No. 17-43

In The
Supreme Court of the United States

LOS ROVELL DAHDA and
ROOSEVELT RICO DAHDA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus The Rutherford Institute, a nonprofit civil-liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the fundamental human rights of all people. The Rutherford Institute advocates for protection of civil liberties and human rights through both *pro bono* legal representation and public education on a wide spectrum of issues affecting individual freedom in the United States and around the world.

As a central part of its mission, The Rutherford Institute advocates against unnecessary government intrusions into citizens' privacy, fighting to prohibit the government from engaging in unreasonable searches and seizures under the guise of detecting and deterring crime. To ensure the vitality of the right to individual privacy in the course of criminal investigations, The Rutherford Institute believes that Title III's suppression remedy should be enforced strictly, in accordance with the plain language of 18 U.S.C. § 2518(10)(a)(ii) and Title III's original purpose—to limit the government's ability to invade individuals' privacy through wiretapping.

[1] The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Title III was Congress's long-brewing response to two decades of escalating societal, political, and judicial concerns over developments in surveillance technology and its threat to individual privacy. Deliberately crafted as a general prohibition on wiretapping, Title III includes a narrow exception for law enforcement that permits interceptions of citizens' private communications only under highly limited and heavily regulated circumstances. The history, structure, and plain text of Title III reinforce the narrowness of the law-enforcement exception, as well as the importance of judicial oversight through rigorous scrutiny of wiretap applications, ongoing supervision of wiretap orders, and congressionally mandated suppression of evidence collected in violation of Title III's requirements.

During the 1950s and 1960s, the American public became increasingly aware of the threat to privacy posed by wiretapping and bugging, as a series of exposés educated citizens on scandalous uses of this technology by private individuals, corporations, and law enforcement. Public outrage led to calls for the outlawing of all wiretapping activities, with opposition to use of the technology coming not only from citizens but also from Congress and The White House.

At the same time, this Court was shaping Fourth Amendment doctrine to address the same concerns over technological advances threatening privacy. After initially permitting any interception of communications

that occurred physically outside a protected area, the Court held in the 1960s that private communications are in fact protected by the Fourth Amendment. Thus, any intrusion on the privacy of those communications would have to meet requirements analogous to those applied to physical searches. This doctrine—and the explicit overturning of a notoriously abused New York statute that gave more leeway for law-enforcement wiretapping—called the legality of most governmental wiretapping into question.

It was against that backdrop of public outcry and this Court's decisions regarding private communications that Congress took up the question of regulating wiretapping. After a number of hearings on bills that ultimately were not enacted, Congress settled on the painstakingly detailed statutory scheme that became Title III. That scheme first outlaws wiretapping and other electronic interceptions of communications. It then provides a narrowly circumscribed exception for law enforcement, available only if a judge confirms the government's compliance with substantive and logistical, statutorily prescribed requirements. In addition to demonstrating probable cause and the ineffectiveness of alternative investigative procedures, a wiretap application also must include detailed descriptions of the type of communications to be intercepted, the person making the communications, and the location of the proposed interception. Importantly, the judge, who may authorize interceptions only within the territorial jurisdiction of her court, continues supervision of any approved interceptions—from requiring progress

reports up to excluding any evidence gathered in violation of the statute. This geographically anchored, judicial gatekeeping role was designed not only to prevent forum shopping, but also to actively effectuate the purpose of the statute—protecting citizens from unwarranted intrusions on their private communications. The suppression remedy in 18 U.S.C. § 2518(10)(a)(ii) is vital to that purpose and should be enforced as written, precluding prosecutors from using evidence of communications intercepted pursuant to a facially insufficient order.

ARGUMENT

I. TITLE III EVOLVED AGAINST THE BACKDROP OF PUBLIC CLAMOR FOR EFFECTIVE LIMITS ON ELECTRONIC INTERCEPTIONS OF COMMUNICATIONS.

Title III arose from a period in which Americans increasingly recognized that changing technologies threatened a bedrock principle of American society: the right to individual privacy. Individual privacy has been protected under the law since before the founding of the Nation and was enshrined in the Fourth Amendment's guarantee that the people shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV; *see Boyd v. United States*, 116 U.S. 616, 626-27 (1886). Less than a century after that constitutional promise, however, improvements in technology began to quietly and quickly erode privacy rights, unbeknownst

to many Americans. *See*, *e.g.*, *Berger v. New York*, 388 U.S. 41, 49 (1967). The creation of the telegraph in the nineteenth-century, which allowed individuals to communicate electronically, ushered in an era of electronic eavesdropping and—once exposed to the American people—a growing suspicion of the government's ability to intercept private communications.[2] *See* SAMUEL DASH, RICHARD F. SCHWARTZ & ROBERT E. KNOWLTON, THE EAVESDROPPERS 23, 26-29 (1959).

