No. 00-691

In the Supreme Court of the United States

WFAA-TV, INC. AND ROBERT RIGGS, PETITIONERS

v.

CARVER DAN PEAVY AND SALLY PEAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Section 2511(1)(c) and (d) of Title 18, United States Code, prohibits the intentional disclosure or use of the contents of an illegally intercepted wire, oral, or electronic communication by any person who "know[s] or ha[s] reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." The questions presented are:

1. Whether the application of 18 U.S.C. 2511(1)(c) and (d) to respondents violates the First Amendment.

2. Whether the *scienter* requirement of 18 U.S.C. 2511(1)(c) and (d) requires knowledge that federal law prohibited the interception of the communication in question.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes—Continued: Page

In the Supreme Court of the United States

No. 00-691

WFAA-TV, INC. AND ROBERT RIGGS, PETITIONERS

v.

CARVER DAN PEAVY AND SALLY PEAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 221 F.3d 158. The opinion of the district court (Pet. App. 61a-110a) is reported at 37 F. Supp. 2d 495.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2000. The petition for a writ of certiorari was filed on October 30, 2000, a Monday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is a private civil action arising under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. 2510 *et seq.* Title III makes it generally unlawful to "intentionally intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. 2511(1)(a). In addition, Title III prohibits the intentional disclosure or use of the contents of illegally intercepted communications by persons who "know[] or hav[e] reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. 2511(1)(c) and (d).

Before 1994, Title III's definition of "wire communication" explicitly excluded communications transmitted by cordless telephones. See 18 U.S.C. 2510(1) (1988) (wire communication "does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit"). In 1994, however, Congress amended Title III to eliminate that exclusion. See Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 202(a)(1), 108 Stat. 4290. Since that time, Title III's prohibitions against the interception, disclosure, and use of private communications have applied with full force to conversations conducted using cordless telephones.

2. Beginning in December of 1994, Charles Harman used a police scanner to intercept the cordless telephone conversations of his neighbor, respondent Dan Peavy. At the time, Peavy was a trustee of the Dallas Independent School District. Using the scanner,

Harman overheard conversations suggesting, *inter alia*, that Peavy was engaged in financial wrongdoing in connection with his school position. Pet. App. 2a.

Harman allegedly contacted the Dallas County District Attorney's Office to ask whether it was lawful to monitor and record Peavy's cordless telephone conversations. By virtue of the then-recent amendment to Title III, the interception of those cordless telephone conversations was unlawful. Harman claims to have been told erroneously, however, that the law permitted such activity. Pet. App. 2a.

Harman then contacted petitioner WFAA-TV, Inc., and arranged to play portions of Peavy's recorded conversations to petitioner Robert Riggs, one of WFAA's reporters. Harman told Riggs that he planned to monitor and tape future telephone calls by Peavy, and he asked Riggs whether he wanted copies of the tapes. Riggs told Harman that he did. Riggs also told Harman to record Peavy's monitored conversations in their entirety, rather than suspend the taping during non-germane discussions, in order to ensure the authenticity of the tapes. Pet. App. 3a-4a.

Riggs and other employees of WFAA consulted the station's outside legal counsel, who erroneously told them that it was lawful for WFAA to use and broadcast the contents of the Peavy tapes. Harman eventually provided WFAA with 18 tapes containing 188 telephone conversations between Peavy and other persons. WFAA reviewed and transcribed the tapes and used the information contained in them to pursue an investigation into Peavy's activities. Pet. App. 4a-5a.

In late February of 1995, WFAA's outside counsel discovered for the first time that Title III applies to cordless telephone communications. The attorney notified WFAA, which returned the original tapes to

Harman and gave copies of the tapes and related documents to the attorney for safekeeping. Pet. App. 5a-6a.

In the summer of 1995, WFAA broadcast a three-part series by Riggs concerning Peavy's alleged financial misdeeds. The station did not play the tape recordings of Peavy's telephone conversations during the broadcasts. The broadcasts, however, included information that allegedly was derived from the tapes. Peavy resigned from his school position and was indicted, but ultimately acquitted, on charges of bribery, conspiracy, and tax evasion. Pet. App. 6a-7a.

3. In 1996, Peavy and his wife, respondent Sally Peavy, filed a civil action against petitioners in the United States District Court for the Northern District of Texas. Respondents asserted statutory claims under Title III and the Texas Wiretap Act as well as common law claims for invasion of privacy, intentional infliction of emotional distress, and conspiracy. Pet. App. 7a.

Respondents claimed that petitioners violated 18 U.S.C. 2511(1)(a) by "procur[ing]" Harman's interception of Peavy's cordless telephone conversations. Respondents also contended that petitioners violated 18 U.S.C. 2511(1)(c) and (d) by intentionally disclosing and using the contents of the intercepted conversations with knowledge that the information was obtained in violation of Title III. Respondents sought damages from petitioners under 18 U.S.C. 2520, which provides a private cause of action to any person whose communication has been intercepted, disclosed, or used in violation of 18 U.S.C. 2511.

