No. _____

IN THE
Supreme Court of the United States

ALI CISSE,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does knowledge of wiretapping establish "consent" to wiretapping under 18 U.S.C. § 2511(2)(c)?

TABLE OF CONTENTS

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ali Cisse respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals, Pet. App. 1a, is published at 32 N.Y.3d 1198 (2019). The decision of the Appellate Division First Judicial Department, Pet. App. 3a, is published at 149 A.D.3d 435 (N.Y. App. Div. 2017). The underlying trial court decision is unpublished, but is reproduced at Pet. App. 28a.

JURISDICTION

The judgment of the New York Court of Appeals was entered on February 21, 2019. Pet. App. 1a-2a. This Court has jurisdiction over the federal question presented under 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 2511(1)

> Except as otherwise specifically provided in this chapter any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(2)(c)

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where . . . one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(10)(a)(i)

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that . . . the communication was unlawfully intercepted . . .

INTRODUCTION

Title III of The Omnibus Crime Control and Safe Streets Act of 1968 prohibits wiretapping by state and private actors. 18 U.S.C. § 2510 *et seq.* ("Title III"). Congress' purpose in enacting Title III was crystal clear: to protect privacy. *Bartnicki v. Vopper*, 532 U.S. 514, 523-26 (2001). "[A]lthough Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern." *Gelbard v. United States*, 408 U.S. 41, 48-50 (1972). "Prior consent" is an exception to Title III's wiretapping prohibitions. 18 U.S.C. § 2511(2)(c) ("It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where . . . one of the parties to the communication has given *prior consent* to such interception.").[1]

Here, the New York Court of Appeals, relying on the majority view of the Circuit Courts of Appeals, held that a caller's mere knowledge of wiretapping proves "prior consent" to the intrusion. Pet. App. 1a-2a (citing, *e.g.*, *United States v. Verdin-Garcia*, 516 F.3d 884, 893-95 (10th Cir. 2008), and *United States v. Workman*, 80 F.3d 688,

[1] Unless otherwise noted, all emphasis in this petition has been added by petitioner.

693-94 (2d Cir. 1996)). But as the Seventh Circuit has observed, this extra-statutory invention injects an absurd loophole into Title III, as it allows any state or private actor to wiretap at will so long as they provide "notice" of wiretapping. *United States v. Daniels*, 902 F.2d 1238 (7th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990); *United States v. Feekes*, 879 F.2d 1562, 1565 (7th Cir. 1989). This Court should close that dangerous loophole here.

Neither the text nor structure of Title III justifies a knowledge exception. Had Congress intended to authorize wiretapping so long as the caller "knew" of the intrusion, Congress would have just said so. *Culbertson v. Berryhill*, 139 S.Ct. 517, 522 (2019).

More fundamentally, Congress could not possibly have intended this absurd loophole. A rule equating "knowledge" with "consent" allows governmental and private actors to wiretap at will so long as they provide a warning. Under this theory, the FBI could simply send every cell-phone user in America a text message notifying them of wiretapping and the wiretapping protections would fade away. Even worse, unless the wiretapper indicates that the wiretapping will end at some point, the caller loses privacy rights *forever*—every subsequent call will have been lawfully intercepted under a knowledge-equals-consent theory. Congress could not possibly have intended to inject this loophole into its comprehensive Title III protections.

As the viability of a knowledge exception to Title III's protections is squarely presented here, this Court should grant the petition.

STATEMENT OF THE CASE

1. In 2012, the State of New York charged Petitioner with robbery and related offenses. The State's theory was that Petitioner fired a gun into a sidewalk to facilitate an accomplice's taking of a necklace.

Identity was the central issue in the case. Grainy surveillance footage of the incident merely depicted the suspect from the back, indicating only that he was wearing a jacket with "U.S.A." written on the back.

Several days after the robbery, the police arrested Petitioner and detained him at Rikers Island, New York's largest jail.

The Rikers facility, administered by the New York City Department of Correction ("DOC"), records all outgoing phone calls (except privileged calls) and stores them on a server for 18 months. DOC's legal division downloads the tapped calls onto a hard drive and sends them to prosecutors upon request. DOC informs detainees, through written notices near the phone banks, and audio recordings on the call, that the facility is monitoring outgoing calls. Trial Transcript 285-307.

Before Petitioner's 2014 trial, the prosecution disclosed inculpatory calls that Petitioner made from Rikers Island. Defense counsel objected to the calls' admission, contending that they were obtained in violation of the federal wiretapping statute. Pet. App. 26a. The court overruled the objection on the grounds that the facility provided "adequate notice" of wiretapping. Pet. App. 28a.