By the mid-twentieth century, Americans had been subjected to over one-hundred years of wiretapping at the hands of law-enforcement officials, corporations, and even other private citizens. *Id.* at 34. In the summer of 1956, amidst growing concern about the proliferation of wiretapping and its disparate treatment by states, The Pennsylvania State Bar Association commissioned a nationwide study into various wiretapping practices, laws, devices, and techniques. *Id.* at 5. The results of this yearlong study were widely publicized with the 1959 release of *The Eavesdroppers*, which thrust the one-hundred-year history of wiretapping's invasive practice into the spotlight and brought the debate of how to protect Americans' privacy from wiretapping to the forefront of all

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[2] For a colorful account of this history, including illustrations of eavesdropping tools mentioned in this brief, such as the legendary "pry martini" cocktail bug, discussed *infra* at 10, see Brian Hochman, *Eavesdropping in the Age of* The Eavesdroppers*; or, The Bug in the Martini Olive*, POST45 (Feb. 3, 2016), http://post45.research.yale.edu/2016/02/eavesdropping-in-the-age-of-the-eavesdroppers-or-the-bug-in-the-martini-olive.

branches of government. *See generally* DASH ET AL., *supra*.[3]

Publication of *The Eavesdroppers* created national uproar and fueled the public outrage against wiretapping that had been simmering throughout the twentieth century. *See id.* at 87-90. As a reviewer in *The Nation* observed, *The Eavesdroppers* portrayed America as a "thoroughly unpleasant society." Carl Dreher, *The Enemy Is Listening*, 1960 THE NATION 54, 55 (reviewing DASH ET AL., *supra*). The reviewer in *Commentary* characterized the police actions described in the book as "the functions of a secret, or political, police" and warned that "the health of the society is obviously jeopardized." Mairi MacInnes, *An Attack on Privacy,* 1960 COMMENT. 274, 275 (reviewing DASH ET AL., *supra*), *available at* https://www.commentarymagazine.com/articles/the-eavesdroppers-by-samuel-dash-robert-knowlton-and-richard-f-schwartz/.[4] Writing a month later, another

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[3] The Pennsylvania State Bar Association's $50,000 endowment to study national wiretapping practices funded an objective, fact-finding study led by attorney Samuel Dash, a former Philadelphia prosecutor. DASH ET AL., *supra*, at 5. *The Eavesdroppers*, a 441-page report published about the findings of this study, looked at wiretapping practices of both law enforcement and private citizens in New York, Boston, Pennsylvania, California, Illinois, and Louisiana. *Id.* at 8. Mr. Dash would later go on to become chief counsel for the Senate Watergate Committee. UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/common/generic/People_DashSam.htm (last visited Dec. 3, 2017).

[4] Reception of *The Eavesdroppers* was not uniformly positive. For example, one Manhattan district attorney who had initially cooperated with Dash stated that in writing *The Eavesdroppers* the authors "grind their axe upon a wheel of un-truth and far-fetched speculation." Frank S. Hogan, *An Answer to the Authors*,

essayist in *Commentary* applauded the reaction to the controversy, observing that "the most satisfying aspect of the wiretapping revolt . . . is the proof that Americans value their constitutional privacy too highly to let it ebb away before an advancing technology or the forays of official and unofficial intruders." Alan F. Westin, *Wire Tapping*, 1960 COMMENT. 333, 340 (reviewing DASH ET AL., *supra*), *available at* https://www.commentarymagazine.com/articles/wire-tapping/.

The Eavesdroppers recounted and revealed to Americans a world of scandal and deception that shocked the nation and rocked the Capital, in particular. The book exposed that, in the mid-1930s, federal investigators discovered that a major private business had placed wiretaps on the telephones of this Court's Justices. DASH ET AL., *supra*, at 29. Knowledge of the wiretaps was hidden from this Court, even after its discovery by federal agents. *Id.* And other branches of the federal government were not immune from similar intrusions. Americans learned that wiretapping in the nation's Capital was suspected throughout the 1950s, with one of the most notable instances coming to light in 1951, when Congress learned that Washington's police lieutenant had tapped the phones of a United States Senator. *Id.* at 32.

Public outcry heightened with the realization that the largest group of wiretapping victims was undoubtedly private citizens. *The Eavesdroppers* and other

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50 J. CRIM. L. CRIMINOLOGY 575, 575 (1960) (reviewing DASH ET AL., *supra*).

reports revealed how far reaching interceptions of private communications had become. For example, *The Eavesdroppers* gave the details behind a 1955 scandal, revealing that a single New York wiretapping facility—set up by an attorney with the help of rogue phone-company employees—was capable of intercepting communications from over 100,000 telephones.[5] *Id.* at 83-85. A contemporaneous Harvard Business School study reported that a growing number of companies were using wiretapping to spy on competitors and their own employees. BYRON H. ALDEN ET AL., COMPETITIVE INTELLIGENCE: INFORMATION, ESPIONAGE, AND DECISION-MAKING 69-70 (1959); *see also* DASH ET AL., *supra*, at 95-96.

