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 *AMICUS CURIAE* PROFESSOR G. ROBERT BLAKEY IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

Amicus curiae is G. Robert Blakey.[1] Professor Blakey holds the William J. and Dorothy K. O'Neill Chair in Law at the Notre Dame Law School, where he has taught for over 30 years.[2] Professor Blakey drafted the so-called "Blakey Bill" that became the model for the key language of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter "Title III") that is before this Court.[3]

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund preparing or submitting this brief. No person – other than *amicus* or his counsel – contributed money to fund preparing or submitting the brief.

[2] From 1969 to 1973, Professor Blakey was the chief counsel to the Subcommittee on Criminal Laws and Procedures. During the processing of Title III, he was a special consultant to the Subcommittee, wrote a draft of the Judiciary Committee Report on Title III, and assisted Senator John L. McClellan on the Senate floor during its passage. The Judiciary Committee drafted the report as it did because "of the complexity in the area of wiretapping and electronic surveillance," and because "[it] believe[d] that a comprehensive and in-depth analysis of title III would be appropriate in order to make explicit congressional intent . . . ." S. Rep. No. 90-1097, *reprinted in* 1968 U.S.C.C.A.N 2112, 2177 (hereinafter "Senate Report"); *see Garcia v. United States*, 469 U.S. 70, 76 (1969) (characterizing committee reports as "the authoritative source" for finding the congressional intent of those who draft and study proposed legislation).

[3] The "Blakey Bill" derived from a recommendation Professor Blakey made to The President's Commission on Law Enforcement and Administration of Justice, Task Force: Organized Crime, which was later introduced in the House of Representatives on October 3, 1967 as H.R. 13275, 113 Cong. Rec. 27718 (1967). *United States v. Giordano*, 416 U.S. 505, 517 n.7 (1974). Senator McClellan also introduced a proposed Federal Wire Interception Act on January 25, 1967 as S. 675, 113 Cong. Rec. 1491, which overlapped, in part, with the Blakey Bill. *See id.* (citing Controlling Crime Through More Effective Law Enforcement: Hearings

Professor Blakey served as a consultant to the President's Commission on Law Enforcement and Administration of Justice, which authored *The Challenge of Crime in a Free Society*,[4] in 1967 (hereinafter "Challenge of Crime Report"), and the *Task Force Report; Organized Crime*,[5] in 1967 (hereinafter "Task Force Report"). He testified before Congress regarding President Johnson's Right of Privacy Act of 1967.[6] Professor Blakey was also a reporter for the Advisory Committee on the Police Function, American Bar Association Project on Minimum Standards for Criminal Justice, which authored *Standards Relating to Electronic Surveillance*,[7] in 1968 (hereinafter "ABA Report"). He testified before Congress regarding the intent of Title III. He also assisted in drafting and implementing

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Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, 90th Cong., 1st Sess., 76 (1967) (hereinafter "Senate Hearings")); *see also* Senate Report at 2153. Senator Hruska later introduced S. 2050, 113 Cong. Rec. 18007, on June 29, 1967, which provided for regulated use of electronic surveillance, as well as wiretapping, and again overlapped with provisions that were present in the Blakey Bill. *Giordano*, 416 U.S. at 517 n.7 (citing Senate Hearings at 1005); *see also* Senate Report at 2153. Ultimately, the same operative language included in the Blakey Bill was enacted in Title III.

[4] President's Comm'n on Law Enforcement & the Admin. of Justice, The Challenge of Crime in a Free Society (1967), *available at* https://www.ncjrs.gov/pdffiles1/nij/42.pdf.

[5] President's Comm'n on Law Enforcement & the Admin. of Justice, Task Force Report: Organized Crime (1967).

[6] *See* Hearings on Anti-Crime Program before Subcomm. No. 5 of the H. Comm. on the Judiciary, 90th Cong., 1st Sess., 1024 (1967).

[7] Am. Bar Assoc. Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance (Tentative Draft 1968).

wiretapping legislation in 39 of the 43 states that have enacted such laws. Finally, Professor Blakey was appointed by the President to serve on the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, which authored a report entitled *Electronic Surveillance*,[8] in 1976 (hereinafter the "NWC Report").

Accordingly, Professor Blakey has an abiding interest in the proper interpretation and application of the requirements of Title III, which Congress passed to protect the privacy of individuals from illegal and unnecessary intrusions.[9] Professor Blakey believes that the district court's decision below was unfortunately predicated on a misinterpretation of the requirements of Title III that, if endorsed by this Court, would result in the substantial deterioration of the privacy protections central to the purpose of Title III.

Professor Blakey, therefore, respectfully submits this brief in support of Appellant. All parties have consented to Professor Blakey's filing of this brief.

