No. 99-1728

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDERICK W. VOPPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the imposition of civil liability under 18 U.S.C. 2511(1)(c) and (d) for using or disclosing the contents of illegally intercepted communications, where the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner United States of America appeared as an intervenor of right in the court of appeals pursuant to 28 U.S.C. 2403(a). Respondents Frederick W. Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; Lackazerne, Inc., d/b/a WGBI Radio; and Jack Yocum were defendants in the district court and appellants in the court of appeals. Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., were plaintiffs in the district court and appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-58a) is reported at 200 F.3d 109. The opinions and orders of the district court (App., *infra*, 59a-68a, 69a, 70a-74a, 75a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1999. The petitions for rehearing were denied on February 25, 2000 (App., *infra*, 82a-83a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and the relevant provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.*, are set forth in the Appendix at App., *infra*, 84a-91a.

STATEMENT

1. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.* (Title III), is a "comprehensive scheme for the regulation of wiretapping and electronic surveillance," *Gelbard* v. *United States*, 408 U.S. 41, 46 (1972), and is designed to "protect effectively the privacy of wire and oral communications." Pub. L. No. 90-351, Tit. III, § 801(b), 82 Stat. 211 (Congressional findings). See also S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968) (1968 Senate Report); *Gelbard*, 408 U.S. at 48.

a. Consistent with that goal, Title III broadly prohibits the interception of wire, oral, and electronic communications except where authorized under Title III itself. 18 U.S.C. 2511(1)(a). It also sets forth the procedures that must be employed, and the substantive criteria that must be met, before a wiretap or other form of electronic surveillance may be authorized under Title III. 18 U.S.C. 2516, 2518 (1994 & Supp. IV 1998). See also 18 U.S.C. 2511(2).

As enacted in 1968, Title III applied only to wire and oral communications. See Tit. III, § 802, 82 Stat. 212. In 1986, however, Congress amended Title III to cover the electronic transmission of non-voice data such as electronic mail and other Internet communications, see 18 U.S.C. 2510(12) (1994 & Supp. IV 1998), and to clarify that Title III extends to communications on cel-

lular and other wireless telephone systems, see 18 U.S.C. 2510(1). See also Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848; S. Rep. No. 541, 99th Cong., 2d Sess. 1-3, 7-8, 11 (1986).[1]

b. Because the interception of communications is generally a surreptitious and difficult-to-detect enterprise, the fact or source of such an invasion "[a]ll too often * * * will go unknown." 1968 Senate Report 69; see also *id.* at 96 ("[U]nlawful electronic surveillance is typically a clandestine crime."). In part for that reason, Congress determined that merely prohibiting unauthorized surveillance itself would not be sufficient. *Id.* at 69. Instead, Congress concluded that "[o]nly by striking at all aspects of the problem can privacy be adequately protected." *Ibid.*

Accordingly, Congress accompanied the prohibition on unauthorized interceptions with restrictions on the use of the fruits of such invasions. 1968 Senate Report 69. See, *e.g.*, 18 U.S.C. 2515 (unlawfully intercepted communications inadmissible as evidence). Section 2511(1)(c) makes it unlawful for any person to "intentionally disclose[], or endeavor[] to disclose, to any other person the contents of any wire, oral, or electronic communication" if the person "know[s] or ha[s] reason to know" that it "was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." Section 2511(1)(d)

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[1] Before the 1986 amendments, it was unsettled whether Title III's definition of "wire communication" reached the radio portion of cellular telephone communications. See, *e.g.*, *Edwards* v. *State Farm Ins. Co.*, 833 F.2d 535, 538 (5th Cir. 1987). ECPA makes it clear that Congress intended to bring cellular phone communications within the ambit of Title III. *Shubert* v. *Metrophone, Inc.*, 898 F.2d 401, 404-405 (3d Cir. 1990).

makes it unlawful for any person with the same knowledge or reason to know to "intentionally use[], or endeavor[] to use, the contents of any wire, oral, or electronic communication." Title III thus proscribes *all* unauthorized uses of the contents of illegally intercepted communications, including but not limited to their disclosure, by persons knowing or having reason to know of their unlawful source.

Violations of Title III may be prosecuted as criminal offenses or result in the imposition of civil fines. 18 U.S.C. 2511(4) and (5). Title III also provides a private cause of action for any person whose communication is intercepted, disclosed, or used in violation of the statute. 18 U.S.C. 2520(a). In a civil action under Title III, a court may award such "relief as may be appropriate," including declaratory and injunctive relief, compensatory damages or prescribed statutory damages, and punitive damages "in appropriate cases." 18 U.S.C. 2520(b) and (c).

2. This case arises out of the illegal interception of a private telephone conversation between Gloria Bartnicki, the chief negotiator for a Pennsylvania teachers union, and Anthony Kane, the union's president. The union was engaged in contract negotiations with a local school board, and Bartnicki and Kane held a confidential telephone conversation in which they discussed the status of the negotiations. Bartnicki used a cellular telephone. App., *infra*, 3a.

An unknown person illegally intercepted the conversation, recorded it, and anonymously delivered a copy of the recording to respondent Jack Yocum. Yocum was president of a local taxpayers association formed for the purpose of opposing the union's bargaining demands. App., *infra*, 3a. Yocum listened to the recording, which contained inflammatory remarks regarding the school

board, and recognized the voices of Bartnicki and Kane. *Ibid.* He then gave the recording to respondent Frederick Vopper, the host of a local radio talk show. *Id.* at 3a-4a. Apparently, respondent Vopper retained the tape for over a month, *id.* at 55a-56a n.6 (Pollak, J., dissenting), but eventually played it on his program repeatedly, *id.* at 4a. That program was broadcast by two local radio stations, respondent station WILK and respondent station WGBI. *Ibid.*

Bartnicki and Kane brought a civil action in the United States District Court for the Middle District of Pennsylvania against respondents Yocum and Vopper, as well as the respondent radio stations, under Title III, 18 U.S.C. 2520, and a parallel provision of Pennsylvania law, 18 Pa. Cons. Stat. Ann. §§ 5701 *et seq.* (West 1983). Bartnicki and Kane asserted that respondents had disclosed and used the taped conversation, knowing or having reason to know that it was intercepted unlawfully, in violation of 18 U.S.C. 2511(1)(c) and (d), and in violation of corresponding provisions of Pennsylvania law, 18 Pa. Cons. Stat. Ann. § 5725 (West 1983 & Supp. 1999).

Respondents sought summary judgment, arguing that application of Title III (and the Pennsylvania electronic eavesdropping statute) to their actions would violate the First Amendment. They asserted that, where a private conversation is illegally intercepted or recorded through electronic eavesdropping devices, third parties have a constitutional right to disclose the contents of that conversation *if* they were not responsible for the initial interception and the conversation is deemed to involve matters of public significance. App., *infra*, 65a; see also *id.* at 74a. According to respondents, statutes that, like Title III, impose liability for such disclosures are subject to strict scrutiny and are

invalid under the First Amendment as applied here. *Id.* at 65a.

The district court denied the motion, holding, *inter alia*, that the application of Title III to respondents does not violate the First Amendment. App., *infra*, 65a-67a, 74a. The district court later certified the First Amendment issue for interlocutory appeal under 28 U.S.C. 1292(b), App., *infra*, 75a-76a, and respondents filed a petition for interlocutory review, *id.* at 5a.

3. Following oral argument on respondents' interlocutory appeal, the court of appeals notified the Attorney General that the constitutionality of the application of 18 U.S.C. 2511(1)(c) and (d) to the facts of this case was at issue and invited the United States to present its views. App., *infra*, 77a-79a; see 28 U.S.C. 2403(a).[2] The United States intervened and filed a brief to defend those provisions. App., *infra*, 5a.

A divided panel of the court of appeals reversed. App., *infra*, 1a-58a. The court stated: "At issue is whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants * * * played no direct or indirect role in the interception." *Id.* at 2a. The court of appeals agreed with the United States that 18 U.S.C. 2511(1)(c) and (d), and the corresponding provisions of Pennsylvania law, are subject to intermediate rather than strict

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[2] Under 28 U.S.C. 2403(a), federal courts are required to notify the Attorney General when the constitutionality of an Act of Congress is drawn into question in a federal suit to which the United States is not a party; and they are required to permit the United States to intervene "with all the rights of a party" to defend the constitutionality of the statute.

scrutiny. App., *infra*, 17a-28a.[3] The court explained that, to the extent those provisions are designed to reinforce the underlying prohibition on unauthorized interceptions, they "are properly treated as content neutral." *Id.* at 28a. The court, concluded, however, that those provisions do not satisfy intermediate scrutiny when applied to "the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged th[e] interception." *Id.* at 42a.

The court of appeals rejected the government's contention that Title III's bar on the use and dissemination of illegally intercepted conversations is necessary to diminish the demand for such materials. App., *infra*, 33a-36a. "The connection between prohibiting third parties from using or disclosing" such communications and "preventing the initial interception," the court of appeals stated, was too "indirect." *Id.* at 33a. The government's interest in protecting privacy and ensuring public confidence, the court of appeals found, "can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants." *Id.* at 35a. Finally, the court expressed concern that the media might be deterred from publishing material not obtained in violation of Title III by the possibility of liability where the information's origin is unclear. *Id.* at 36a.

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[3] The court of appeals rejected respondents' claim that *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), require the application of strict scrutiny. Those cases, the court held, expressly decline to address the constitutionality of laws that, like Title III, proscribe the dissemination of a communication that "has been acquired *unlawfully* by a newspaper or [by] a source." App., *infra*, 13a (quoting *Florida Star*, 491 U.S. at 535 n.8).

Judge Pollak (Senior D.J., sitting by designation) dissented. App., *infra*, 42a-58a. Judge Pollak agreed with the majority's conclusion that intermediate scrutiny is appropriate, but he "part[ed] company" with the majority on the proper application of that standard to Title III. *Id.* at 47a (Pollak, J., dissenting). He explained: "Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an unlawful interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping." *Id.* at 50a-51a (quoting *Boehner* v. *McDermott*, 191 F.3d 463, 470 (D.C. Cir. 1999)). Judge Pollak concluded that the "First Amendment values on which [respondents] take their stand are countered by privacy values sought to be advanced by Congress and the Pennsylvania General Assembly that are of comparable—indeed kindred—dimension." App., *infra*, 58a.

The United States and the plaintiffs filed petitions for rehearing en banc. The court denied rehearing en banc by a 6-5 vote; Judges Greenberg, Scirica, Nygaard, Alito, and Rendell would have granted rehearing en banc. App., *infra*, 82a-83a.

REASONS FOR GRANTING THE PETITION

The court of appeals has invalidated, as contrary to the First Amendment, a significant application of Title III's "comprehensive scheme," *Gelbard* v. *United States*, 408 U.S. 41, 46 (1972), for protecting the privacy of, and ensuring public confidence in the facilities used for, wire, oral, and electronic communications. Under 18 U.S.C. 2511(1)(c) and (d), it is unlawful for any person to use or disclose the contents of a communication intercepted in violation of Title III, if that person

knows or has reason to know that the communication was intercepted unlawfully. The court of appeals held those provisions unconstitutional as applied to anyone who did not participate in or encourage the initial illegal interception if the intercepted communication relates to a matter of public significance. App., *infra*, 37a, 42a.

That conclusion is wrong. It is also inconsistent with the decision in *Boehner* v. *McDermott*, 191 F.3d 463 (D.C. Cir. 1999), which rejected an almost indistinguishable constitutional challenge. The Third Circuit's decision here, moreover, calls into question the constitutionality of numerous state statutes that contain prohibitions like those contained in Title III. And it undermines the comprehensive scheme Congress established to ensure public confidence in the security of private conversations. This Court's review is therefore warranted.[4]

1. The fundamental purpose of Title III is to protect the privacy of wire, oral, and electronic communications. Title III's restriction on the use of illegally intercepted communications, contained in 18 U.S.C. 2511(1)(c) and (d), furthers that legislative goal in at least two ways. First, it reinforces Title III's underlying prohibition on electronic surveillance, 18 U.S.C. 2511(1)(a). Because no one can lawfully disclose or otherwise use a communication he knows to be the product of illegal wiretapping, there can be no "market" for illegally intercepted communications. Title III thus

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[4] The plaintiffs below have filed a petition for a writ of certiorari seeking review of the judgment of the court of appeals. *Bartnicki* v. *Vopper*, No. 99-1687 (filed Apr. 19, 2000). The defendant in *Boehner* v. *McDermott* has filed a petition for a writ of certiorari seeking review of the District of Columbia Circuit's decision in that case. See *McDermott* v. *Boehner*, No. 99-1709 (filed Apr. 25, 2000).

reduces the incentive to engage in unlawful wiretapping (and other prohibited forms of electronic surveillance) in the first instance. See *Boehner*, 191 F.3d at 469-470; *Fultz* v. *Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991) (18 U.S.C. 2511(1)(c) and (d) "strengthen[s] [Section 2511(1)(a)] by denying the wrongdoer the fruits of his conduct").

Second, when illegal surveillance does take place, the challenged provisions protect against the additional injury that occurs when the contents of intercepted communications are exploited by third parties. As this Court has observed, an "invasion of privacy is [not] over and done with" when a communication is intercepted, but instead is compounded when the communication is disclosed or otherwise used without the permission of the parties to the conversation. *Gelbard*, 408 U.S. at 51-52.

The use-and-disclosure prohibitions of Title III thus offer members of the public the assurance that they can speak freely with one another through private means —whether by telephone or in person in the privacy of their homes—without having their confidential conversations disclosed or otherwise exploited by unknown persons. The provisions thus further the fundamental interest in "the free exchange of ideas enshrined in the First Amendment." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 686 (1989).

a. As the Third Circuit here and the District of Columbia Circuit in *Boehner*, *supra*, both recognized, when Title III's restrictions are applied to the disclosure of illegally intercepted communications by persons other than the individuals who intercepted them, they are subject to intermediate rather than strict scrutiny under the First Amendment. App., *infra*, 28a; *Boehner*, 191 F.3d at 467. Two features of Section

2511(1)(c) and (d) support that conclusion. First, Title III does not single out speech or other expressive activities, but rather establishes a general prohibition on the use of illegally intercepted communications; that prohibition includes, but is not confined to, expressive uses like disclosure. *Boehner*, 191 F.3d at 467-468. See *United States* v. *O'Brien*, 391 U.S. 367 (1968).[5] Second, Title III is content-neutral. It does not predicate liability on "the[] content" of the intercepted communications, "but instead [on] the *process* by which they are collected." *Lam Lek Chong* v. *United States DEA*, 929 F.2d 729, 733 (D.C. Cir. 1991) (emphasis added). Where a communication is acquired through illegal electronic surveillance, Title III bars disclosure and other uses, regardless of subject matter or viewpoint.

