No. 11-4416-cr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

DANIELLE CHIESI,
Defendant,

RAJ RAJARATNAM
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* RETIRED FEDERAL JUDGES IN SUPPORT OF NEITHER PARTY

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are eight former federal district and circuit court judges: Hon. John W. Bissell, Hon. Robert J. Cindrich, Hon. John J. Gibbons, Hon. Nathaniel R. Jones, Hon. Timothy K. Lewis, Hon. Stephen M. Orlofsky, Hon. H. Lee Sarokin, and Hon. Alfred M. Wolin.[2] As former federal judges, *amici* have a particularly strong interest in this case because of their commitment to preserving the role of the judicial branch of government – including the crucial function that judges play in effectuating the requirements of the Fourth Amendment to the United States Constitution and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") when they authorize and oversee wiretaps. Several of the *amici* judges have also participated as *amici curiae* in other cases, and as in those cases, they seek here to bring their perspective as former judges to bear with respect to an issue that they believe concerns the continued authority of the judicial branch. *See Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (*amicus* brief about the application of

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[1] All parties have consented to the filing of this brief. No portion of this brief was authored or funded by any party or counsel for any party, nor did any other person or entity support this brief with monetary contributions. John J. Gibbons and Gibbons P.C. represent Raj Rajaratnam in an unrelated civil case in the District of New Jersey, *Krishanthi v. Rajaratnam*, No. 09-cv-05395(DMC)(MF). Neither Mr. Rajaratnam nor any party associated with him has in any way funded the filing of this brief, which is being filed under the auspices of the Firm's pro bono John J. Gibbons Fellowship in Public Interest and Constitutional Law.

[2] Additional biographical information about each retired judge is provided in the appendix to this brief.

the Great Writ to detainees at Guantanamo, filed on behalf of Retired Federal Judges including Hon. John J. Gibbons, Hon. Nathaniel R. Jones, Hon. Stephen M. Orlofsky, Hon. H. Lee Sarokin, and Hon. Alfred M. Wolin); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (*amicus* brief about the availability of a damages remedy in connection with constitutional violations, filed on behalf of Retired Federal Judges including Hon. John J. Gibbons, Hon. Nathaniel R. Jones, Hon. Timothy K. Lewis, and Hon. H. Lee Sarokin).

Amici submit this brief not to support either party, but to address a significant ruling by the district court which, if allowed to stand, would pose a grave threat to the integrity of the warrant process, and particularly to the judicial oversight provided for by Title III: After concluding that the government recklessly made false statements and omissions when obtaining approval for a wiretap, the district court relied upon facts that were never presented to the authorizing judge in holding that these misrepresentations were not material. From their years of service on the bench, *amici* are keenly aware that the warrant process depends on the candor and forthrightness of the government, and that deceptive conduct of the kind that the district court found to have occurred in this case makes meaningful judicial review of wiretap applications impossible. Indeed, *amici* believe that the district court's troubling analysis effectively renders meaningless the prior judicial approval of wiretaps, and thereby undermines judges' essential

role in ensuring that electronic surveillance comports with the requirements of Title III and the Fourth Amendment to the Constitution of the United States.

SUMMARY OF THE ARGUMENT

"By its very nature [electronic] eavesdropping involves an intrusion on privacy that is broad in scope." *Berger v. New York*, 388 U.S. 41, 56 (1967). With this intrusion in mind, the Fourth Amendment and Title III demand close judicial oversight of wiretaps – including prior judicial approval – in order to ensure that the appropriate balance between the interests of law enforcement and the privacy interests of individuals is maintained. But judges can only perform this crucial role if the government is forthright during the wiretap application process, particularly because the proceedings are *ex parte*, and judges are therefore entirely dependent upon government representations in determining whether a wiretap is appropriately authorized.

In this case, the district court found that the government recklessly failed to disclose an ongoing SEC investigation in its wiretap application "even though (1) that investigation was the most important part of the criminal investigation at the time of the wiretap application and (2) that investigation employed entirely conventional investigative techniques." SA2. The court found that these omissions made it impossible for the authorizing judge "to fulfill [his] function of determining whether conventional investigative techniques are likely to prove

inadequate," a necessary finding before a wiretap can be authorized under Title III. SA42. Nevertheless, the district court held that the government's omissions were not material and refused to suppress the resulting wiretap evidence, relying upon evidence that was presented by the government at the suppression hearing, but never made available to the authorizing judge, that "the SEC investigation had . . . failed to fully uncover the scope of Rajaratnam's alleged insider trader ring and was reasonably unlikely to do so because evidence suggested that Rajaratnam and others conducted their scheme by telephone." SA2-3.