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[8] Report of the Nat'l Comm'n for the Review of Fed. & State Laws Relating to Wiretapping & Elec. Surveillance, Electronic Surveillance (1976), *available at* http://babel.hathitrust.org/cgi/pt?seq=7&id=mdp.39015004937671&page=root&view=image&size=100&orient=0.

[9] Senate Hearings at 955 ("I support court order[ed] electronic surveillance because I think it is the only way to secure privacy in this country. It is because I love privacy more, not less, that I support a system of court-ordered electronic surveillance. . . . [I]f we can regulate . . . [it] and bring it into some sort of court-order system, we will be able to curtail police abuse.").

PRELIMINARY STATEMENT

The court below erred by declining to suppress thousands of taped calls spanning many months of private communications, notwithstanding its own finding that the government violated one of the most crucial preconditions to a wiretap's authorization. The decision reflects acquiescence in the government's law enforcement interests at a cost to privacy interests that is inconsistent with Title III's language and spirit. Nor does the decision adequately account for the historical context that gave rise to Title III, described below: debates raging within and among the Supreme Court, the Congress, the White House and the Department of Justice at the time Title III was contemplated and enacted, where the competing interests of law enforcement and privacy rights pulled and pushed in starkly different directions. Indeed, after the Supreme Court decisions in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967), substantial disagreement remained as to whether it was even legally possible for law enforcement to engage in electronic surveillance consistent with the Court's interpretation of the Fourth Amendment.

This highly charged debate reached an uneasy and delicate compromise in the form of Title III. As Learned Hand wisely said, "[statutes] should be loyally

enforced until they are amended by the same process which made them."[10] Under Title III, wiretapping is illegal as inimical to a free society. The rare exception, a limited privilege afforded to specially designated law enforcement officers, is contained in Title III, which carefully and narrowly constrains the reach of that exception. Any wiretap conducted in violation of the specific terms of Title III is necessarily outside of the exception and is, therefore, illegal. The conduct of law enforcement officers, whether acting in good faith or bad, is not exempt from this provision of Title III. The critical precondition to any authorization is that the applicant provide a "full and complete" statement to the judicial officer, to whom Title III gives the final decision as to whether to authorize a wiretap. Without a full and complete statement, the judicial officer cannot properly exercise his or her discretion. Central to that precondition is the "full and complete" showing of "necessity," a faithful description of alternative investigative techniques that were tried and failed, reasonably appear not to be effective, or appear too dangerous. That precondition was essential to passage of the statute, for it gave opponents of the legislation a measure of comfort that a wiretap would be a method of last resort that could be utilized only when an Article III judge concluded before the

[10] Learned Hand, The Spirit of Liberty 120 (Vintage Books 1958) (hereinafter "Hand").

surveillance began that less intrusive measures had been tried and failed or would be impractical or too dangerous.

Given this background, what has happened in this case is alarming on two counts: the performance of the officers of the court and the decision of the court in the face of that performance. First, the district court squarely concluded, after a full factual hearing, that officers of the court omitted to tell the authorizing judge about the extensive investigation of the defendant that had occurred and was ongoing; instead, what they provided was mere "boilerplate." Second, after making its determination, the district court failed to suppress the fruits of the wiretap even though Congress in Title III mandated suppression. The court based that decision on a series of post hoc governmental explanations that appear nowhere in the initial application and that are not countenanced by Title III itself. Congress required a precondition; the district court permitted a subsequent rationalization in its stead.

Bluntly, by failing to comply with the plain language of the statute, the wiretap was illegal. And the statute provides for one judicial remedy for illegal wiretaps: suppression. Nowhere in the text is the remedy qualified by the discretion of a subsequent judicial officer. No judge possesses the power to excuse a violation or to otherwise modify or qualify the uncompromising statutory mandate of suppression.

Amicus curiae respectfully requests reversal of the order denying suppression and the grant of a new trial with the wiretaps and their fruits excluded from evidence.

ARGUMENT

I. THE GOVERNMENT'S FAILURE TO PROVIDE A "FULL AND COMPLETE" STATEMENT OF NECESSITY VIOLATED A CORE PRECONDITION FOR A LAWFUL WIRETAP, RENDERING THE RESULTING INTERCEPTIONS ILLEGAL

A. Congress Enacted Title III at a Time of Great Concern About Governmental Encroachments upon the Right of Individual Privacy

The central importance of the "full and complete" statement provision requires a consideration of the forty-year debate that culminated in the compromise finally struck by Title III.[11] The utility and constitutionality of electronic surveillance under the Fourth Amendment was the subject of heated debate between those who championed the need for aggressive law enforcement and the powerful forces in the courts and the legislative and executive branches who feared encroachments on individual privacy rights. *See Berger*, 388 U.S. at 63 (White, J., dissenting); Senate Report at 2231 ("Wiretapping and other forms of eavesdropping are recognized by even their most zealous advocates as encroachments on a man's right to privacy . . . the most comprehensive of rights and the right most value by civilized men.") (internal quotations omitted).

