No. _____

In The

Supreme Court of the United States

JOHN JONES,

Petitioner,

v.

LYUDMYLA PYANKOVSKA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution's protection of the right to petition the government extend to insulate an attorney, presenting to a court in a custody proceeding recordings made by one parent of private conversations of the other parent with their minor child, from liability under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510, *et seq.*, when the attorney did not have any involvement in the unlawful recording and the recordings are directly relevant to the determination of the child's best interest in the custody proceeding?

PARTIES TO THE PROCEEDING BELOW

Petitioner John Jones, Esq. was an appellee in the court of appeals and a defendant in the proceedings below in the district court. Respondent Lyudmyla Pyankovska was plaintiff in the original action in the district court and was appellant in the court of appeals. Pyankovska brought the original action against Jones, Jones' client Sean Abid and his spouse Angela Abid. Pyankovska claimed she brought the action on behalf of her spouse and children including the minor child Pyankovska shares with Abid. The district court dismissed Lyudmyla's spouse and children leaving only Pyankovska as plaintiff. App. 40. The district court also dismissed Angela Abid.[1] Jones does not believe Sean Abid has an interest in the outcome of this petition because judgment below was entered against Sean Abid by default as a sanction and accordingly, he has not been listed as a respondent.

RELATED PROCEEDINGS

Abid v. Abid, Case No. D-10424830-Z, Eighth Judicial District Court, Clark County Nevada. Judgment entered March 3, 2016. Appealed to the Nevada Supreme Court, *Abid v. Abid*, Case No. 69995. *En Banc* opinion entered December 7, 2017. The Nevada Supreme Court's opinion is reported at *Abid v. Abid*, 133 Nev. 770, 406 P.3d 476 (2017). It is reprinted in the Appendix ("App.") at 52-64.

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[1] Record below, ECF No. 52, District of Nevada, April 24, 2017.

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JURISDICTION

The opinion of the Ninth Circuit was entered on April 18, 2023. The petitions for rehearing were denied on July 3, 2023. App. 72-73. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

28 U.S.C. 2403(a) may apply. No lower court certified to the Attorney General the fact that the application of an act of congress to Jones under the circumstances presented here may be unconstitutional. A copy of this petition has been served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and the 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. 86-92. Nevada Revised Statutes Ch. 125C.0035(1) provides in relevant part:

> In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child.

INTRODUCTION

Child custody proceedings are not typical civil proceedings. While there are two parties, typically the mother and the father, the actual interests and rights being determined are those of the child. In Nevada and other states, the role of the court is not to adjudicate the rights of the parents but, rather, the rights of the non-party minor child where the one and only consideration is the child's best interest. *See, e.g.*, *Abid v. Abid*, 133 Nev. 770, 773-75, 406 P.3d 476, 479-81 (2017) (App. 55-63); Nev. Rev. Stat. 125C.0035(1).[1]

Jones, a family law attorney practicing in Nevada, was presented with a situation similar to the circumstances in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). He was presented by his client, Abid, transcripts of recordings Abid had made of conversations between the minor child and Pyankovska through a hidden tape recorder. Jones did not know his client did this and had not advised him to do it. Whether the recordings were lawfully made was not certain, but Jones, knowing that in a custody dispute, the only relevant interest is the *child*'s interest, filed a motion with the state court to change custody. In that motion, Jones disclosed the

[1] This standard is applied in jurisdictions throughout the United States.

recorded conversations, how they were obtained and presented argument and authorities as to why they were lawful and admissible under the vicarious consent doctrine. Jones argued that even if they were unlawfully made and inadmissible, the recordings should be provided to a court-appointed psychologist for use in determining the best interest of the child.[2]

On appeal, the Nevada Supreme Court ruled Jones was right to have presented the materials to the court for either admission directly or for use by the court-appointed psychologist. Even though the recordings were likely unlawfully obtained, the Nevada

[2] Vicarious consent is a doctrine adopted by many courts and there was ample basis at the time for Attorney Jones to, in good faith, believe the recordings were at least arguably lawfully made and admissible. *See, e.g.*, *Pollock v. Pollock*, 154 F.3d 601, 610-11 (6th Cir. 1998) (adopting the doctrine of vicarious consent in wiretap action, holding that a parent may consent to recording for a minor when "the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child."); *Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994) ("We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for that child's well-being"); *Commonwealth. v. F.W.*, 986 N.E.2d 868, 877 (Mass. 2013) (approving vicarious consent for electronic recording of oral communications by non-custodial sibling; "Our conclusion is consistent with the State's 'compelling interest in protecting children from actual or potential harm [citation omitted] to which the privacy interests of the grandfather must yield.' "); *Campbell v. Price*, 2 F.Supp.2d 1186, 1191 (E.D. Ark. 1998) (parent's good faith concern for his minor child's best interest may empower the parent to legally intercept the child's conversations); *Thompson v. Dulaney*, 838 F.Supp. 1535, 1544 (D. Utah 1993) (finding the vicarious consent doctrine permissible under the federal wiretap statute because of a parent's duty to act in the best interest of their child).

Supreme Court held that the best interest of the child mandated that the court not turn a blind eye to ongoing harm being done to a child in a custody proceeding. *Abid*, 133 Nev. at 479-81, 406 P.3d at 774-76 (App. 56-63).