Title III's use prohibitions thus are not the product of the government's "agreement or disagreement with the message" conveyed. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642-643 (1994) (brackets omitted). Nor do they reflect a legislative desire to conceal from the public information on particular subjects. Instead, because Title III contains "generally applicable, content neutral prohibitions on conduct that create incidental burdens on speech," *Boehner*, 191 F.3d at 467, it falls squarely within the ambit of this Court's intermediate

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[5] Title III's ban on the use of illegally intercepted communications thus applies with equal force whether the defendant uses the communication for wholly non-expressive purposes, 18 U.S.C. 2511(1)(d), such as trading stocks or developing a new product, see, *e.g.*, 1968 Senate Report 69 (use of intercepted communications regarding trade secrets or corporate and labor-management transactions); *Fultz*, 942 F.2d at 400 n.4 (extortion); *Dorris* v. *Absher*, 959 F. Supp. 813, 815-817 (M.D. Tenn. 1997) (workplace discipline), or instead uses it for expressive purposes such as publication, 18 U.S.C. 2511(1)(c).

scrutiny precedents. See *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) ("If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien*," but "[i]f the government interest is related to the content of the expression, * * * then the regulation falls outside the scope of the *O'Brien* test."); *Turner*, 512 U.S. at 661 (provisions subject to intermediate scrutiny where they "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny").

Under the intermediate scrutiny framework of *O'Brien*, a statute's application is constitutional if the statute "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377; *Turner*, 512 U.S. at 662. Title III meets that test.[6] Its underlying goal of protecting and maintaining the confidentiality of wire, oral, and electronic communications is manifestly legitimate and substantial, and unrelated to "the suppression of free expression." See *Boehner*, 191 F.3d at 468. By barring the use of unlawfully intercepted communications, Section 2511(1)(c) and (d) reinforces Title III's prohibition on illicit surveillance and protects against the additional injury that arises when illegally intercepted information is put to unauthorized uses. 191 F.3d at 468-469. The statute thereby promotes free

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[6] Even if strict scrutiny were applicable, Title III's prohibitions would pass constitutional muster.

expression by assuring individuals that the law will protect the confidentiality of their private conversations. In addition, Title III's use restrictions are not unnecessarily broad. They apply only to those who know or have reason to know of the unlawful source. And only by comprehensively prohibiting such uses of illegally intercepted communications can the interests served by Title III be vindicated. 191 F.3d at 470; p. 3, *supra* (legislative findings).

b. The Third Circuit's rationale for concluding that Section 2511(1)(c) and (d) fails intermediate scrutiny is unsound. That court believed that the proposition that Title III's use-and-disclosure restrictions deter unlawful interceptions, by curtailing the incentive to conduct them in the first instance, is an "ipse dixit" that rests on "little more than assertion and conjecture." App., *infra*, 33a-34a. But the same logic has long been accepted as a justification for statutes that prohibit the knowing possession and sale of stolen property. See, *e.g.*, *United States* v. *Gardner*, 516 F.2d 334, 349 (7th Cir.), cert. denied, 423 U.S. 861 (1975); *United States* v. *Bolin*, 423 F.2d 834, 838 (9th Cir.), cert. denied, 398 U.S. 954 (1970). This Court itself relied on a similar rationale in *New York* v. *Ferber*, 458 U.S. 747, 760 (1982), where it held that "[t]he most expeditious if not the only practical method" of effectuating a ban on the production of child pornography "may be to dry up the market for this material" by imposing sanctions on possession, advertising, and distribution.[7] The court of appeals also

[7] Given the immediate connection between the use-and-disclosure restrictions and their effect on incentives to conduct illegal interceptions, and this Court's recognition of similiar connections in cases such as *Ferber* and *Osborne* v. *Ohio*, 495 U.S. 103, 110 (1990), the government does not need to provide evidentiary "proof" for the obvious proposition that more surveillance will take

erred in failing to take into account the function of the use-and-disclosure ban in preventing aggravation of the initial invasion of privacy. See *Gelbard*, 408 U.S. at 51-52. The court apparently discounted that purpose because of its view that preventing "the injury associated with the disclosure of private facts" is an interest that would make the provisions at issue "subject to strict scrutiny as a content-based regulation." App., *infra*, 27a. But the use-or-disclosure ban protects the privacy of communications based on the means by which they were unlawfully acquired; it contains no content criteria at all.

The court of appeals likewise erred in its suggestion that the objectives of the statute "can be reached by enforcement of existing provisions against the responsible parties," *i.e.*, by punishing only the persons who engage in illegal wiretapping and electronic surveillance. App., *infra*, 35a. That is not a practicable option. By its very nature, electronic surveillance is a surreptitious enterprise. One who employs unlawful wiretaps can effectively insulate himself from liability by conveying the intercepted communication to third parties anonymously. As the District of Columbia Circuit has pointed out, criminals who bug residences, intercept and record private phone calls, and engage in other forms of unlawful electronic surveillance "can literally launder illegally intercepted information." *Boehner*, 191 F.3d at 471. In this very case neither the private plaintiffs nor the United States can enforce Title III

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place if eavesdroppers enjoy an unrestricted market for the fruits of their labors. Cf. *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 906 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

against the party responsible for the illegal interception because that party is unknown. "[E]nforcement of existing provisions against the responsible parties," App., *infra*, 35a, is therefore insufficient to deter illegal surveillance. Instead, as Congress recognized when it enacted Title III, "[o]nly by striking at all aspects of the problem can privacy be adequately protected." 1968 Senate Report 69. Accord *Boehner*, 191 F.3d at 471 (invalidation of Section 2511(1)(c) would "render the government powerless to prevent disclosure of private information" because criminals can both intercept and disclose communications anonymously).

The court of appeals expressed concern that the threat of liability under Title III might deter the news media from disseminating the contents of communications that were *not* illegally intercepted. App., *infra*, 36a-37a. In light of Title III's scienter requirements, however, that "chilling" concern is overstated. Liability attaches under 18 U.S.C. 2511(1)(c) and (d) only when a defendant "know[s] or ha[s] reason to know" that the communication was intercepted in violation of Title III. Thus, the recipient who knows or ignores evidence that the proffered information was obtained unlawfully may face liability; but the party without such knowledge or reason to know does not—even if the communication in fact was illegally intercepted.[8]

2. The Third Circuit's decision in this case is inconsistent with the District of Columbia Circuit's recent

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[8] To the extent there may be remaining concerns about the potential chilling effect of the statute, those concerns can be addressed by, for example, requiring clear and convincing proof in a civil case and providing for de novo appellate review—approaches applied in other First Amendment settings. See App., *infra*, 56a-57a (Pollak, J., dissenting); see generally *Waters* v. *Churchill*, 511 U.S. 661, 669-671 (1994) (plurality opinion).

decision in *Boehner*, *supra*, which rejected a virtually identical First Amendment challenge to the constitutionality of 18 U.S.C. 2511(1)(c) and a parallel Florida statute. In *Boehner*, the District of Columbia Circuit, like the Third Circuit in this case, subjected Section 2511(1)(c) to intermediate scrutiny. 191 F.3d at 466-467. But, unlike the Third Circuit, the District of Columbia Circuit concluded that Section 2511(1)(c) could constitutionally be applied to the non-media defendant in that case, who had disclosed the contents of intercepted conversations concerning matters of public interest, even though he did not participate in the initial interception. See 191 F.3d at 467-470. See also *id.* at 480 (Ginsburg, J., concurring) ("I agree that the statute passes [intermediate scrutiny] for the reasons given in the opinion for the Court.").

The court of appeals in this case attempted to distinguish *Boehner*, pointing out that *Boehner* did not involve media defendants, whereas this case does. App., *infra*, 40a; 191 F.3d at 407, 477-478 (reserving the issue of media liability). That difference does not distinguish *Boehner*, however. As the Third Circuit acknowledged, respondent Yocum in this case is not a media defendant. To the contrary, he "technically * * * stands in the same position as" the defendant in *Boehner*, *i.e.*, as a non-press defendant who served "as the source but not the interceptor." App., *infra*, 40a. See also *id.* at 46a n.3 (Pollak, J., dissenting) (respondent Yocum's role "seems analogous to that of" the *Boehner* defendant); *id.* at 37a n.7 (Pollak, J., dissenting) (presence of media respondents in this case does not enhance non-media respondent Yocum's rights). In any event, the court in *Boehner* stated that "the press has no greater First Amendment rights than

anyone else." 191 F.3d at 477 n.20; accord, *id.* at 483 (Sentelle, J. dissenting).

The Third Circuit also suggested that respondent Yokum was not similarly situated to the individual defendant in *Boehner* because that defendant (Representative James McDermott) may have been "more than an innocent conduit" at the time he received the illegally recorded tape from those who conducted the interception. App., *infra*, 40a. But neither individual defendant (Yokum or McDermott) was alleged to have had "participated in or encouraged that [unlawful] interception"—the Third Circuit's own criteria for removing First Amendment protection (*id.* at 42a)—and both defendants were alleged to have had knowledge or reason to know of the illegal interception at the time of the challenged use or disclosure. There is thus no sound basis in the facts of the two cases to justify their divergent outcomes. Where, as here, courts of appeals have reached different conclusions regarding the constitutionality of the application of an Act of Congress to materially indistinguishable facts, this Court's intervention is warranted.

3. The court of appeals' decision addresses an important and unresolved issue of constitutional law. This Court has never squarely decided "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." *Florida Star* v. *B.J.F.*, 491 U.S. 524, 535 n.8 (1989) (emphasis added); *Boehner*, 191 F.3d at 472-473 (Randolph, J.) (explaining that the Court's cases "do not 'settle'" the issue); App., *infra*, 13a-14a (similar). In *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979), this Court did state that the application of statutes to punish the disclosure of "law-

fully obtained," truthful information of public significance generally must be justified by a state interest of the highest order. But in *Florida Star*, this Court clarified that Congress and the States may, to protect the privacy of confidential information held by private parties, "under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Florida Star*, 491 U.S. at 534. The challenged provisions of Title III do precisely that, *i.e.*, they regulate the use of *unlawfully* intercepted communications.

Where this Court has invalidated statutes barring the publication of truthful information, the statutes not only extended to information that was "lawfully obtained" in the first instance, but also targeted speech, on the basis of its subject matter, in order to foreclose public knowledge of a particular type of information. See, *e.g.*, *Florida Star*, 491 U.S. at 534 (prohibition on publication of the names of victims of sexual assault); *Daily Mail*, 443 U.S. at 99 (identity of juvenile charged as an offender in West Virginia courts). And those cases involved information that either came from the government itself, *Florida Star*, 491 U.S. at 534 (information provided by police), or concerned governmental proceedings, *Daily Mail*, 443 U.S. at 99 (charging of juvenile in West Virginia courts). See also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838-839 (1978) (publication bar with respect to judicial discipline proceedings). Title III, in contrast, is limited to the contents of communications that were illegally obtained; it prohibits all uses of such communications, rather than singling out expression or publication; it does not predicate liability on content or subject matter; it does not seek to suppress public knowledge

about particular issues or subjects; and it is not aimed at information from or concerning the government. This Court should determine whether such a statute is constitutional.

The constitutionality of Title III and statutes like it is a matter of considerable import. Forty-four States and the District of Columbia have laws that, like Title III and the Pennsylvania statute at issue here, bar "not only the interception of electronic communications, but also the disclosure of those communications by persons acting under color of law." *Boehner*, 191 F.3d 468 n.6; see App., *infra*, 53a & n. 5 (Pollak, J., dissenting) (noting numerous statutes that "closely parallel the provisions of" Title III, and declaring that "in the two centuries of our constitutional history there cannot have been more than a handful of decisions * * * which, in the exercise of the awesome power of judicial review, have cut so wide a swath"). Similar First Amendment challenges are being pursued in at least two other pending cases: *Peavy* v. *WFAA TV, Inc.*, No. 99-10272 (5th Cir. argued Apr. 3, 2000), and *Quigley* v. *Rosenthal*, No. 94-N-2782 (D. Colo.). And the volume of communications affected by those statutes and the Third Circuit's decision is rapidly increasing. As the technologies for carrying private communications proliferate and their usage increases, so too have the means that can be used to intercept them.[9]

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[9] Electronic mail over the Internet and wireless telephone usage have both experienced exponential growth in recent years. Because cellular handsets send and receive encoded radio signals that can be intercepted and deciphered "by regular radio scanners modified to intercept cellular calls," calls made on such handsets are easier to intercept than those made on traditional, wireline telephones. *Shubert* v. *Metrophone, Inc.*, 898 F.2d 401, 405 (3d Cir. 1990). Electronic mail transmitted over the Internet is likewise

The Third Circuit's decision decreases the security of such means of communications. Under that decision, individuals must communicate at the risk that, if their conversation is unlawfully intercepted, anyone other than the wiretapper himself is free to disclose the contents of the conversation to the world. Without assurances that the law will effectively protect the confidentiality of their conversations, members of the public may be less willing to take advantage of the means of communication that are increasingly at their disposal.

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subject to unlawful interception by surreptitious means. See, *e.g.*, "Security of the Internet," 15 *Encyclopedia of Telecommunications* 231, 236, 242 (Fritz E. Froehlich & Allen Kent eds. 1998); CERT Coordination Center, Software Engineering Institute, Carnegie Mellon University, *Report to the President's Commission on Critical Infrastructure Protection* § 3.1.3 (Jan. 1997) ("Information (such as electronic mail * * * and other data) is sent from one computer to another [on the Internet] in a form easily readable by anyone connected to a part of the network joining the two systems together.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 98-7156

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS;
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO;
LACKAZERNE INC., D/B/A WGBI RADIO; JANE DOE;
JOHN DOE; JACK YOCUM

FREDERICK W. VOPPER,
A/K/A FRED WILLIAMS; KEYMARKET OF NEPA, INC.,
D/B/A WILK RADIO; LACKAZERNE, INC., D/B/A WGBI
RADIO; JACK YOCUM, APPELLANTS,

UNITED STATES OF AMERICA, INTERVENOR.