During the 1960s, a number of other books addressed the issues covered by *The Eavesdroppers*, expanding the documentation of widespread interceptions of citizens' private communications. Some books suggested that up to one-third of divorce cases in major American cities involved evidence obtained by bugging, and many businesses, including up to 100% in some industries, had purchased audio-surveillance equipment to spy on competitors. ROBERT M. BROWN,

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[5] The attorney used the wiretaps (which covered "an exceedingly fashionable section of midtown Manhattan") to collect specific evidence requested by clients, but he also "would at times, on his own initiative, approach wealthy persons he knew were having domestic difficulties and offer his wiretapping services. He would actually sample telephone conversations to obtain incriminating bits of evidence which he could use as a selling point when he approached a prospective [client]." DASH ET AL., *supra*, at 85-87.

THE ELECTRONIC INVASION 23-24 (2d ed. 1975) (1st ed. published in 1967); EDWARD V. LONG, THE INTRUDERS: THE INVASION OF PRIVACY BY GOVERNMENT AND INDUSTRY 17 (1966).

Perhaps the most shocking examples of wiretapping, though, involved use of the technology by law enforcement. Telephone companies had been secretly helping the police conduct wiretaps in Boston, Chicago, and New Orleans, with the understanding that the police would not disclose the telephone companies' cooperation to the public. DASH ET AL., *supra*, at 122-23 (describing this practice in New Orleans); *id.* at 154 (describing this practice in Boston); *id.* at 219 (describing this practice in Chicago). In states like California—which had already banned law-enforcement wiretapping in response to public outcry—police would hire private contractors to install wiretaps so that police could claim *they* were not violating state wiretapping laws. *Id.* at 164. And in states like New York—where law-enforcement wiretapping required a court order—prosecutors would avoid taking wiretap orders to judges who refused to issue them, "quickly learn[ing] which judges [would] be more receptive to their applications, and consistently tak[ing] them to these judges." *Id.* at 45. In 1953, a Deputy Attorney General who was a former New York prosecutor testified to the Committee on the Judiciary for the House that local requirements for getting a court order afforded little protection from wiretapping. *Id.* at 67 (citing *Hearings on H.R. 408 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 83d Cong. 37 (1953)).

By the early 1960s, Congress started considering action to curtail wiretapping. Four wiretapping bills were introduced in early 1961, but none passed. *Wiretapping and Eavesdropping Legislation: Hearings on S. 1086, S. 1221, S. 1495, and S. 1822 Before the Subcomm. on Constitutional Rts. of the S. Comm. on the Judiciary*, 87th Cong. 1-8 (1961); *see also* EDITH J. LAPIDUS, EAVESDROPPING ON TRIAL 11 (1974). In hearings on another bill in 1965, Harold Lipset, a private investigator, pretended to sip a dirty martini while testifying, and then played back his testimony—supposedly recorded by a transmitter camouflaged as the olive in the martini.[6] *Invasions of Privacy (Gov't Agencies): Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 89th Cong. 13-21 (1965) (statement of Harold K. Lipset, private detective). As might be imagined, this caused quite a stir. *See* Russell Baker, *Treacherous Vegetables*, MIAMI NEWS, Feb. 23, 1965, at 64; *Your Olive May Quote You If Snoopers Know You Drink*, BALT. SUN, Feb. 19, 1965, at 1; Laurence Stern, *Don't Talk to a Martini, Olive May Be Listening*, WASH. POST Feb. 19, 1965, at A1.

The public outrage against this invasion of privacy culminated in President Johnson's 1967 State of the Union Address, where he called on Congress to "outlaw wiretapping—public and private—whenever and

[6] The recording was actually from a microphone hidden in a flower arrangement (apparently, the martini set-up was not reliable). PATRICIA HOLT, THE BUG IN THE MARTINI OLIVE, AND OTHER TRUE CASES FROM THE FILES OF HAL LIPSET, PRIVATE EYE 67 (1991). The martini glass also held no liquid, to keep the microphone from shorting out. *Id.*

wherever it occurs, except when the security of the Nation itself is at stake—and only then with the strictest safeguards." President Lyndon B. Johnson, *Annual Message to the Congress on the State of the Union, January 10, 1967*, LBJ PRESIDENTIAL LIBR. (June 6, 2007), http://www.lbjlibrary.net/collections/selected-speeches/1967/01-10-1967.html.