Pyankovska sued Jones in federal court seeking damages for alleged violations of 18 U.S.C. 2510, *et seq.* (the "Wiretap Act") for disclosing the unlawfully obtained recordings to the state court. App. 74-85.

The First Amendment to the United States Constitution protects the right to petition. It is no lesser right than the right to speech, or of the press. This Court has described the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights" and "intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press." *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

This petition asks the question of whether a lawyer, acting as an officer of the court in a unique proceeding where *all* involved must advocate only for the best interest of the child (not the personal interests of the disputing parents), may be held civilly liable under 18 U.S.C. 2510, *et seq.*, when he innocently receives unlawfully (or potentially unlawfully) made recordings of private conversations that reveal ongoing emotional harm being done to a minor child by one parent and discloses that relevant and probative evidence to the court presiding over the issue of custody. This Court, in

the context of the First Amendment's protection of speech and the press, has already ruled that the Wiretap Act's prohibitions and liabilities do not reach protected core First Amendment activity of the press when they innocently receive unlawfully made interceptions and disclose them. *Bartnicki*, 532 U.S. at 532-35. There, the right of the public to be informed on matters of public concern outweighed the privacy interests being protected by 18 U.S.C. 2511's prohibition on the use or disclosure of unlawfully intercepted conversations by anyone and imposition of civil liability under 18 U.S.C. 2520 for violation. Jones' right to petition—to present evidence, argue for its admissibility, argue for its use by a court-appointed expert—is no less worthy of protection in this narrow circumstance where the rights of the innocent child were paramount and of critical importance in the custody proceeding and superior to the privacy interests of Pyankovska with respect to the harm being done by her to the child.

STATEMENT

1. FACTUAL BACKGROUND

Respondent Lyudmyla Pyankovska and Sean Abid ("Abid") were married and have one son together. After their divorce, Respondent and Abid shared joint legal and physical custody for several years. App. 4; App. 27; *Abid*, 133 Nev. at 771, 406 P.3d at 477 (App. 53). They continued to have custody issues, which resulted in further court proceedings in 2015 and 2016. *Id.*

Petitioner John Jones represented Abid in those proceedings and the claims against Jones arise exclusively out of his in-court actions as counsel in that custody dispute. App. 76-78 (¶¶12-18); *Abid*, 133 Nev. at 771, 406 P.3d at 478 (App. 53).

On January 9, 2015, Pyankovska filed a motion (in the Nevada state court family division) seeking to hold Abid in contempt and modify the parental timeshare. App. 76 (¶12); App. 27. Abid, through Jones, responded and counter-moved to change custody to give Abid primary custody. App. 4, 27-28, 76-77; *Abid*, 133 Nev. at 771, 406 P.3d at 478 (App. 53). Part of that opposition and counter-motion filed by Jones included the submission of a declaration by Abid which relayed a transcript of excerpts from recordings that Abid made of conversations between Pyankovska and their son.

Abid procured these recordings, without Jones' knowledge or participation, by placing a tape recorder (without the child's or Pyankovska's knowledge) in the child's backpack before the son would go over to his mother's for her physical custodial time. App. 67-69; 27, 76-77; *Abid*, 133 Nev. at 771, 406 P.3d at 478 (App. 53). Abid took this action because he believed that Pyankovska was making harsh negative comments about him to their son, causing him confusion and harm by alienating the child against his father and emotionally scaring him.[3] Abid edited the recordings to

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[3] One parent making disparaging comments about the other parent, which is known as "parental alienation" commented on as a form of child mental abuse. *See McClain v. McClain*, 539 S.W.3d 170, 200 (Tenn. App. 2017) ("The Court does find and does believe

only contain the statements pertinent to his claim of alienation (the discussions where Pyankovska made disparaging remarks about Abid to their son) and destroyed the original full recordings, prior to advising Jones he had made them and delivering transcripts and the edited tapes to Jones. App. 67-69.

Jones is an experienced family law practitioner and aware that the interest actually being litigated in a custody proceeding is the child's best interest, not the personal interests of the disputing parents. *Abid*, 133 Nev. at 773-75, 406 P.3d at 479-81 (App. 55-63); Nev. Rev. Stat. 125(c).0035(1). With the recording excerpts and transcripts placed into his hands after-the-fact, Jones recognized the need for the family court to receive the evidence of emotional harm being done to the child. To that end, he had to determine whether it was authorized by vicarious consent, to determine its admissibility and to determine even if not lawfully collected and inadmissible, the transcripts and recording excerpts could be provided to a court-appointed psychologist. After researching the vicarious consent doctrine, he determined that there was a basis to argue that the recordings were lawfully made and admissible. Jones' research also led him to the conclusion that, even if the recordings were not lawfully made and inadmissible as evidence, the family court could order the tapes/transcripts be provided to a court-appointed psychologist to utilize in conducting interviews to

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that parental alienation is a form of emotional abuse that should not be tolerated.").

assist the court in determining what was in the best interests of the child.