At trial, the State introduced over 150 wiretapped calls (made from December 7, 2012 through February 19, 2013) into evidence. The State relied heavily on three of those calls, playing them for the jury and providing a transcript. *See* Transcripts of Calls: Pet. App. 40a-48a. Summation: Trial Transcript 729.

During a December 8, 2012 call, Petitioner said he didn't "know what's going on with [his] case." He added that the evidence consisted of a "coat" he had purchased from Macy's. Pet. App. 40a-41a.

Days later, Petitioner told an unidentified person to tell Anthony Robinson, the purported robbery accomplice, to "fall back." Robinson got on the phone and Appellant asked about a firearm's location. Petitioner said the police "raided my crib for that" and Robinson asked if anyone had said anything "about me." Appellant responded that witnesses had "said it was two of us, but . . . they don't know [our] names . . . . They just got me walking . . . on the back like you feel me, from the back?" Pet. App. 42a-44a.

The next day, Petitioner called Robinson and said he should "get rid" of the firearm because the police were looking for it. Petitioner added that the surveillance footage showed him "walking away. They don't even got my face[, only] my back, like the back of the jacket." Robinson asked if Petitioner had seen the video; Petitioner answered, "Nah, they only showed me one picture of me walking." Pet. App. 45a-48a.

In summation, the prosecution claimed that these calls were "powerful, independent corroborating evidence of the defendant's identity as the perpetrator." The prosecution played the three calls for the jury, pressing that "you have the defendant essentially telling you it was him." Trial Transcript 729.

The jury convicted Petitioner of robbery and related offenses. Petitioner was sentenced to 12 years in a state prison, where he is currently incarcerated.

2. Petitioner appealed to the Appellate Division First Judicial Department. Relying on Seventh Circuit authority, *United States v. Feekes*, 879 F.2d 1562 (7th Cir. 1989) and *United States v. Daniels*, 902 F.2d 1238 (7th Cir. 1990), Petitioner argued that a person does not consent to wiretapping under 18 U.S.C. § 2511(2)(c) simply because he has knowledge of wiretapping. Congress did not, Petitioner pressed, intend a knowledge loophole. Under that loophole, any governmental or private actor could evade Title III's protections by simply providing a wiretapping warning to their targets. *See* Petitioner's Appellate Division Brief at 42-47.[2]

The State did not deny that under its consent theory, any governmental or private actor could monitor calls or e-mails so long as the wiretapper provided "notice." Nor did the State deny that such a construction would clash with Congress' intent to protect the citizenry from wiretapping. Nevertheless, citing the majority circuit court view that knowledge equals consent, the State contended that Petitioner "impliedly"

[2] All the briefs filed in the Appellate Division and New York Court of Appeals are available on the New York Court of Appeals website at https://www.nycourts.gov/ctapps/courtpass/.

consented because he knew he was being tapped and made a call. State's Appellate Division Brief at 60-65 (citing, *e.g.*, *United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988)).

The Appellate Division found no wiretapping violation. Pet. App. 3a-4a. The court held that Petitioner consented to wiretapping because he made a call "after receiving multiple forms of notice that his calls may be monitored and recorded." Pet. App. 3a-4a (citing *United States v. Conley*, 531 F.3d 56, 58 (1st Cir. 2008), *United States v. Verdin-Garcia*, 516 F.3d 884, 893-95 (10th Cir. 2008), *United States v. Horr*, 963 F.2d 1124, 1125-26 (8th Cir. 1992), *cert. denied* 506 U.S. 848 (1992), *Amen*, 831 F.2d 373).

3. Before the Court of Appeals, Petitioner renewed his contention that a notice-equals-consent rule creates an absurd loophole in the wiretapping statutes. Petitioner's Court of Appeals Brief at 49-55.

The Court of Appeals, like the Appellate Division below, held that Petitioner "impliedly consented" to wiretapping because he had notice of the wiretapping. Pet. App. 1a-2a (citing 18 U.S.C. § 2511(2)(c), *Conley*, 531 F.3d at 58, *Verdin-Garcia*, 516 F.3d at 894, *Horr*, 963 F.2d at 1126, *Amen*, 831 F.2d at 378-379, *United States v. Faulkner*, 439 F.3d 1221, 1224-25 (10th Cir. 2006), *United States v. Hammond*, 286 F.3d 189, 192 (4th Cir. 2002), *cert. denied*, 537 U.S. 900 (2002), *United States v. Van Poyck*, 77 F.3d 285, 292 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996), *United States v. Workman*, 80 F.3d 688, 696 (2d Cir. 1996), *cert. denied,* 519 U.S. 955 (1996), and *Amen*, 831 F.2d at 378-379).