[Argued: Oct. 5, 1998.
Decided: Dec. 27, 1999]

Before: SLOVITER and COWEN, Circuit Judges, and POLLAK,* District Judge

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* Hon. Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

At issue is whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants, two radio stations, their reporter, and the individual who furnished the tape recording, played no direct or indirect role in the interception.

I.

BACKGROUND

A.

From the beginning of 1992 until the beginning of 1994, Wyoming Valley West School District was in contract negotiations with the Wyoming Valley West School District Teachers' Union (the "Teachers' Union") over the terms of the teachers' new contract. The negotiations, which were markedly contentious, generated significant public interest and were frequently covered by the news media.

Plaintiffs Gloria Bartnicki and Anthony F. Kane, Jr., as well as defendant Jack Yocum, all were heavily involved in the negotiating process. Bartnicki was the chief negotiator on behalf of the Teachers' Union. Kane, a teacher at Wyoming Valley West High School, served as president of the local union. Yocum served as pres-

ident of the Wyoming Valley West Taxpayers' Association, an organization formed by local citizens for the sole purpose of opposing the Teachers' Union's proposals.

In May of 1993, Bartnicki, using her cellular phone, had a conversation with Kane. They discussed whether the teachers would obtain a three-percent raise, as suggested by the Wyoming Valley West School Board, or a six-percent raise, as suggested by the Teachers' Union. In the course of their phone conversation, Kane stated:

> If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys . . . . Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, 'we'll meet and discuss this.' You don't discuss the items in public.

App. at 35-36. Bartnicki responded, "No," and, Kane continued, "You don't discuss this in public . . . . Particularly with the press." App. at 36.

This conversation, including the statements quoted above, was intercepted and recorded by an unknown person, and the tape left in Yocum's mailbox. Yocum retrieved the tape, listened to it, and recognized the voices of Bartnicki and Kane. He then gave a copy of

the tape to Fred Williams, also known as Frederick W. Vopper, of WILK Radio and Rob Neyhard of WARM Radio, both local radio stations. Williams repeatedly played part of the tape on the air as part of the Fred Williams Show, a radio news/public affairs talk show which is broadcast simultaneously over WILK Radio and WGBI-AM. The tape was also aired on some local television stations and written transcripts were published in some newspapers.

B.

Bartnicki and Kane sued Yocum, Williams, WILK Radio, and WGBI Radio (hereafter "media defendants") under both federal and state law. They based their federal claims on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 28 U.S.C. § 2510 *et seq.*, and their state claims on the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5701 *et seq.* As relief, Bartnicki and Kane sought (1) actual damages in excess of $50,000, (2) statutory damages under 18 U.S.C. § 2520(c)(2), (3) liquidated damages under 18 Pa. Cons. Stat. § 5725(a)(1), (4) punitive damages, and (5) attorneys' fees and costs.

Bartnicki, Kane, and the defendants each moved for summary judgment. The District Court denied these motions on June 14, 1996 and denied defendants' motion to reconsider on November 8, 1996, specifically holding that imposing liability on the defendants would not violate the First Amendment.

The District Court subsequently certified two questions as controlling questions of law: "(1) whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape on the Defendant Fred Williams' radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of the Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping statutes] on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment." App. at 388. Williams, WILK Radio, and WGBI Radio subsequently petitioned for permission to appeal. Yocum filed an answer to the petition in which he joined the media defendants' request that we hear this appeal. We granted the petition by order dated February 26, 1998. The Pennsylvania State Education Association submitted a brief as *amicus curiae* in support of the appellees, and the United States has intervened as of right pursuant to 28 U.S.C. § 2403.

C.

The District Court had jurisdiction to consider claims based on the Omnibus Crime Control and Safe Streets Act of 1968 pursuant to 28 U.S.C. § 1331. It had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to consider claims based on the Pennsylvania Wiretapping and Electronic Surveillance Control Act. We have appellate jurisdiction to review the District Court's substantive determination pursuant to 28 U.S.C. § 1292(b).

The scope of our review in a permitted interlocutory appeal is limited to questions of law raised by the underlying order. We are not limited to answering the questions certified, however, and may address any issue necessary to decide the appeal. *See Dailey v. National Hockey League*, 987 F.2d 172, 175 (3d Cir. 1993).

We review the grant or denial of a motion for summary judgment de novo. *See H.K. Porter Co. v. Pennsylvania Ins. Guaranty Ass'n*, 75 F.3d 137, 140 (3d Cir. 1996). We are "required to apply the same test the district court should have utilized initially," to view inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion, and to take the non-movant's allegations as true whenever these allegations conflict with those of the movant. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976).

D.

The Federal Omnibus Crime Control and Safe Streets Act of 1968 (the "Federal Wiretapping Act") provides in relevant part:

> (1) Except as otherwise specifically provided in this chapter any person who—
>
> . . . . .
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the inter-

> ception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511. It continues:

> (a) **In general**.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in the violation such relief as may be appropriate.

18 U.S.C. § 2520. The Federal Wiretapping Act thus creates civil and criminal causes of action against those who intentionally use or disclose to another the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained in violation of the statute.

The Pennsylvania Wiretapping and Electronic Surveillance Control Act (the "Pennsylvania Wiretapping Act") is similar. It provides:

> Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

. . . . .

> (2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or
>
> (3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication.

18 Pa. Cons. Stat. § 5703. It further provides:

> (a) Cause of action.—Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication . . . .

18 Pa. Cons. Stat. § 5725. The Pennsylvania Wiretapping Act thus also creates civil and criminal causes of action based on the knowing or negligent use or disclosure of illegally intercepted material. We refer to the federal and state statutes at issue here as "The Wiretapping Acts."

Both Acts also explicitly authorize the recovery of civil relief. The Federal Wiretapping Act provides that a court may assess as damages whichever is the greater of—

> (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
>
> (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

18 U.S.C. § 2520(c)(2). The Pennsylvania Wiretapping Act specifies that a successful plaintiff shall be entitled to recover from any such person:

> (1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher.
>
> (2) Punitive damages.
>
> (3) A reasonable attorney's fee and other litigation costs reasonably incurred.

18 Pa. Cons. Stat. § 5725(a).

II.

DISCUSSION

A.

As the District Court acknowledged and the parties do not dispute, the media defendants neither intercepted nor taped the conversation between Bartnicki and Kane. Indeed, the record does not disclose how or by whom the conversation was intercepted. The media

defendants argued before the District Court that these facts preclude a court from finding them liable under the Wiretapping Acts. The District Court disagreed. It concluded that, "a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception." *Bartnicki v. Vopper*, No. 94-1201, slip op. at 5 (M.D. Pa. June 17, 1996). It further opined that such an interpretation of the statute "adheres to the purpose of the act which was to protect wire and oral communications and an individual's privacy interest in such." *Id.* The District Court concluded that genuine disputes of material fact remain regarding (1) whether the Bartnicki-Kane conversation was illegally intercepted, and if so (2) whether any or all of the defendants knew or had reason to know that that conversation was illegally intercepted. *See id.* at 5, 10. The parties do not challenge these holdings on appeal.

Hence, this case does not involve the prohibitions of the Wiretapping Acts against the actual *interception* of wire communications. Nor does it involve any application of the Acts' criminal provisions. Rather, this case focuses exclusively on the portions of the Wiretapping Acts that create causes of action for civil damages against those who use or disclose intercepted communications and who had reason to know that the information was received through an illegal interception.

The defendants argue that applying the damages provision of the Wiretapping Acts to hold them liable for disclosing the Bartnicki-Kane conversation violates the First Amendment. They contend that this case is

controlled by the Supreme Court's decisions in a series of cases addressing the tension between the First Amendment and the right to privacy.

In the first of these cases, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed.2d 328 (1975), the Court considered a private right of action created by a Georgia statute making it a "misdemeanor to publish or broadcast the name or identity of a rape victim." *Id.* at 472, 95 S. Ct. 1029. The Court was asked to decide whether Georgia could impose civil liability on a television broadcasting company, among others, for accurately broadcasting the name of a deceased, 17-year-old rape victim where the reporter obtained the information from official court records open to public inspection.

In the next case, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L.Ed.2d 1 (1978), the Court reviewed a Virginia statute that both provided for the confidentiality of judicial disciplinary proceedings and made it unlawful to divulge the identity of a judge subject to such proceedings prior to the filing of a formal complaint with the state's highest court. The Supreme Court was asked to decide whether Virginia could criminally prosecute a newspaper for publishing accurate information about such proceedings where the newspaper received the information from a participant in the proceedings who had the right to receive the information but not the right to divulge it. *See id.* at 830, 98 S. Ct. 1535.

Finally, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L.Ed.2d 399 (1979), the Court considered a West Virginia statute "making it a crime

for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender." *Id.* at 98, 99 S. Ct. 2667. The Court was asked to decide whether West Virginia could prosecute two newspapers for publishing the name of a 14-year-old student who was accused of shooting and killing a 15-year-old classmate at the local junior high school. The newspapers had obtained the student's name by interviewing witnesses at the school.

The Supreme Court concluded that each of these attempts to punish or deter the press's publication of truthful information was unconstitutional. The *Smith* Court, in summarizing the Court's past cases, read them as suggesting at least two propositions: (1) "state action to punish the publication of truthful information seldom can satisfy constitutional standards," and (2) "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." 491 U.S. at 102, 103, 109 S. Ct. 2324; *accord Florida Star v. B.J.F.*, 491 U.S. 524, 533-37, 109 S. Ct. 2603, 105 L.Ed.2d 443 (1989) (adopting and explaining the justification for the second *Smith* proposition).

The defendants contend that the information disclosed about the Bartnicki-Kane conversation was lawfully obtained within the meaning of the *Smith* decision because the defendants in this case neither participated in the presumed interception nor violated any law by receiving the information. They conclude that the Wiretapping Acts may not be applied to hold

them liable without first meeting the test of strict scrutiny.

Bartnicki and Kane respond by arguing that the information at issue here was unlawfully obtained because the original interception presumably was illegal. They conclude that applying the Acts to hold the defendants liable is constitutional without subjecting those statutes to any level of First Amendment scrutiny. The parties thus assume that we should determine the constitutionality of the Wiretapping Acts by first determining whether the information disclosed was "lawfully" or "unlawfully" obtained.

Although we are cognizant of the importance of the *Cox*, *Landmark*, and *Smith* cases as background, we decline to read *Smith* as controlling here. The Supreme Court has explicitly repudiated any suggestion that *Smith* answers the question whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny. In *Florida Star*, the Court stated, "The [*Smith*] 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, 109 S. Ct. 2603. Similarly, the *Smith* Court was careful to note that its holding did not reach the issue of unlawful press access. *See* 443 U.S. at 105, 99 S. Ct. 2667.

Moreover, the Supreme Court's practice of narrowly circumscribing its holdings in this area strongly suggests that a rule for undecided cases should not be

derived by negative implication from its reported decisions. The defendant in *Landmark* urged the Court to adopt a blanket rule, protecting the press from any liability for truthfully reporting information concerning public officials and their public duties, but the Supreme Court refused to do so. *See* 435 U.S. at 838, 98 S. Ct. 1535. Instead it considered the very narrow question: "whether [a state] may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes." *Id.* at 830, 98 S. Ct. 1535.

Similarly, the *Florida Star* Court refused "appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment." 491 U.S. at 532, 109 S. Ct. 2603. It stated: "Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily . . . . We continue to believe that 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." *Id.* at 532-33, 109 S. Ct. 2603.

In keeping with the Supreme Court's approach to deciding these illustrative cases, we will resolve the present controversy not by mechanically applying a test gleaned from *Cox* and its progeny, but by reviewing First Amendment principles in light of the unique facts and circumstances of this case.

B.

The District Court based its conclusion that the damages provision of the Wiretapping Acts may constitutionally be applied to penalize the defendants' conduct primarily on the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S. Ct. 2513, 115 L.Ed.2d 586 (1991). The District Court interpreted that decision as standing for the proposition that a generally applicable law that neither singles out the press for special burdens nor purposefully restricts free expression does not offend the First Amendment. *See Bartnicki*, slip op. at 8 ("Generally applicable laws 'do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.'" (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S. Ct. 2513, 115 L.Ed.2d 586 (1991))). The District Court emphasized language from the *Cohen* opinion in which the Supreme Court stated, "'[i]t is . . . beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'" *Bartnicki*, slip op. at 8 (quoting *Cohen*, 501 U.S. at 670, 111 S. Ct. 2513).

After reviewing the Federal and Pennsylvania Wiretapping Acts, the District Court found that neither Act targets or singles out the press. The District Court also opined that these laws are not "specifically designed to chill free speech." *Id.* at 7. Based on this finding, it concluded that "both acts are matters of general applicability" and, without further analysis,

denied defendants' motion for summary judgment on the basis of the First Amendment.

There is reason to question whether the damages provisions of the Acts are properly categorized as generally applicable laws. Arguably, that term should be reserved for laws that directly regulate conduct rather than speech. *See* infra at 119. Moreover, it may well be that be that [*sic*] by banning the disclosure of certain information, the damages provisions impose a disproportionate burden on the press. Indeed, we would not be surprised to find that a prohibition on disclosure falls more heavily on the press, which is in the business of disseminating information, than it does on ordinary citizens whose opportunities for spreading information are more limited.

We need not resolve that question, however, because we conclude that, by suggesting that generally applicable laws do not require First Amendment scrutiny when applied to the press, the District Court read the cited portions of *Cohen* too broadly. In *Cohen*, the plaintiff, who was actively associated with the election staff of a gubernatorial candidate, offered to provide two newspapers with some information concerning the candidate's opponent in exchange for a promise that the newspapers would not use his name in any resulting story. After having made the promise and secured the information, each newspaper proceeded to publish a story identifying Cohen as the source of the information and highlighting his role in the gubernatorial campaign. Cohen lost his job the day the stories ran. He then sued the publishers of the newspapers in state court and recovered damages under a theory of promissory estoppel. The publishers appealed, arguing that holding

them liable for their breached promises would violate the First Amendment.

