No. 11-947

IN THE

Supreme Court of the United States

ROBERT SIMELS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF ELECTRONIC FRONTIER FOUNDATION AND CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37, Amici Curiae Electronic Frontier Foundation and Center for Constitutional Rights respectfully submit this brief in support of Petitioner Robert Simels.[1]

STATEMENT OF INTEREST

Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect privacy rights in a world of rapid technological change. As part of that mission, EFF actively encourages and challenges government and the courts to support privacy, and has served as counsel or amicus in privacy cases before this Court, including *United States v. Jones*, 132 S. Ct. 945 (2012), *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), *National Aeronautics and Space Administration v. Nelson,* 131 S. Ct. 746 (2011), and *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

The Center for Constitutional Rights ("CCR") is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements and activists in the South, CCR has over the last four decades litigated significant cases in the areas of constitutional and human rights. Among these is the landmark warrantless wiretapping case *United States v.*

1. *Amici* affirms that no counsel for a party authored this brief in whole or in part and no person or entity made a monetary contribution to this brief other than the *amici*. Both Petitioner Robert Simels and Respondent United States of America have given express written consent to the filing of this brief.

United States District Court (Keith), 407 U.S. 297 (1972). On January 17, 2006, CCR filed a challenge to the National Security Agency's warrantless wiretapping program, which is currently on appeal to the Ninth Circuit, *Center for Constitutional Rights v. Obama*.

SUMMARY OF ARGUMENT

Congress spoke clearly and unambiguously in 18 U.S.C. § 2515: "no part of the contents" of a communication illegally intercepted "and no evidence derived therefrom may be received in evidence in any trial."[2] But instead of following this clear Congressional directive, the courts below created an impeachment exception in § 2515 noticeably absent in the plain language of the statute, and in complete disregard of this Court's established canons of statutory interpretation.

Even more worrisome, while the number of wiretap authorizations and individuals wiretapped has increased dramatically since 2001, the number of incriminating wiretaps and convictions obtained as a result of wiretaps has decreased. As a result, more innocent individuals are having their private conversations recorded with less judicial oversight and scrutiny.

Because the lower courts' mistake in easing the strong and clear privacy protection in § 2515 has enormous implications for the privacy of innocent people in the future, this Court should grant *certiorari*.

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2. All further statutory references refer to Title 18 of the United States code unless otherwise noted.

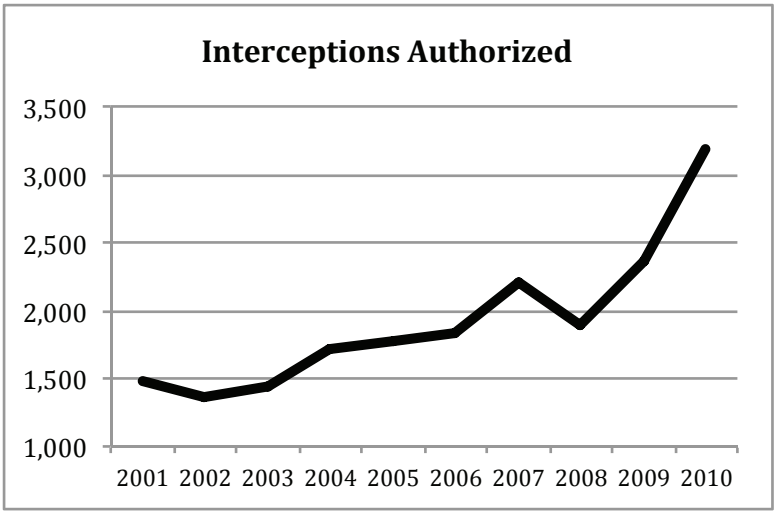
ARGUMENT

A. The Judicial Creation of an Impeachment Exception to Title III's Absolute Prohibition on the Use of Illegally Intercepted Conversations Endangers the Privacy Rights of Innocent Individuals.

Maintaining § 2515's absolute suppression requirement is necessary to protect the privacy of innocent individuals as the use of wiretaps has rapidly grown over the past decade. A close examination into wiretap order statistics[3] leads to the unmistakable conclusion that more innocent people are having their private conversations intercepted, with less judicial scrutiny of the government's requests.