[11] *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 37 (Amy Guttman ed., 1997) ("In textual interpretation, context is everything . . . .").

The Supreme Court in *Berger* traced the value our laws place on privacy rights to an English common law case from the 1700s:

> [I]t has been held since Lord Camden's day that intrusions into [individual privacy] are "subversive of all the comforts of society." *Entick v. Carrington*, 19 How.St.Tr. 1029, 1066 (1765). And the Founders so decided a quarter of a century later when they declared in the Fourth Amendment that the people had a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures [. . . .] Almost a century thereafter this Court took specific and lengthy notice of *Entick v. Carrington*, *supra*, finding that its holding was undoubtedly familiar in the minds of those who framed the fourth amendment * * *. *Boyd v. United States*, 116 U.S. 616, 626-627, 6 S.Ct. 524, 530, 29 L.Ed. 746 (1886). And after quoting from Lord Camden's opinion at some length, Mr. Justice Bradley characterized it thus:
>
> > "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case * * * they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." At 630, 6 S.Ct. at 532.

388 U.S. at 49.

Thus, the debate concerned not simply what might constitute an acceptable intrusion into individuals' private space, but whether electronic surveillance should be permitted in *any* form in light of its unique capacity to undermine a core value of American life. *Nat'l Broadcasting Co. v. United States Dep't of Justice*, 735 F.2d 51, 53 (2d Cir. 1984). Indeed, at the time, the President of the United States himself, as well as his Attorney General, had serious misgivings about whether any

wiretapping should be licit except in cases involving national security. In his State of the Union Address in 1967, President Johnson stated:

> We should protect what Justice Brandeis called the 'right most valued by civilized men' – the right to privacy. We should outlaw all wiretapping – public and private – wherever and whenever it occurs, except when the security of the Nation itself is at stake – and only then with the strictest safeguards.

Senate Report at 2233. Following that speech, on February 8, 1967, the President sent to Congress his Right of Privacy Act, which outlawed electronic eavesdropping except in national security cases. *Id.* at 2234. Twenty-two Senators cosponsored the bill. *Id.* While Title III ultimately went beyond that presidential proposal, the Right to Privacy Act serves as a stark reminder of the national presumption against any form of wiretaps at the time of Title III's passage and the powerful adherence to principles of privacy. That presumption forms the backbone of Title III, which Congress framed as a statute that prohibited all wiretapping with only limited exceptions.

Even those who believed wiretapping was a necessary tool recognized its Orwellian potential; the need to carefully and narrowly restrict its use; and the need to create the strongest possible safeguards against its abuse by requiring prior judicial approval. *See* Senate Report at 2163. The President's Commission on Law Enforcement and Administration of Justice, which supported a system permitting court-ordered surveillance, concluded that any legislation allowing

wiretaps had to have "stringent limitations" and had to "significantly" "reduce the incentive for, and incidence of, improper electronic surveillance." *Berger*, 388 U.S. at 128-29 (citing excerpt from Challenge of Crime Report at 200-03);[12] *see also* ABA Report at 100 ("Any system of permissive use must include limitations, limitations which must, in fact, work to protect privacy.").

B. *Berger* and *Katz* Provided Guidance for Highly Restrictive Wiretap Authorization

Concurrent with these debates within Congress and the Executive Branch, the Supreme Court decided *Berger*, closely followed by *Katz*.[13] These decisions made plain the need for strict restraints if the government were to conduct lawful wiretapping. *Berger*, 388 U.S. 41; *Katz*, 389 U.S. 347; *see also* Senate Report at 2155-56.

Indeed, at the time *Berger* was decided, its language so emphasized the perils of wiretapping and the restraints necessary to make it legal that many

[12] As the Supreme Court observed in *Giordano*, Professor Blakey prepared a draft statute for the Commission's review in the Challenge of Crime Report. *See Giordano*, 416 U.S. at 517 n.7.

[13] While *Berger* was pending, the Challenge of Crime Report and Task Force Report concluded that "the present status of the law (relating to electronic surveillance) is intolerable . . . . It serves neither the interests of privacy nor of law enforcement." Challenge of Crime Report at 200-03; Task Force Report at 18. Aware of the threat to privacy posed by unbridled electronic surveillance and of the pending *Berger* decision, the reports recommended that any legislation carefully circumscribe authorized use in a manner scrupulously following the Court's decision in *Berger*. Challenge of Crime Report at 200-03; Task Force Report at 18.

believed the Supreme Court had sounded wiretapping's death knell. 388 U.S. at 89-90 (Harlan, J., dissenting). In *Katz*, however, the Supreme Court observed that a highly structured and restrictive law might be crafted to bring wiretapping into accord with the Fourth Amendment.