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. The circuit courts are split on the question of whether knowledge establishes consent to wiretapping.

1. Wiretapping and electronic surveillance are a basic threat to any free people. Thus, to protect privacy and liberty, Congress enacted Title III in 1968. *Gelbard v. United States*, 408 U.S. 41, 47-50 (1972). Title III's comprehensive regulations ban state, federal, and private actors from engaging in three classes of surveillance:

- the "intercept[ion]" of "any wire" "communication"—that is, phone wiretapping;
- the "intercept[ion]" of "any . . . electronic communication," including e-mails and text messages; and
- the "us[e] [of] any . . . device to intercept any oral communication"—that is, the recording of conversations with a recording device (commonly known as "bugging").

18 U.S.C. § 2511(1)(a),(b); 18 U.S.C. § 2510(1) (defining "wire communications"); 18 U.S.C. § 2510(2) (defining "oral communications"); 18 U.S.C. § 2510(12) (defining "electronic communications); *Hately v. Watts*, 917 F.3d 770, 784-85 (4th Cir. 2019) (18 U.S.C. § 2511(12) covers e-mails); *United States v. Jones*, 451 F.Supp.2d 71, 75 (D.D.C. 2006) (same as to text messages).

Title III's ban on wiretapping provides far more protection than the Fourth Amendment. *E.g.*, Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 Fordham L. Rev. 747, 754-56 (2005) ("Warrants under the Wiretap Act have certain protections that Fourth Amendment warrants lack"; they are "'super search warrants.'") (citation and bracket omitted).

Unlike the Fourth Amendment, Title III: (1) covers private actors, (2) requires a showing that alternative investigative routes have failed before a warrant can issue, and (3) applies even if the caller lacks an objective or subjective "expectation of privacy." 18 U.S.C. § 2510-11; 18 U.S.C. § 2518(3)(c); *Briggs v. Am. Air Filter Co., Inc.*, 630 F.2d 414, 417 & n. 4 (5th Cir. 1980); *PBA Loc. No. 38 v. Woodbridge Police Dept.*, 832 F.Supp. 808, 819 (D.N.J. 1993). Evidence obtained in violation of the wiretapping laws is inadmissible. 18 U.S.C. § 2515, 2518(10)(a)(i); *United States v. Donovan*, 429 U.S. 413, 432 (1977).

"Prior consent" is an exception to Title III's prohibitions: "It shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has *given prior consent* to such interception." 18 U.S.C. § 2511(2)(c); 18 U.S.C. § 2511(2)(d) (same "prior consent" standard governs private actors, except private actors cannot wiretap with "prior consent" when they do so "for the purpose of committing any criminal or tortious act").

2. The federal circuit courts are divided on the question of whether a person's knowledge of wiretapping proves consent. The Seventh Circuit has correctly recognized that a knowledge-equals-consent rule would create an unreasonable loophole. In *United States v. Feekes*, 879 F.2d 1562, 1565 (7th Cir. 1989), the government argued that "since [a federal-prison inmate] knew the phones were tapped and used

them anyway, he consented to their being tapped." *Id.* The Seventh Circuit found this argument "troubling" because of its far-reaching implications:

> To take a risk is not the same thing as to consent. The implication of the argument is that since wiretapping is known to be a widely employed investigative tool, anyone suspected of criminal (particularly drug) activity who uses a phone consents to have his phone tapped—particularly if he speaks in code, thereby manifesting an awareness of the risk. Yet the more the government engages in wiretapping, the less protection people may have against illegal wiretapping.

Id.; *see also id.* at 1565-66 (nevertheless finding the calls admissible under 18 U.S.C. § 2510(5)(a)(ii), which exempts wiretapping performed "by an investigative or law enforcement officer in the ordinary course of his duties"); State's Court of Appeals Brief: Pet. App. 34a (disclaiming any reliance on this "ordinary-course" exception) (citing 18 U.S.C. § 2510(5)(a)(ii)).

Again, in *United States v. Daniels*, 902 F.2d 1238, 1245 (7th Cir. 1990), another prison-wiretapping case, the Seventh Circuit emphasized that "knowledge and consent are not synonyms." The Court explained that equating knowledge with consent would lead to the unreasonable result that if wiretapping became ubiquitous (thus placing everyone on actual notice that calls were being monitored), "anyone who used a phone would have consented to its being tapped." *Id.*; *see also id.* (nevertheless finding the calls admissible under 18 U.S.C. § 2510(5)(a)(ii)).