It is in the context of rejecting this argument that the Supreme Court stated, "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen*, 501 U.S. at 669, 111 S. Ct. 2513. The Court explained that "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670, 111 S. Ct. 2513.

The *Cohen* opinion thus instructs that a law of general applicability, which neither targets nor imposes disproportionate burdens upon the press, is enforceable against the press to the same extent that it is enforceable against individuals or organizations. The question remains whether the damages provisions of the Wiretapping Acts may constitutionally be applied to penalize individuals or organizations for disclosing material they know or have reason to know was illegally intercepted who had no part in the interception.

C.

In order to determine whether the provisions for civil sanctions from the Wiretapping Acts may constitutionally be applied to penalize defendants' disclosure, we must first decide what degree of First Amendment scrutiny should be applied.

The United States argues that the Federal Wiretapping Act is subject to intermediate rather than strict

scrutiny. It bases this contention on two subsidiary assertions: (1) that these are "general law[s] that impose[ ] only incidental burdens on expression" and (2) that "to the extent that Title III restricts speech in particular cases, it does so in an entirely content-neutral fashion." United States' Br. at 22. It states that "[a] statute satisfies intermediate scrutiny, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on speech is not unnecessarily great." United States' Br. at 11-12. We assume that the United States' arguments apply equally to the Pennsylvania Wiretapping Act, which is substantially similar to the Federal Wiretapping Act.

We first consider the United States' argument that the disclosure provisions of the Wiretapping Acts merit only intermediate scrutiny because they impose only incidental burdens on expression. In support, the United States cites a series of Supreme Court decisions, beginning with *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968).

O'Brien was arrested and convicted for burning his draft card on the steps of the South Boston Courthouse. On appeal, O'Brien argued that the federal law, making it an offense to "forge[ ], alter[ ], knowingly destroy[ ], knowingly mutilate[ ], or in any manner change[ ] . . . such [a] certificate," was unconstitutional. *Id.* at 370, 88 S. Ct. 1673 (italics omitted). The Court of Appeals for the First Circuit agreed that this provision unconstitutionally abridged the freedom of speech.

The Supreme Court, however, reversed. It opined that the statute "on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct." *Id.* at 375, 88 S. Ct. 1673.[1] The Supreme Court nonetheless recognized that O'Brien had burned his draft card as a form of protest against war. Assuming for the sake of argument that "the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment," the Supreme Court held that the statute was still a permissible regulation. *Id.* at 376, 88 S. Ct. 1673. It reasoned that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* The Court stated that such "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest." *Id.* at 377, 88 S. Ct. 1673.

In *O'Brien* and its progeny, the Supreme Court distinguished between "expressive conduct protected to some extent by the First Amendment" and oral or

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[1] Respected commentators have taken issue with this holding in *O'Brien*. *See, e.g.*, Lawrence H. Tribe, *American Constitutional Law*, § 312-6 at 824-25 (2d ed. 1988).

written expression, which is fully protected by that amendment. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984). "[C]onduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative" is "[s]ymbolic expression," otherwise known as expressive conduct. *Id.* at 294, 104 S. Ct. 3065. The cases the United States cites in addition to O'Brien also focus on the permissibility of regulating expressive conduct. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 115 L.Ed.2d 504 (1991) (Indiana statute prohibiting complete nudity in public places); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S. Ct. 3172, 92 L.Ed.2d 568 (1986) (New York statute authorizing closure of building found to be a public health nuisance); *United States v. Albertini*, 472 U.S. 675, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985) (federal statute making it unlawful to reenter a military base after having been barred by the commanding officer); *Clark*, 468 U.S. at 289, 104 S. Ct. 3065 (National Park Service regulation prohibiting camping in Lafayette Park); *cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992) (Minnesota statute prohibiting display of certain objects, including a burning cross or Nazi swastika).

By citing this line of cases in support of its position that intermediate scrutiny applies here, the United States apparently suggests that defendants' actions in disclosing the contents of the Bartnicki-Kane conversation are properly considered "expressive conduct" rather than speech. If this is the thrust of the government's citations, it is not persuasive. The acts on which Bartnicki and Kane base their complaint are Yocum's "intentionally disclos[ing a] tape to several individuals

and media sources"[2] and the media defendants' "intentionally disclos[ing] and publish[ing] to the public the entire contents of the private telephone conversation between Bartnicki and Kane." App. at 149. If the acts of "disclosing" and "publishing" information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.

We have no doubt that it is possible to identify some act by the media defendants in the course of preparing the broadcasts during which the tape was disclosed that falls within our ordinary understanding of the term conduct. However, this fact does not alter the analysis. The Supreme Court has observed, "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such kernel is not sufficient to bring the activity within the protection of the First Amendment." *Barnes*, 501 U.S. at 570, 111 S. Ct. 2456 (quoting *Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L.Ed.2d 18 (1989)). Similarly, although it may be possible to find some kernel of conduct in almost every act of expression, such kernel of conduct does not take the defendants' speech activities outside the protection of the First Amendment.

The United States nonetheless insists that intermediate scrutiny is appropriate because the statute, read as

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[2] The complaint also alleges that Yocum "obtained a tape of the surreptitiously recorded telephone conversation," App. at 149, but the complaint does not allege that the mere obtaining of the tape violates either statute.

a whole, primarily prohibits conduct rather than speech. It notes that the prohibition in 18 U.S.C. § 2511(1)(d) against using or endeavoring to use intercepted material encompasses more than disclosure. The government asserts that it precludes, for example, a person or company from using intercepted material to develop a competing product, to craft a negotiating strategy, or to justify taking disciplinary action against an employee. United States' Br. at 22-23.

The government cites no support for the surprising proposition that a statute that governs both pure speech and conduct merits less First Amendment scrutiny than one that regulates speech alone. We are convinced that this proposition does not accurately state First Amendment law. A statute that prohibited the "use" of evolution theory would surely violate the First Amendment if applied to prohibit the disclosure of Charles Darwin's writings, much as a law that directly prohibited the publication of those writings would surely violate that Amendment.

Because the defendants' acts in this case—the disclosure and broadcast of information—contain no significant "nonspeech" elements, we need not decide whether this statute could properly be subjected to lesser scrutiny if applied to prohibit "uses" that do involve such "nonspeech" elements. We merely hold that, when a statute that regulates both speech and conduct is applied to an act of pure speech, that statute must meet the same degree of First Amendment scrutiny as a statute that regulates speech alone.

The United States' second argument—that intermediate scrutiny applies because the Acts are content-neutral—is more persuasive.

When the state uses a "content-based" regulation to restrict free expression, particularly political speech, that regulation is subject to "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L.Ed.2d 333 (1988); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172 (3d Cir. 1997) (en banc). It will not be upheld unless the state can show that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos*, 485 U.S. at 321, 108 S. Ct. 1157; *see also Phillips*, 107 F.3d at 172 ("State regulations of speech that are not regarded as content neutral will be sustained only if they are shown to serve a compelling state interest in a manner which involves the least possible burden on expression.").

By contrast, when the state places a reasonable "content-neutral" restriction on speech, such as a time, place and manner regulation, that regulation need not meet the same high degree of scrutiny. "Content-neutral" restrictions are valid under the First Amendment provided that they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information."[3] *Clark*, 468 U.S. at 293, 104 S. Ct. 3065.

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[3] This standard is little different from that announced in *O'Brien* as governing conduct regulations that incidentally restrict expressive behavior. *See Clark*, 468 U.S. at 298, 104 S. Ct. 3065.

We recognize that an argument could be made that the Wiretapping Acts are content-based. Ordinarily, the distinction between permissible and impermissible regulation of speech depends on whether the law at issue regulates the substantive content of the speech (what is said) or whether it merely regulates the time, place, or manner of the speech (when, where, at what volume, and through which medium it is said). The former regulations are content-based while the latter are content-neutral. The essence of the distinction lies in the fact that, if the regulation were content-based, it would not be possible to determine whether a particular speech is prohibited without referring to the substantive import of that expression.

The United States contends that the Wiretapping Acts are not content-based even in the literal sense referred to above because the Acts define the content that is prohibited by reference to the manner in which the information was acquired, rather than to its subject matter or viewpoint. We suspect that the mere fact that a regulation defines the category of content that is prohibited by reference to its source rather than its subject matter is unlikely to be sufficient to justify treating the regulation as content-neutral. For example, one might argue that a ban on the publication of information obtained through experimentation on human embryos would raise sufficient First Amendment concerns to merit heightened scrutiny, even if such experimentation were illegal.

The Supreme Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986), however, suggests that we are not limited to a literal interpretation of the phrase "content-neutral"

but may determine whether speech is content-neutral or content-based with reference to the government's proffered justification for the restriction. In *Renton*, the Supreme Court described "content-neutral" speech restrictions as those that "are justified without reference to the content of the regulated speech." *Id.* at 48, 106 S. Ct. 925 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976)). We therefore turn to consider the purpose or purposes the Wiretapping Acts are meant to serve.

The Senate Report describes the purposes of the Federal Wiretapping Act as: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153. Congress thus focused on privacy in adopting 18 U.S.C. § 2511, the provision that prohibits the interception of wire, oral, or electronic communications, as well as the use or disclosure of the contents of illegally intercepted communications. Congress did not, however, define the privacy interest that it intended the Act to protect.

As commonly understood, the right to privacy encompasses both the right "to be free from unreasonable intrusions upon [one's] seclusion" and the right to be free from "unreasonable publicity concerning [one's] private life." *Fultz v. Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991); *see also Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L.Ed.2d 64 (1977); *Paul P. v. Verniero*, 170 F.3d 396 (3d Cir. 1999). The Sixth Circuit has opined that "[t]he prohibitions Congress incorporated

into section 2511(1) of Title III protect both these interests first, by prohibiting the surreptitious interception of private communications in the first instance—a highly offensive physical intrusion on the victim's private affairs—and second, by circumscribing the dissemination of private information so obtained." *Fultz*, 942 F.2d at 401 (footnote omitted). The First Circuit has similarly suggested that by enacting Title III Congress recognized "that the invasion of privacy is not over when the interception occurs but is compounded by disclosure." *Providence Journal Co. v. FBI*, 602 F.2d 1010, 1013 (1st Cir. 1979); *see also Fultz*, 942 F.2d at 402 ("Each time the illicitly obtained recording is replayed to a new and different listener, the scope of the invasion widens and the aggrieved party's injury is aggravated.").

We have no doubt that the state has a significant interest in protecting the latter privacy right—the right not to have intimate facts concerning one's life disclosed without one's consent. That right is a venerable one whose constitutional significance we have recognized in the past. *See Paul P.*, 170 F.3d at 401-02 (collecting cases). We also have no doubt that the prohibition on using or disclosing the contents of an illegally intercepted communication serves that interest by deterring the publicization of private facts.

We are less certain, however, that the desire to protect the privacy interest that inheres in private facts is a content-neutral justification for restricting speech. The Supreme Court has instructed that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, 112 S. Ct. 2395, 120 L.Ed.2d 101

(1992); *accord Lind v. Grimmer*, 30 F.3d 1115, 1117 (9th Cir. 1994) ("Because the[ ] concerns [addressed by the statute] all stem from the direct communicative impact of speech, we conclude that section 11-216(d) regulates speech on the basis of its content.") As Justice O'Connor explained in *Boos*, "[r]egulations that focus on the direct impact of speech on its audience"—the speech's "primary effects"—are not properly treated as content-neutral under *Renton*. 485 U.S. at 321, 108 S. Ct. 1157 (Opinion of O'Connor, J.).

Although the defendants do not argue that the regulations at issue are content-based, there is a not implausible argument that the injury associated with the disclosure of private facts stems from the communicative impact of speech that contains those facts, i.e. having others learn information about which one wishes they had remained ignorant. Thus, under the Supreme Court's jurisprudence, the injury associated with such disclosure constitutes a "primary effect" of the disfavored speech, rather than a "secondary effect." This reasoning might suggest that a statute that regulated expression for the purpose of protecting the right not to have private facts disclosed without permission would be subject to strict scrutiny as a content-based regulation.

We do not decide whether the Wiretapping Acts would indeed be properly categorized as content-based if justified on the basis of a need to prevent the disclosure of private facts because the United States for the most part eschews reliance on that justification in explaining the purpose of those acts. Instead, the United States argues that "the fundamental purpose of Title III is to maintain the confidentiality of wire,

electronic, and oral communications." United States' Br. at 33. It reasons that "prohibiting the use of illegally intercepted communication . . . 'strengthen[s] subsection (1)(a),' the provision that imposes the underlying ban on unauthorized interception, 'by denying the wrongdoer the fruits of his labor' and by eliminating the demand for those fruits by third parties." United States' Br. at 33. We are satisfied that this latter justification does not rely on the communicative impact of speech and, therefore, that the Acts are properly treated as content-neutral.

D.

Accordingly, we adopt the government's position that we should apply intermediate scrutiny in our analysis of the issue before us. In doing so, we must first fix upon an acceptable definition of the term "intermediate scrutiny."[4] Intermediate scrutiny is used by the Court in a wide variety of cases calling for some balancing. Thus, intermediate scrutiny has been applied to statutes that discriminate on the basis of gender. *See Craig v. Boren*, 429 U.S. 190, 200, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976) (holding that prohibiting sale of 3.2% beer to males under 21 and females under 18 did not "closely serve" goal of promoting traffic safety). It is the review standard used to examine whether an even-handed regulation promulgated for a legitimate

[4] In a recent article, the author uses the term "'intermediate scrutiny' to refer to a test that requires a state interest which is greater than legitimate but less than compelling and a fit between means and end that is not necessarily narrowly tailored but has more than just an incidental connection." Jay D. Wexler, Defending the Middle Way: *Intermediate Scrutiny as Judicial Minimalism*, 66 Geo. Wash. L.Rev. 298, 300 n. 15 (1998).

public interest violates the dormant Commerce Clause. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970) (describing balancing test for state regulation); *Southern Pac. Co. v. Arizona ex rel Sullivan*, 325 U.S. 761, 65 S. Ct. 1515, 89 L.Ed. 1915 (1945) (invalidating limit on train length as not "plainly essential" to further state interest in safety). And in the First Amendment context, intermediate scrutiny has been applied to commercial speech cases, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980) (establishing four-part test for commercial speech regulation), and to examine the validity of time, place, and manner regulations, *see United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L.Ed.2d 736 (1983) (invalidating statute prohibiting displaying flag, banner or device in Supreme Court building or on its grounds).