The district court's decision in this regard is not only inconsistent with the case law regarding suppression, but also dangerously undermines judges' ability to provide meaningful oversight of wiretaps and other electronic surveillance. Specifically, by allowing the government to retroactively rewrite a wiretap application, the district court transformed the prior approval process into little more than an empty gesture, creating incentives for the government to mislead authorizing judges and undermining the ability of these judges to provide the prior approval and oversight that the Constitution and laws of the United States demand. This Court should correct this serious error, and make clear that a motion to suppress a wiretap does not offer the government an opportunity to introduce facts that it failed to include in its wiretap application.

ARGUMENT

I. Government Misrepresentations and Omissions in Wiretap Applications Undermine Judges' Crucial Oversight Role.

A. Judges must provide close judicial oversight of wiretaps because of the important privacy interests involved.

"'Over and over again [the Supreme] Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes." *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Thus, the question of "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent" who is "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

This need for robust judicial oversight in the warrant process is heightened in the context of electronic surveillance. "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger*, 388 U.S. at 63. Indeed, wiretaps and other forms of electronic eavesdropping pose a "far greater invasion of privacy" than traditional searches, because

> [a] wiretap may capture the intimate details of a person's life over an extended period of time without that person's knowledge. In contrast, a search pursuant to a warrant, which has long been a recognized tool of the prosecutor, occurs just once and, by its nature, puts the person searched on notice of the violation of privacy. A wiretap is like a continuous film of events in your home, secretly recorded over a period of weeks or months. A search is

> like a surprise snapshot of your home taken in your presence.

In re United States, 10 F.3d 931, 938 (2d Cir. 1993). Electronic surveillance also raises heightened privacy concerns because it seizes conversations "indiscriminately and without regard to their connection with the crime under investigation," *Berger*, 388 U.S. at 59, and because "the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him," *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, *J.*, dissenting).

In enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.*, Congress addressed these concerns about the broad intrusion on privacy posed by wiretapping. "[H]eed[ing] the Supreme Court's admonitions" about the dangers to individual liberty from wiretapping, *United States v. Marion*, 535 F.2d 697, 700 (2d Cir. 1976), "Title III was not enacted simply to facilitate electronic surveillance by law enforcement agencies," *In re United States*, 10 F.3d at 936. Rather, "the statute placed strict limits on the use of wiretapping." *Id.* Title III thus "prohibits, in all but a few instances, the interception and disclosure of wire or oral communications," and permits interception only "pursuant to the Act's stringent and detailed procedures designed to restrict electronic intrusions into privacy." *Marion*, 535 F.2d at 700. Among the showings that the government must make in order to obtain approval for a Title

III wiretap is that "other investigative procedures either have been tried and failed, or reasonably appear to be unlikely to succeed (or too dangerous) if attempted." *Id.* (citing 18 U.S.C. § 2518(3)(c)). This so-called "necessity" requirement is rooted in the Fourth Amendment, which requires "special facts" demonstrating "exigency" to justify the use of wiretapping. *Berger*, 388 U.S. at 60; *see also United States v. United States Dist. Court*, 407 U.S. 297, 302 (1972) ("Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in *Berger v. New York* and *Katz v. United States*." (citations omitted)). The necessity requirement, then, specifically ensures that "'wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime,'" thus protecting the significant privacy interests at stake whenever a wiretap is utilized. *United States v. Concepcion*, 579 F.3d 214, 218 (2d Cir. 2009) (quoting *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974)).[3]

Extensive judicial oversight is crucial to enforcing these "strict limits on wiretapping," including the necessity requirement. *Nat'l Broad. Co. v. Dep't of*

[3] In addition, under Title III, "a wiretap is authorized only for specified crimes, for a limited duration, . . . with minimized interception of innocent conversations, [and] notice to targets." *In re Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. 2d 747, 751 (S.D. Tex. 2005); *see also* Orin S. Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607, 630 (2003) (describing Title III's requirements as a form of "super-warrant").

