No. 11-947

In The Supreme Court of the United States

ROBERT SIMELS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge of the law in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the defense of individual liberties. In furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1]

NACDL has a particular interest in this case because of its potential impact on preserving statutory

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[1] The Petitioner was notified ten days prior to the due date of this brief of the intention to file. The Respondent has waived ten day notice in the matter. The parties have consented to the filing of this brief.

As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

protections for privacy and protecting them from dilution through judicially-created exclusions.

SUMMARY OF ARGUMENT

The Second Circuit's ruling that a judicially-created impeachment exception to the judicially-made Fourth Amendment exclusionary rule may be read into Title III of the Omnibus Crime Control and Safe Streets Act of 1968's unequivocal statutory suppression remedy, which prohibits *any* use of illegal wiretap intercepts at trial, endangers the sanctity of the protection against such invasions of privacy that was central to Congress's enactment of Title III, and in particular §2515 of that Act. *See* Pub. L. No. 90-351, 82 Stat. 211; 18 U.S.C. §§2510-2522.

In holding that Defendant-Petitioner Robert Simels's testimony could be impeached with portions of an illegally obtained wiretap intercept that had been suppressed under Title III, the Second Circuit found it unfathomable that Congress intended "evidence obtained in violation of a mere statute to be more severely restricted than evidence obtained in violation of the Constitution." *See* Petitioner's Appendix, at 17a, *quoting United States v. Baftiri*, 263 F.3d 856, 857 (8th Cir. 2001).

In so concluding, the Second Circuit failed to see that, in the context of Title III wiretap intercepts, the constitutional protections afforded by the Fourth Amendment are but a floor, not a ceiling. Accordingly,

the Court ignored the clear and express statutory protections set forth in §2515, in favor of the lesser protections provided by the Fourth Amendment.

The Second Circuit's dismissive treatment of §2515's statutory protections against the use of illegal intercepts for impeachment purposes, in deference to a judicially-created Fourth Amendment exception to the exclusionary rule, is alarmingly part of a national trend, which expands beyond the impeachment exception to other judicially-made Fourth Amendment exceptions, such as "good faith" or "clean hands."

These judicially-fashioned and judicially-implemented exceptions are chipping away at the protections afforded by Title III, just as those protections are needed most. Despite the unwillingness of the circuit courts to accept the full range of protections under Title III, wiretap authorizations under Title III are now at an all-time high, with an increase of 34% in federal and state applications for wiretaps in 2010 alone. *See* Robert Simels's Petition for a Writ of Certiorari, at 26, *citing* James C. Duff, *Report on the Director of the Administrative Office of the U.S. Courts on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications* 7, Admin. Office of the U.S. Courts (June 2011), available at http://www.uscourts.gov/uscourts/Statistics/Wiretap Reports/2010/2010WireTapReport.pdf.

In light of the highly intrusive invasion of privacy wiretap interception represents, the dramatic increase in the number of authorizations for both

state and federal wiretaps under Title III since the Act's inception more than 40 years ago, and the fact that this Court has not addressed the scope of §2515 in more than thirty years, *amicus* NACDL recognizes the pressing need for this Court to fortify the uniform statutory protection against the invasion of privacy caused by the illegal wiretap interception and disclosure of such intercepts at trial that Congress enacted Title III to provide. *See* Electronic Privacy Information Center, *Title III Wiretap Orders 1968-2009*, EPIC.org, http://epic.org/privacy/wiretap/stats/wiretapping_graphs.html (last visited on Feb. 27, 2012).

The result reached by the Second Circuit collides with the fundamental premises underlying Congress's enactment of Title III. It is important that the Court resolve this case now to restore the statutory protections provided by §2515 of Title III, and to preserve the integrity of the judicial process.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO DETERMINE THE PARAMETERS OF THE PROTECTIONS AGAINST THE INVASION OF PRIVACY AND DISCLOSURE OF ILLEGAL WIRETAP INTERCEPTIONS UNDER §2515 OF TITLE III

A. Wiretapping Is Among the Most Intrusive Invasions of Privacy

As this Court recognized in *Berger v. New York*, 383 U.S. 41, 62-63 (1967), "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." In response to *Berger*, and in order to address the extreme intrusion electronic surveillance exerts on privacy, a year later Congress enacted a comprehensive package of legislation controlling that extraordinarily invasive technique.

B. Protecting Individuals from Unlawful Invasions of Their Privacy Was a Primary Consideration in the Enactment of §2515 of Title III

As this Court has explained, Title III represents Congress's efforts to codify "special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance." *United States v. Calandra*, 414 U.S. 338, 355 n.11 (1974). In particular, in enacting Title III, "the protection of privacy was an overriding congressional concern" and §2515 was

"central" to realizing that protection in the legislation. *Gelbard v. United States*, 408 U.S. 41, 48, 50 (1972).