Admittedly, the intermediate scrutiny test applied varies to some extent from context to context, and case to case. But it always encompasses some balancing of the state interest and the means used to effectuate that interest. And despite the frequent tendency to assume that regulations that are reviewed under less exacting scrutiny than strict scrutiny will be upheld, each of the cases referred to above as applying intermediate scrutiny held that the regulation in question was unconstitutional. The reasons varied. Sometimes, the Court held the asserted government interest insufficient to justify an expansive prohibition and noted the government failed to demonstrate that a lesser prohibition would not adequately serve its purpose. *See, e.g.*, *Schneider v. State*, 308 U.S. 147, 162, 60 S. Ct. 146, 84 L.Ed. 155 (1939) (holding that state interest in pre-

venting littering did not justify ban on leafletting); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980) (invalidating prohibition on charitable solicitations for certain charities as too destructive of First Amendment interests). Other times, the Court held the government failed to show that the challenged regulation substantially served the asserted government interest. *See*, *e.g.*, *Grace*, 461 U.S. at 182, 103 S. Ct. 1702. It should also be noted that in making the examination into whether the means chosen were those appropriate to the government interest, the Court has not always made a distinction between its analysis for purposes of intermediate scrutiny and for strict scrutiny. *See*, *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L.Ed.2d 547 (1983) (invalidating candidate registration statute because voters' associational and voting rights outweighed state interest).

The test usually applied in First Amendment cases to content-neutral regulation requires an examination of whether the regulation is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984). There is a considerable number of First Amendment cases in which the Supreme Court, applying intermediate scrutiny, has found that the regulation at issue, albeit designed to advance legitimate state interests, failed to withstand that scrutiny. A review of illustrative cases provides some indication of the Court's analytic approach in such instances.

In *Schneider*, the Court recognized that there is a legitimate government interest in preventing street littering but nevertheless found that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." 308 U.S. at 162, 60 S. Ct. 146. The Court termed the burden imposed on the cities in cleaning and caring for the streets "an indirect consequence of such distribution," and one that resulted from the "constitutional protection of the freedom of speech and press." *Id.* The Court continued, in language significant for this case, "[t]here are obvious methods of preventing littering. Amongst these is *the punishment of those who actually throw papers on the streets*." *Id.* (emphasis added).

Similarly, in *Village of Schaumburg*, the Court recognized that the government had a substantial interest in protecting the public from fraud, crime and undue annoyance, but held that the proffered interest, which the government sought to accomplish by an ordinance that prohibited the solicitation of contributions by charitable organizations that did not use at least 75% of their receipts for "charitable purposes," was "only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests." 444 U.S. at 636, 100 S. Ct. 826.

Both *Schneider* and *Schaumburg* were cited by the Court in a later case to illustrate "the delicate and difficult task [that] falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the

free enjoyment of [First Amendment] rights." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70, 101 S. Ct. 2176, 68 L.Ed.2d 671 (1981) (quoting *Schneider*, 308 U.S. at 161, 60 S. Ct. 146). In *Schad*, the Court invalidated a zoning ordinance that excluded live entertainment, including nude dancing, throughout the borough after finding that the borough "ha[d] not adequately justified its substantial restriction of protected activity." *Id.* at 72, 101 S. Ct. 2176. Justice Blackmun's concurring opinion makes clear that the burden to "articulate, and support, a reasoned and significant basis" for the governmental regulation should not be viewed as de minimis, even when the regulation is subjected to intermediate scrutiny. *Id.* at 77, 101 S. Ct. 2176; *see also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 52-53 (1987) (describing intermediate scrutiny as a test that "takes seriously the inquiries into the substantiality of the governmental interest and the availability of less restrictive alternatives.").

With the Supreme Court precedent as a guide, we examine whether the government has shown that its proffered interest is sufficiently furthered by application to these defendants of the damages provisions of the Wiretapping Acts to justify the impingement on the protected First Amendment interests at stake.

As noted above, the United States contends that the Wiretapping Acts serve the government's interest in protecting privacy by helping "maintain the confidentiality of wire, electronic, and oral communications." United States' Br. at 33. Undoubtedly, this is a significant state interest. We do not understand the defendants to deny that there is an important gov-

ernmental interest served by the Wiretapping Acts. However, the government recognizes that not all of the provisions of the Wiretapping Acts are being challenged. In fact, only a portion of those Acts are at issue here—the provisions imposing damages and counsel fees for the use and disclosure of intercepted material on those who played no part in the interception.

The United States asserts that these provisions protect the confidentiality of communications in two ways: (1) "by denying the wrongdoer the fruits of his labor" and (2) "by eliminating the demand for those fruits by third parties." United States' Br. at 33. In this case, however, there is no question of "denying the wrongdoer the fruits of his labor." The record is devoid of any allegation that the defendants encouraged or participated in the interception in a way that would justify characterizing them as "wrongdoers." Thus, the application of these provisions to penalize an individual or radio stations who did participate in the interception and thereafter disclosed the intercepted material is not before us.

We therefore focus on the United States' second contention—that the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties. The connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best. The United States has offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation. Nor

has the United States offered any basis for us to conclude that these provisions have deterred any other would-be interceptors.[5] Given the indirectness of the manner in which the United States claims the provisions serve its interest, we are not prepared to accept the United States' unsupported allegation that the statute is likely to produce the hypothesized effect. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841, 98 S. Ct. 1535, 56 L.Ed.2d 1 (1978) ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."). Faced with nothing "more than assertion and conjecture," it would be a long stretch indeed to conclude that the imposition of damages on defendants who were unconnected with the interception even "peripherally promoted" the effort to deter interception. *See Village of Schaumburg*, 444 U.S. at 636, 100 S. Ct. 826.

When the state seeks to effectuate legitimate state interests,

> it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.

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[5] As the Supreme Court recently emphasized in invalidating a prohibition on the receipt of honoraria by government employees, "[w]hen the government defends a regulation on speech . . . it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and *that the regulation will in fact alleviate these harms in a direct and material way*." *United States v. National Treasury Employees Union*, 513 U.S. 454, 475, 115 S. Ct. 1003, 130 L.Ed.2d 964 (1995) (citation and internal quotation omitted) (emphasis added).

> *Hynes v. Mayor of Oradell*, 425 U.S. at 620, 96 S. Ct. 1755; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963) (citations omitted).

Village of Schaumburg, 444 U.S. at 637, 100 S. Ct. 826.

In *Village of Schaumburg*, the Court stated that the Village's legitimate interest in preventing fraud could be better served by requiring solicitors to inform the public of the uses made of their contributions, than by prohibiting solicitation. *Id.* Similarly, in *Martin v. Struthers*, 319 U.S. 141, 147-48, 63 S. Ct. 862, 87 L.Ed. 1313 (1943), the Court held that in lieu of a complete prohibition of door-to-door solicitation, with its draconian impact on First Amendment values, the City could have used the less restrictive means of punishing those who trespass "in defiance of the previously expressed will of the occupant." Indeed, the Wiretapping Acts already provide for punishment of the offender, i.e., the individual who intercepted the wire communication and who used or disclosed it. *See Schneider*, 308 U.S. at 162, 60 S. Ct. 146 (city should prevent littering by punishing litterers, not by prohibiting leafleting). Those who indirectly participated in the interception, either by aiding or abetting, would also fall within the sanctions provided by the statute. Therefore, the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants.

We are also concerned that the provisions will deter significantly more speech than is necessary to serve the government's asserted interest. It is likely that in many instances these provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts.

Reporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source. Moreover, defendants argue that they cannot be held liable for use and publication of information that had previously been disclosed. Assuming this is so, reporters may have difficulty discerning whether material they are considering publishing has previously been disclosed to the public. Such uncertainty could lead a cautious reporter not to disclose information of public concern for fear of violating the Wiretapping Acts.

Bartnicki and Kane recognize that the Supreme Court has frequently expressed concern about the "timidity and self-censorship" that may result from permitting the media to be punished for publishing certain truthful information. *See, e.g.*, *Florida Star*, 491 U.S. at 535, 109 S. Ct. 2603; *Cox Broadcasting*, 420 U.S. at 496, 95 S. Ct. 1029. The public interest and newsworthiness of the conversation broadcast and disclosed by the defendants are patent. In the conversation, the president of a union engaged in spirited negotiations with the School Board suggested "blow[ing] off [the] front porches" of the School Board members. Nothing in the context suggests that this was said in anything other than a serious vein. Certainly, even if no later

acts were taken to follow through on the statement, and hence no crime committed, the fact that the president of the school teachers' union would countenance the suggestion is highly newsworthy and of public significance. Our concerns are only heightened by the Supreme Court's admonition in *Smith* that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." 443 U.S. at 102, 99 S. Ct. 2667.

Our dissenting colleague does not disagree with any of the applicable legal principles. He candidly states that the difference between us is one of "ultimate application of [the agreed upon] analysis to the case at bar." Dissenting Op. at 130. Therefore, we add only a few brief comments pertaining to that application.

Evidently, one of the principal differences between our respective applications lies in the weight we give the factors to be balanced. The dissent suggests the Supreme Court's decisions in *Schneider*, *Struthers*, and *Schaumburg* are not pertinent to this case because the state interests in those cases (littered streets, annoying door-to-door proselytizers,[6] and fraudulent charitable solicitors, respectively) were "not very important." The dissent contrasts those interests with the significant governmental interest at issue here—that of maintaining the confidentiality of wire, electronic, and oral communications.

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[6] The dissent fails to mention that one of the purposes for the ordinance referred to by the Court in *Struthers* was crime prevention. *See* 319 U.S. at 144-45, 63 S. Ct. 862.

Presumably, the dissent's point is that we must weigh more heavily the privacy interests furthered by the Wiretapping Acts than the Court weighed the state interests in the three cited cases. Given the conceded importance of privacy and confidentiality at issue here, we nonetheless find it difficult to accord it more weight than the interests in preventing disclosure of the name of a rape victim, the identity of a judge in a putative disciplinary proceeding, or the identity of a youth charged as a juvenile offender at issue in *Cox Broadcasting*, *Landmark Communications* and *Smith*, respectively. Yet when faced with each of those circumstances, the Supreme Court determined that despite the strong privacy interest underlying the statutory and state constitutional provisions punishing disclosure of such information, the interests served by the First Amendment must take precedence.[7] It would be difficult to hold that privacy of telephone conversations are more "important" than the privacy interests the states unsuccessfully championed in those cases.

In addition, we do not share the dissent's confidence that imposition of civil liability on those who neither participated in nor encouraged the interception is an effective deterrent to such interception. The dissent finds such a nexus in the legislative landscape, where

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[7] Although we acknowledge that those decisions arose from a stricter level of scrutiny than we employ here and somewhat different circumstances, the fact remains that the Court has generally tilted for the First Amendment in the tension between press freedom and privacy rights. This is bemoaned by the dissenting Justices in *The Florida Star*, who state candidly they "would strike the balance rather differently." 491 U.S. at 552, 109 S. Ct. 2603 (White, J., dissenting). So, apparently, would the dissent in this case.

half of the states that prohibit wiretapping also authorize civil damage actions. With due respect, we find this a slim reed, not only because it appears from the dissent's statistics that the other half of the states with wiretapping statutes have not included a damage provision but because the incidence of state statutes, and hence "widespread legislative consensus," does not prove the deterrent effect of the prohibition. Indeed, there is not even general agreement as to the deterrent effect of a criminal statute on the perpetrator,[8] much less on those who were not in league with the perpetrator. In determining whether a regulation that restricts First Amendment rights "substantially serves [its asserted] purposes," *see Grace*, 461 U.S. at 182, 103 S. Ct. 1702, the Court has never found that question satisfied by sheer numbers of state statutes.

The dissent engages in hyperbole when it suggests that our decision "invalidates a portion of the federal statute" and "by necessary implication spells the demise of a portion of more than twenty other state statutes." Dissenting Op. at 134. The statutes, which are designed to prohibit and punish wiretapping, remain unimpaired. All that is at issue is the application of those statutes to punish members of the media who neither encouraged nor participated directly or indirectly in the interception, an application rarely attempted.

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[8] The opposing views of deterrence were noted in connection with capital punishment in Chief Justice Burger's dissenting opinion in *Furman v. Georgia*, 408 U.S. 238, 395-96, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).

Moreover, we do not agree that the recent decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), presented that court with the same issue presented here. Most particularly, in *Boehner*, where a divided court upheld the constitutionality of § 2511(1)(c), all three judges emphasized in their separate opinions that there was no effort to impose civil damages on the newspapers (The New York Times, *et al.*) which had printed the details of a conversation that been [*sic*] illegally intercepted. Thus, for example, in the lead opinion the court stated at the outset, "[n]or should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call." *Id.* at 467. Liability in that case was sought to be imposed on James McDermott, a congressman who caused a copy of the tape to be given to the newspapers. Although technically, defendant Yocum in our case stands in the same position as McDermott, i.e. as the source but not the interceptor, there is an indication in *Boehner* that McDermott was more than merely an innocent conduit. Indeed, McDermott, unlike Yocum, knew who intercepted the conversation because he "accepted" the tape from the interceptors and, the opinion suggests, not only sought to embarrass his political opponents with the tape but also promised the interceptors immunity for their illegal conduct. *Id.* at 475-76. In fact, the second judge, who concurred in the judgment and in only a portion of the opinion for the court, specifically limited his concurrence to the decision that § 2511(1)(c) "is not unconstitutional *as applied in this case*," *id.* at 478 (emphasis added), and pointed out that "McDermott knew the transaction was illegal at the time he entered into it," *id.* at 479. In contrast, Yocum has not been shown to have "entered

into" any transaction with the interceptors. In the posture of this case, all parties accept his allegation that the tape was left in his mailbox.