Attorney General Ramsey Clark shared the President's sentiment, stating that "over a period of 6 years the Department has come more and more to the view that wiretapping should be prohibited." *Anti-Crime Program: Hearings on H.R. 5037, H.R 5038, H.R. 5384, H.R. 5385, and H.R. 5386 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 90th Cong. 38 (1967) [hereinafter *Anti-Crime Program Hearings*] (statement of Ramsey Clark, Attorney General, United States). When testifying before a House Subcommittee of the Judiciary, Attorney General Clark warned of the dangers of wiretapping with a description that likely hit close to home for many in his audience: With current technology, a person enjoying cocktails at an elegant Washington watering hole could have his conversations recorded and transmitted by a device that appeared to be his drinking partner's cufflinks, or even (according to Hal Lipset) the olive in his martini. *See id.* at 211.

The President's Commission on Law Enforcement and Administration of Justice summed it up in its report on the challenge of crime in a free society: "The present status of the law with respect to wiretapping

and bugging is intolerable." THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOC'Y 203 (1967).

II. AS GROWING PUBLIC DEMAND FOR PROTECTION FROM WIRETAPPING FUELED LEGISLATIVE AND EXECUTIVE-BRANCH RESPONSES, THIS COURT ALSO SHAPED ITS DOCTRINE TO PROTECT INDIVIDUALS FROM IMPROPER INTERCEPTION OF PRIVATE COMMUNICATIONS.

Over the half century leading up to the enactment of Title III, this Court faced the challenge of applying constitutional protections to changing surveillance technology. At first, it applied concepts of trespass more suited to search or seizure of tangible objects. *See, e.g.*, *Goldman v. United States*, 316 U.S. 129, 133-36 (1942); *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928). But, by 1967, it arrived at a framework designed to protect individuals from unreasonable searches of private communications—the framework that would underlie much of Title III. *See Katz v. United States*, 389 U.S. 347, 354-59 (1967); *Berger v. New York*, 388 U.S. 41, 54-60 (1967).

This Court tracked the law of trespass when it decided its first wiretap case in 1928, determining that protection from interceptions of electronic communications would have to come from legislative action, not the Fourth Amendment. *See Olmstead*, 277 U.S. at 465. In *Olmstead*, this Court held that there had been no

search or seizure when federal officers gathered evidence of illegal alcohol sales by inserting small wires into the telephone lines running from the defendants' residences or offices to the telephone company, because the telephone wires were "not part of [the defendants'] house or office." *Id.* at 465. This Court concluded that the "reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment." *Id.* at 466. At the same time, however, this Court pointed out that "Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials." *Id.* at 465.

Congress responded to this suggestion in 1934, specifically prohibiting the interception without authorization of telephone communications. Federal Communications Act, ch. 652, 48 Stat. 1103 (1934) (rewritten by Title III of the Omnibus Crime Act of 1968, 82 Stat. 22, § 803 (1968)). This Court then extended the exclusionary rule to wiretap evidence offered in violation of the statute. *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Nardone v. United States*, 302 U.S. 379, 384 (1937).

This Court first addressed "bugging" (using a listening device rather than a true wiretap) in 1942. *Goldman v. United States*, 316 U.S. 129 (1942). In *Goldman*, the police had placed a "detectaphone" against an office wall to hear conversations in the office on the other side of the wall. *Id.* at 131. Once again, this Court

looked to the law of trespass and concluded there was no Fourth Amendment violation because there was no physical intrusion into the office. *Id.* at 135.

In 1954, this Court again affirmed a conviction based on evidence gathered with a bug. *Irvine v. California*, 347 U.S. 128 (1954). Although there was no question that a physical intrusion occurred—police had broken into the premises to place the listening device—this Court allowed the conviction to stand because the exclusionary rule did not apply to state courts. *Id.* at 137. Despite affirming the conviction, the opinion included striking language signaling a new level of concern over the use of bugs, which this Court described as "frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busy-body." *Id.* at 132.

Less than a decade later, this Court held for the first time that "eavesdropping" could violate the Fourth Amendment. *Silverman v. United States*, 365 U.S. 505 (1961). In *Silverman*, the police had used a "spike mike"—a microphone mounted at the end of a foot-long spike that was inserted into a party wall until it could pick up conversations in the adjoining house through the heating ducts. *Id.* at 506. Transitioning away from a pure focus on physical intrusion, this Court clarified that its decision did "not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area." *Id.* at 512.