In *Berger*, the Supreme Court held that a New York statute permitting court-approved electronic surveillance was a facially invalid infringement on an individual's constitutionally protected right to privacy. 388 U.S. at 64 ("Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does."). The Court found objectionable the New York statute's failure to meet: "(1) Particularity in describing the place . . . (2) Particularity in describing the crime . . . (3) Particularity in describing the type of conversation sought . . . (5) Probable cause . . . (8) A showing of exigent circumstances in order to overcome the defect of not giving prior notice." Senate Report at 2161-62 (citing *Berger*, 388 U.S. at 59-60).

Six months after the *Berger* decision, the Court reaffirmed these principles in *Katz*. There, the Court found that "the Government agents ignored the procedure of antecedent justification that is central to the fourth amendment, and a procedure the Court held to be a constitutional precondition of the kind of

electronic surveillance involved in this case." *Katz*, 389 U.S. at 358-59 ("[B]ypassing a neutral predetermination of the scope of a [wiretap] search . . . leaves individuals secure from [privacy and constitutional] violations only in the discretion of the police."); Senate Report at 2162; *see also Berger*, 388 U.S. at 69 ("The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope.").

The *Berger* Court delineated, and *Katz* clarified, the essential requirements for any electronic surveillance legislation that had any hope of passing constitutional muster. Senate Report at 2162-63. In brief, these decisions served as the foundation for Title III, which Congress drafted to comply with, and exceed, their criteria. *Id.* The starting place was the requirement that a Title III application had to include a "full and complete"[14] statement of the exigencies necessitating electronic surveillance. *Id.* at 2190 ("This requirement is patterned after . . . English procedure in the issuance of warrants to wiretap by the Home Secretary

[14] The phrase is an example of a common law couplet used to emphasize or stress a legal command, in which one word – "full" – is derived from Anglo Saxon, the other – "complete" – from French. Ernest Weekley, Cruelty to Words 43 (1931). The use of such couplets is an old English practice whereby law-givers assured that both Anglo-Saxon and French understood the command of the law. *Id.*

. . . . The judgment would involve a consideration of all the facts and circumstances.").

C. The Required Protections in Title III and the Core Requirement of a Full and Complete Statement

1. Title III Is Informed By, But Exceeds, the Requirements in *Berger* and *Katz*

Congress wrote Title III as a broad *prohibition* against electronic surveillance with a narrow exception permitting law enforcement use only in special and controlled circumstances. 18 U.S.C. § 2511; *Giordano*, 416 U.S. at 514; ABA Report at 13 ("Broadly, the standards begin with the judgment that the interests of privacy in our society demand that all private and public use of electronic surveillance techniques to intercept privacy communications be prohibited. To this general principle, only the most carefully limited and closely supervised exception for law enforcement use of these techniques in the administration of justice should be recognized."). Its machinery was finely calibrated to minimize intrusions unless all statutorily required safeguards were observed. The most critical requirement was the active engagement of a fully informed and fully neutral Article III judge.[15]

[15] *See also Giordano*, 416 U.S. at 515 ("Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and

In crafting the necessity requirement, the drafters of the legislation did more than try to merely satisfy the principles espoused in *Berger*. They intended its protections to exceed the constitutional prerequisites set forth in *Berger*.[16] Because of unanimous concern among proponents and opponents of Title III over the potential for abuse posed by such an inherently invasive investigative technique, the *statutory* safeguards written into Title III went well beyond those required by the Constitution.[17] Senate Report at 2286 ("All members of the . . . Commission agree . . . if authority to employ these techniques is granted it must be granted only with stringent limitations."); *see also* Task Force Report at 19; Challenge of Crime at 200-03; 114 Cong. Rec. S4,779 (daily ed. May 1, 1968) (statement of Sen. McClellan) ("Every safeguard that is practical and necessary to protect the legitimate rights of privacy is in the bill.").

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oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation.").

[16] Examples of provisions of Title III that go beyond the Constitution's requirements include Section 2516(1) (requiring authorization by the Attorney General), Section 2516(1)(a)-(f) (limiting electronic surveillance to cases of certain serious crimes), Section 2518 (3) (permitted denial or modification of applications), Section 2518(6) (permitting issuing judges to require periodic reports during the duration of the order), and Section 2518 (8) (requiring recording to prevent editing, immediate sealing, and judicially supervised custody).