Jones therefore submitted the transcripts with the counter-motion to change custody arguing they were lawfully made and admissible via vicarious consent, but even if they were not, that the court could and should allow an appointed psychologist to review the transcripts/tapes as part of her evaluation of the circumstances and the child's best interest. App. 67-71; 4-5; 27-28; *Abid*, 133 Nev. at 771, 406 P.3d at 478 (App. 53-54).

The state court judge found that Abid could not meet the requirements for applying the vicarious consent doctrine and that the tapes/transcripts themselves would be inadmissible. App. 67-71; 4-5; 27-28; *Abid*, 133 Nev. at 771, 406 P.3d at 478 (App. 53-54). However, after briefing, an evidentiary hearing and argument, the state court ruled that the court-appointed psychologist evaluating the child would be allowed access to the tape excerpts/transcripts as part of the information the psychologist could consider in rendering a report/evaluation regarding the best interests of the child. App. 67-71; 77-80; 4-5; 27-28; *Abid*, 133 Nev. at 771, 406 P.3d at 478 (App. 53-54).

The court-appointed psychologist testified at trial regarding her interviews with the child, her interviews of the parents, and her conclusion that alienation was happening and causing emotional distress to the child. The state court ruled that what Abid feared was happening was *precisely* what was going on (*i.e.*, alienation

by Pyankovska) and changed the custody arrangements, awarding primary physical custody to Abid as in the best finding that it was in the best interests of the child to do so. App. 4-5; *Abid*, 133 Nev. at 771, 406 P.3d at 478 (App. 53-54).

Pyankovska appealed the custody ruling to the Nevada Supreme Court which affirmed the lower court in a unanimous *en banc* published opinion. *Abid*, 133 Nev. 770, 406 P.3d 476 (2017) (App. 52). In doing so, the Nevada Supreme Court made a number of important rulings.

First, the Nevada Supreme Court found that *even if* the recordings were illegally made, the trial court's ruling that they be provided to an expert for consideration in determining the best interests of the child was not only proper, *it served a compelling public interest*. *Id.* at 772-74, 406 P.3d at 478-79 (App. 54-59). The Nevada Supreme Court recognized that the purpose of wiretap statutes were to protect privacy interests but held that given the expert's charge was to delve into the intimate details of the mother/child relationship, prohibiting the expert from considering and relying on this *highly probative* evidence did not advance those purposes but would subvert a compelling issue of public concern: the child's best interest. *Id.* (in a child custody case "the 'child's best interest is paramount'" (*quoting Bluestein v. Bluestein*, 131 Nev. 106, 112, 345 P.3d 1044, 1048 (2015)) (App. 57). The Nevada Supreme Court went on to note that child custody matters are *quite different* from some "mere adversary

proceeding between plaintiff and defendant," *id.* at 479, 406 P.3d at 774 (App. 58), and that

> [h]ere, the interests of a nonlitigant child are at stake. Prohibiting an expert from considering evidence punishes that child by hindering the expert's inquiry into the child's best interests. It is sanctioning the child for the alleged crime of his parent.

Id.[4]

Second, the Nevada Supreme Court rejected the concept of *per se* inadmissibility in Nevada for civil proceedings, particularly in child custody proceedings where "[c]ategorically excluding such evidence would clearly be against the best interests of the minor and, therefore, in contravention of NRS 125C.0045(2)." *Id.* at 776, 406 P.3d at 481 (App. 62-63). The Nevada Supreme Court went on to rule that it was *error* by the

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[4] The Nevada Supreme Court went out of its way to make clear it did not sanction what it perceived to be likely an unlawful recording by Abid. It noted there were many ways he could be independently punished, and the conduct deterred if it were an unlawful recording without, in the context of proceedings considering the potential physical or mental harm to the child, forcing "the district court to close its eyes to relevant evidence and possibly place or leave a child in a dangerous living situation." *Id.* at 776, 406 P.3d at 481 (App. 61). The Nevada Supreme Court was very clear that "a district court 'needs to consider as much relevant evidence as possible when deciding child custody.' " *Id.* at 775, 406 P.3d at 480 (App. 60). *See also* (cited in *Abid*) *Munson v. Munson*, 27 Cal.2d 659, 166 P.2d 268, 271 (1946) ("[T]he controlling rights are those of the minor child and the state in the child's welfare.").

lower court to rule the recordings/transcripts themselves inadmissible as evidence. *Id.*

The Nevada Supreme Court concluded its opinion as follows:

> In a child custody setting, the "[c]hild's best interest is paramount." *Bluestein*, 131 Nev. at ___, 345 P.3d at 1048. The court's duty to determine the best interests of a nonlitigant child must outweigh the policy interests in deterring illegal conduct between parent litigants. Accordingly, the district court did not abuse its discretion in providing the recordings to the expert because reviewing them furthered the expert's evaluation of the child's relationship with his parents and aided the district court's determination as to the child's best interest. We affirm.

Id. at 481-82, 406 P.3d at 777 (App. 64).

2. PROCEEDINGS BELOW

Pyankovska filed her complaint in this action on December 20, 2016. App. 74. She filed it representing herself *pro se*, but also purported to bring claims for Pyankovska's husband and her children. The claims identified were (1) claims under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510, *et seq.*, as to Jones alleging that he violated 18 U.S.C. 2511(1)(c)-(d) by disclosing and/or using the communications in court; (2) a state law claim for "Invasion of Privacy and Conspiracy to

Commit Invasion of Privacy"; (3) a state law claim for violation of NRS 200.650 (Nevada's wiretapping statute); and (4) a claim alleging violation of 18 U.S.C. 2261, *et seq*. (a federal anti-stalking statute). App. 74-85.