Following from *Silverman*, this Court explicitly stated two years later that overheard oral statements are subject to the exclusionary rule. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963). Although this Court went on to permit use of electronically recorded conversations in two cases from the early 1960s, *Lopez v. United States*, 373 U.S. 427 (1963), and *Osborn v. United States*, 385 U.S. 323 (1966), this Court's admissibility analysis was strikingly different from its approach in earlier opinions. In *Lopez*, this Court upheld use of a recorded conversation between a federal agent and the defendant because the recording "was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." 373 U.S. at 439. In *Osborn*, this Court again took a restrictive approach in considering the admissibility of statements obtained when a potential witness wore a recording device that was authorized only under "the most precise and discriminate circumstances," 385 U.S. at 329, for a "narrow and particularized purpose," *id.* at 330. Because the search met the same requirements this Court would apply in the case of a physical search, it allowed the use of the recording. *Id.*

It was against this backdrop that this Court issued its opinion in *Berger v. New York*, 388 U.S. 41 (1967), creating the legal framework that would underlie much of Title III. *Berger* involved a challenge to the admissibility of evidence collected through a wiretap

conducted in accordance with a New York statute that permitted wiretaps by police

> upon "oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof * * * ." The oath must state "that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and * * * identifying the particular telephone number or telegraph line involved."

Id. at 54.

Despite the particularities required for a wiretap order, this Court held that the interceptions violated the Fourth Amendment, finding the New York statute constitutionally deficient for a number of reasons. *See id.* at 58-60. First, the statute did not require a belief that any particular offense had been committed, and it did not require that the conversations sought to be seized "be particularly described." *Id.* at 58-59. Second, the authorization of a wiretap for two months was "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." *Id.* at 59. Third, "the statute place[d] no termination date on the eavesdrop once the conversation sought is seized." *Id.* And, finally, the statute did not overcome the problem of a lack of notice (inherent, of course, in a

search that depends on secrecy) "by requiring some showing of special facts." *Id.* at 60.

By dissecting the New York statute in this manner, this Court effectively laid out a blueprint for regulating wiretapping consistent with constitutional demands. Indeed, at least one commentator suggested that this Court's approach in *Berger* was critical to shaping the legislation that followed. Professor G. Robert Blakey, who drafted a model statute that in fact became the foundation for much of Title III, stated that, if this Court had not reversed the conviction in *Berger*, "the likelihood is that the New York statute would have become the model and would have been copied and enacted by other States and the National Congress." *Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, S. 552, S. 580, S. 674, S. 675, S. 678, S. 798, S. 824, S. 916, S. 917, S. 992, S. 1007, S. 1094, S. 1194, S. 1333, and S. 2050 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary,* 90th Cong. 957 (1967) [hereinafter *Controlling Crime Hearings*] (statement of G. Robert Blakey, Professor, Notre Dame Law School); *see also United States v. Giordano*, 416 U.S. 505, 518 (1974) (describing Professor Blakey as "the draftsman of the bill containing the basic outline of Title III"). In Professor Blakey's view, the Court "struck it down in such a way that they could write, in effect, an advisory opinion to the Congress and the States on the kind of statute they would like to see." *Controlling Crime Hearings*, *supra*, at 957.

Six months after *Berger*, this Court issued its opinion in *Katz v. United States*, explicitly rejecting the reliance in *Olmstead* and *Goldman* on the physical placement of the recording device, focusing instead on whether an individual has a reasonable expectation of privacy in his conversations. 389 U.S. 347, 351-53 (1967). This Court reiterated that "under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the * * * allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.'" *Id.* at 355 (quoting *Osborn*, 385 U.S. at 329-30). Thus, while this Court established the protected status of private conversations, it left the door open for carefully circumscribed law-enforcement incursions on this zone of privacy. The ball was now in Congress's court.

III. CONGRESS ENACTED TITLE III TO LIMIT WIRETAPPING, RELYING ON JUDICIAL OVERSIGHT TO SHARPLY CURTAIL INTERCEPTED COMMUNICATIONS.

Congress enacted Title III in the wake of escalating societal, political, and judicial concerns over burgeoning surveillance technology and its threat to individual privacy. By outlawing all interceptions of communications except those expressly permitted by statute, Title III unambiguously established that "the protection of privacy was an overriding congressional concern." *See Gelbard v. United States*, 408 U.S. 41,

48 (1972); *see also Giordano*, 416 U.S. at 514. A critical reflection of that congressional concern was the particularized, restrictive requirements defining the limited circumstances under which a wiretap order could be obtained by law enforcement. *See, e.g.*, 18 U.S.C. § 2518(1), (3)-(6), (8)(a)-(d); *id*. § 2510(9). As such, "Title III takes the form of a series of limitations and prohibitions on lawful eavesdropping: the 'do's' are largely the residue of multitudinous 'don'ts.'" NAT'L COMM'N FOR THE REVIEW OF FED. & STATE LAWS RELATING TO WIRETAPPING & ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 4 (1976).