The "unequivocal language of s 2515" was designed to protect privacy, and, as this Court pointed out, "expresses th[is] fundamental policy adopted by Congress on the subject of wiretapping and electronic surveillance[.]" *Id*., at 47.

In addition, as this Court explained in *Gelbard*, the "congressional findings for Title III make plain" that the statute operates "[t]o safeguard the privacy of innocent persons." *Id*., *quoting* §801(d), 82 Stat. 211.

Accordingly, as this Court declared in *Gelbard*, §2515's "importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." *Gelbard*, 408 U.S. at 50.

C. Preserving Statutory Protections Provided in Title III Is of Utmost Importance Since the Protections Afforded by §2515 Provide a Greater Degree of Protection for Privacy than Does the Fourth Amendment's Exclusionary Rule

It is well-settled that §2515 of Title III provides a greater degree of protection for privacy than does the Fourth Amendment's exclusionary rule because §2515 is substantially more restrictive, far stronger, and far broader, than the judicially-created exclusionary rule. *See*, *e.g.*, *United States v. Giordano*, 416 U.S. 505, 524

(1974) (§2515 requires the suppression of the intercepted communications at issue even though the "judicially fashioned exclusionary rule [under the Fourth Amendment] aimed at deterring violations of Fourth Amendment rights," improperly applied by the government, was not sufficient to do so); *Calandra*, 414 U.S. at 355 n.11 (relying on *Gelbard* for the proposition that §2515 encompasses grand jury testimony, while the Fourth Amendment's exclusionary rule does not).

Thus, for the Second Circuit, or any court, to substitute a judicially fashioned exclusionary rule for the more robust protections of §2515 threatens both the future potency of Title III, and the effectiveness of statutory law in general. To continue to allow judges to read in a judicially-crafted Fourth Amendment exclusionary rule when Title III expressly requires that its own unequivocal suppression remedy be implemented would serve only to dilute the intended force of the protections of the right to privacy expressly provided by Congress under Title III.

From a policy perspective, NACDL submits that to permit judges to impose their own exceptions in defiance of protections provided by statute – and in particular those statutes such as Title III which provides greater protections than those under the Constitution and was intended to govern the realm of wiretap intercepts and their disclosure entirely – threatens to undermine the power of Congress to enact laws that will have their intended effect.

D. The Court Must Intervene Now to Stop the Trend Amongst the Circuits to Impose Judicially-crafted Exceptions That Erode the Efficacy of §2515 and Threaten the Very Integrity of Court Proceedings

While this case addresses the Second Circuit's improper insertion of a judge-made impeachment exception to a judge-made Fourth Amendment exclusionary rule into Title III's unequivocal statutory suppression remedy, even allowing this one exception creates an unwarranted invitation to courts to erode Title III with other judicially-crafted exceptions.

As set forth in Mr. Simels's Petition, at 18-19, there exists today a growing trend amongst the circuits to read into Title III's statutory suppression remedy other exceptions – such as "good faith" or "clean hands" – to the Fourth Amendment's exclusionary rule. *See* Simels's Petition, at 19, n.7 & n.8.

This gradual incursion into Title III's protections against the unlawful invasion of privacy also serves to erode the buffer created by Title III between the government and the courts, which "ensures that the courts do not become partners to illegal conduct" through "entangle[ment] in the illegal acts of Government agents." *Gelbard*, 408 U.S. at 51.

If this trend continues, Title III might be weakened to the point that the exceptions will swallow the rule, just as justices of this Court have observed to be the fate of the Fourth Amendment exclusionary rule itself. *See* Petitioner's Brief, at 22, *citing Davis v.*

United States, 131 S.Ct. 2419, 2440 (Breyer, J., dissenting) (criticizing "trend" of good faith exception swallowing the rule); *Herring v. United States*, 555 U.S. 135, 157 (2009) (Ginsberg, J., dissenting) (criticizing the Court's "further erod[ing]" the rule).

In order to halt this troubling trend, and restore the protections afforded by §2515 of Title III, as well as "to protect the integrity of the court and administrative proceedings," the Court should intervene by granting certiorari in this case. *See Gelbard*, 408 U.S. at 51.

E. The Court Must Also Protect Against the Disclosure of Illegal Intercepts Because the Fear of Public Disclosure of Private Conversations May Have a Chilling Effect on Private Speech

In his Petition, at 28, Petitioner addresses the potential chilling effect on private speech that an erosion of the protection of privacy under Title III could have due to "the fear of public disclosure of private conversations." *Id*., *citing Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001). *Amicus* NACDL also endorses this view.

CONCLUSION

For all the reasons set forth above, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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