The Complaint allegations concerning Jones are that as counsel for Abid in the state family court proceedings, he submitted the transcripts/recordings to the Nevada state court judge presiding over the ongoing custody dispute between Pyankovska and Abid. *Id*.

All parties and the Nevada state court recognize that Jones was informed only *after the fact* and did nothing other than present the evidence to the state court and argue for its admission as evidence and/or use by the Court-appointed expert. App. 77 (¶12); App. 69 (state court minutes finding Jones did not participate in, advise, consent or know of the making of the recordings or deletion of portions in advance: "The Court reiterated Mr. Jones was in no way a participant in the recordings, and did not know about the recordings until after the fact").

On March 27, 2017, Jones filed a motion to dismiss all claims against him, raising a number of arguments, including that his exclusively in-court actions were protected by the First Amendment of the Constitution of the United States right to petition.

On November 16, 2017, the court below dismissed Jones, dismissing him entirely from the case based upon the First Amendment and the doctrine first

articulated by this Court in *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 664-65 (1965). App. 36-38.

While the district court order concludes that no claim had been stated against Jones, claims had been asserted against Abid that could proceed, the Court's order also granted Pyankovska leave to file an amended complaint, which she did on June 3, 2018, changing the originally proposed amended complaint to name only Abid as a defendant and asserting additional state law claims against him. App. 36-38.

With Jones dismissed, the matter below proceeded between Pyankovska and Abid. The district court ultimately struck Abid's answer to the amended complaint as a sanction and entered default judgment against him in the amount of $10,000.00, as the statutory damages under 18 U.S.C. 2520 (2)(B) exceeded her actual damages. App. 41, 50.

Pyankovska appealed to the Court of Appeals, initially *pro se* but later represented by appointed counsel challenging the dismissal of Jones and other issues related to Abid and damages. On April 13, 2023, the Ninth Circuit issued its opinion, 65 F.4th 1067, reversing the dismissal of Jones on First Amendment grounds. App. 1-25.

The Ninth Circuit ruled that the First Amendment and *Noerr-Pennington* had no application to Jones' conduct for two reasons. First, the lower court ruled that it was not possible that "a successful

damages action [against Jones for disclosing the intercepts in a custody proceeding] imposes an unconstitutional "'burden' on the state court litigation" because "[t]he illegally obtained communications found their way into state court where the evidence was reviewed by the court-appointed psychologist and by the court and Abid prevailed . . . " App. 16-17. Second, the lower court ruled that filing a claim to change custody, submitting the recordings Abid had collected and arguing that they were lawfully obtained through vicarious consent and be either admitted directly or provided to the court-appointed psychologist to use was not a "petition" worthy of First Amendment protection and therefore punishing Jones for violating 18 U.S.C. 2511 was not a burden on First Amendment rights. "Jones[']s . . . right to petition in a case with no public significance does not grant Jones immunity from the penalties prescribed by Congress for those who violate the Wiretap Act." App. 17-18.

In addressing this Court's opinion finding that the First Amendment does place limits on the broad reach of the federal Wiretap Act when applied to the disclosure or use of unlawfully intercepted communications by parties who did not participate in the unlawful collection in *Bartnicki*, the Ninth Circuit dismissed *Bartnicki* as having any application because the intercepted communications showing ongoing emotional harm being done to a child were "of no public importance and consequently involved none of the First Amendment concerns that were dispositive in *Bartnicki*." App. 13-14.

The court of appeals reversed the dismissal of Jones on *Noerr-Pennington* grounds and remanded for further proceedings. The court of appeals further reversed and remanded for clarification certain rulings by the lower court pertaining to damages as to Abid. The parties in the lower court agreed to a stay pending this petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THE NEVADA SUPREME COURT'S DECISION IN *ABID V. ABID*, THE PRINCIPALS ESTABLISHED BY THIS COURT'S OPINION IN *BARTNICKI*, AND OTHER CIRCUITS.

A. The Nevada Supreme Court's *Abid v. Abid* Opinion.

The Ninth Circuit held there is no First Amendment protection under *Noerr-Pennington* (or simply a matter of the First Amendment's protection for the right to petition) for Jones to submit the transcripts/recording excerpts, which Jones received innocently, and to argue that the state court should consider them when evaluating the best interests of the child, a well-established public interest in a custody proceeding. The Ninth Circuit held that a person such as Jones may be liable and punished after-the-fact under a federal statute notwithstanding that he was engaged in proper petitioning activity—presenting evidence and

arguments to the state court for the state court to rule upon.