In the Fourth Amendment context, this Court has similarly recognized the absurdity of permitting an otherwise illegal search simply because the individual knows the search is coming. In *Smith v. Maryland*, 442 U.S. 735 (1979), this Court explained

that "if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects." *Id.* at 740 n. 5. Nevertheless, because a legal protection is useless if the government can erase it with a mere "announcement," this Court recognized that a person's knowledge of a search could not justify an invasion of privacy. *Id.* ("[W]here an individual's subjective expectations had been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play *no meaningful role*" in the Fourth Amendment analysis.).

Leading scholars agree. As Professor LaFave has observed, "Consent in any meaningful sense cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing. Were it otherwise, the police could utilize the implied consent theory to subject everyone on the streets after 11 p.m. to a search merely by making public announcements in the press, radio and television that such searches would be undertaken." 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 8.2(*l*) (5th ed.) (internal quotation marks omitted) (citing Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 384 (1974) (one's *subjective* expectation of privacy—that is, one's knowledge of an intrusion—"can neither add to, nor can its absence detract from, an individual's claim to

Fourth Amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that . . . we were all forthwith being placed under comprehensive electronic surveillance.")).

A majority of the circuit courts have, however, held that knowledge establishes consent to wiretapping. *See*, *e.g.*, *Griggs-Ryan v. Smith*, 904 F.2d 112, 116-17 (1st Cir. 1990) ("[I]mplied consent is not constructive consent. Rather, implied consent is 'consent in fact,'" which can be established by evidence that the caller "knows of" the wiretapping) (citing *United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987)); *Amen*, 831 F. 2d at 379 ("actual notice" of wiretapping proved consent); *United States v. Workman*, 80 F.3d 688, 693-94 (2d Cir. 1996) ("[W]e infer[ ] consent from circumstances indicating that the prisoner used the telephone with awareness of the possible surveillance."); *United States v. Cooper*, 893 F.3d 840, 845 (6th Cir. 2018) (same), *cert. denied,* 139 S.Ct. 855 (2019); *United States v. Horr*, 963 F.2d 1124, 1126 (8th Cir. 1992) (as caller was "aware" of wiretapping, the caller consented under 18 U.S.C. § 2511(2)(c)); *United States v. Habben*, 258 Fed. Appx. 972, 974 (9th Cir. 2007) (unpublished) (citing *United States v. Van Poyck*, 77 F.3d 285, 290-92 (9th Cir. 1996)), *cert. denied,* 552 U.S. 1218 (2008); *United States v. Faulkner*, 439 F.3d 1221, 1223-25 (10th Cir. 2006); *Berry v. Funk*, 146 F.3d 1003, 1011 (D.C. Cir. 1998).

Under this majority view, a state/private individual can wiretap at will so long as the wiretapper informs his target that he is listening in. *E.g. Griggs*, 904 F.2d at 117

(tenant consented to surveillance by landlord because the landlord told the tenant that she would be monitoring the calls).

Although the legislative history says nothing about a knowledge exception, the majority view has grounded its knowledge exception on a curt passage from a Senate Judiciary Committee Report (endorsing Title III), which states that "consent may be expressed or implied." S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News p. 2112, 2182 ("Committee Report"); *Faulkner*, 439 F.3d at 1223-25; *Amen*, 831 F.2d at 378. From this brief passage, the Circuit Court majority, with little explanation, has both divined a "knowledge-equals-consent" exception and leapt to the conclusion that "Congress intended the consent [exception] to be construed broadly." *Faulkner*, 439 F.3d at 1224; *Amen*, 831 F.2d at 378.

3. The question presented has fully percolated throughout the circuit courts. The split has existed for decades, and there is no indication that the circuit courts will shift their positions. The only step remaining is for this Court to decide the question presented once and for all.

II. Title III's text, purpose, and structure preclude a knowledge exception.

1. A court cannot interpret a statute to contain an absurd loophole. *E.g., Public Citizen v. Dept. of Justice*, 491 U.S. 440, 453-54 (1989) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)); *id.* at 470-71 (Kennedy, J., concurring). Nevertheless, by defining "knowledge" to mean "consent," the majority view has done just that.

As Petitioner has repeatedly argued—and the State has never denied—a rule that equates "knowledge" with "consent" allows governmental and private actors to wiretap at will so long as they provide a warning. Under this loophole, the FBI could simply send every cell-phone user in America a text message notifying them of wiretapping and, *presto*, the wiretapping protections would fade away. Similarly, the New York City Police Department could bypass Title III's protections by broadcasting that all phone calls made in the subway system were being tapped by the police.