Justice, 735 F.2d 51, 53 (2d Cir. 1984). Indeed, Title III is premised 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). Thus, in enacting Title III, Congress specifically found that "[t]o safeguard the privacy of innocent persons," wiretap interceptions "should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court." Omnibus Crime Control and Safe Streets Act of 1968, Title III, § 801(d), 82 Stat. 197 (1968) (congressional findings). Reflecting this concern, Title III expressly provides for extensive judicial oversight at every stage of the wiretapping process.

First, and most importantly, private wire and oral communications can be intercepted only with "prior judicial approval, an approval that may not be given except upon compliance with stringent conditions." *Gelbard v. United States*, 408 U.S. 41, 46 (1972). Such prior judicial approval is, of course, a fundamental principle of Fourth Amendment jurisprudence: it is a "basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357

(1967)). That is, under the Fourth Amendment, it is not enough that government agents "act[] with restraint" in undertaking a search, and "voluntarily confine[] their activities" to that which a judge *would have* authorized. *Katz*, 389 U.S. at 356. Rather, prior approval demands that "before commencing the search," agents "present their estimate of probable cause for detached scrutiny by a neutral magistrate," and "during the conduct of the search itself," "observe precise limits established in advance by a specific court order." *Id*. Thus, as the Supreme Court has made clear, the "'safeguards provided by an objective predetermination of probable cause'" protect against the "'far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.'" *Id.* at 358 (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964)).

Moreover, prior judicial approval of wiretaps is more searching than that which is ordinarily required for search warrants, because of the heightened privacy interests involved. Judges must make findings "on the basis of the facts submitted by the applicant" that all of the requirements of Title III have been met, including the necessity requirement. 18 U.S.C. § 2518(3). And these findings are no mere rubber stamps. In reviewing applications – as this Court has made clear – a judge must "carefully scrutinize[] th[e] supporting papers and determine[] [if] the statute's requirements [are] satisfied," *Marion*, 535 F.2d at 703, and, in particular,

"must remain vigilant in ensuring that . . . reasoning[] based more on efficiency and simplicity than necessity, will not justify a wiretap," *United States v. Concepcion*, 579 F.3d at 220. Judges may also require additional testimony or documentary evidence before issuing an authorization. 18 U.S.C. § 2518(2). This statutory command reflects the allocation of authority provided for by Title III: it is "[t]he district judge, not the agents, [who] must determine whether the command of Congress has been obeyed." *United States v. Spagnuilo*, 549 F.2d 705, 711 (9th Cir. 1977).[4]

Nor does judicial involvement in overseeing electronic eavesdropping end with prior approval. Title III provides strict requirements for the content of a wiretapping order issued by a judge: it "must particularize the extent and nature of the interceptions that [it] authorize[s]." *United States v. Giordano*, 416 U.S. 505, 515 (1974) (internal citations omitted). A judge may also "require reports to be made . . . showing what progress has been made toward achievement of the authorized objective and the need for continued interception." 18 U.S.C. § 2518(6); *see also Giordano*, 416 U.S. at 515 (under Title III, "[j]udicial

[4] In fact, only judges, and not magistrates or magistrate judges, are permitted to approve eavesdropping applications under Title III. *In re United States*, 10 F.3d at 938.

supervision of the progress of the interception is provided for").[5] Finally, as discussed in greater detail, *infra* Part II, Title III provides for "detailed and specific restrictions upon . . . the subsequent use of the fruits of such interceptions," reflecting "an effort to ensure careful judicial scrutiny throughout." *Marion*, 535 F.2d at 698. And Title III provides that wiretapping evidence must be suppressed when "the communication was unlawfully intercepted." 18 U.S.C. § 2518(10)(a)(i).