The district court entered summary judgment in favor of petitioners. Pet. App. 61a-63a. With respect to respondents' procurement claim under 18 U.S.C. 2511(1)(a), the district court held that petitioners' dealings with the Harmans did not amount to "procuring"

the interception of respondents' conversations. Pet. App. 83a-86a. With respect to respondents' claims under 18 U.S.C. 2511(1)(c) and (d), the district court held that petitioners intentionally used and disclosed the contents of the illegally intercepted communications, and that petitioners' undisputed knowledge of the facts surrounding the interception satisfied the statute's *scienter* requirement. Pet. App. 82a-83a, 86a-90a. The court went on to hold, however, that the application of Section 2511(1)(c) and (d) to petitioners would violate the First Amendment. The court held that, as applied to the disclosure and use of truthful information about matters of public significance by persons who did not themselves conduct the illegal interception or procure others to do so, Section 2511(1)(c) and (d) is subject to strict scrutiny. The privacy interests served by the statute, the court concluded, are not weighty enough to satisfy strict scrutiny. Pet. App. 91a-96a.

4. The court of appeals affirmed in part, reversed in part, and vacated and remanded in part. Pet. App. 1a-60a. The court of appeals addressed three issues that are pertinent here.

First, the court of appeals vacated the district court's ruling that petitioners had not "procured" the Harmans' interception of respondents' conversations and remanded for further proceedings on that issue. Pet. App. 13a-17a. Based on its review of the summary judgment record, the court of appeals concluded that a reasonable jury could find that petitioners' conduct amounted to procurement. *Id.* at 17a. "At the very least," the court reasoned, "to the extent [that] Riggs' instructions regarding recording entire conversations caused the Harmans to intercept and record portions of conversations they otherwise would not have inter-

cepted and recorded, a reasonable jury could conclude [that] Riggs 'obtained' (or 'procured') the Harmans' interception of those discrete portions" of the conversations. *Ibid.*

Second, the court affirmed the district court's ruling that petitioners had the mental state or *scienter* required by the disclosure and use prohibitions in 18 U.S.C. 2511(1)(c) and (d). Pet. App. 29a-31a. Petitioners argued that, while they knew that the recordings were obtained through unconsented interception and monitoring of respondents' telephone conversations, they had a good-faith belief that those interceptions were lawful based on their consultations with their legal counsel and local law enforcement officials. *Id.* at 30a. The court of appeals held that a good-faith belief in the legality of the underlying interceptions is immaterial because Section 2511(1)(c) and (d) does not embody "an ignorance or mistake of law defense." *Ibid.* "Based on the existence of [Title III] and [petitioners'] knowledge of the circumstances of the Harmans' interception," the court concluded that petitioners had, "at a minimum, * * * reason to know the interceptions were illegal." *Id.* at 31a.

Third, the court of appeals reversed the district court's ruling that the application of Section 2511(1)(c) and (d) to petitioners violates the First Amendment. Pet. App. 32a-58a. The court held that Section 2511(1)(c) and (d) is subject to intermediate scrutiny, rather than strict scrutiny, and that "as applied to the facts in this case," the statutory prohibitions meet the requirements of intermediate scrutiny. *Id.* at 57a. In so holding, the court emphasized that petitioners had engaged in "undisputed participation concerning the interceptions," *id.* at 34a, making it "quite arguable that [petitioners] did not lawfully receive the contents of the

tapes," *id.* at 50a. The court ruled that petitioners' involvement in the interception distinguished this case from *Bartnicki* v. *Voppper*, 200 F.3d 109 (3d Cir. 1999), cert. granted, Nos. 99-1687, 99-1728 (argued Dec. 5, 2000). In *Bartnicki*, the Third Circuit held that the First Amendment bars the application of Section 2511(1)(c) and (d) to defendants who receive an unsolicited recording of an intercepted telephone conversation from an anonymous source and make the contents of the recording public. The Fifth Circuit noted that the decision in *Bartnicki* was directed at a case "*where[, unlike here,] there is no allegation that the defendants participated in or encouraged that interception.*" Pet. App. 48a (quoting *Bartnicki*, 200 F.3d at 129) (emphasis and bracketed language added by Fifth Circuit); see also *id.* at 53a ("the media defendants in *Bartnicki*, unlike [petitioners], were not in any way involved with the interceptors, or the interceptions").

DISCUSSION

1. Because the First Amendment issue presented by the petition in this case is related, although not identical, to the question currently pending before the Court in *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728 (collectively *Bartnicki*), which were argued on December 5, 2000, we agree with petitioners (Pet. 11-15) that the case should be held for *Bartnicki*. In *Bartnicki*, the question presented is whether the imposition of civil liability under 18 U.S.C. 2511(1)(c) and (d) for using or disclosing the contents of illegally intercepted communications violates the First Amendment, where the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, and the

information at issue concerns a matter of public significance.