Congress could not possibly have intended these unreasonable results. But they are the foreseeable consequences of a knowledge loophole that allows governmental and private actors to invade privacy "merely by," as this Court put it in *Smith*, "announc[ing]" that a search is coming. *Smith*, 442 U.S. at 740 n. 5.

Even worse, a knowledge exception creates *permanent* consent. Once a person knows another is listening in, the person relinquishes privacy rights to a knowledge exception *forever* (unless the wiretapper indicates a temporal limitation on the surveillance). A knowledge exception thus places control over our privacy in the hands of wiretappers, giving them the power to permanently turn off Title III's protections by providing "notice." This is, to say the least, an "odd" regime. *Public Citizen*, 491 U.S. at 454. Congress did not—and could not possibly have intended to—enact it.

Common sense reinforces the point. No one would suggest that someone consents to a search of their mail simply because an officer announces, "If you choose to send a letter through the Postal Service, I will search it." No legislator, let alone American

citizen, would comprehend such a bizarre understanding of consent. It is unreasonable to assume Congress had this understanding of "consent" in mind when it banned wiretapping. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1010 (2017) ("We thus begin and end our inquiry with the text, giving each word its ordinary, contemporary, common meaning.") (internal quotations omitted).

At its core, a knowledge-equals-consent theory ignores that consent, "in any meaningful sense," requires a "free and unconstrained choice"—that is, the autonomy to say "no." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); LaFave, *supra*, at § 8.2(*l*). But when, as in Petitioner's case, the wiretapper never provides the option to reject the privacy intrusion—instead unilaterally imposing a wiretapping condition upon the caller—the caller cannot make a "free and unconstrained choice." *Schneckloth*, 412 U.S. at 225.

To be sure, prisons and other governmental agencies can wiretap under a consent theory if they provide an option to reject the intrusion. Here, for instance, the Rikers facility could ask prisoners to sign a form consenting to wiretapping or install a program asking callers to "press 1 to accept monitoring or press 2 to reject it." If the person accepts monitoring, the facility has acquired "prior consent" as it has provided the caller with an actual choice. 18 U.S.C. § 2511(2)(c). Under the majority approach, however, the wiretapper need not give the caller an option to avoid wiretapping. *Schneckloth*, 412 U.S. at 225. Instead, the wiretapper can simply force the condition upon the caller. That is the fundamental problem with the majority view.

2. Title III's text and structure confirm that knowledge is not an exception to Title III's protections.

a. Had Congress intended to permit wiretapping upon mere "knowledge" of that intrusion, it would have just said so. *E.g.*, *Culbertson v. Berryhill*, 139 S.Ct. 517, 522 (2019).

Congress' adoption of a knowledge exception to its ban on the interception of "oral communications" (the use of a bugging device) confirms that when Congress intended a knowledge exception to Title III's protections, it just said so. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Unlike "wire" and "electronic" communications, Title III authorizes the interception of "oral communications" if the speaker lacks an expectation of privacy. *See* 18 U.S.C. § 2510(2) (defining protected "oral communications" to "mean[ ] any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . ."); *Briggs*, 630 F.2d at 417 & 417 n. 4; *PBA Loc. No. 38*, 832 F.Supp. at 819. This definition operates as a knowledge exception to the prohibition on the interception of "oral communications." *United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978); *United States v. Duncan*, 598 F.2d 839, 849-50 & 850 n. 6 (4th Cir. 1979), *cert. denied,*

444 U.S. 871 (1979). If a person has knowledge of wiretapping, that person has no "justifiable" "expectation that [the] communication" is private. 18 U.S.C § 2510(2).

"So if we needed any proof that Congress knew how to" permit privacy invasions based upon the caller's mere knowledge of wiretapping, "here we find it." *Caraco Pharm. Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012). Had Congress desired a knowledge exception to its ban on wiretapping and electronic surveillance, Congress would have just defined "wire communications" and "electronic communications" the same way it defined "oral communications." It did not do so.

b. A knowledge exception transforms Title III into a regime that bans *secret* wiretapping only. Secret surveillance is, no doubt, pernicious. But—and thankfully for all of us—Congress did not limit Title III to "secret" wiretapping. As Congress declined to enact that sharp limitation, the Judiciary lacks the power to edit the statute to include one. *Pub. Citizen*, 491 U.S. at 470 (Kennedy, J., concurring) ("I cannot go along with the unhealthy process of amending the statute by judicial interpretation.").