In all of these ways, Title III reflects Congress's judgment, rooted in the Fourth Amendment, that wiretapping should be subject both to strict limitations and close judicial oversight, in order to ensure "an acceptable balance between the privacy rights of individuals and the legitimate needs of law enforcement." *Gardner v. Newsday, Inc.*, 895 F.2d 74, 76 (2d Cir. 1990); *see also Berger*, 388 U.S. at 60; *United States Dist. Court*, 407 U.S. at 302. But prior approval and other forms of judicial oversight only function effectively when the government provides authorizing judges with accurate information, so that they may gauge whether the dictates of Title III have been met. By removing any consequences from even intentional or reckless misrepresentations to an authorizing court, the

[5] Wiretapping authorizations also "expire within a specified time unless expressly extended by a judge based on further application by enforcement officials," *Giordano*, 416 U.S. at 515 (internal citations omitted), and the authorizing judge must determine the length of time for the wiretapping order, 18 U.S.C. § 2518(4)(e), (5).

district court's decision risks turning the robust oversight provisions of Title III into mere rubber stamps.

B. The judicial oversight required by the Constitution and Title III is only possible if the government is honest and forthright during the warrant authorization process.

The judicial oversight demanded by the Fourth Amendment and Title III is vitiated when the government misleads the Court as to the facts underlying its application. In this case, the district court found that the government recklessly "failed to disclose the heart and soul of [the conventional] investigation [of Rajaratnam], without which a reasoned evaluation of the necessity of employing wiretaps was impossible." SA43. Among other things, the government omitted mention of "the millions of documents, witness interviews, and the actual deposition of Rajaratnam himself," which the authorities had yet to review, thus failing to disclose the "nuts and bolts" information "that must be presented to a court if it is to fulfill its function of determining" necessity. SA36, 42. Misrepresentations of this kind make it impossible for judges reviewing wiretap applications to meaningfully assess whether the necessity requirement, or any other Title III requirement for that matter, has been satisfied, stripping the protections offered by prior judicial approval and oversight of any real power.

The Warrants Clause "surely takes the affiant's good faith as its premise." *Franks v. Delaware*, 438 U.S. 154, 164 (1978). Title III also requires "a full and

complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued." 18 U.S.C. § 2518(1)(b). Honesty and forthrightness in the wiretap application process is essential because wiretapping authorizations are undertaken *ex parte*, and thus are not "tested for reliability in the usual adversarial crucible." *United States v. Abuhamra*, 389 F.3d 309, 331 (2d Cir. 2004); *see also Franks*, 438 U.S. at 169 ("The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous."). As a result, the government has "a heightened obligation to bring material facts to the attention of the Court, even, and indeed, particularly when they are adverse." *Plamar Navigation, Ltd. v. Tianjin Shengjia Shipping Co.*, 2011 U.S. Dist. LEXIS 7336, at *7 (S.D.N.Y. Jan. 19, 2011); *see also Maine Audubon Soc. v. Purslow*, 907 F.2d 265, 268 (1st Cir. 1990) ("[T]he court is entitled to expect an even greater degree of thoroughness and candor from unopposed counsel than in the typical adversarial setting.").

Courts, of course, rely upon the government's representations. Indeed, wiretaps are overwhelmingly approved by federal judges based upon the representations made to them that the applicable search comports with the mandates of Title III. *See* Administrative Office of the United States Courts, *2010 Wiretap Report* 7 (2011) (only one out of 3,195 intercept applications was denied in 2010). Absent honest representations by the government, however, judges lack

any basis upon which to assess whether the "stringent conditions" for a wiretap are met, *Gelbard*, 408 U.S. at 46, including, with respect to the necessity requirement, "whether any efforts were made to avoid needless invasion of privacy," *United States v. Lilla*, 699 F.2d 99, 104 (2d Cir. 1983). Judges are similarly stymied in fulfilling their duty of overseeing the wiretapping process. As discussed *supra* Part I.A, Title III leaves a myriad of questions to the discretion of the authorizing judge, including whether to demand additional information before authorizing a wiretap, whether and how to require the government to report on its progress, what the scope of the authorizing order should be, and the period of time authorized in the order. 18 U.S.C. § 2518(2), (4)), (5)), (6)). Without honest and accurate "information upon which to exercise his discretion," a judge cannot make these informed judgments, as Title III demands of judicial officers. *See United States v. Donovan*, 429 U.S. 413, 429 (1977) (requiring prosecutors to classify and transmit the categories of individuals whose conversations have been intercepted under Title III, so that judges can determine whether an inventory notice should be provided to third parties); *see also Gregg v. Georgia*, 428 U.S. 153, 189 & n.37 (1976) (Federal Rules of Criminal Procedure give defendants an opportunity to comment on presentence reports because "discretion in the area of sentencing [must] be exercised in an informed manner").