[17] Even in light of *Berger* and *Katz*, many still had doubts about whether and how wiretapping in any form could be a constitutional practice. In his concurrence in *Gelbard v. United States*, Justice Douglas noted, "Title III . . . offends the Fourth Amendment, as does all wiretapping and bugging, for reasons which I have often expressed elsewhere." 408 U.S. 41, 62 (1972) (internal citations omitted).

During the Senate Committee Hearings on Title III, Senator John L. McClellan, the chairman of the committee and principal sponsor of the bill,[18] cautioned that the law should "be tight, very definitely as free from loopholes as it can possibly be made." Senate Hearings at 869. Senator McClellan regularly solicited guidance on behalf of his Committee on how to erect the most rigorous possible protections against abuse.[19] *Giordano*, 416 U.S. at 517 n.7.

Through a bipartisan effort that struck a carefully crafted balance between the conflicting needs for privacy and law enforcement, Title III was passed and signed into law by the President. Senate Report at 2112. Even then, many dissenting votes existed among legislators who would have done as President Johnson urged in 1967: bar all forms of wiretap other than for national security reasons. *See, e.g.*, *Id.* at 2222, 2238, 2245 (containing legislative commentary opposing the use of electronic surveillance). The extraordinary safeguards proscribed by the language and structure of Title III, together with the crucial

[18] Because Senator McClellan was the principal sponsor of Title III, his comments are entitled to "weight." *Lewis v. United States*, 445 U.S. 55, 62 (1980); *Simpson v. United States*, 435 U.S. 6, 13 (1978).

[19] Senator McClellan commented to a federal judge who appeared as a witness before the committee, "[t]his legislation, as you know, requires rather thorough court supervision through the application for a court order made by the Attorney General or officials designated in the bill. A court of course, would have to weigh the probable cause or the reasonable cause in support of such an application. I do not know how to tighten it up any more than we have in the bill. . . . Can you tell us how to tighten it up any more?" Senate Hearing at 894-95.

expectation that courts would closely monitor compliance, mitigated concerns about the intrusions inherent in permitting any electronic surveillance, at least in sufficient measure to gain passage into law. *Id.* at 2156, 2177-98.

In this case, the statutory provisions that Congress enacted to protect privacy interests have not been followed as Congress intended they would be.

2. The Necessity Requirement Is a Core Condition for Granting a Wiretap

Congress addressed the principles of notice and exigency articulated in *Berger* and later in *Katz* through Title III's necessity requirement. *See* Senate Report at 2161-63. Since the advent of the Fourth Amendment, prior notice has been an essential component of a constitutionally reasonable search. *Wilson v. Ark.*, 514 U.S. 927, 933-35 (1995) (citing G. Robert Blakey, *The Rule of Announcement and Unlawful Entry*, 112 U. Penn. L. Rev. 499, 504-08 (1964)). Nevertheless, imposing a Fourth Amendment requirement of prior notice akin to that required in a typical search warrant would render electronic surveillance ineffective, as its success necessarily "depends on secrecy." *Berger*, 388 U.S. at 60.

As such, *Berger* and *Katz* held that a lack of notice constitutionally demands a "showing of special facts" or "exigent circumstances," as is required for warrantless searches or arrests, that justifies the government in secretly intercepting private conversations. *Id.* ("Such a showing of exigency, in order to

avoid notice would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized."); ABA Report at 96 ("Only the most compelling showing of need can justify an exception to th[e] general principle [of prohibition].").

"Necessity" is the constitutional substitute for the exigency requirement when prior notice is impracticable. *Id.* at 59. Further, *Berger* and *Katz* prescribed that the Constitution requires that wiretap surveillance, unlike other searches and seizures under the Fourth Amendment, constitute law enforcement's "weapon of last resort." NWC Report at 14; *see also* Senate Hearings at 935, 977-978 (comments by Professor Blakey).

Indeed, the statute went even further than the Fourth Amendment required – it mandated, without exception, 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." 18 U.S.C. § 2518(1)(c). As such, the formal requirements of the statute added heightened safeguards to ensure not only the utmost protection of the privacy of communications, but also that "the courts do not become partners to illegal conduct." *Gelbard*, 408 U.S. at 51 (citation omitted).

The "full and complete" statement provisions of Title III "play a central role in the statutory scheme," *see Giordano*, 416 U.S. at 528, ensuring that Title III

protects privacy interests through adherence to its statutory framework. Congress deemed that bulwark essential to serve Title III's purpose of ensuring that electronic surveillance techniques were "used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity." Senate Report at 2191. Authoritative decisions construing the statute indisputably establish that the "full and complete" statement of necessity "*directly and substantially* implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for [their] employment . . . ." *United States v. Donovan*, 429 U.S. 413, 433-34 (1977) (emphasis added); *see also United States v. Lilla*, 699 F.2d 99, 104 (2d Cir. 1983) ("The requirement of a 'full and complete statement' regarding the procedures attempted or considered prior to the application for a wiretap serves both to underscore the desirability of using less intrusive procedures and to provide courts with some indication of whether any efforts were made to avoid needless invasion of privacy.").