The suppression remedy in 18 U.S.C. § 2518(10)(a), including the evidentiary sanction for facially insufficient wiretap orders in § 2518(10)(a)(ii), is an integral part of Congress's comprehensive scheme to outlaw unchecked eavesdropping, prescribing definitive consequences for evidence impermissibly obtained through interception "don'ts." *See id.*; S. Rep. No. 90-1097 (1968), at 96, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185 (describing the suppression remedy as "an integral part of the system of limitations designed to protect privacy"); *see also* 18 U.S.C. § 2518(10)(a). That statutory remedy, and deterrent, should be strictly enforced pursuant to its plain text to effectuate Congress's deliberate, thoroughly considered response to the clamor over wiretapping that proliferated throughout American society and all branches of government, coming to a head with the enactment of Title III.

A. Title III Was the Product of Years of Increasingly Impassioned Opposition to Wiretapping in the House and Senate.

Prior to the enactment of Title III, the only federal statute addressing wiretapping was section 605 of the Federal Communications Act of 1934, which was generally ineffective. EDITH J. LAPIDUS, EAVESDROPPING ON TRIAL 11 (1974). Although in 1961 the Kennedy Administration endorsed a proposal to authorize wiretapping in cases of national security, organized crime, and other serious crimes, nothing tangible resulted. *Id.* at 12. As previously mentioned, highly publicized hearings began in 1961 before the Permanent Subcommittee on Investigations headed by Senator John McClellan, but Congress took no action on President Kennedy's proposal. *Id.* Further hearings were conducted in the mid-1960s, but no legislation was passed. *See id.*

When the 90th Congress met in 1967, legislators could no longer avoid acting as widespread outrage over wiretapping swept the nation. The public uproar over wiretapping, President Johnson's 1967 State of the Union Address urging Congress to "outlaw wiretapping—public and private" unless required for national security, President Lyndon B. Johnson, *Annual Message to the Congress on the State of the Union, January 10, 1967*, LBJ PRESIDENTIAL LIBR. (June 6, 2007), http://www.lbjlibrary.net/collections/selected-speeches/1967/01-10-1967.html, and this Court's pending decisions in *Berger* and *Katz* all weighed heavily on the legislative agenda. Revelations into the extent of

wiretapping sparked concern from the highest-ranking members of Congress, such as Representative Emmanuel Celler, the Chairman of the House Judiciary Committee, who noted that wiretapping and electronic surveillance had by 1967 "become most obnoxious," arguing that such practices sanctioned an invasion of privacy that "[n]o liberty-loving nation should tolerate." *Anti-Crime Program Hearings*, *supra*, at 23.

Thus, when the House Judiciary Committee conducted hearings for the "Safe Streets and Crime Control Act of 1967" (H.R. 5037, 90th Cong. (1967)), it dedicated two days of testimony to H.R. 5386, the "Right to Privacy Act," which dealt with wiretapping and electronic eavesdropping. *See Anti-Crime Program Hearings, supra*, at 79; *see also* H.R. 5386, 90th Cong. (1967). H.R. 5386 would have prohibited all willful interceptions or attempts to intercept wire communications without the consent of at least one of the parties to the communications, as well as any unconsented-to electronic eavesdropping (i.e., bugging) unless such practices were authorized by the President as "necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power or any other serious threat to the security of the United States." H.R. 5386, 90th Cong. §§ 2511, 2514 (1967). Furthermore, even in the case of the "national security" exception, the Act would have prohibited the admission of any information obtained by the wiretap or electronic eavesdropping into evidence in any judicial or administrative proceeding, and expressly prohibited divulging or using such information "except as

necessary to implement [the electronic surveillance]." *Id*. § 2514; *see also* E. JEREMY HUTTON & JOHNNY H. KILLIAN, THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT: BACKGROUND AND SUMMARY OF ITS PROVISIONS 21 (1968).

Meanwhile, the Senate was drafting its own legislation to curb wiretapping and electronic eavesdropping. On January 25, 1967, Senator John McClellan, the Democratic Chairman of the Senate Judiciary Committee, introduced S. 675, which would have "prohibit[ed] all wiretapping except pursuant to Presidential order for national security purposes" and "where authorized by court order, under strict procedural safeguards, for the purpose of the investigation or prosecution of certain crimes." S. 675, 90th Cong. §§ 3-6 (1967); *Controlling Crime Hearings*, *supra*, at 76. Furthermore, on June 29, 1967, Senator Roman Hruska, a Republican, introduced S. 2050, which, like Senator McClellan's proposed bill, would have prohibited wiretapping unless done to investigate certain specified crimes by duly authorized law-enforcement officers or where authorized by the President where national security made such surveillance necessary. S. 2050, 90th Cong. §§ 2511, 2515-17 (1967). In both bills, the admission into evidence of any information obtained was explicitly prohibited unless it had been collected through surveillance practices in accordance with the proposed legislation. S. 675 § 6; S. 2050 § 2517.