The *Boehner* court was acutely aware that no court has yet held that the government may punish the press through imposition of damages merely for publishing information of public significance because its original source acquired that information in violation of a federal or state statute. *Cf. Landmark*, 435 U.S. at 837, 98 S. Ct. 1535 (finding it unnecessary to adopt categorical approach). As noted earlier in this opinion, the Supreme Court has been asked to permit a state to penalize the publication of truthful information in at least four instances. In three of the four cases, the statutes at issue protected the privacy interests of such vulnerable individuals as juveniles and the victims of sexual assault. *See Florida Star*, 491 U.S. at 526, 109 S. Ct. 2603; *Smith*, 443 U.S. at 98, 99 S. Ct. 2667; *Cox Broadcasting*, 420 U.S. at 472, 95 S. Ct. 1029. In the remaining case, the statute at issue was meant to protect the state's interest in an independent and ethical judiciary. *See Landmark*, 435 U.S. at 830, 98 S. Ct. 1535. Despite the strength of the state interests asserted, the Supreme Court in each case concluded that those interests were insufficient to justify the burdens imposed on First Amendment freedoms.

We likewise conclude that the government's significant interest in protecting privacy is not sufficient to justify the serious burdens the damages provisions of the Wiretapping Acts place on free speech. We are skeptical that the burden these provisions place on speech will serve to advance the government's goals. Even assuming the provisions might advance these interests, the practical impact on speech is likely to be

"substantially broader than necessary." *Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989).

We therefore hold that the Wiretapping Acts fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception. It follows that we need not decide whether these provisions leave open ample alternative channels for communication of information.

III.

CONCLUSION

For the reasons set forth, we will reverse the order of the District Court denying summary judgment to the defendants, and will remand with directions to grant that motion.

POLLAK, District Judge, dissenting.

The Court of Appeals for the District of Columbia Circuit has recently determined, in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), that the First Amendment does not bar a civil damage action brought, pursuant to 18 U.S.C. § 2511(1)(c) and 18 U.S.C. § 2520(a), and pursuant to the Florida statutory provisions that are counterparts of the federal statute, against one who, so the plaintiff alleged, gave to the *New York Times* and other newspapers copies of a tape recording of a telephone conversation which the defendant had "knowledge and reason to know" had

been unlawfully intercepted.[1] Today this court holds that the First Amendment does bar a civil damage

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[1] In *Boehner v. McDermott*, the plaintiff, John Boehner, is a Republican Representative who, together with other members of the Republican leadership of the House of Representatives (including then Speaker Gingrich), was in 1996 party to a conference telephone call that was unlawfully intercepted by persons equipped with a radio scanner. According to Representative Boehner's complaint, the interceptors turned over the tape to James A. McDermott, a Democratic Representative who was at the time the ranking minority member of the House Ethics Committee; Representative McDermott in turn gave copies of the tape to the *New York Times* and other newspapers; and the *New York Times* promptly published part of the taped conversation. Representative Boehner sued Representative McDermott, but did not sue the *New York Times* or any other newspaper. The district court dismissed Representative Boehner's complaint on First Amendment grounds. The circuit court reversed.

The circuit court perceived a potentially important distinction between Representative McDermott's First Amendment claim and the First Amendment claim that might have been made by the *New York Times* or another newspaper, if a newspaper had been named as a defendant. Identifying that potential distinction, the court was at pains to confine its analysis to Representative McDermott's claim:

> McDermott's liability under § 2511(1)(c) rests on the truth of two allegations: that he "caused a copy of the tape" to be given to the newspapers; and that he "did so intentionally and with knowledge and reason to know that the recorded phone conversation had been illegally intercepted (as the cover letter on its face disclosed)." Complaint ¶ 20. Although the circumstances of McDermott's transactions with the newspapers, including who said what to whom, may become evidence at trial, it is his conduct in delivering the tape that gives rise to his potential liability under § 2511(1)(c). McDermott's behavior in turning over the tapes doubtless conveyed a message, expressing something about him. All behavior does. But not all behavior comes within the First Amendment.

action brought, pursuant to the Federal statute and its Pennsylvania counterpart, against (1) one who handed over a copy of a taped telephone conversation to a radio reporter, and (2) the radio reporter and the two radio stations that subsequently broadcast the tape, plaintiffs having alleged that both the person who handed over the tape and the radio reporter had, in the statutory language, "reason to know" that the taped conversation had been intercepted in contravention of the federal and Pennsylvania statutes. In the case decided today the court addresses a broader range of issues then those presented in *Boehner v. McDermott*: in *Boehner*

> "[E]ven on the assumption that there was [some] communicative element in" McDermott's conduct, the Supreme Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968). The *O'Brien* framework is the proper mode of First Amendment analysis in this case. McDermott's challenge is only to the statute as it applies to his delivery of the tape to newspapers. Whether a different analysis would govern if, for instance, McDermott violated § 2511(1)(c) by reading a transcript of the tape in a news conference, is therefore a question not presented here. Nor should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call. The focus must be on McDermott's activity and on his activity alone.

191 F.3d at 467.

The author of the court's opinion was Judge Randolph. Judge Ginsburg filed a concurring opinion, joining part (including the paragraphs just quoted) of Judge Randolph's opinion. Judge Santelle [sic] filed a dissenting opinion.

v. McDermott the only defendant was the person who allegedly delivered to the media a copy of a tape of an allegedly wrongfully intercepted telephone conversation; in today's case there are three "media defendants" in addition to the defendant who allegedly delivered to the media a copy of a tape of an allegedly wrongfully intercepted telephone conversation.[2]

I am in general agreement with the careful analytic path traced by the court through the minefield of First Amendment precedents. However, I find myself in disagreement with the court's ultimate application of its analysis to the case at bar.

Accordingly, I respectfully dissent.[3]

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[2] The *Boehner v. McDermott* court was at pains to point out the limited scope of its ruling. *See* note 1, *supra*. *See also* note 3, *infra*.

[3] Although I have expressed general agreement with the court's analytic approach, I should note one aspect of the analysis on which I differ with the court. That aspect is cogently illustrated by the distinction the *Boehner v. McDermott* court drew between the First Amendment posture of Representative McDermott and the potential First Amendment posture of a newspaper that published (as the *New York Times* in fact did) a portion of the intercepted telephone conference call, had such a newspaper been sued. As the *Boehner v. McDermott* excerpt quoted in footnote 1, *supra*, makes clear, the court was doubtful that Representative McDermott's action in giving copies of the tape to newspapers was itself "speech" in the full First Amendment sense. Judge Randolph, speaking for the court, saw Representative McDermott's First Amendment claim as cabined by the Supreme Court's holding in *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968), that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech

I.

I agree with the court's statement of the case. And I agree with the court's determination that the challenged federal and Pennsylvania wiretapping statutes—here invoked by plaintiffs seeking damages for defendants' alleged disclosure and use of a taped telephone conversation of plaintiffs that defendants allegedly had "reason to know" was the product of a prohibited "interception of a wire . . . communication," 18 U.S.C. § 2511(c); 18 Pa. Cons. Stat. § 5703(2)—are "content neutral." I further agree with the court that the proper standard to be applied in testing the constitutionality of the federal and Pennsylvania statutes as here applied is "intermediate

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element can justify incidental limitations on First Amendment freedoms."

In the case at bar, in which the plaintiffs have sued both Yocum and media defendants, the United States argues that the approach reflected in *O'Brien* and cases that follow it is appropriate to the entire case. The court rejects that view. I find the *Boehner v. McDermott* exposition of Representative McDermott's limited First Amendment posture persuasive, and thus in the case at bar I would apply the *O'Brien* approach to defendant Yocum—whose role, from a First Amendment perspective, seems analogous to that of Representative McDermott—while rejecting *O'Brien* as the proper approach to the First Amendment claims of the media defendants. However, the distinction is not one that I need pursue, because, accepting for the purposes of the case at bar the court's comprehensive rejection of *O'Brien*, I nonetheless wind up disagreeing with the court on how the court's analytic approach plays out as applied, with the result that I conclude that liability in damages could constitutionally have been imposed both on Yocum and on the media defendants if the plaintiffs had been permitted to take their case to trial and had proved their allegations to the satisfaction of the fact-finder.

scrutiny." Finally, I agree with the court that intermediate scrutiny "always encompasses some balancing of the state interest and the means used to effectuate that interest." Op., p. 124. Concretely, such scrutiny calls for judicial assessment of whether the challenged regulation is "narrowly tailored to serve a significant governmental interest." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984).[4]

Where I part company with the court is in its application of intermediate scrutiny in this case.

A.

The court begins by acknowledging what I take to be beyond dispute: namely, that the professed governmental interest—the interest of the United States (which is presumably also Pennsylvania's interest) in "maintain[ing] the confidentiality of wire, electronic, and oral communications," Brief for the United States, p. 33—is "a significant state interest." Op., *supra*, p. 125. Then—evidently with a view to exploring whether the challenged prohibition on disclosure or use of a conversation by one who had "reason to know" that the conversation was intercepted unlawfully is "narrowly tailored to serve [that] signifi-

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[4] The other criterion identified in *Clark v. Community for Creative Non-Violence*—namely, whether the challenged regulation "leave[s] open ample alternative channels for communication of the information" 468 U.S. at 293, 104 S. Ct. 3065—is not pertinent to the case at bar because the challenged statutes are not, as the challenged regulations in *Clark v. Community for Creative Non-Violence* were deemed to be, "time, place or manner restrictions." *Ibid.* And see *id.* at 295, 104 S. Ct. 3065.

cant governmental interest"—the court undertakes to "focus on the United States' . . . contention . . . that the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties." Op., p. 125. The court then proceeds as follows:

> The connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best. The United States has offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation. Nor has the United States offered any basis for us to conclude that these provisions have deterred any other would-be interceptors. Given the indirectness of the manner in which the United States claims the provisions serve its interest, we are not prepared to accept the United States' unsupported allegation that the statute actually produces the hypothesized effect. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841, 98 S. Ct. 1535, 56 L.Ed.2d 1 (1978) ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."). Faced with nothing "more than assertion and conjecture," it would be a long stretch indeed to conclude that the imposition of damages on defendants who were unconnected with the interception even "peripherally promoted" the effort to

> deter interception. *See Village of Schaumburg*, 444 U.S. at 636, 100 S. Ct. 826.

When the state seeks to effectuate legitimate state interests,

> it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes v. Mayor of Oradell*, 425 U.S. at 620, 96 S. Ct. 1755; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963) (citations omitted).

Village of Schaumburg, 444 U.S. at 637, 100 S. Ct. 826.

> In *Village of Schaumburg*, the Court stated that the Village's legitimate interest in preventing fraud could be better served by requiring solicitors to inform the public of the uses made of their contributions, than by prohibiting solicitation. *Id.* Similarly, in *Martin v. Struthers*, 319 U.S. 141, 147-48, 63 S. Ct. 862, 87 L.Ed. 1313 (1943), the Court held that in lieu of a complete prohibition of door-to-door solicitation, with its draconian impact on First Amendment values, the City could have used the less restrictive means of punishing those who trespass "in defiance of the previously expressed will of the occupant." Indeed, the Wiretapping Acts already provide for punishment of the offender, i.e., the individual who intercepted the wire communication and who used or disclosed it. *See Schneider*, 308 U.S. at 162, 60 S. Ct. 146 (city should prevent

> littering by punishing litterers, not by prohibiting leafleting). Those who indirectly participated in the interception, either by aiding or abetting, would also fall within the sanctions provided by the statute. Therefore, the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants.

Op. p. 125-27.

With all respect, I find this portion of the court's opinion unpersuasive:

First: I take issue with the proposition that "[t]he connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best." "[P]reventing the initial interception" is only part of the statutory scheme. The statutory purposes, as the court has noted, are "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153. Unauthorized interception of a communication is prohibited—and made both a criminal offense and an event giving rise to civil liability—both to protect parties to a communication from an initial trespass on their privacy and to protect them from subsequent disclosure (and/or other detrimental use). "Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to

prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore 'essential' for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of non-disclosure." *Boehner v. McDermott*, 191 F.3d at 470.

Second: Given the close nexus between the legislative prohibition on unauthorized interception and the legislative imposition upon "third parties, that is, upon those not responsible for the interception, [of] a duty of non-disclosure," I am puzzled by the court's view that the argument presented by the United States in support of the statutory regime of civil liability lacks persuasiveness because it is not supported by a demonstration that "imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation," or "that these [statutory] provisions have deterred any other would-be interceptors." Nor do I think the court's view is buttressed by the court's invocation of *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L.Ed.2d 1 (1978). It is true that in *Landmark*, in which the Supreme Court struck down, as applied to a newspaper, a statute making it a misdemeanor to "divulge information" about confidential proceedings conducted by Virginia's Judicial Inquiry and Review Commission, the Court observed that "[t]he Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme [which contemplated a process of confidential

inquiry into alleged judicial misconduct] would be seriously undermined." But the special—and limited—pertinence of the Court's observation becomes clear when it is read in context. The full paragraph follows:

> It can be assumed for purposes of decision that confidentiality of Commission proceedings serves legitimate state interests. The question, however, is whether these interests are sufficient to justify the encroachment on First Amendment guarantees which the imposition of criminal sanctions entails with respect to nonparticipants such as Landmark. The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined. While not dispositive, we note that more than 40 States having similar commissions have not found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants.

435 U.S. at 841, 98 S. Ct. 1535. In striking contrast is the legislative landscape that forms the setting of the case at bar. Complementing the federal statute are more than forty state wiretapping statutes. Of these state statutes, approximately half have provisions which, like the federal statute, (1) prohibit disclosure or use of an intercepted conversation by one who knows or has "reason to know" that the interception was unlawful, and (2) authorize civil damage actions against one who discloses or uses such unlawful interception. As this case illustrates, Pennsylvania is one of those states. So are Delaware and New Jersey—Pennsylvania's Third Circuit siblings. See 11 Del. Code Ann., § 1336 (1996); N.J. Stat. Ann. §§ 2A-156-A-3; 2A-156-A-24 (West 1985 & Supp. 1999). Listed in footnote

5 are the other state statutes that closely parallel the provisions of the federal and Pennsylvania legislation challenged by defendants in the case at bar.[5]

In short, there appears to be a widespread legislative consensus that the imposition of civil liability on persons engaged in conduct of the kind attributed to these defendants is an important ingredient of a regime designed to protect the privacy of private conversations. Moreover, the decision announced today not only invalidates a portion of the federal statute and the counterpart portion of the Pennsylvania statute, it by necessary implication spells the demise of a portion of more than twenty other state statutes (and also of a statute of the District of Columbia); in the two centuries of our constitutional history there cannot have been more than a handful of prior decisions, either of a federal court or of a state court, which, in the exercise of the awesome power of judicial review, have cut so wide a swath.

