wife and a third party against husband, where husband had recorded calls on their household telephone to gather information useful in pending divorce proceeding).

34. *Mayes* v. *LIN Television of Texas, Inc.*, No. 96-CV-0396-X, 1998 WL 665088 (N.D. Tex. Sept. 22, 1998) (anonymously recorded telephone conversation of politician delivered to politician's opponents, who distributed copies of politically damaging conversation to the media; call may have been intercepted by ex-wife of one of the call's participants).

35. *Meharg* v. *Poznick*, No. 96-1074, 111 F.3d 129 (4th Cir. 1997) (Table) (no facts provided).

36. *Nalley* v. *Nalley*, 53 F. 3d 649 (4th Cir. 1995) (suit by husband against wife, where anonymous source had sent wife a recording of husband's telephone conversations, revealing extra-marital affair; wife played the recordings for her children, for her attorney, and for the husband of the woman with whom her husband was having the affair).

37. *Natoli* v. *Sullivan*, 606 N.Y.S.2d 504 (N.Y. Sup. Ct. 1993) (defendants alleged to have recorded plaintiff's phone calls and provided the recordings to the media defendants "to obtain political, economic, and other advantage at plaintiff's expense").

38. *Newcomb* v. *Ingle*, 944 F.2d 1534 (10th Cir. 1991) (suit by child against his mother because she recorded a conversation during which the child's father instructed the child as he set fire to the family home).

39. *Noel* v. *Hall*, No. 99-649-AS, 2000 WL 1364227 (D. Or. Sept. 15, 2000) (after plaintiff recorded his own phone conversations, former business partner allegedly broke into business, copied the tapes, listened to them, shared them with others, and then took them to the police).

40. *Peavy* v. *WFAA-TV*, *Inc.*, 221 F.3d 158 (5th Cir. 2000) (telephone calls intercepted and recorded by plaintiff's neighbor, who had been involved in various disputes with plaintiff; neighbor in turn provided tapes to defendant television station, which encouraged additional interceptions).

41. *Pollock* v. *Pollock*, 154 F.3d 601 (6th Cir. 1998) (ex-husband sued former wife for recording phone calls between him and their minor daughter during a custody dispute).

42. *Pritchard* v. *Pritchard*, 732 F.2d 372 (4th Cir. 1984) (suit by ex-husband against former wife where wife had placed a recording device on the family phone to record his telephone calls).

43. *Quigley* v. *Rosenthal*, 43 F. Supp. 2d 1163 (D. Colo. 1999) (suit against neighbors who allegedly, as part of a

campaign to defame the plaintiffs, intercepted, recorded, and disclosed the contents of the plaintiffs' cordless phone calls).

44. *Reynolds* v. *Spears*, 857 F. Supp. 1341 (W.D. Ark. 1994) (companion case to *Deal* v. *Spears*, *supra*; holding that wife of business owner was not liable merely because she overheard recordings of conversations as her husband listened to them).

45. *Rice* v. *Rice*, No. 98-0806-CV-W-3, 1990 WL 357332 (W.D. Mo. Sept. 4, 1990) (suit by ex-husband against former wife for recording telephone conversations between him and their children).

46. *Ricupero* v. *Wuliger, Fadel & Beyer*, No. 1:91CV0589, 1994 WL 483871 (N.D. Oh. 1994) (suit by wife against husband and his lawyers, after husband secretly recorded wife's calls on home phone and, discovering her extra-marital affair, disclosed the tapes to his lawyers for use in divorce proceedings).

47. *Rodgers* v. *Wood*, 910 F.2d 444 (7th Cir. 1990) (suit by police officers after suspect recorded call they made from the suspect's home; call was disclosed by suspect's attorney in court, to other police officers, and to the Assistant District Attorney).

48. *S.L.* v. *Friends Central High School*, No. Civ.A.00-472, 2000 WL 352367 (E.D. Pa. Apr. 5, 2000) (transcript of plaintiff's e-mail exchange with another student, printed out by the other student and used to discipline plaintiff, held not to have been unlawfully intercepted).