Although the law that became the Omnibus Crime Control and Safe Streets Act of 1968—of which Title

III is a part—was based on H.R. 5037, the anti-wiretapping provision played an essential part in the passage of the bill in the Senate. When the House sent H.R. 5037 to the Senate on August 8, 1967, it included only the "Safe Streets and Crime Prevention Act of 1967"; the anti-wiretapping provisions in H.R. 5386 were absent entirely. The Senate, however, chose to substantially amend its companion to H.R. 5037—S. 917—by including language from both Senator McClellan and Senator Hruska's anti-wiretapping bills. *See* HUTTON & KILLIAN, *supra*, at 21-22 (explaining that Title III was added to S. 917 by the Senate Judiciary Committee as "essentially a combination of S. 675 . . . and S. 2050"). The Senate then passed S. 917 and substituted its text for that of H.R. 5037, which was then sent back to the House. *Id.* at 1. The Omnibus Crime Control bill was passed on June 16, 114 Cong. Rec. 16300 (1968), and Title III took effect on June 19, 1968. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197-239 (1968).

B. Congress Designed a Comprehensive Scheme for Regulating Wiretapping at Federal and State Levels, Assigning a Geographically Limited Gatekeeping Role to Judges.

Confronted with the ominous backdrop of the rapid expansion of wiretaps, Congress adopted legislation that would sharply curtail electronic surveillance at all levels of government. Congress understood that Title III would create a "dual system" of federal and

state law enforcement, with Title III's new, rigorous requirements serving as a baseline for states that sought to pass wiretap acts of their own. *See Anti-Crime Program Hearings*, *supra*, at 1380 (statement of G. Robert Blakey, Professor, Notre Dame Law School) (explaining the dual system of wiretapping and the changes needed to bring New York's wiretap statute into compliance with Title III).

The recent publicity surrounding wiretaps, which had revealed the prevalence of forum shopping, made clear to Congress that the key to an effective statutory limitation on wiretapping would be a "scrupulous system of impartial court authorized supervision." S. Rep. No. 90-1097, at 225 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2122, 2274; *see Anti-Crime Program Hearings*, *supra*, at 1379 (statement of Professor Blakey) ("One of the criticisms of the New York System is the New York police can go to 'easy judges.' . . . This bill attempts to meet that objection . . . ."). As part of the judicial-oversight solution to forum shopping, Congress included a requirement permitting only a "judge of competent jurisdiction" to receive an application and issue a wiretap order. 18 U.S.C. § 2518(1). Congress defined a judge of competent jurisdiction as a judge of a United States district court or court of appeals and a judge of any court of general criminal jurisdiction of a state that is authorized by state statute to issue wiretap orders, *id.* § 2510(9)—a notably narrower group than those empowered to grant standard search warrants, which is defined by the broader standard of a

"neutral and detached magistrate." *See Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1973).

Congress took the requirement that a wiretap order issue only from a judge of competent jurisdiction from a presidential task force report prepared by Professor Blakey, which contained a draft bill including this geographic limitation. *Compare* 18 U.S.C. § 2518, *with* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF JUST., TASK FORCE REP.: ORGANIZED CRIME, App. C, at 109 (1967). The "judge of competent jurisdiction" language, later incorporated into S. 675 and S. 2050, *see Giordano*, 416 U.S. at 517 n.7, was understood as permitting approval of a wiretap order only by a judge who oversaw the territory in which the communications took place. *Anti-Crime Program Hearings*, *supra*, at 1379 (statement of Professor Blakey) (explaining that a "judge of competent jurisdiction" for a hypothetical crime that occurred in San Francisco would be "either the chief judge in the California District Court or the chief judge of the [N]inth [C]ircuit.").

Congress further narrowed the field of judges authorized to receive and issue wiretap orders by limiting the geographical scope of interceptions, specifying that a judge of competent jurisdiction may authorize interception of wire, oral, or electronic communications only "within the territorial jurisdiction of the court in which the judge is sitting."[7] 18 U.S.C. § 2518(3). The

[7] Using modern technology, it is arguably possible to "intercept" communications with a "listening post" in a jurisdiction

requirement that an order be approved by a geographically limited district or appellate judge, or the state counterpart (as opposed to the additional officials authorized to grant standard search warrants) was "intended to guarantee responsible judicial participation in the decision to use these techniques." S. Rep. No. 90-1097, at 91 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2179.