In doing so, the Ninth Circuit ruled that his petitioning activity is not burdened by the imposition of civil liability because the state court ultimately accepted the recordings and ruled that they could be used by the psychologist. App. 16-17. This circularity itself is conflicting with this Court's precedent recognizing that after-the-fact statutory liability does chill petitioning. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014) ("We crafted the *Noerr-Pennington* doctrine—and carved out only a narrow exception for 'sham' litigation—to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances.").[5] The Ninth Circuit further held that Jones' activity was not worthy of First Amendment protection because it was not a matter of public concern. App. 14; 18. This conflicts with the Nevada Supreme Court's decision in *Abid.* Furthermore, it is difficult to imagine that the best interests of the child in a custody situation and protecting the child from harm is anything but an important matter of public interest.

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[5] *See also White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) ("This court has held that government officials violate this provision when their acts 'would chill or silence a person of ordinary firmness from future First Amendment activities.'"). *Bartnicki* presented the precise issue but only on a different aspect of the First Amendment, determining that the parties there could not be subsequently held liable for violating the Wiretap Act because the alternative would impermissibly burden First Amendment rights and chill free speech.

The Nevada Supreme Court held that even if Abid recorded the conversations illegally, Jones and subsequently the state court properly provided them to the court-appointed psychologist for the proceedings to determine the child's best interest and found that the lower court erred by ruling that the recordings were *per se* inadmissible as evidence. To be sure, the only way the materials could be presented to the court-appointed expert and/or admitted is by anyone presenting them to the court, and arguing for their admissibility and/or use by the expert.[6] Under the Ninth Circuit's reasoning, the state courts in custody proceedings would be deprived of such information due to the threat of civil liability to counsel even when the information is deemed essential to the court's determination of the child's best interests.

The Ninth Circuit's opinion conflicts with the Nevada Supreme Court's in a number of ways. First, the

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[6] The initial filing was not under seal. At that time, the legality/admissibility had not yet been determined. But the constitutional infirmity of the Wiretap Act is its total bar and punishment affecting the First Amendment conduct here for which under the language of the Wiretap Act, there is no expressed exception for filing under seal (which would still be disclosing or using). Hence, while the preference in Nevada is for open court proceedings, even had Jones filed them under seal, the claimed violation of the Wiretap Act here would remain the same. The issue is not best practices advice with 20/20 hindsight because a statute cannot impose punishment if it is not clear in what is prohibited and how to comply (such as sealing). *See Kolender v. Lawson*, 461 U.S. 353, 357-58 (1983). Lastly, Pyankovska had a right (and standing) to seek the sealing of such documents herself. She was represented by counsel in the state court proceedings yet failed to do so *for years*.

Nevada Supreme Court expressly found that the state had an "'overwhelming interest in promoting and protecting the best interests of its children'" which overrode any deterrent interest or privacy interest advanced by prohibitions on disclosure or admission in a custody proceeding.[7] Hence, the Ninth Circuit's dismissal of the applicability of petitioning protections in custody proceedings as of no public import directly conflicts with the Nevada Supreme Court in *Abid*. Indeed, custody and the protection of its minor children from harm is an inherently local matter within the state and the state courts of Nevada are in the best position to determine whether consideration of the best interests of children is an important public policy and what information is needed by the court in a custody proceeding to ensure the child's best interest is the sole concern and result.

Second, the Nevada Supreme Court, while not condoning Abid's actions in making the recordings found that the public interest in ensuring courts or appointed experts have *all relevant* evidence pertinent to the child's best interest overrode any interest served in rules prohibiting the disclosure of unlawfully obtained recordings because the *relevant* interests at stake were that of the minor child who did nothing wrong and whose interest is paramount. The Ninth Circuit

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[7] Like this Court in *Bartnicki*, the Nevada Supreme Court found the deterrent effect of such rules not a strong consideration as there were other ways to deter or punish the unlawful collection of the recordings without ignoring the best interest of the child.

conflicts by ignoring the important distinction between a custody matter and the interests of the innocent child and other types of civil litigation matters and deeming the child's interests unworthy of protecting under the First Amendment.

Finally, the conflict between the Ninth Circuit's opinion and the Nevada Supreme Court creates an ongoing burden in family law custody proceedings for practitioners when they receive information relevant to ongoing harm to a child in a custody proceeding that may have been obtained illegally. Any reasonable practitioner would never advise or suggest illegal recording. But when such recordings are done without the practitioner's knowledge the bell cannot be un-rung. The lawyer, knowing that there is a higher purpose charged to all participants in a custody proceeding, the best interests of the child, is put to an untenable choice. In Nevada, to fail to submit the information to the Court, argue for its admission, and argue for its submission to a court-appointed expert, would be malpractice. The Nevada Supreme Court has unequivocally held in *Abid*, that the child's interests in having the information presented to the court and used in a custody proceeding is superior to *any* other considerations. But under the Ninth Circuit's ruling, that same lawyer will, while meeting the standard of care, be subject to liability for having done so. This forces the practitioner to face an irreconcilable conflict of interest between the child's best interest and the lawyer's own interest in avoiding federal civil liability.

The Court should grant certiorari to resolve this ongoing conflict between the Nevada Supreme Court's *Abid* decision and the Ninth Circuit's opinion, particularly the relevant First Amendment interests being advanced in *Abid* and the compelling public interest in protecting petitioning activity that advances the innocent child's best interest in a custody proceeding. Additionally, the conflict between the Ninth Circuit's opinion and the Nevada Supreme Court's opinion in *Abid* further highlights the tension between the Ninth Circuit's opinion dismissing First Amendment concerns in child custody proceedings and the policies, analysis and principals stated by this Court in *Bartnicki*.