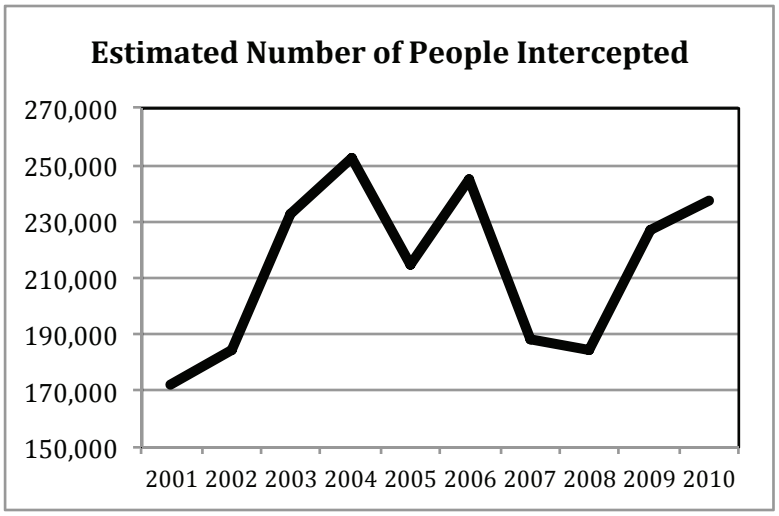
3. All statistics concerning wiretaps were obtained from the publically available *Wiretap Report* published by the Administrative Office of the United States Courts annually, available at http://www.uscourts.gov/Statistics/WiretapReports.aspx (last accessed February 25, 2012).

There has been a rapid growth in the amount of wiretap authorizations, particularly in the last ten years since the enactment of the PATRIOT Act. The number of authorized interceptions more than doubled from 1,491 authorized in 2001 to 3,194 in 2010.

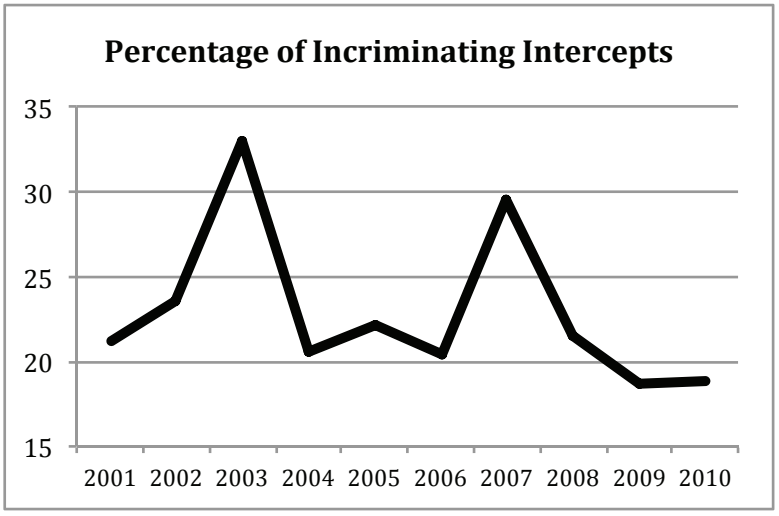


As the number of interceptions has increased, so too has the total number of individuals who are having their private conversations intercepted.[4]

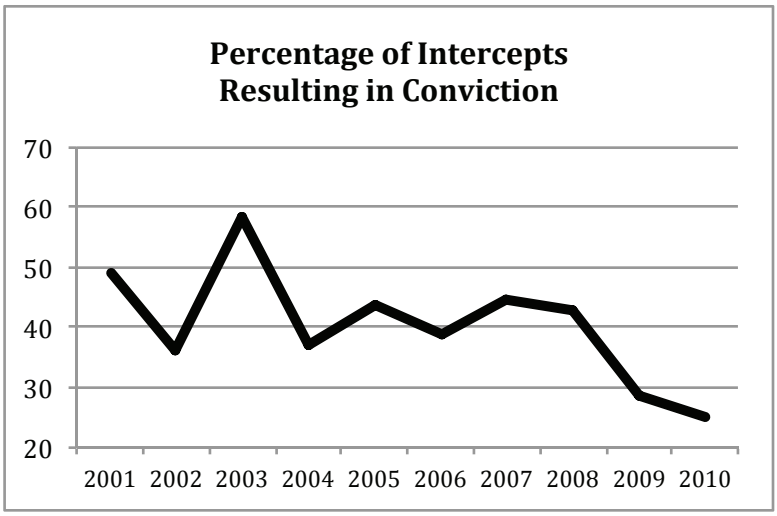
4. The estimate is based on the average number of individuals intercepted per wiretap, multiplied by the number of interceptions issued per year.