c. A knowledge exception also clashes with the plain text of the consent exception itself: "It shall not be unlawful . . . to intercept a [ ] communication, where [a party to the communication] has given *prior consent* to such interception." 18 U.S.C. § 2511(2)(c). The phrase "*prior* consent" indicates that Congress intended consent to be "given" *before* the "wire communication." *See also* Committee Report, *above*, at 2182 ("Paragraph (2)(c) provides that it shall not be unlawful for a party to any wire or oral

communication or a person *given prior authority* by a party to a communication to intercept such communication."). But under a knowledge-equals-consent theory, the consent does not occur "prior" to the phone communication—it occurs at the precise moment the communication *begins*. That is not "*prior* consent" at all.

By using the word "prior," Congress was contemplating the typical forms of consent: a caller asks another to listen in or grants permission to listen in *before* making the call. *E.g.*, *Rathbun v. United States*, 355 U.S. 107, 108-11 (1957) (one party to the call affirmatively asked the police to listen in); *Nichols v. Kelly*, 923 F.Supp. 420, 422, 424 n.1 (W.D.N.Y. 1996) (wiretapping of phone calls was permissible because the caller granted prior permission to the police); *cf. Schneckloth*, 412 U.S. at 220 ("Officer Rand asked Alcala if he could search the car. Alcala replied, 'Sure, go ahead.'"). Those classic scenarios involve "*prior* consent." The scenario at issue here—someone merely knows of wiretapping and makes a call—does not.

3. Trying to get blood from a stone, the Second and Tenth Circuits have argued that the following vague passage from the Senate Judiciary Committee's Report creates a knowledge exception:

> Paragraph (2)(c) provides that it shall not be unlawful for a party to any wire or oral communication or a person given prior authority by a party to a communication to intercept such communication. It largely reflects existing law. Where one of the parties consents, it is not unlawful. (*Lopez v. United States*, 373 U.S. 427 (1963); *Rathbun v. United States*, 355 U.S. 107 (1957); *Lee v. United States*, 343 U.S. 747 (1952)). Consent may be expressed or implied. Surveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to.

Committee Report, *above*, at 2182; *Faulkner*, 439 F.3d at 1223-25; *Amen*, 831 F.2d at 378.

A curt passage from legislative history, which no member of Congress ever voted upon, cannot create an unreasonable statutory loophole. *Public Citizen*, 491 U.S. at 453-54; *see also Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *BNSF Ry. Co. v. Loos*, 139 S.Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (explaining that "unenacted legislative history" has neither been voted upon by Congress nor presented to the President for approval).

Moreover, the text of this ambiguous passage does not even support a "knowledge" exception. The passage first states that the consent provision "largely reflects existing law," and cites three pre-1968 decisions from this Court (*Rathbun*, *Lee*, and *Lopez*). None of these cases holds that knowledge establishes consent to wiretapping.

Rathbun found consent because the caller affirmatively asked the police to listen in. 355 U.S. at 108-111. That is classic consent, the way someone "consents" to a visit from a neighbor by opening the door and saying, "Come on in." *Rathbun* does not address whether mere knowledge proves consent. And as for *Lee and Lopez*, those cases do not even involve phone wiretapping. Instead, *Lee* and *Lopez* were "bugging"

cases that said absolutely nothing about a knowledge-equals-consent theory. *Lopez*, 373 U.S. at 429-30; *Lee*, 343 U.S. at 749.

The Committee Report's reference to "institutional or personal protection" is an even less reliable foundation for an extra-statutory "knowledge" exception. Committee Report, *above*, at 2182. The Report seems to suggest that when wiretapping promotes "institutional or personal protection," the target of the surveillance has somehow "implicitly consented." This suggestion is incomprehensible, and hardly "reliable" evidence that Congress intended a knowledge exception. *Digital Realty Tr., Inc. v. Somers*, 138 S.Ct. 767, 783 (2018) (Sotomayor, J., concurring) ("*reliable* legislative history" can guide statutory construction).

The Report's reference to "institutional or personal protection" outlines a *security* exception (which is absent from the statute)—not a *consent* exception. It is odd to say that someone has "consented" to surveillance because the surveillance advances "personal protection." That is simply not "consent" in any ordinary sense of the word. *Star Athletica,* 137 S.Ct. at 1010. Certainly no legislator would have discerned that definition of "consent" from the text of the bill.