Assurance of Title III's protection of the right to privacy depends upon its statutory controls, and these controls depend upon judicial review and authorization. The sponsors of Title III repeatedly sought to reassure the public that the courts would enforce Title III strictly through a "scrupulous system of impartial court authorized supervision." Senate Report at 2274; ABA Report at 15

("[N]o statutory scheme for the authorized interception of communications will pass constitutional muster under the Fourth Amendment absent provision for judicial supervision based on . . . a demonstration of special facts or exigent circumstances to avoid the requirement of notice . . . ."); NWC Report at 74-75.[20]

The requirement of a full and complete – that is, forthright – statement of the facts establishing necessity implements Title III's "stringent conditions" on wiretap authority. It is a vital precursor to the independent judicial review of *ex parte* wiretap applications and to the determination of whether the government truly needs to resort to such an extraordinary intrusion. *Gelbard*, 408 U.S. at 46-48; *United States v. Spagnuolo*, 549 F.2d 705, 711 (9th Cir. 1977) ("[F]ull and complete" statements are the backbone of the statute's requirement that "[t]he district judge, not the agents, must determine whether the command of Congress has been obeyed."); *United States v. Gigante*, 538 F.2d 502, 503 (2d Cir. 1976) (Title III was designed "to ensure careful judicial scrutiny."). Strict adherence to

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[20] Learned Hand commented:

> But an independent judiciary is an inescapable corollary of "enacted law" . . . . [I]t is of critical consequence that [such laws] should be loyally enforced until they are amended by the same process which made them. That is the presumption upon which the compromises were originally accepted; to disturb them by surreptitious, irresponsible and anonymous intervention imperils the possibility of any future settlements and pro tanto upsets the whole system.

Hand at 120.

formality and procedure "delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized" was an essential component of the bill – for without adherence to the statute's requirements, its central provisions designed to ensure the protection of privacy would be ineffective. Senate Report at 2153; s*ee also Giordano*, 416 U.S. at 515-16.

D. The Government's Violation of the Core Condition Rendered Its Wiretap Illegal

No dispute exists on this record that the government violated the core condition of providing a "full and complete" statement of necessity. As the district court found, the government's wiretap application failed to satisfy that requirement and, instead, recklessly omitted the "elephant in the room" – the conventional investigation long underway and the extensive evidence it had successfully developed – which was "the most important part," "the nuts and bolts," and the "heart and soul" of the government's own investigation. *See United States v. Rajaratnam*, No. 09-cr-01184, 2010 WL 4867402, at *15, 17-18 (S.D.N.Y. Nov. 29, 2010). The district court found that the government "failed to disclose to [the authorizing judge] that the SEC had for several years been conducting an extensive investigation into the very same activity the wiretap was intended to expose using many of the same techniques the affidavit casually affirmed had been or were unlikely to be successful . . . without which a reasoned evaluation of the necessity

of employing wiretaps was impossible." *Id.* at *18. "By failing to disclose the substance and course of the SEC investigation, the government made what was nearly a full and complete *omission* of what investigative techniques had been tried." *Id.* at *17 (emphasis in original).

The prior judicial review that Congress found to be central to Title III and that was determined to be indispensable to protecting the rights enunciated in *Berger* and *Katz* is simply impossible when the government fails to provide a "full and complete" disclosure of necessity. Without that statement, an authorizing judge cannot appropriately determine whether a wiretap should issue. The government's failure to meet the statutory test constituted a blatant violation of a provision of Title III that "play[s] a central role in the statutory scheme." *Giordano*, 416 U.S. at 528. Certainly, that requirement is no less central than the one providing that only certain Justice Department personnel may approve an application for a wiretap, the violation of which the *Giordano* Court held required suppression of the resulting interceptions. *Id.*

Simply put, because the government failed to comply strictly (or even loosely, for that matter) with each and every one of the statutory preconditions of a lawful wiretap, the government's subsequent wiretap was necessarily illegal.