B. *Bartnicki*.

In *Bartnicki*, the Court presumed for its determination that the interceptions there were unlawful and though the respondents did not participate in the unlawful interception, they had at least reason to know that the interception was unlawful. The question was whether they could be punished or held civilly liable for disclosing and publishing the unlawful intercepts anyway, which is expressly prohibited and a violation of 18 U.S.C. 2511. 532 U.S. at 525.

While the Court agreed that the Wiretap Act itself is content neutral, in that it signals out communications by virtue of their source (illegal interception) rather than the content, the Court focused on the fact that the Wiretap Act also purports to regulate speech

by an absolute blanket bar to disclosure. 532 U.S. at 526-27.[8] It is there that the Wiretap Act's provisions were held to conflict with the First Amendment.

In holding that there could be no Wiretap Act liability in *Bartnicki*, the Court first noted that "[a]s a general matter state action to punish the publication of truthful information seldom can satisfy constitutional standards." 532 U.S. at 527 (internal quotation marks omitted). Ultimately, the Court examined the purpose of the Wiretap Act and interests protected by it and weighed them against the First Amendment rights of the party sought to be held liable for violation of the Wiretap Act by publishing the intercepts. In terms of deterrence, the Court found those interests sufficient to bar the use of the illegally intercepted information by the person who in fact did the illegal interception, but that "it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends." 532 U.S. at 529.

> The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of §2511(1)(a) do not provide sufficient deterrence, perhaps those sanctions should be

[8] "As the majority below put it, '[i]f 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.'" *Id.*

> made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.

532 U.S. at 529-530. The Court found that the interest of deterring illegal interception was not sufficient to merit a suppression of speech, and rejected the idea that punishing a party who did not participate in the illegal collection of the information (through criminal or civil liability) but disclosing the information would somehow deter unlawful collection of the information. 532 U.S. at 529-530. As for the second interest, the protection of privacy, the Court similarly rejected privacy interest as sufficient when it burdened the core purpose of the First Amendment by imposing sanctions on protected First Amendment activity. 532 U.S. at 532-35.

Accordingly, notwithstanding the broad language of the Wiretap Act which purports to impose civil liability for *any* disclosure (or other conduct or use which is core First Amendment activity), under *Bartnicki*, the Wiretap Act's prohibitions and imposition of civil or criminal liability for the disclosure of information is limited under the First Amendment such that it *cannot* be used to impose liability (or punish) an individual who *did not take part in any illegal interception*, but, rather, discloses the information *as an exercise of core First Amendment rights*.

Bartnicki turned, in part, on the fact that the information concerned a matter of public concern, which

is a relevant consideration in a speech or media cases. But *Bartnicki* provides the framework and principals for analysis when Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510, *et seq.*, conflicts with other core First Amendment protections. The proper analysis necessarily is to weigh the competing interests. In a custody matter, the interest is the interest of the child and the child's interest in having either party, or an attorney, present relevant and probative evidence impacting the determination of the child's best interest to the court.[9] The Ninth Circuit's blanket rejection of these principles and the application of the First Amendment to petitioning activity at all absent a court case on a matter of public concern conflicts with *Bartnicki*'s clear instruction that the Wiretap Act has First Amendment limits when the privacy interests advanced by that statute are outweighed by the First Amendment protection of the rights of parties to engage in core First Amendment activity who did not participate in the illegal interception of the communications.

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[9] And, of course, the chilling effect of imposing statutory (and possibly criminal) liability after-the-fact when through the adjudicative process it was determined that Abid could not rely on the vicarious consent doctrine (though Jones reasonably believed it did apply) is self-evident. In the context of this case—custody litigation over emotional abuse of a child—the interests of that innocent child are, as the Nevada Supreme Court has recognized, *paramount to any competing interests of either parent*. Imposing liability on an attorney submitting relevant information to the Court not only impermissibly infringes on core First Amendment activity, it elevates an abuser's "privacy rights" over the rights of the child to be free from such emotional harm.

C. The Ninth Circuit's Holding Conflicts With Other Circuits By Dismissing First Amendment Protection Of Petitioning Unless It Is A Matter Of Public Concern.

This Court has only ever restricted First Amendment protections for petitioning to matters of public concern in a very narrow context: government employees. *See Borough of Duryea, Penn. v. Guarnieri*, 564 U.S. 379 (2011). In doing so the Court distinguished public employees from the rights of private citizens and found a compelling government interest as an employer to manage its affairs warranted lesser protections on the right to petition. While not directly ruling on the issue, the Court implicitly suggested that "public concern" issues have no place in evaluating the First Amendment protections for petitioning for ordinary citizens. Indeed, the Court commented that "[o]utside of the public employment context, constitutional protection does not necessarily turn on whether those petitions relate to a matter of public concern." 564 U.S. at 394.[10]

The Ninth's Circuit dismissal of the First Amendment and *Noerr-Pennington*'s application to this custody dispute because it deems a custody matter a minor matter of no public concern despite the Nevada Supreme Court's holding in *Abid*, conflicts with

[10] The Court also cautioned that while the clauses are closely related and of equal importance, "Courts should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause Claims." 564 U.S. at 389.