Third: What has been said points up the nonpertinence to the case at bar of *Schneider v. State*, 308

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[5] Fla. Stat. Ann. §§ 934.03, 812.15; Haw. Rev. Stat. §§ 803-42(a)(3), 803-48; Idaho Code §§ 18-6702, 18-6709; 720 Ill. Comp. Stat. Ann. 5/14-2, 5/14-6; Iowa Code §§ 808B.2(1)(c), 808B.8; La. Rev. Stat. Ann. §§ 15:1303 A(3), 15:1312; Md. Code Ann. §§ 10-402(a)(2), 10-410; Mich. Comp. Laws Ann. §§ 750.539e, 750.539h; Minn. Stat. Ann. §§ 626A.02(c), 626A.13; Neb. Rev. Stat. §§ 86-702; N.H. Rev. Stat. Ann. §§ 570-A:2, 570-A:11; N.C. Gen. Stat. §§ 15A-287, 15A-296; Ohio Rev. Code Ann. §§ 2933.52, 2933.65; Tenn. Code Ann. §§ 39-13-601, 39-13-603; Utah Code Ann. §§ 77-23a-4, 77-23a-11; Va. Code Ann. §§ 19.2-62, 19.2-69; W. Va. Code §§ 62-1D-3, 62-1D-12; Wis. Stat. § 968.31; Wyo. Stat. Ann. §§ 7-3-602, 7-3-609; See also D.C. Code Ann. §§ 23-542, 23-554.

U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155 (1939), *Martin v. Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L.Ed. 1313 (1943), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980), cases cited by the court as illustrative of the proposition that regulations designed to promote significant governmental interests should not sweep so broadly as to impose unnecessary constraints on First Amendment rights of free expression and communication. The constitutional shortcomings in *Schneider* (combating the littering of streets by curbing leafleting), *Struthers* (banning door-to-door distribution of circulars, including religious literature, in order to protect homeowners from annoyance), and *Village of Schaumburg* (combating allegedly fraudulent charitable solicitation by banning all solicitation by groups not disbursing 75% of receipts) involved situations in which small towns imposed on traditional First Amendment activities pervasive constraints sought to be justified as ways of dealing with distinct (and not very important) problems that could have been more effectively addressed by governmental action directed at the actual problems—e.g., prosecuting litterers (*Schneider*); prosecuting as trespassers solicitors who do not depart when requested by homeowners to do so (*Struthers*); requiring organizations soliciting contributions to disclose how receipts are used (*Village of Schaumburg*). In the case at bar, unauthorized disclosure (or other use) of private conversations is a central aspect of the very evil the challenged statutory provisions are designed to combat.

B.

The court also notes that "[r]eporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source," or, indeed, "whether material they are considering publishing has previously been disclosed to the public." Op., p. 127, As a result, the court opines, "[i]t is likely that in many instances these [challenged statutory] provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts." *Ibid.*

I think the court overstates the potential problems of the media. One would suppose that a responsible journalist—whether press or broadcast—would be unlikely to propose publication of a transcript of an apparently newsworthy conversation without some effort to insure that the conversation in fact took place and to authenticate the identities of the parties to the conversation. As part of such an inquiry, the question whether the parties to the conversation had authorized its recording and release, or whether others had lawfully intercepted the conversation, would seem naturally to arise. Moreover, current technology would make it relatively easy to determine whether the conversation had been the subject of a prior press or broadcast report.[6]

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[6] On occasion, inquiry of the kind suggested might indeed take a few days. But news reporting—especially with respect to events (such as a conversation) that are concluded, rather than still evolving—need not be an instant process. In the case at bar, it appears that defendant Vopper did not broadcast the conversation

In my judgment, a more substantial First Amendment difficulty is posed by the fact that the person or entity charged with knowing or having "reason to know" that a published conversation was unlawfully intercepted is called on to contest before a judicial fact-finder (whether jury or judge) a plaintiff's allegation of knowledge or "reason to know." But the difficulties attendant on fact-finder oversight of journalistic practice (or, indeed, of public disclosure by non-journalists) can, I believe, be met by adoption of the procedural proposals advanced in the brief for the United States:

> In criminal prosecutions under Title III, *scienter* must be proved beyond a reasonable doubt. In civil cases *scienter* ordinarily would be subject to a conventional preponderance-of-the-evidence standard. When a claim is brought for disclosure of information about matters of public significance by persons who were not involved in the illegal interception, however, a preponderance-of-the-evidence standard may operate to deter the publication of information that was *not* the product of illegal surveillance. To avoid that result, it might prove

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until some months after defendant Yocum gave him a copy of the tape. Deposition of Frederick W. Vopper, App. 60a-61a. On the other hand, the *New York Times* published a portion of the intercepted conversation that gave rise to *Boehner v. McDermott* the day after it received the tape. The *New York Times* story also reported that the tape had been "made . . . available to the New York Times" by "a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further" and who told the *Times* that the tape had been given to him [on January 8, 1997] by a couple who said the tape "had been recorded [on December 21, 1996] off a radio scanner, suggesting that one participant was using a cellular telephone." N.Y. Times, January 10, 1997, p. 1, col.3.

> appropriate for district courts to impose a higher standard of proof of *scienter* in such cases, such as proof by "clear and convincing" evidence, and for appellate courts to conduct independent review of the findings of the trier of fact. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974) (requiring clear and convincing evidence of "actual malice" in defamation cases); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511, 104 S. Ct. 1949, 80 L.Ed.2d 502 (1984) (*de novo* appellate review of findings regarding actual malice). See generally *Waters v. Churchill*, 511 U.S. 661, 669-71, 114 S. Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) (discussing circumstances in which First Amendment requires modifications of burdens of proof and other procedural rules).

Brief for the United States, pp. 40-41 n. 8.[7]

II.

As the court's opinion makes plain, the First Amendment values of free speech and press are among the values most cherished in the American social order.

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[7] The court's decision has the anomalous consequence of cloaking Yocum, who is not a "media defendant", with the First Amendment protections the court deems appropriate for radio reporter Vopper and the two radio stations. I have undertaken to explain in footnote 3, *supra*, that in my judgment Yocum has a far more tenuous First Amendment claim (if any) than the media defendants. I do not think that, merely by virtue of the fortuity that the plaintiffs have elected to sue Yocum and the media defendants (which the plaintiff in *Boehner v. McDermott* did not do), Yocum becomes a third-party beneficiary of whatever First Amendment protections may accrue to the media defendants.

Maintenance of these values (and the other values of the Bill of Rights) against overreaching by the legislature or the executive is among the judiciary's major and most demanding responsibilities. In the case at bar, however, the First Amendment values on which defendants take their stand are countered by privacy values sought to be advanced by Congress and the Pennsylvania General Assembly that are of comparable —indeed kindred—dimension. Three decades ago the late Chief Judge Fuld of the New York Court of Appeals put the matter well in *Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 244 N.E.2d 250, 255 (1968) (in words that the Supreme Court has quoted with approval, *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 560, 105 S. Ct. 2218, 85 L.Ed.2d 588 (1985)):

> The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 3:CV-94-1201
(Judge Kosik)

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

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO, JANE DOE
AND JOHN DOE, AND JACK YOCUM, DEFENDANTS

[Filed: June 17, 1995]

MEMORANDUM

Before the court are respective motions for summary judgment filed by Plaintiffs Bartnicki and Kane; Defendant Yocum; and Defendants Frederick Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; and Lackazerne, Inc., d/b/a WGBI Radio (Media Defendants). The matter involves allegations of violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2511, 2520, and the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Con. Stat. Ann. § 5701 *et seq.* [hereinafter electronic surveillance acts]. For

the following reasons, we deny the motions for summary judgment.

I. Background

Plaintiff Gloria Bartnicki is employed by the Pennsylvania State Education Association (PSEA) and, at relevant times, was assigned as a negotiator in a contract dispute between the teachers' union and Wyoming Valley West School District. Plaintiff Anthony Kane, Jr., was a teacher at Wyoming Valley West High School and president of the PSEA's local union representing the teachers of the school district.

During the pendency of the negotiations between the teachers' union and the school board, a citizens group, Wyoming Valley West Taxpayers Association (Association), was formed for the purpose of opposing the union's proposals. Defendant Jack Yocum was president of the Association.

It is represented that the contract negotiations were the regular subject of the local media.

In May of 1993, Plaintiffs Bartnicki and Kane engaged in a telephone conversation about the union's demands and the negotiations. The conversation occurred via a transmission from Plaintiff Bartnicki's cellular car phone and Plaintiff's Kane conventional household telephone line. The conversation was intercepted and recorded by an unidentified party. The Plaintiffs allege that the interception of their communi-

cation was intentional, while the Defendants argue that the interception was inadvertent and unintentional.[1]

The Defendants' acquisition of the intercepted communication allegedly occurred as follows. A cassette containing a recording of the conversation was placed in Defendant Yocum's mailbox without any markings identifying the depositing party or the person who made the recording. Defendant Yocum played the tape and recognized the voices as those belonging to the Plaintiffs.

There exists some dispute as to whom Defendant Yocum played the tape, but it is undisputed that Defendant Yocum provided Defendant Vopper of Defendant WILK's radio station with the recording. The recording was aired during Defendant Vopper's radio program.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure states:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[2]

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[1] Both parties have failed to supply any facts regarding the interception. However, both parties supply the court with theories on the methods of intercepting cellular communications.

[2] Fed. R. Civ. P. 56.

The Supreme Court has held that Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2551 (1986). Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); *see also Gile v. Optical Radiation Corp.*, 22 F.3d 540, 541 (3d Cir.), *cert. denied*, 115 S. Ct. 429 (1994).

Initially, to support its motion for summary judgment, the moving party must show the absence of a genuine issue concerning any material fact. *Celotex*, 477 U.S. at 322-23. Once the moving party has satisfied its burden, the non-moving party must present "affirmative evidence" to defeat the motion for summary judgment, consisting of verified or documented materials. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 3189 (1990); *Anderson*, 477 U.S. at 256-57. Mere conclusory allegations or denials taken from the pleadings are insufficient. *Schoch v. First Fidelity*, 912 F.2d 654, 657 (3d Cir. 1990) (citations omitted).

In evaluating a motion for summary judgment, the entire record must be examined in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences derived from the evidence. *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3d Cir. 1994); *White v. Westinghouse Electric Company*, 862 F.2d 56, 59 (3d Cir. 1988).

III. DISCUSSION

Media Defendants motion this court for the granting of summary judgment because 1) they did not violate the electronic surveillance acts and 2) they are protected by the First Amendment.

Media Defendants' first argument is that they did not violate the applicable statutory provisions. *See* Document 56 at 12. In moving for summary judgment, Media Defendants state that the record establishes that Media Defendants did not intercept or tape the electronic communication between the Plaintiffs. We agree that there exists no genuine issue as to this fact, but that is not dispositive of Media Defendants' compliance with the electronic surveillance acts. The federal statute provides that a person violates the act if he "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or *having reason to know* that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c) (1996) (emphasis added). The state electronic surveillance statute parallels the federal statutory language. *See* 18 Pa. Con. Stat. § 5703. Accordingly, a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception. Such an interpretation of the statute adheres to the purpose of the act which was to protect wire and oral communications and an individual's privacy interest in such. To allow a third party who is provided access to the intercepted communications to use the contents of the

intercepted communications knowing or having reason to know that such communications were illegally intercepted would defeat the purpose of both the federal and state act. *See Natoli v. Sullivan*, 606 N.Y.2d 504, 507 (N.Y. Sup. Ct. 1993), *aff'd*, 616 N.Y.S.2d 318 (N.Y. App. Div. 1994).

In reviewing the record, we believe that there exists a genuine issue as to a material fact as to whether Media Defendants knew or had reason to know that the communication was illegally intercepted. *See Forsyth v. Barr*, 19 F.3d 1527, 1539 (5th Cir.), *cert. denied*, 115 S. Ct. 195 (1994). Media Defendants point out that there exists a great likelihood that the conversation was inadvertently intercepted and recorded, thus outside the scope of both statutory provisions. *See* Document 56 at 7-8 (providing circumstances in which the cellular conversation might have been intercepted unintentionally); Document 72 at 2 (citing *Bayges v. SEPTA*, 144 F.R.D. 269, 271-72 (E.D. Pa. 1992), for the proposition that unintentional interceptions do not offend the statute). On the other hand, the Plaintiffs note that there exists references within the conversation indicating the confidential nature of the conversation and the fact that it was being conducted via a cellular telephone, as well as the relative difficulty in intercepting such a communication. *See* Document 53 at 7-10; Document 54; Document 68 at 9-13. Therefore, Media Defendants' motion for summary judgment as it pertains to the argument that they did not violate the electronic surveillance acts is denied.

Defendant Yocum moves for summary judgment also alleging that he was not involved in intercepting the communication and that the communication may have

been legally intercepted. *See* Document 45; Document 49 at 13-18. The record reflects that Defendant Yocum used and disclosed the contents of the conversation, as evidenced in his uncontroverted disclosure of the recording to Media Defendants. In accordance with our analysis of Media Defendants' argument on this issue, we find that there exists a genuine issue of material facts as it pertains to Defendant Yocum knowing or having reason to know that the communications were illegally intercepted. Therefore, it is inappropriate for us to grant summary judgment to Defendant Yocum on this ground.

Media Defendants also move for summary judgment based on their First Amendment rights. They assert that the broadcasting of the audiotape which was "newsworthy" was protected by the First Amendment and therefore was not prohibited by the electronic surveillance acts.