II. WHEN CENTRAL PROVISIONS OF TITLE III ARE VIOLATED, ONLY ONE REMEDY APPLIES: SUPPRESSION

Despite its unambiguous findings, the district court nevertheless denied suppression by reviewing the violation under a *Franks v. Delaware* analysis and affording the government extraordinary leeway to provide a post hoc justification for its failure to comply with a key statutory mandate.[21] But the court was not empowered to deviate from the standard of Title III. The Act contains a comprehensive remedial scheme designed to ensure that privacy interests do not give way to overzealous government surveillance. 18 U.S.C. §§ 2515, 2518(10)(a). Essential to the remedial scheme in Title III is the mandatory requirement that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. That prohibition is enforced through Section 2518(10)(a), which permits an aggrieved party to move for suppression where "a communication was unlawfully intercepted . . . ." 18 U.S.C. § 2518(10)(a); *see also* ABA Report at 115 ("This

[21] *See United States v. Rosa*, 626 F.3d 56, 58 (2d Cir. 2010) (citing *Groh v. Ramirez*, 540 U.S. 551 (2004)) (recognizing that *Groh* abrogated *United States v. Bianco*, 998 F.2d 1112, 1126-27 (2d Cir. 1993), and disallowed "consideration of unattached and unincorporated supporting documents to cure an otherwise defective [Title III] search warrant").

standard, therefore, echoes the prevailing judgment that the unlawful use of electronic surveillance techniques may be deterred by the suppression sanction.").

To deter and sanction violations of Title III, Congress thought it necessary to employ each of the legal techniques and sanctions available to it: prior prosecutor approval, court supervision, suppression, tort, and criminal penalties. It did not give to a court discretion to avoid the suppression remedy. Had it wanted to give such discretion, it had the capacity to set it out on the face of the statute.[22] But nothing on the face of the statute or its legislative history supports such discretion. In fact, Congress made the suppression sanction expansive, extending it beyond the limits of the Fourth Amendment to grand juries, administrative agencies, and the committee of Congress itself. 18 U.S.C. § 2515. Congress did all it could to protect privacy, and it is inconsistent with the language and spirit of Title III to retreat from that Congressional intention.

The Supreme Court has made plain the unyielding nature of these requirements and the remedy – suppression – that must follow a violation. In *Giordano*, the Supreme Court held that Congress "intended to require suppression [under] Title III where there is a failure to satisfy any of those statutory

[22] *See United States v. Vest*, 813 F.2d 477, 481-82 (1st Cir. 1987) ("[W]e believe that if Congress had intended to commit to the courts general authority to create exceptions to section 2515 in the same manner as the court might develop future exceptions to the fourth amendment exclusionary rule, Congress would certainly have said so more clearly.").

requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures." 416 U.S. at 527. In keeping with Section 2518(10)(a)'s unequivocal language, where the government "ignore[s]" a provision of Title III that "play[s] a central role in the statutory scheme" – the full and complete statement requirement is one such provision – suppression is the sole remedy.[23] *Giordano*, 416 U.S. at 528; *see United States v. Mondragon*, 52 F.3d 291, 294 (10th Cir. 1995) ("[F]ailure to satisfy [the necessity] requirement requires that the contents of the intercepted communications and the evidence derived therefrom be suppressed."). That conclusion is fully and firmly supported by Title III's history: the privacy interests at stake in permitting even limited electronic surveillance were so vital to the passage of the statute that violations of its provisions had to require, without exception, the extremely strict remedial measures the statute expressly contained. *See Giordano*, 416 U.S. at 528.

Thus, the district court's conclusion that the government's application contained a "nearly complete *omission*" of the statutorily-required facts should have led ineluctably to suppression.

[23] Statutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there." *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) (internal citation omitted).

A. The District Court Erred in Applying a *Franks* Analysis to the Wiretap Application's Failure to Include a Full and Complete Statement of Necessity

While the district court found that it would have been "far better" for the authorizing judge to make the fully-informed determination of necessity, it nonetheless found the government's omission immaterial under Franks and declined to suppress on that basis. *Rajaratnam*, 2010 WL 4867402, at *15, 18. The application of Franks was inappropriate. The exclusionary rule as it has evolved in the context of search warrants is inapplicable to a statute that has its own self-contained statutory suppression remedy. *See United States v. Jones*, No. 10-1259, slip op. at 11 (Jan. 23, 2012) (Alito, J., concurring) ("After Katz, Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute, see 18 U.S.C. §§ 2510-2522, and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law.").

The exclusionary rule gives a defendant protection from the seizure of evidence in violation of his Fourth Amendment rights. *Weeks v. United States*, 232 U.S. 383, 398 (1914). It makes meaningful the Fourth Amendment's promise of freedom from unreasonable searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (failure to suppress evidence illegally obtained by the government was

to "grant the right but in reality to withhold its privilege and enjoyment").

During the 1970s and 1980s (well after the passage of Title III), the breadth of the exclusionary rule was significantly curtailed by the Supreme Court, limiting its application to instances where it would meaningfully deter future police misconduct. *United States v. Leon*, 468 U.S. 897, 908 (1984); *Illinois v. Gates*, 462 U.S. 213, 223 (1983) ("[Applying the exclusionary rule is] an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.").