At core, misrepresentations like the ones at issue in this case leave judges incapable of performing their constitutional and statutorily delegated roles, leaving governmental intrusions on individual privacy effectively unchecked and "impermissibly threaten[ing] the institutional integrity of the Judicial Branch." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). In permitting such misrepresentations to be undertaken without consequence, the district court decision dilutes the authority of the judicial branch and the separation of powers that is at the heart of our system of government. *Amici* most respectfully assert that the district court's analysis should, for this reason, not be permitted to stand.

II. Because the Government's Wiretap Application Recklessly Omitted Information Necessary to Evaluating the Necessity Requirement, the Wiretap Evidence Should Have Been Suppressed.

While not every misrepresentation or omission in a wiretapping application necessitates suppression, where, as here, the district court found that the government recklessly deprived the authorizing judge of facts that were clearly needed to determine whether a wiretap was necessary – a statutory prerequisite to a wiretapping order – suppression is the only remedy that will ensure that prior approval carries the weight that the Fourth Amendment and Title III demand. If judicial oversight of the wiretapping process is to mean anything, then the reckless omissions at issue in this case, which the district court found made "a reasoned

evaluation of the necessity of employing wiretaps . . . impossible," SA43, should have been suppressed.

Pursuant to Title III, wiretapping evidence must be suppressed when "the communication was unlawfully intercepted," 18 U.S.C. § 2518(10)(a)(i), including when an affidavit fails to provide "sufficient information" regarding necessity. *See Lilla*, 699 F.2d at 100. Similarly, when a facially valid wiretapping application intentionally or recklessly misleads an authorizing judge, a court reviewing a suppression motion must determine whether the applicable misrepresentations or omissions were material: "The ultimate inquiry is whether, after putting aside erroneous information and material omissions, there remains a residue of independent and lawful information sufficient to support probable cause," *States v. Canfield*, 212 F.3d 713, 718 (2d Cir. 2000) (internal quotation marks omitted), or, as applicable here, necessity, *United States v. Ippolito*, 774 F.2d 1482, 1484 (9th Cir. 1985); *United States v. Moran*, 349 F. Supp. 2d 425, 461 (N.D.N.Y. 2005). Here, the district court found that the government had omitted crucial information about the SEC investigation – information "that must be presented to a court if it is to fulfill its function of determining [necessity]." SA42. But the court refused to suppress the wiretap, because the government provided information in the suppression hearing – information that had *not* been presented to the authorizing judge – that "the SEC investigation had . . . failed to fully uncover the scope of

Rajaratnam's alleged insider trader ring and was reasonably unlikely to do so because evidence suggested that Rajaratnam and others conducted their scheme by telephone." SA2-3.

In considering these new facts, the district court effectively recreated the prior approval process *ex post*. The district court considered not just the "residue of independent and lawful information" in the government's original application with respect to necessity, *Canfield*, 212 F.3d at 718, but also new information which an authorizing court could have considered had the information been made available to it. Thus, the district court allowed the government to "deprive[] [the authorizing judge] of the opportunity to assess what a conventional investigation of Rajaratnam could achieve" without any adverse consequences, SA40, as long as it *could have* presented facts that would have passed muster under Title III. But "[i]t is one thing for a court to insert exculpatory evidence that has been wrongfully omitted from an affidavit . . . . It is quite another for a court to insert inculpatory evidence that an affiant has neglected to include in his or her affidavit . . . ." *Thompson v. Wagner*, 631 F. Supp. 2d 664, 679 (W.D. Pa. 2008). Permitting the government to benefit from information it never provided to the authorizing judge effectively writes prior approval out of Title III, and is inconsistent with the "careful[] scrutin[y]" that Title III demands from the wiretap authorization process. *See Marion*, 535 F.2d at 703. This is not and cannot be the law.