Guarnieri. But it also establishes a conflict among the Circuits that reject measuring the First Amendment's protection of petitioning through a "public concern" lens. *See Van Deelen v. Johnson*, 497 F.3d 1151, 1158-59 (10th Cir. 2007) ("To summarize, . . . the right of a private citizen to seek redress of grievances is not limited to matters of 'public concern' . . . ").

The conflict presented here is an ongoing and important matter and merits resolution through a grant of certiorari. The Court has touched on the issue regarding the extent of private citizen petitioning rights and the extent of protection under the First Amendment, but never directly addressed it. The Circuits on this point are split. Certiorari is warranted to ensure that the right to petition is protected for all not just those who might have an interest and standing with respect to a matter of public concern.

II. THIS CASE PRESENTS AN IMPORTANT ISSUE WITH SIGNIFICANT IMPLICATIONS FOR COURT PROCEEDINGS INVOLVING CUSTODY OF MINORS.

The blanket prohibition on disclosure or use of unlawful interceptions, and punishment of violation by way of, *inter alia*, a civil action in the context of custody proceedings by way of 18 U.S.C. 2511(1)(c)-(d) and 18 U.S.C. 2520, presents a conflict between the privacy interests advanced by the Wiretap Act and the unique situation that is a custody proceeding where the only interest to be considered is the minor child. It further

would serve to clarify the already recognized First Amendment limitations on the reach of the Wiretap Act to protected First Amendment activity by, like *Bartnicki*, ensuring that the law recognizes the correct interests involved in a custody proceeding, the child's best interests and weighs the child's interest in a custody court receiving and using, through petitioning activity in the form of a motion or motions, relevant information regarding harm being done to the child by one parent against the privacy interest of that parent protected by the Wiretap Act.

As recognized by the Nevada Supreme Court and many others, in a custody proceeding, the *child's best interest is the sole consideration and paramount*. The Ninth Circuit's opinion operates to do exactly what the Nevada Supreme Court found completely contrary to the purposes of a custody proceeding and the interests involved and mechanically blind the court to clear and relevant evidence directly impacting the determination of the child's best interest by revealing ongoing harm to the child. As the Nevada Supreme Court put it:

> [h]ere, the interests of a nonlitigant child are at stake. Prohibiting an expert from considering evidence punishes that child by hindering the expert's inquiry into the child's best interests. It is sanctioning the child for the alleged crime of his parent.

406 P.3d at 774 (App. 58).

This case is a good vehicle to, like *Bartnicki*, carve out a limited exception under the First Amendment without doing violence to the overall purpose of the Wiretap Act and the privacy interests it protects. The interest of the child to have a court in a custody dispute directly, or through an appointed expert, have evidence of emotional harm being done to the child considered, is a situation not presented in typical civil disputes, but is a matter of compelling state interest. Lawyers participating in a custody proceeding know that the overriding charge to all involved is to advocate for the best interest of the child only. As such, while the parents can and sometimes do, engage in unlawful conduct when under the belief their child is being harmed, as this Court recognized in *Bartnicki* and Nevada recognized in *Abid*, the solution is harsher punishments for the unlawful collection, not punishing someone who in the interest of the public good (protecting children) engaged in petitioning activity advocating the child's best interest. Affirming the First Amendment right of participants, including lawyers subject to the statutory and court requirement to advance the best interest of the child, to petition the court to accept, admit or use through an expert, even though unlawfully obtained, will advance the overriding state interest in protecting children and ensure that children are not punished for the sins of the parent.

III. THE DECISION BELOW IS WRONG.

In denying Jones' protection under the First Amendment for his petitioning activity the Ninth Circuit's opinion committed error.

This Court originally articulated the protection against imposition of liability under a federal statute for engaging in protected petitioning activity in *Noerr*, 365 U.S. 127 and *Pennington*, 381 U.S. 657 in the context of federal anti-trust statutes. The principles have since been expanded outside the anti-trust context. *See, e.g.*, *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516 (2002). The courts of appeals have similarly expanded the *Noerr-Pennington* doctrine's principles to many other contexts, including extending First Amendment petitioning protection to attorneys and all aspects reasonably related to litigation. *See*, *e.g.*, *White*, 227 F.3d at 1231 ("While the *Noerr-Pennington* doctrine originally arose in the antitrust context, it is based upon and implements the First Amendment right to petition and therefore, with one exception we discuss *infra* [internal cite omitted], applies equally in all contexts."); *Freeman v. Lasky, Hass & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005) (*Noerr-Pennington* immunity applies to petitioning activity in the courts both affirmatively and defensively, including conduct incidental to a petition, such as settlement or refusal to settle, "and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something" and noting that *Noerr-Pennington* immunity is "not limited to lawyers"); *Kearney v. Foley &*

Lardner, LLP, 590 F.3d 638, 645 (9th Cir. 2009) (attorneys covered by First Amendment petitioning immunity). *See also*, *e.g.*, *CSMN Investments, LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1283 (10th Cir. 2020) ("In this circuit, this immunity extends beyond antitrust situations. [citation omitted]. But we refer to it as Petition Clause immunity, reserving the name *Noerr-Pennington*, for antitrust cases."); *Video Intern. Production, Inc. v. Warner-Amex Cable Comm. Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) ("Although the *Noerr-Pennington* doctrine initially arouse in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws. . . .").