Title III's statutory suppression remedy and its preeminent concern for privacy rights are, however, unaffected by the evolution of that court-developed rule and, in particular, the *Franks* framework employed below. *See Jones*, No. 10-1259, slip op. at 11 (Alito, J., concurring). Put simply, Title III affords a defendant a remedy fixed by the face of the statute itself that exceeds the Fourth Amendment's requirements. *See United States v. Amanuel*, 615 F.3d 117, 125 (2d Cir. 2010) (acknowledging that Title III provides the remedy of suppression for violations of the act that do not amount to constitutional violations); *see also* Senate Report at 2185 (suppression under Title III "largely reflects *existing* law" and was intended to generally mirror then "*present* search and seizure law").

Thus, while *Franks v. Delaware*, for Fourth Amendment purposes, permits inquiry into whether intentional or reckless misstatements in a search warrant

application were material to the warrant, 438 U.S. 154, 171-72 (1978), that analysis has no application to the statutory scheme in Title III.

In the first instance, the plain language of the statute requires suppression where law enforcement violates a central provision; no need exists to inquire further. But *Franks* is also inappropriate to Title III because of the differing purposes of the court-developed exclusionary rule and the statutorily mandated suppression remedy of Title III. A *Franks* analysis focuses on the exclusionary rule's deterrent function. *Id.* at 186 (Rehnquist, J., dissenting). Title III requires that electronic surveillance evidence be suppressed when its provisions – and, therefore, individual privacy interests protected by those provisions – were violated. 18 U.S.C. §§ 2515, 2518(10)(a); Senate Report at 2156 ("All too often the invasion of privacy itself will itself go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions."). To view a Title III violation through a *Franks* lens, therefore, squarely frustrates congressional intent and denies to individuals the privacy protections under the statute. *See Jones*, No. 10-1259, slip op. at 11 (Alito, J., concurring).

The *Franks* analysis employed by the district court is similarly inappropriate because it does not account for the special place that a judge's discretion plays within the Title III framework. *Spagnuolo*, 549 F.2d at 711 ("[F]ull and complete"

statements are the means of fulfilling the statute's requirement that "[t]he district judge, not the agents, must determine whether the command of Congress has been obeyed."). As noted above, Title III gives a judge discretion to reject or modify a Title III application even where Title III's requirements have been satisfied. 18 U.S.C. § 2518(3). That is because the drafters of Title III sought to ensure that a judge would play an *active* role in determining whether law enforcement really needs to employ this extraordinarily intrusive technique even where, as a statutory matter, a judge could authorize it. NWC Report at 10 ("The drafters of Title III found the issuance of normal search warrants . . . too permissive for electronic surveillance" and "that a higher-level judicial review was required for Title III applications.").

Judicial discretion to grant a wiretap distinguishes Title III applications from search warrants – the subject of *Franks* – because courts are required to issue normal search warrants on a probable cause showing. Fed. R. Crim. Proc. R. 41(d). In other words, even if – under *Franks* – the facts recklessly omitted here were immaterial to a determination of whether a wiretap order *could* have been issued, that does not answer the question of whether the reviewing judge, had he been fully informed, *would* have issued the order. *Cf. Nix v. Williams*, 467 U.S. 431, 444 (1984) (*would* have inevitably discovered, not *could* have inevitably discovered); *United States v. Allen*, 159 F.3d 832, 843 (4th Cir. 1998) ("Thus, not

only does the government's case lack concrete evidence that the officers would have obtained a warrant, the testimony of record affirmatively supports the conclusion that they would *not* have done so. To permit the presence of evidence establishing probable cause to whitewash the unlawful search would eviscerate the warrant requirement. As Judge Posner has noted, 'a warrant is a condition precedent to a lawful search or seizure, other than in exceptional circumstances of which superfluity is not one.'" (citing *United States v. Cardona-Rivera*, 904 F.2d 1149, 1155 (7th Cir. 1990)). Without a full and complete statement of necessity, the authorizing judge could not exercise his statutorily-granted discretion in a meaningful way, and it is simply impossible to know via a post hoc *Franks* review how that particular judge, at that particular time, would have exercised that discretion. This is especially true where, as here, it appears the court relied on subsequently developed facts that were not set forth in the four corners of the original application. *Rajaratnam*, 2010 WL 4867402, at *20-24.

In sum, the *Franks* analysis employed by the district court was inappropriate. As the wiretap application violated Title III's unambiguous statutory requirement of a full and complete statement of necessity, the statute obliged the district court to suppress the resulting intercepts.

CONCLUSION

For all the foregoing reasons, *amicus curiae* respectfully requests reversal of the order denying suppression and the grant of a new trial with the wiretaps and their fruits excluded from evidence.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as adjusted by Fed. R. App. P. 29(d), because it contains 5,924 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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