Moreover, this confusing passage—if taken seriously—would create a "security" exception that would not even require *knowledge*. If the wiretapping advances "institutional or personal protection," the theory goes, there is "implied consent." If, say, a public school monitored all students' phone calls in order to advance "institutional or

personal protection," Title III's protections would dissolve, even if that invasive program was a secret to all.

Obviously, nothing in Title III states that state or private actors can wiretap others so long as the tapping seems to advance "personal protection" or other "security interests." And for good reason; such a statute would be unmanageable and toothless.

This "institutional or personal protection" comment is thus either the product of loose or mistaken language, or an effort to enact through legislative history what some Senators believed they couldn't enact through the good old-fashioned method: a majority vote on the *text* of a bill. *Loos*, 139 S.Ct. at 906 (Gorsuch, J., dissenting) (explaining that legislative history may "consist[ ] of advocacy aimed at winning in future litigation what couldn't be won in past statutes"); *Blanchard v. Bergeron*, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring) (explaining that, as "anyone familiar with modern-day drafting of congressional committee reports is well aware," comments in a report are often "inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.").

In the end though, even if there could be meaningful debate about the meaning of this ambiguous legislative history, one thing is certain: it is vague at best. It thus

cannot provide a reliable foundation for an extra-textual loophole that drastically dilutes Title III's protections.

III. The question presented has grave implications for the privacy of Americans.

Millions of Americans currently live under a "knowledge-equals-consent" regime (except those who reside in the Seventh Circuit's jurisdiction). Their e-mails, text messages, and phone calls can be monitored so long as the intruder provides "notice." If the *status quo* remains intact, the privacy of millions is vulnerable.

As this Court has long observed, the government's use of comprehensive surveillance methods is a grave threat to liberty. *Carpenter v. United States*, 138 S.Ct. 2206, 2223 (2018) (citing *Olmstead v. United States*, 277 U.S. 438, 473-74 (1928) (Brandeis, J., dissenting)). That threat is all the more pressing in the modern day, where virtually all of our communications occur through phone, e-mail, and text message. *Id.* (the "'progress of science'" enhances surveillance capabilities) (quoting *Olmstead*, 277 U.S. at 473-74). But under a knowledge exception, government agents can easily bypass a comprehensive statutory regime designed to prevent those very agents from invading our communication networks.

This knowledge exception also has significant implications for non-governmental wiretapping and electronic surveillance. When Congress enacted Title III, it was concerned with "private surveillance 'in domestic relations.'" *Bartnicki*, 532 U.S. at 531 n. 16. In that context, a knowledge exception creates a privacy nightmare. Spouses

can spy on each other so long as they provide notice.[3] Parents can spy on their children's text messages/e-mails with ease. *Williams v. Williams*, 229 Mich. App. 318, 325 (Mich. Ct. App. 1998). And litigants in divorce actions can—by sending a curt e-mail ("I am going to monitor your e-mails, texts, and calls")—monitor their former spouse's communications in order to snoop or gain an edge in a matrimonial action.[4]

These are not "doomsday" predictions as the State suggested before the New York Court of Appeals. Pet. App. 35a. They reflect real-world problems that Congress aimed to attack when it enacted Title III. *Bartnicki*, 532 U.S. at n. 16; Committee Report, *above*, at 2154 ("The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. . . . No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.").

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[3] *E.g.*, *Zaratzian v. Abadir*, 2014 W.L. 4467919, *6 (S.D.N.Y. Sept. 2, 2014) (plaintiff wife alleged that defendant husband set up auto-forwarding of her e-mail account to monitor her e-mails); Hon. James G. Carr *et al.*, 2 Law of Electronic Surveillance (2019 ed.) ("[A]n eavesdropper or electronic interloper is not entitled to interspousal immunity") (collecting cases).

[4] *See* Frick & Long, *Interspousal Wiretapping and Eavesdropping: An Update Part 1*, 24 Colo. Law. 2343, 2343 (1995) ("Contested custody actions are, by their very nature, a process that requires each spouse to expose the worst in the other spouse. The temptation on the part of one spouse to tape telephone conversations of an opposing spouse may be irresistible.").

Unfortunately, stalkers can easily exploit a knowledge exception. As the New York Times has reported, "More than 200 apps and services offer would-be stalkers a variety of capabilities, from basic location tracking to harvesting texts and even secretly recording video, according to a new academic study. More than two dozen services were promoted as surveillance tools for spying on romantic partners[.] Most of the spying services required access to victims' phones or knowledge of their passwords — both common in domestic relationships." Jennifer Valentino-Devries, *Hundreds of Apps Can Empower Stalkers to Track Their Victims*, New York Times (May 19, 2018). Armed with a knowledge loophole, stalkers can—through a simple "warning"—use these new technologies to pervasively monitor others.