Media Defendants correctly note that it is well-established that where the media lawfully obtains truthful information about a matter of public significance or concern, government officials may not constitutionally punish the publication of that information absent the need to further a government interest of a higher order. *See* Document 56 at 14 (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535 (1978); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667; *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603 (1989); *Oklahoma Publishing Co. v. United States*, 515 F. Supp. 1255, 1259 (W.D. Ok. 1981)). However, these cases addressed matters where a state actor attempted to place a prior restraint on

specified speech or where the intentional interception was legal but the disclosure was illegal.

In the matter before this court, there exist no statutory provisions specifically designed to chill free speech. Rather, at issue is the federal and state electronic surveillance laws which are general application laws. These surveillance laws apply equally to the general public and impose no further restrictions on the media. Accordingly, there exists no indicia of prior restraint or the chilling of free speech.

The Supreme Court has specifically addressed the constitutionality of general application laws as they pertain to the media. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 668-70, 111 S. Ct. 2513, 2518 (1991). The Supreme Court in *Cohen* addressed the imposition of a fine levied against a publisher for the publication of a confidential informant's identity. The case was analyzed pursuant to Minnesota's doctrine of promissory estoppel, and the Court deemed the doctrine as one of general applicability. *See id.* at 670. The Court, in distinguishing a similar line of cases that Media Defendants here rely on, stated that it is "well-established" that generally applicable laws "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669. The Court recognized that such a statement applies even when the information obtained was truthful because, as the Court stated, "it is beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Id.* at 670 (internal quotation marks omitted).

In reviewing both the federal and the state electronic surveillance laws, we conclude that both acts are matters of general applicability. We do not find that the statutes target or single out the press. We, therefore, deny Media Defendants' motion for summary judgment as it applies to this argument.

Defendant Yocum, in his motion for summary judgment, additionally argues that he was a "newsgather" for Media Defendants and therefore should be afforded the same First Amendment protections. *See* Document 49 at 19-21. The same analysis applies, and Defendant Yocum's motion for summary judgment on the basis of the First Amendment also fails.

Plaintiffs Bartnicki and Kane also move this court for summary judgment because "the pleadings and depositions demonstrate that there are no disputed material issues of fact regarding the question of whether the Defendants, Vopper, WILK and Yocum intentionally disclosed and published the surreptitiously taped telephone conversation between the Plaintiffs, Bartnicki and Kane without their permission." *See* Document 40. The Plaintiffs assert that such a showing demonstrates the Defendants' violation of the electronic surveillance acts and entitles them to summary judgment. Although the court agrees that there exists no genuine issue of material fact as it relates to Defendant Yocum using the communication and disclosing it to Media Defendants and to Media Defendants' use and disclosure of the communication to its listening audience, such a showing is insufficient to demonstrate a violation of the applicable statutes.

The electronic surveillance acts seek to impose both criminal and civil sanctions on the interception, use, or disclosure of *illegally* intercepted electronic communications. However, the acts do not impose criminal or civil penalties for legally intercepted communications. For instance, the federal and state electronic surveillance laws do not prohibit the interception, use, or disclosure of unintentionally intercepted communications. *See* 18 U.S.C. § 2511 (1995); 18 Pa. Con. Stat. Ann. § 5704 (1995). The record reveals that there exists a genuine issue of material fact with regard to whether the communication was illegally intercepted. In addition, there exists a genuine issue as to whether the Defendants knew or should have known that the communication was illegally intercepted.

Because the legality of the interception and the Defendants' state of mind are material facts at issue, we deny the Plaintiff's motion for summary judgment.

IV. CONCLUSION

We find that there exists genuine issues as to material facts, and we accordingly deny all the motions for summary judgment.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 3:CV-94-1201
(Judge Kosik)

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

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO, JANE DOE
AND JOHN DOE, AND JACK YOCUM, DEFENDANTS

ORDER

AND NOW, this 14th day of June, 1996, IT IS HEREBY ORDERED THAT:

[1] Defendants Frederick Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; and Lackazerne, Inc., d/b/a WGBI Radio's motion for summary judgment [Document 43] is denied;

[2] Defendant Yocum's motion for summary judgment [Document 45] is denied;

[3] Plaintiffs Bartnicki and Kane's motion for summary judgment [Document 40] is denied; and

[4] a pretrial conference shall be set forthwith.

/s/ EDWIN M. KOSIK
EDWIN M. KOSIK
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 3:CV-94-1201
(Judge Kosik)

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

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO, JANE DOE
AND JOHN DOE, AND JACK YOCUM, DEFENDANTS

[Filed: Nov. 8, 1996]

MEMORANDUM

Before the court is Defendants' motion to reconsider our decision of June 17, 1996, where we denied the cross motions for summary judgment. *See* Document 73. The matter involves allegations of violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2511, 2520, and the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Con. Stat. Ann. § 5701 *et seq.* [hereinafter acts]. For the following reasons, we deny the motion for reconsideration.

I. STANDARD OF REVIEW

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). As one court has noted:

> The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983).

Parties must remember that a motion for reconsideration is not an appeal. Therefore, it is improper on a motion for reconsideration for the party to request "the Court to rethink what it had already thought through—rightly or wrongly." *Id.* Thus, a party "must show more than a disagreement with the court's decision." *Panna v. Firstrust Sav. Bank*, 760 F. Supp. 432, 435 (D. N. J. 1991).

III. DISCUSSION

Defendants[1] motion this court to reconsider our denial of summary judgment because 1) Plaintiffs were unable to demonstrate the ability to prove at trial a necessary element of their case, i.e. that the conversation was intentionally intercepted and therefore illegal and 2) Defendants are protected by the First Amendment.

First, Defendants contend that Plaintiffs' failed to demonstrate a material element of their case. Defendants argue that Plaintiffs' were required to show that the interception of the conversation was not inadvertent, and, therefore, illegal. We addressed this issue in detail in our previous Order. Both the federal and state acts impose liability to a user if he "knew or had reason to know" that the communication was intercepted. *See* 18 U.S.C. § 2511 (1996); 18 Pa. C.S.A. § 5703. In addressing these provisions in our previous Order, we stated:

> Accordingly, a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception. Such an interpretation of the statute adheres to the purpose of the act which was to protect wire and oral communications and an

---

[1] Defendants Frederick Vopper; Keymarket of NEPA, Inc.; and Lackazerne, Inc. (Media Defendants) and Defendant Yocum filed separate motions. *See* Document 75; Document 76. However, both motions address similar issues, and accordingly we need only address the motion for reconsideration in the singular.

> individual's privacy interest in such. To allow a third party who is provided access to the intercepted communications to use the contents of the intercepted communications knowing or having reason to know that such communications w[as] illegally intercepted would defeat the purpose of both the federal and state act.

Document 73 at 5 (citations omitted).

Therefore, a violation of the acts can occur by the mere showing that Defendants "knew or should have known" that the communication was illegally intercepted. In our opinion, we stated:

> In reviewing the record, we believe that there exists a genuine issue as to a material fact as to whether Media Defendants knew or had reason to know that the communication was illegally intercepted. Media Defendants point out that there exists a great likelihood that the conversation was inadvertently intercepted and recorded, thus outside the scope of both statutory provisions. On the other hand, the Plaintiffs note that there exists references within the conversation indicating the confidential nature of the conversation and the fact that it was being conducted via a cellular telephone, as well as the relative difficulty in intercepting such a communication.

Id. at 5-6 (citations omitted).

Remembering that the burden of proof at trial is a preponderance of the evidence, we find that Plaintiffs have sufficiently demonstrated that Defendants "knew or should have known" that the communication was intercepted. As to the illegal element for a violation of

the statute, both sides have offered sufficient theories of how the communication was intercepted. This goes beyond the mere characterization of unsupported allegations with which Defendants attempt to classify Plaintiffs' contentions. Accordingly, we find that there is sufficient evidence on which a reasonable jury could conclude, by a preponderance of the evidence, that Defendants violated the acts. As a result, we believe that Plaintiffs have met their burden.

Defendants have also sought reconsideration of our decision denying them summary judgment pursuant to their First Amendment argument. In seeking to have us reconsider our decision, Defendants cite a Pennsylvania Supreme Court decision that held: "Without dispute, it is in the public interest to have a free press. Thus, the legislature intended for the public interest and a free press to supersede the interest of an individual whose private conversation regarding his illegal activities had been *lawfully intercepted and lawfully obtained* by a newspaper." Document 80 at 5 (citing *Bottger v. Loverro*, 587 A.2d 712, 720-21 (Pa. 1991)) (emphasis added).

We need not discuss this rule because the Pennsylvania Supreme Court's decision clearly was addressing issues involving the lawful interception and lawful acquisition of private conversations pertaining to illegal activities. The focus of this litigation is whether the disclosure was legal pursuant to the acts. In addition, it is disputed that the alleged illegal conduct, "a threat to blow-off a porch," was truly a threat of future illegal activity.

We deny the motions for reconsideration.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CASE NO. 3:94-CV-01201
(Judge Kosik)

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

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO,
AND JACK YOCUM, DEFENDANTS

[Filed: Jan. 7, 1998]

ORDER

IT IS HEREBY CERTIFIED that the Memorandum and Order dated June 14, 1996 denying the Motion for Summary Judgment of the Defendants and the Memorandum and Order of November 8, 1996 which denied the Defendants' Motion to Reconsider the June 17, 1996 decision involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order will materially advance the ultimate termination of this litigation.

The controlling questions of law are: (1) whether the imposition of liability on the media Defendants under the Federal Electronic Surveillance Statute, 18 U.S.C. §§ 2511, 2520 and under the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. § 5701, *et seq.*, solely for broadcasting the newsworthy tape on the Defendant Fred Williams' radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid Federal and Pennsylvania Electronic Surveillance Statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment. I make this certification pursuant to 28 U.S.C. § 1292(b).

BY THE COURT:

/s/ EDWIN M. KOSIK
EDWIN M. KOSIK
United States District
Judge

Dated: January 7th, 1998

APPENDIX F

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790

P. DOUGLAS SISK
CLERK

TELEPHONE
215-597-2995

October 6, 1998

Via Facsimile and
Regular Mail

David M. Barasch, Esquire,
U.S. Attorney
Office of United States Attorney
Federal Building
228 Walnut Street
P.O. Box 11754
Harrisburg, PA 17108

RE: Bartnicki v. Vopper
No. 98-7156
Listed for Disposition: October 5, 1998

Dear Mr. Barasch:

The Court wishes to advise you that in the above case the defendants/appellants argue that insofar as the

federal act dealing with electronic surveillance, 18 CSA §§ 2511, 2520, authorizes compensation in a civil action by persons who were the victims of an unlawful interception, the statute would conflict with the First Amendment, and therefore should be interpreted as inapplicable to media defendants and their sources who were not responsible for the interception. Although the case was filed and maintained as a private action, it was only after the case was argued this morning that the Court realized that this interpretation might trench upon its obligation under 28 U.S.C. § 2403(a) to provide you with notice with respect to the constitutional issue.

If you choose to file a brief on the constitutional issue, please have four copies filed in the Office of the Clerk by Tuesday, October 20, 1998. The Court is sending similar notice to the Attorney General of the Commonwealth of Pennsylvania as the Pennsylvania Wiretapping and Electronic Surveillance Control Act is also at issue. After the Court reads the briefs, if any, submitted by the respective Attorney Generals' offices, it will decide whether reargument would be appropriate with the representatives of one or both of the Attorney Generals participating.

If you would like copies of the briefs filed by the parties, please contact the lawyers whose names are listed below:

Donald H. Brobst, Esq.
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Greenwald
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Raymond P. Wendolowski, Esq.
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Frank J. Aritz, Esq.
23 West Walnut Street
Kingston, PA 18704
(717) 288-9751

Very truly yours,
P. DOUGLAS SISK, Clerk

By: /s/ CAROL L. GILLIN
CAROL L. GILLIN,
Calendaring Clerk
Direct Dial: (215) 597-3130

PDS:clg

cc: Donald H. Brobst, Esquire
Frank J. Aritz, Esquire
Raymond P. Wendolowski, Esquire
Jeremiah A. Collins, Esquire (fyi)

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7156

GLORIA BARTNICKI; ANTHONY F. KANE, JR.,
APPELLEES

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO, APPELLANTS

(Middle District of PA (Scranton)
D.C. Civil No. 94-1201) (EMK)

[Nov. 19, 1998]

Present: SLOVITER, COWEN, *Circuit Judges* and POLLAK, *District Judge*

Motion by United States to intervene as of right for the purpose of defending the constitutionality of 18 U.S.C. Section 2511.

/s/ DEBRA D. WALL
DEBRA D. WALL 597-0485
Case Management Supervisor

Argued 10/5/98

_____ORDER _____

The foregoing motion is granted.

By the Court,

/s/ DELORES SLOVITER
Circuit Judge

DATED: DEC 30 1998

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7156

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS;
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO;
LACKAZERNE, INC., D/B/A WGBI RADIO, JANE DOE;
JOHN DOE; JACK YOCUM

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS;
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO;
LACKAZERNE, INC., D/B/A WGBI RADIO, JACK YOCUM

APPELLANTS

UNITED STATES OF AMERICA, INTERVENOR

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, and BARRY, *Circuit Judges*, and POLLAK, *District Judge*[1]

---

[1] Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, as to panel rehearing only.

The petition for rehearing filed by the Appellees and Amicus Pennsylvania State Education Association and the petition for rehearing filed by Intervenor United States in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

Judges Greenberg, Scirica, Nygaard, Alito and Rendell would have granted the petitions for rehearing.

By the Court,

/s/ DELORES SLOVITER
Circuit Judge

Dated: FEB 25 2000

APPENDIX I

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 18 U.S.C. 2510 provides in pertinent part:

Definitions

As used in this chapter—

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but

such term does not include any electronic communication; * * *

3. 18 U.S.C. 2511 provides in pertinent part:

Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter [18 U.S.C. 2510-2520] any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; [or]

* * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; * * *

* * *

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

* * *

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then—

(i) if the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is—

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection—

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

4. 18 U.S.C. 2515 provides:

Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United

States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

5. 18 U.S.C. 2520 provides:

Recovery of civil damages authorized

(a) IN GENERAL.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) COMPUTATION OF DAMAGES.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal

purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) DEFENSE.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) LIMITATION.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.