Yet, while there has been an increase in the number of intercepts, the number of "incriminating intercepts" has steadily declined.



So, too, has the percentage of authorizations resulting in convictions of the individuals wiretapped.



One final statistic stands out that does not need a graph. Between 2001 and 2010, while there were 19,282 wiretaps authorized, only *three* wiretap applications were denied.[5] These statistics lead to one inescapable conclusion: the number of innocent people being wiretapped has increased over the last ten years. Despite an increase in the total number of wiretap authorizations, over two-thirds of the intercepts are capturing non-incriminating content. And only one-third of the intercepts are resulting in conviction.

With the judiciary granting wiretap applications with little scrutiny, preserving the integrity of § 2515's absolute bar on the use of illegal intercepts becomes all the more

5. *See* Table 2 in each year's *Wiretap Reports*, available at http://www.uscourts.gov/Statistics/WiretapReports.aspx (last accessed February 25, 2012).

important. Because if illegally obtained wiretaps are nonetheless admitted into Court, Congress' express intent of protecting privacy, manifested in the clear text of Title III, becomes meaningless. As will be seen, however, the lower courts' failed to adhere to the plain text of § 2515. And as a result, *Certiorari* is necessary.

B. On Its Face, Title III Requires The Suppression of Illegal Intercepts In Any Proceeding.

The Wiretap Act, 18 U.S.C. §§ 2510-2522, generally prohibits the interception and disclosure of oral, written or electronic communications. *See* 18 U.S.C. § 2511.[6] Because the "protection of privacy was an overriding congressional concern," Title III elevated privacy rights at the expense of law enforcement's ability to more easily investigate crime. *Gelbard v. United States*, 408 U.S. 41, 48 (1972). As a result, the Wiretap Act contains a number of explicit statutory limitations on obtaining and using wiretaps. For example, to ensure wiretaps are not "routinely employed as the initial step in criminal investigation," Congress required law enforcement to demonstrate that "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *United States v. Giordano*, 416 U.S. 505, 516 (1974) (citing 18 U.S.C. §§ 2518(1)(c) and (3)(c)).

Another important limitation in Title III is contained in § 2518(5), which requires every order authorizing

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6. The Wiretap Act was Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. This brief refers to "Title III" and the "Wiretap Act" interchangeably.

a wiretap to direct law enforcement to "minimize the interception of communications not otherwise subject to interception under this chapter." It was this provision of the Wiretap Act that the government violated in this case. *See United States v. Simels*, 2009 WL 1924746, *12-13 (E.D.N.Y. Jul. 2, 2009).

But without a strong sanction to deter violations of Title III's strict requirements, the Wiretap Act's prohibitions would be meaningless. Thus, in § 2515, Congress called for suppression of any interception taken in violation of the Title III:

> Whenever 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, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515. As this Court has explained, § 2515 "serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct." *Gelbard*, 408 U.S. at 51. And as a result, there are no exceptions to § 2515 anywhere else in Title III.

While not every technical violation results in suppression under § 2515, the remedy is appropriate if a

portion of the Wiretap Act that "'directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device'" is violated. *United States v. Chavez*, 416 U.S. 562, 575 (1974) (quoting *Giordano*, 416 U.S. at 527). And as the district court correctly found in this case, Title III's minimization requirements in § 2518(5) "directly and substantially implement the congressional intention to limit the use of intercept procedures." *Giordano*, 416 U.S. at 527; *Simels*, 2009 WL 1924746 at *11. That is because "[n]othing places the extraordinary intrusiveness of electronic surveillance in clearer relief than the recording of communications that bear no relationship to the criminal activity giving rise to the surveillance itself." *Simels*, 2009 WL 1924746 at *11; *see also id.* at *13 (citing *United States v. Scully*, 546 F.2d 255, 262 (9th Cir. 1976), *vacated on other grounds sub nom. United States v. Cabral*, 430 U.S. 902 (1977) for proposition that violation of minimization requirements warrants suppression of wiretap).

Finding a Title III violation, the district court correctly suppressed the wiretaps. And under § 2515, "no part of the contents of such communication and no evidence derived . . . may be received in evidence in any trial." Congress made clear in the plain text of the statute that there is no impeachment exception to this absolute bar. That should have been the end of the court's inquiry.