Whether couched in terms of First Amendment protection for the right to petition (or "First Amendment petitioning immunity") or *Noerr-Pennington*, the protection under the First Amendment for petitions to the government is part of the core rights protected by the First Amendment.

The Ninth Circuit, to achieve the result, wrongly decided that Jones' actions, which were wholly in court, was not a qualifying "petition." App. 17-18. But his actions were exactly petitions to the court to accept and admit the evidence (as lawfully obtained under vicarious consent) or otherwise rule it could be disclosed to and used by the court-appointed psychologist. There is no question that First Amendment petitioning includes conduct in court. *See*, *e.g.*, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First

Amendment right to petition the Government for redress of grievances."); *Freeman*, 410 F.3d at 1184 (petitioning immunity applies to petitioning activity in the courts both affirmatively and defensively, including conduct incidental to a petition, such as motions that "present arguments to support their request that do something or not do something . . . "); *Kearney*, 590 F.3d at 645 (attorneys covered by First Amendment petitioning immunity for court activities).

Here, Jones' activities were limited to filing motions and arguing to the court with respect to custody and the best interest of the child. He provided the proffered evidence, offered argument and authority as to why it was not unlawful for Abid to make the recordings under vicarious consent, and further argued that even if they were unlawful, the evidence was admissible or at a minimum, could be provided to the court-appointed expert for use in evaluating the situation and reporting to the court. While he was representing a client, Abid, the unique nature of custody determination ultimately charged Jones as an officer of the court to advocate the *child*'s best interest as the sole consideration of the court.

The Ninth Circuit erred when it dismissed Jones' petitioning activity as something other than a petition. Even the Ninth Circuit's own prior precedent—which it did not overrule or otherwise indicate a change—does not support such a conclusion.

Similarly, the Ninth Circuit's opinion is wrong when it dismisses the custody matter in state court as

meriting First Amendment petitioning protection at all because it is not a matter of "public concern" or suggesting that Jones' First Amendment rights are not chilled or burdened by after-the-fact liability under a federal statute because the state court ultimately allowed the recordings to go to the expert.

As discussed in Statement Section I.C, *supra*, the protection of the right to petition under the First Amendment does not turn on whether the petition in question is a matter of public concern. *See Guarnieri*, 564 U.S. at 394. This Court has never so limited the First Amendment except in a narrow set of circumstances not applicable here and other courts of appeal have rejected the notion adopted by the Ninth Circuit's opinion. *See also Van Deelen*, 497 F.3d at 1158-59 ("To summarize, . . . the right of a private citizen to seek redress of grievances is not limited to matters of 'public concern' . . .).

As for the idea that petitioning rights and core First Amendment activity is not chilled by the imposition of liability under a federal statute for engaging in protected petitioning because, before sued under the federal statute the in-court activities met with some success, is simply logically incorrect. The entire point of shielding against liability for engaging in non-sham petitioning activity under the First Amendment is the chilling effect such liability would have on legitimate exercises (*i.e.*, non-sham) of core First Amendment rights. *See Octane Fitness*, 572 U.S. at 556 (2014) ("We crafted the *Noerr-Pennington* doctrine—and carved out only a narrow exception for 'sham' litigation—to avoid

chilling the exercise of the First Amendment right to petition the government for the redress of grievances."); *White*, 227 F.3d at 1228 ("This court has held that government officials violate this provision when their acts 'would chill or silence a person of ordinary firmness from future First Amendment activities.' ").

Finally, though not made a basis of its decision, certain Ninth Circuit precedent, including precedent cited in the opinion below, departs from the core First Amendment analysis created by this Court in *Noerr-Pennington* which immunize legitimate exercises of the First Amendment right to petition from liability under a federal statute unless that activity is determined to be purely a sham. The Ninth Circuit has in recent decisions and in the opinion below, articulated the rule for analysis to include a new requirement to be entitled to First Amendment protection in addition to those traditionally (does the suit impose a burden on petitioning rights, is the activity at issue a sham), to add a third criteria, which is that one is only entitled to protection under the First Amendment if the statue in question can be construed to avoid the burden. App. 16, 18 n.5. But as this Court said in *Octane Fitness*, the applicability of First Amendment protection to petitioning activity has only one exception: sham litigation. 572 U.S. at 556. It is fundamentally wrong to impose a restriction on the right to protection under the First Amendment to limit protection to only those who establish they do not need it because the statute can be construed to not apply. Of course a statute should always be construed in the first instance to

avoid constitutional infirmities. However, when that is not possible, and the statute in question imposes liability for exercising first amendment rights—long recognized and an burden on the exercise of those rights (and chilling future exercise), the First Amendment commands that the statute be invalidated as to the petitioning activity in question. This is what happened in *Bartnicki*, where the activity in question was clearly and expressly prohibited by the Wiretap Act and, but for the First Amendment, liability under the statute would necessarily result. *Bartnicki* did not treat the First Amendment as a rule of statutory construction, and there is no reason that the result would be different when considering a different, but co-equal protection for petitioning the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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