Additionally, Congress allowed for judicial discretion to ensure that even when wiretap requests complied with statutory requirements, they could be denied by judges of competent jurisdiction in the interests of justice and privacy. *See* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF JUST., TASK FORCE REP.: ORGANIZED CRIME, 102-03; 18 U.S.C. § 2518(3). As the authors of the *Standards Relating to Electronic Surveillance* (a group that included Professor Blakey) noted, "there will be situations where a technically adequate showing of probable cause might

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other than the jurisdiction in which the communications are initially made. *See, e.g.*, *United States v. Jackson*, 839 F.3d 540, 551 (3d Cir. 2017). At the time Title III was enacted, however, the interception would have had to be made relatively near the device being "tapped." *See Anti-Crime Program Hearings*, *supra*, at 1379 (statement of Professor Blakey); DASH ET AL., *supra*, at 314, 322. At the time, there were two primary methods of tapping a phone line: The wiretapper could install a tap directly onto the wires of the victim's terminal box (direct tapping), or install an inductive device in close proximity to the phone or the terminal box of the victim (inductive tapping). DASH ET AL., *supra*, at 314, 320. For direct tapping, the listener had to be within blocks of his victim, and for inductive tapping, the listener had to be within mere feet. *Id.* at 314, 322.

be made out yet where a concrete balance of the interests of privacy and justice might indicate that surveillance should not be authorized"; in such situations, "the judicial officer ought to have the power . . . to refuse to grant the order based on his evaluation of all the facts and circumstances . . . ." STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 146 (AM. BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIM. JUST., Tentative Draft 1968). This grant of judicial discretion was understood by some as a safeguard against electronic surveillance that obviated the need to limit wiretap orders to the investigation of only specific crimes: As J. Edward Lumbard, Chief Judge of the Second Circuit, explained to the Senate, there was no need for such a requirement because "the judge to whom the [wiretap] application is made can be expected to exercise sound discretion about approving its use unless a strong showing of need is made in cases of lessor importance." *Controlling Crime Hearings*, *supra*, at 172. This important role of the judiciary was adopted by the drafters of Title III and reflects congressional understanding of the need for extensive judicial involvement in regulating wiretap requests. *See* S. Rep. No. 90-1097, at 225 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2274.

For example, as part of the power to approve a wiretap order, 18 U.S.C. § 2518(3), a judge of competent jurisdiction must ensure that an application includes, among other things, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to

be unlikely to succeed if tried or to be too dangerous." *Id.* § 2518(1)(c). Upon receiving the application, the judge may require that the applicant furnish additional testimony or documentary evidence if the judge deems it necessary, or she may grant or deny an ex parte order. *Id.* § 2518(2), (3). To grant the order, the judge must determine that: (1) there is probable cause for belief that an individual is committing, has committed, or is about to commit an offense; (2) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (3) normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or to be too dangerous; and (4) there is probable cause for belief that the facilities or place where the communications are to be intercepted are being used, or about to be used, in connection with the offense. *Id.* § 2518(3).

The judge's role does not end, moreover, once the decision is made to grant an application. In the order, the judge must specify details such as the person whose communications are to be intercepted, the location of the authorized interception, the type of communication sought to be intercepted, the agency authorized to intercept the communications, and the period of time for which such interception is authorized. *Id.* § 2518(4). In addition, the judge may require reports detailing both the progress made toward the achievement of the objective and the need for continued interception to be made at intervals determined by the judge. *Id.* § 2518(6). Judges are also granted discretion to

authorize time extensions and to seal recordings upon expiration of the order. *Id.* § 2518(5), (8). And, importantly, § 2518(10)(a) assigns judges the critical gatekeeping role of suppressing evidence obtained in violation of Title III's strict requirements. *See id.* § 2518(10)(a). This "elaborate and comprehensive system of checks and safeguards," including "provisions for the suppression of evidence when gathered improperly," was viewed as essential "to protect individual privacy, curb abuses by law-enforcement officers and assure the rights and liberties" of criminal targets. 113 Cong. Rec. 17891, 17948 (1967) (statement of Rep. Poff).[8]

As such, the effectiveness of Title III's scheme depends on "the responsible part that the judiciary must play in supervising the interception of wire or oral communications in order that the privacy of innocent persons may be protected." S. Rep. No. 90-1097, at 89 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2117. As one commentator noted, "Title III's sponsors clearly recognized that society's right to privacy would depend, in large part, upon this system of statutory controls and that these controls, in turn, were dependent upon proper judicial implementation." Michael Goldsmith, *The Supreme Court and Title III: Rewriting the*

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[8] It has been suggested that the suppression remedy actually has a greater deterrent effect in the case of electronic surveillance, which requires advance planning, than in the case of most unlawful searches, in which decisions are made "on the spot." Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 40 n.223 (1983).

Law of Electronic Surveillance, 74 J. CRIM. L. & CRIMINOLOGY 1, 44 (1983) (citing S. Rep. No. 90-1097, at 225 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2274).

Only by enforcing these statutory controls as intended, and as plainly written, by Congress can this Court ensure that Title III's bulwark against government encroachments on individual privacy remains intact. The suppression remedy in § 2518(10)(a)(ii) is an essential component of Congress's deliberately crafted scheme for protecting privacy in the face of evolving interception technology, and the statute is unambiguous in its clear requirement that the judiciary, in its critical gatekeeping role, prohibit prosecutors from using evidence obtained pursuant to a facially insufficient order.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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