The question presented is whether Congress ratified that invasion of privacy when it passed a comprehensive regime designed to *protect* privacy. The statute, and simple common sense, establish that the answer to that question is no.[5]

IV. This case is an ideal vehicle for resolving the question presented.

Three aspects of this case make it perfect for resolving the question presented.

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[5] If this Court rejects the majority view, state and federal officials who previously relied upon then-existing Circuit Court law will have a host of defenses to civil-damages claims. 18 U.S.C. § 2520(d)(1) ("good faith reliance" on "statutory authorization" is an absolute defense); 18 U.S.C. § 2510(5)(a)(ii) (exempting wiretapping performed by "an investigative or law enforcement officer in the ordinary course of his duties"); *Blake v. Wright*, 179 F.3d 1003, 1011-13 (6th Cir. 1999) (barring Title III claim on qualified immunity grounds); *Feekes*, 879 F.2d at 1565-66 (applying the 18 U.S.C. § 2510(5)(a)(ii) "ordinary course" exception to prison wiretapping); *United States v. Lewis*, 406 F.3d 11, 16-19 (1st Cir. 2005) (same), *cert. denied,* 548 U.S. 917 (2006); State's Court of Appeals Brief: Pet App. 34a (disclaiming reliance on the "ordinary course" exception); 18 U.S.C. § 2520(e) (creating a two-year statute of limitations period for bringing a wiretapping claim).

This case thus presents the opportunity to correct the misguided majority view without any real prospect of creating new liability for those who operated under the old regime.

1. The case is procedurally clean. At every stage of this litigation, Petitioner has argued that his phone calls were obtained in violation of the federal wiretapping protections. Pet. App. 26a; Petitioner's Appellate Division Brief at 42-47; Petitioner's Court of Appeals Brief at 49-55. And at every stage of the litigation, the state courts rejected that claim on the merits, finding that knowledge of wiretapping proved consent. Pet. App. 1a-4a, 28a.

2. The consent exception is the only issue in this case as the State has never advanced any alternative grounds for admissibility. State's Court of Appeals Brief: Pet. App. 34a (disclaiming reliance on 18 U.S.C. § 2510(5)(a)(ii)'s "ordinary course" of "law enforcement" exception).

Having gone all-in on a consent theory and secured a ruling on the merits from both the New York Appellate Division and Court of Appeals, the State must now defend that theory before this Court.

3. This case squarely implicates the question of whether notice proves consent in all scenarios, thus ensuring that this Court can settle a broad legal question in a single case. This Court's resolution of the question presented—whether knowledge proves consent—will govern consent analysis in numerous wiretapping contexts: the prison context (at issue here), the residential context, and numerous other scenarios. As this important question of law is squarely presented here, this Court should grant the petition.

V. At a minimum, this Court should hold this petition pending its decision in *Mitchell v. Wisconsin*.

Like Petitioner's appeal, *Mitchell v. Wisconsin* (Case no. 18-6210), argued on April 23, 2019, involves the viability of an "implied-consent" loophole. 383 Wis.2d 192 (Wis. 2018), *cert. granted*, 139 S.Ct. 915 (Jan. 11, 2019). There, Wisconsin argues that since a Wisconsin statute requires consent to a blood draw whenever someone drives a car, any person who drives has "consented" to a warrantless blood draw. Brief for Respondent State of Wisconsin 19-23. In challenging this implied consent theory, Mr. Mitchell, like Petitioner here, argues that allowing the State to establish consent by simply conditioning conduct on a waiver of Fourth Amendment privileges would create a significant loophole in the Fourth Amendment's design. Brief for Petitioner Mitchell at 31-32.

As the *Mitchell* decision may address the logic of conditioning certain conduct on "consent," the decision could impact the resolution of the federal wiretapping issue presented here. Therefore, this Court should, at a minimum, hold this petition pending its decision in *Mitchell*.

If this Court's decision in *Mitchell* implicates the viability of the knowledge-equals-consent theory at issue here, this Court should grant this petition in order to determine how the *Mitchell* decision impacts the question presented here. Alternatively, this Court should grant this petition, vacate the decision of the New York Court of Appeals, and remand for further consideration in light of the *Mitchell* disposition. *E.g.*, *Clark v. Louisiana*, 138 S.Ct. 2671 (2018).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court should hold this case pending resolution of *Mitchell v. Wisconsin* (Case No. 18-6210).

Respectfully submitted,

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