As discussed in greater detail in Appellant's brief, *see* App. Br. 22-43, the law is clear that a reviewing court cannot rely upon new facts that were "known at the time" but "not included" in the government's original affidavit. *United States v. Awadallah*, 349 F.3d 42, 70 n.22 (2d Cir. 2003); *see also Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 565 (1971) ("[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate."). Thus, "'related facts,'" asserted in connection with curing a misleading affidavit, "lie outside the scope of a proper *Franks* inquiry because the relevant question is whether 'the remaining portions of the affidavit' give rise to probable cause.'" *Awadallah*, 349 F.3d at 70 n.22 (quoting *Canfield*, 212 F.3d at 718). In the context of Title III, the Supreme Court has explained that the appropriateness of suppression turns on whether "the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied." *Donovan*, 429 U.S. at 436.

Significantly, this approach reinforces the importance of prior approval and judicial oversight in the context of a suppression hearing. If the government presented enough truthful information to the authorizing court that it would have made the same decision even without the misrepresentation, then any omission is, effectively, harmless error, and the wiretap evidence should be deemed admissible.

But if, without the misrepresentation, the authorizing judge lacked sufficient information to make the requisite findings under Title III, then the evidence simply must be suppressed, lest the prior authorization requirement of the statute be rendered completely meaningless.

The district court's approach turns this principle on its head.[6] First, permitting the government to "cure" its wiretap application with information never provided to the authorizing court provides a powerful incentive for the government to act recklessly or even intentionally in supplying false or misleading information to the court. That is because the government is in no worse position having misled the court than had it been forthright with the court: as a practical matter, if the government can avoid suppression when it can show that it *could have* established necessity in its initial application though it did not, there is no incentive for the government to be forthright in the first instance. Moreover, relatively few wiretaps will even be scrutinized after-the-fact: Defendants frequently plead guilty before

[6] Indeed, if the district court's ruling is permitted to stand, then it is only a short step to permitting an illegal search to be upheld because incriminating evidence was gathered. But this is obviously not the law – indeed it would strip the Fourth Amendment's warrant requirement of any meaning. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (admitting evidence obtained as the result of illegal searches and seizures reduces the protections of the Fourth Amendment to "a form of words, valueless and undeserving of mention" (internal quotation marks omitted)).

the legality of a wiretap is litigated,[7] and "few victims of unlawful surveillance have sufficient incentive to bring a [civil] case, no matter how egregious the privacy violation." Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, 63-64 (2004) (noting that "amounts for statutory damages will not cover the costs of most lawsuits"). In sum, the ruling below not only marks a significant and unwise departure from Title III's "effort to ensure careful judicial scrutiny throughout" the wiretapping process, *United States v. Marion*, 535 F.2d at 698, but also demonstrates the appropriateness of the suppression remedy, one of the main functions of which is to "compel[] respect" for the government's duties under Title III and the Fourth Amendment, "by removing the incentive to disregard" these responsibilities. *Elkins v. United States*, 364 U.S. 206, 217 (1960); *see also Hudson v. Michigan*, 547 U.S. 586, 596 (2006) ("[T]he value of [this] deterrence depends upon the strength of the incentive to commit the forbidden act.").

[7] With respect to federal intercepts that terminated in 2009, 593 individuals were convicted in connection with these intercepts, but only 24 motions to suppress were resolved. Administrative Office of the United States Courts, *2010 Wiretap Report*, *supra*, Tbl. 8 at 34 (data reported as of December 31, 2010). Although the *Wiretap Report* does not include the percentage of wiretapping convictions that came from guilty pleas, *amici* note that more than 90% of all felony convictions result from guilty pleas. *See* Bureau of Justice Statistics, *Felony Defendants*, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=231 (94% of felony offenders sentenced in 2006 pleaded guilty).

Suppression is also required because allowing intentional or reckless misrepresentations regarding necessity or other Title III factors to go effectively unremedied is inconsistent with an independent and robust judicial system. That is, meaningful judicial review is nullified when the government allows a judge to go through the motions of reviewing a wiretap application, "carefully scrutiniz[ing] th[e] supporting papers," *Marion*, 535 F.2d at 703, all the while unaware that the prosecution had omitted the information "most important" to evaluating the statutory factors, SA36. In that regard, the conduct here at issue is inconsistent not only with the central role that Title III demands judges play in authorizing and overseeing wiretaps, but also with "the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States v. Nixon*, 418 U.S. 683, 704 (1974); *see also The Federalist* No. 78 (Alexander Hamilton) ("'[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.'" (quoting 1 Montesquieu, *Spirit of Laws* 181)); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, *J.*, concurring) ("Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority."). In contrast, suppressing evidence when the facts before the court were insufficient to support prior authorization serves as a means "to protect the integrity of court . . . proceedings," as well as to ensure that "the courts do not become partners to illegal

conduct." *Gelbard*, 408 U.S. at 49, 51; *see also Weeks v. United States*, 232 U.S. 383, 392 (1914) ("The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution[.]").