C. The Court Violated the Canons of Statutory Interpretation By Looking at the Legislative History of Title III Because The Text of § 2515 Is "Plain and Unambiguous."

But instead of stopping at the plain text of the statute, the district court and Second Circuit went on to read an exception into the statute where none existed. This goes against this Court's precedent concerning statutory interpretation of the Wiretap Act.

When analyzing the contours of the suppression remedy in Title III, this Court has always looked *exclusively* to the text of the Wiretap Act. *See United States v. Donovan*, 429 U.S. 413, 432 n. 22 (1977) ("The availability of the suppression remedy for these statutory, as opposed to constitutional, violations, turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights."); *Giordano*, 416 U.S. at 524 ("The issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III."). Thus, any analysis of suppression in Title III must begin with the text of § 2515.

This Court has made clear that when a "statute's language is plain, 'the *sole* function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)) (emphasis added). When interpreting a statute, a court's "first step" is "to determine whether the language at issue has a plain and unambiguous meaning with regard

to the particular dispute in the case. Our inquiry must *cease* if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *Ron Pair Enterprises,* 489 U.S. at 240) (emphasis added); *see also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

Section 2515 is nothing but "plain and unambiguous." *Robinson*, 519 U.S. at 340. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson,* 519 U.S. at 340 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). All three of these factors make clear that § 2515 is "plain and unambiguous," and therefore the literal terms of the text must be enforced.

Beginning with the language itself, § 2515 is abundantly clear: "no part of the contents" of an illegal intercepted communication "and no evidence derived therefrom may be received in evidence in any trial." The text is absolute and has no exceptions, qualifications, or cross-references to other statutes. And it has no trace of the word "impeachment."

The specific context in which the language of § 2515 was used further supports the absence of an impeachment exception. Not only are illegally intercepted communications inadmissible at trial, they are also inadmissible in any "hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory

body, legislative committee, or other authority." In other words, Congress' prohibition goes far beyond just federal criminal trials, but also bans the use of illegal intercepts in any state or federal governmental function.

Finally, and most importantly, looking at the context of the statute as a whole, it is clear why Congress would enact such a broad and sweeping prohibition: Congress passed Title III specifically to protect privacy. It explicitly prohibited *every* intentional disclosure of an illegally obtained intercept to "any other person." 18 U.S.C. § 2511(1)(c). This includes people sitting on a jury. As a result, every time an illicitly obtained wiretap recording is played to people – including jurors – who have not heard it, a new Title III violation occurs, and with it, another privacy invasion. *See Gelbard,* 408 U.S. at 51-52. Creating an impeachment exception would allow for repeated privacy invasions (and Title III violations), in defiance of Congress' express intent.

Thus, once the court realized that § 2515 was "plain and unambiguous," the court should have ended its inquiry and prohibited the government from using the wiretaps for impeachment purposes. The district court itself recognized, "a literal reading of § 2515 provides substantial support for Simels's argument against an impeachment exception." *Simels*, 2009 WL 4730232 at *6. But instead of stopping its analysis and enforcing the plain terms of the statute, the court went further and grafted an extraneous impeachment exception onto § 2515. *Certiorari* is thus appropriate to correct the Second Circuit's erroneous statutory interpretation.

D. Certiorari Is Appropriate to Clarify the Law

A majority of federal courts have concluded that an impeachment exception exists in § 2515 despite the absence of any explicit exception in the plain text. *See e.g.*, *United States v. Vest*, 813 F.2d 477, 484 (1st Cir. 1987); *United States v. Caron*, 474 F.2d 506, 509-10 (5th Cir. 1973); *United States v. Baftiri*, 263 F.3d 856, 857–58 (8th Cir. 2001); *United States v. Echavarria–Olarte*, 904 F.2d 1391, 1397 (9th Cir. 1990).