While the two cases have similarities, they differ in at least one potentially significant respect. In *Bartnicki*, the defendants disclosed the contents of an illegally intercepted conversation, but they were neither directly nor indirectly involved in the initial interception itself; the conversation was intercepted by an unknown party who anonymously mailed a tape of the conversation to one of the defendants. Here, in contrast, petitioners—particularly petitioner Riggs—were directly associated with ongoing interceptions. See Pet. App. 3a-5a, 16a-17a, 66a-68a, 84a-86a (summarizing Riggs's dealings with the Harmans). The precise extent of petitioners' involvement is unresolved, as is the precise effect of petitioners' actions on the Harmans' surveillance activities. Nonetheless, under any view of the record, petitioners are more closely associated with the interception in this case than were the defendants in *Bartnicki*. As a result, even if this Court were ultimately to hold that the First Amendment precludes the application of Section 2511(1)(c) and (d) to the defendants in *Bartnicki*, it would not necessarily follow that similar constitutional problems arise from application of the same provisions to persons in petitioners' position.

2. Petitioners also ask the Court to address the meaning of the *scienter* provision of 18 U.S.C. 2511(1)(c) and (d), which confines liability for the disclosure or use of illegally intercepted communications to persons who "know[] or hav[e] reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." The Fifth Circuit held that the *scienter* requirement does not require actual knowledge of the

legal requirements of Title III itself. That holding is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is not warranted.

Every court of appeals that has addressed the *scienter* requirement in Section 2511(1)(c) and (d) has reached the same conclusion—that it requires only knowledge of the facts that render the interception unlawful, not knowledge of the legal standards that apply to the interception. See *Forsyth* v. *Barr*, 19 F.3d 1527, 1538 n.21 (5th Cir.), cert. denied, 513 U.S. 871 (1994); *Williams* v. *Poulos*, 11 F.3d 271, 284 (1st Cir. 1993); *United States* v. *Wuliger*, 981 F.2d 1497, 1502 (6th Cir. 1992), cert. denied, 510 U.S. 1191 (1994); *Thompson* v. *Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992). See also *Reynolds* v. *Spears*, 93 F.3d 428, 435-436 (8th Cir. 1996) (reliance on advice of law enforcement officer is not a defense to liability under Section 2511(1)(a)); *Heggy* v. *Heggy*, 944 F.2d 1537, 1541-1542 (10th Cir. 1991) (good-faith belief in legality of conduct is not a defense to liability under Section 2511(1)(a)), cert. denied, 503 U.S. 951 (1992); *United States* v. *McIntyre*, 582 F.2d 1221, 1224-1225 (9th Cir. 1978) (same). Although petitioners cite a number of supposedly contrary decisions of this Court and other courts of appeals (Pet. 20-22), none of those decisions involves the statutory provisions at issue here, and none involves the language used in Section 2511(1)(c) and (d).

Moreover, in arguing that "reasonabl[e] reli[ance] on advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information" negates liability under Section 2511(1)(c) and (d), Pet. 17, petitioners disregard the existence of 18 U.S.C. 2520(d), which creates an express and carefully defined good-

faith defense to liability under Title III. Section 2520(d) provides that:

> A good faith reliance on—
>
> (1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;
>
> (2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or
>
> (3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;
>
> is a complete defense against any civil or criminal action brought under this chapter or any other law.

Section 2520(d) represents a conscious effort by Congress to identify the circumstances in which a good-faith belief in the legality of conduct excuses a defendant from liability under Title III.

Petitioners do not claim that this case comes within the ambit of Section 2520(d). Nor could they: Section 2520 does not recognize a good-faith exception for reasonable reliance "on advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information" (Pet. 17). Petitioners thus, in essence, are inviting the judiciary to create an additional good-faith exception beyond those that Congress itself chose to recognize. The courts of appeals have uniformly and correctly rejected that invitation, and there is no reason for this Court to do otherwise here.*

---

* Indeed, it is far from clear that this case properly presents any question concerning Title III's applicability to parties who rely

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending this Court's decision in *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728, and then disposed of as is appropriate in light of the decision in those cases.

"on advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information" (Pet. 17). Although petitioners claim that they should be able to avoid liability because they did not know that the interceptions were prohibited by Title III, they do not dispute that, in late February of 1995, their outside counsel discovered that Title III applies to cordless telephone communications and expressly notified petitioners that the communications at issue here were illegally intercepted. Petitioners, in fact, responded by returning the original tapes to Harman and giving copies of the tapes and related documents to their attorney for safekeeping. Pet. App. 5a-6a. Nonetheless, in the summer of 1995, petitioners allegedly used and disclosed information obtained from the illegally intercepted communications in the preparation and broadcast of a three-part series concerning respondent Peavy's alleged financial misdeeds. *Id.* at 6a-7a; see *id.* at 88a ("Ultimately, the tapes formed the basis for the broadcasts themselves."); *id.* at 89a (the broadcasts "disclosed the 'substance, purport, and meaning' of the illegally intercepted communications" even though they "did not play, refer to, or summarize the tapes"). See also *id.* at 23a (remanding because "there is a material fact issue whether, in their television broadcasts, defendants intentionally disclosed the contents of the illegal interceptions."). It is difficult to see how petitioners can defend in this action by claiming ignorance of the law when they persisted in their offending conduct—knowing use and disclosure of information from communications intercepted in violation of Title III—months *after* their outside counsel specifically advised them that the initial interceptions in fact were illegal.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

DECEMBER 2000