The district court decision is, then, not only inconsistent with established precedent. It also undermines the central role that judges play in the wiretap authorization process and, more generally, their capacity to perform their constitutional and statutory function of acting as a vital check on executive branch actions which may intrude into personal privacy. Even more troubling, perhaps, it writes a dangerous new chapter in the history of the relationship between the executive and judicial branches, so essential to our scheme of government. For these reasons, the district court's decision should not be permitted to stand.

CONCLUSION

For these reasons, *amici* urge the Court to make clear that in finding that government misrepresentations or omissions in a wiretap application were not material, the district court can rely only upon those facts that were presented to the authorizing judge in the government's wiretap application.

Respectfully submitted,

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Dated: February 1, 2012

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of *Amici Curiae* Retired Federal Judges complies with the type-volume limitation specified in the Federal Rule of Appellate Procedure 32(a)(7)(B) and the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5). The Brief has been prepared using a proportionately spaced typeface using Microsoft Word 2002, in Times New Roman 14 point font. It contains less than 7000 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

February 1, 2012

CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check of the electronic .PDF version of this Brief was performed using Sophos Endpoint Security and Control, version 9, and the .PDF file was found to be virus free.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

February 1, 2012

APPENDIX

Biographical Information for *Amici Curiae*

The Honorable John W. Bissell served on the United States District Court for the District of New Jersey from 1982 to 2005. From 2001 until 2005, he was Chief Judge of the Court. From 1981 to 1982, he served as Judge, Superior Court of New Jersey, and from 1978 to 1981 he served as Judge, Essex County, New Jersey District Court.

The Honorable Robert J. Cindrich served on the United States District Court for the Western District of Pennsylvania from 1994 to 2004. He was the United States Attorney for the Western District of Pennsylvania from 1978 to 1981. He is currently the Senior Advisor to the Office of the President, University of Pittsburgh Medical Center.

The Honorable John J. Gibbons served as Chief Judge from 1987 to 1990 and Judge from 1969 to 1980 for the United States Court of Appeals for the Third Circuit. He is the Founder of the John J. Gibbons Fellowship in Public Interest and Constitutional Law and is currently a Director at Gibbons P.C.

The Honorable Nathaniel R. Jones served on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002 and as Assistant United States Attorney for the Northern District of Ohio. He is currently Of Counsel at Blank Rome LLP in Cincinnati, Ohio.

The Honorable Timothy K. Lewis served on the United States District Court for the Western District of Pennsylvania from 1991 until 1992, and on the United States Court of Appeals for the Third Circuit from 1992 until 1999. He is currently Of Counsel at Schnader Harrison Segal & Lewis LLP.

The Honorable Stephen M. Orlofsky served on the United States District Court for the District of New Jersey from 1996 to 2003 and was Magistrate Judge for the District of New Jersey from 1976 to 1980. He is the Administrative Partner of Blank Rome LLP's Princeton Office, and chairs its Appellate Practice Group.

The Honorable H. Lee Sarokin served on the United States Court of Appeals for the Third Circuit from 1994 to 1996 and served on the United States District Court for the District of New Jersey from 1979 to 1994.

The Honorable Alfred M. Wolin served on the United States District Court for the District of New Jersey from 1987 to 2004. He was Presiding Judge of the Superior Court of New Jersey Criminal Division from 1983 to 1987, and a judge on the Superior Court of New Jersey, Civil Division, from 1982 to 1983. He is currently Special Counsel at Saiber LLC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 1st day of February, 2012, I caused six copies of the Brief of *Amici Curiae* Retired Federal Judges to be delivered to the following address via Federal Express:

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A copy of this Brief was also served electronically via CM/ECF and via Federal Express on:

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