49. *Sands* v. *Crist*, No. 89-15502, 892 F.2d 1046 (9th Cir. 1989) (Table) (suit by prisoner alleging that prison monitored his phone calls dismissed based on prisoner's consent).

50. *Scheib* v. *Grant*, 22 F.3d 149 (7th Cir. 1994) (suit by ex- wife against former husband's attorneys, where husband had recorded her phone calls with their son, disclosed them to his attorneys, and the attorneys had attempted to introduce them at a hearing on a custody settlement).

51. *Sheinbrot* v. *Pfeffer*, Nos. 93 CV 5343, 94 CV 0649, 1995 WL 432608 (E.D.N.Y. July 12, 1995) (suit by physicians against former employee radiologist, who had listened to their phone calls at the office).

52. *Smith* v. *City of Hartford*, No. X07CV 980070792S, 2000 WL 1058877 (Conn. Super. Jul. 14, 2000) (city, firefighters union, and others allegedly used radio scanner to intercept and record plaintiff's calls).

53. *Spetalieri* v. *Kavanaugh*, 36 F. Supp. 2d 92 (N.D.N.Y. 1998) (suit by police administrator against individual who used scanner to intercept and record plaintiff's phone conversation, and against employer that, after receiving the tapes, used them to investigate and discipline plaintiff).

54. *Thompson* v. *Dulaney*, 838 F. Supp. 1535 (D. Ut. 1993) (suit against former wife, her parents, her expert witnesses, and her lawyers where ex-wife taped ex-husband's phone conversations with their children for use in divorce proceedings).

55. *Weeks* v. *Union Camp Corp.*, 215 F.3d 1323 (Table) (suit by employees against former employer, who had relied on tape of illegally intercepted conversation to dismiss them; tape of conversation had been made when another employee concealed a tape recorder in the workplace, near plaintiffs, in order to intercept their conversations).

56. *Wesley College* v. *Pitts*, 974 F. Supp. 375 (D. De. 1997) (suit by college against former clerical employee, former faculty member, and current faculty member, where college president was sent unmarked envelope containing hard copies of sensitive e-mails the president had authored).

57. *Williams* v. *Poulos*, 11 F.3d 271 (1st Cir. 1993) (granting injunction against further use or disclosure of illegally intercepted calls where owners of company in bankruptcy had recorded employee phone calls, including calls made by officers of venture capital group taking over the bankrupt company, and then used information in the tapes for litigation purposes).

58. *United States* v. *Anaya*, 779 F.2d 532 (9th Cir. 1985) (prosecution of police officers for placing a bug and recording the proceedings of a closed executive session of the city council).

59. *United States* v. *Harpel*, 493 F.2d 346 (10th Cir. 1974) (prosecution of police officer for twice playing—for certain individuals in a bar—recording of an illegally intercepted conversation between other law enforcement officers; evidence insufficient to establish who had made the illegal recording in the first instance).

60. *United States* v. *Jones*, 580 F.2d 219 (6th Cir. 1978) (prosecution for illegal interception and use of estranged wife's calls).

61. *United States* v. *Landrum*, 93 F.3d 122 (4th Cir. 1996) (suit by prisoner seeking collateral relief after he was convicted of, among other things, intercepting his wife's phone calls and using the contents in violation of Sections 2511(1)(a) and (c)).

62. *United States* v. *Newman*, 476 F.2d 733 (3d Cir. 1973) (affirming conviction and sentence of former city councilman who willfully procured a phone company employee to illegally intercept and record the phone calls of his opponents so as to provide him with politically useful information regarding their plans).

63. *Zerilli* v. *Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980) (dismissing suit against law enforcement agents and newspaper where the agents allegedly had disclosed, and the newspaper published articles based on, the contents of communications intercepted by bugging devices in the early 1960s; interceptions pre-dated Title III's enactment).