Conversely, there have been a number of courts to correctly interpret the plain language of § 2515 and conclude that no impeachment exception exists. *See United States v. Wuliger*, 981 F.2d 1497, 1506 (6th Cir. 1992), *cert. denied*, 510 U.S. 1191 (1994); *United States v. Gray*, 521 F.3d 514, 530 (6th Cir. 2008); *Anthony v. United States*, 667 F.2d 870, 879 (10th Cir. 1981). Yet these courts have only precluded impeachment for criminal defendants or private litigants; in other words these courts have only allowed the *government* to use illegally obtained wiretap evidence for impeachment in criminal cases. *See Nix v. O'Malley*, 160 F.3d 343, 350 (6th Cir. 1998); *see also Gray*, 521 F.3d at 530; *Wuliger*, 981 F.2d at 1506; *Anthony*, 667 F.3d at 879-80.

This confusion regarding the contours of a judicially created impeachment exception absent in the plain text of § 2515 comes from an incorrect analysis of the Wiretap Act's legislative history, purporting to define the scope of § 2515:

> [§ 2515] applies to suppress evidence directly (*Nardone v. United States*, 58 S.Ct. 275, 302 U.S.

> 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone v. United States*, 60 S.Ct. 266, 308 U.S. 338 (1939)). There is, however, no intention to change the attenuation rule. *See Nardone v. United States*, 127 F.2d 521 (2d Cir.), *certiorari denied*, 62 S.Ct. 1296, 316 U.S. 698 (1942); *Wong Sun v. United States*, 83 S.Ct. 307, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role beyond present search and seizure law. *See Wal[d]er v. United States*, 74 S.Ct. 354, 347 U.S. 62 (1954).

S.Rep. No. 1097, 90th Cong., 2d Sess., at 68 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2185.

Walder held that evidence obtained in violation of the Fourth Amendment could nonetheless be used to impeach a defendant who testifies inconsistently with that evidence. *Walder*, 347 U.S. at 65. As a result, beginning with the Fifth Circuit's decision in *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973), appellate courts have ruled that the legislative history's desire to not "press the scope of the suppression role beyond present search and seizure law" and its citation to *Walder*, meant that suppressed wiretaps were nonetheless admissible for impeachment purposes. *See Caron*, 474 F.2d at 509-10.

Yet if Congress intended to create an impeachment exception to § 2515's absolute suppression requirement, it could have done so by explicitly writing an exception into the statute. But when Congress decides not to speak, its silence controls. *See e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("'[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but

omits it in another,' and that presumption is even stronger when the omission entails the replacement of standard legal terminology with a neologism.") (quoting *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted)). The "short answer is that Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979). Since Congress explicitly omitted any impeachment exception, courts must respect this determination.

If there is a concern that § 2515's absence of an impeachment exception permits litigants to engage in perjury (as the government claimed before the district court and the Second Circuit), then the solution is for Congress, not the courts, to amend Title III and make an impeachment exception explicit in § 2515. After all, a "*legislative body* is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring in the judgment) (emphasis added). And this is what happened with respect to the law surrounding wiretaps. *See id.* 132 S. Ct. at 963.

Following this Court's decision in *Katz v. United States*, 389 U.S. 347 (1967), "Congress did not leave it to the courts to develop a body of Fourth Amendment case law." *Id.* Instead, Congress enacted the Wiretap Act "and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law." *Id.* Allowing Congress to amend Title III, rather than allowing judges to invent an exception, thus comports with this Court's traditional understanding of the Wiretap Act.

But in this particular case, the Second Circuit usurped Congress' traditional role. It affirmed the district court's creation of an impeachment exception because it believed that "'[i]t makes no sense for evidence obtained in violation of a mere statute to be more severely restricted than evidence obtained in violation of the Constitution.'" *Simels*, 654 F.3d at 170 (quoting *Baftiri*, 263 F.3d at 857). But this too is wrong.

The Constitution provides a minimum threshold: legislatures, including Congress, are free to craft *greater* protections than those required by the Constitution. *See, e.g., California v. Ramos*, 463 U.S. 992, 1013-14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."); *Mills v. Rogers*, 457 U.S. 291, 300 (1982) ("a State may confer procedural protections of liberty interests that extend beyond those minimally required by the Constitution of the United States. If a State does so, the minimal requirements of the Federal Constitution would not be controlling, and would not need to be identified in order to determine the legal rights and duties of persons within that State.").

And Congress did precisely that in Title III by only authorizing judges to issue wiretap orders upon a showing greater than the probable cause requirement of the Fourth Amendment. *See, e.g., In re Application of U.S. for an order: (1) Authorizing Use of a Pen Register and Trap and Trace Device, (2) Authorizing Release of Subscriber and Other Information, (3) Authorizing Disclosure of Location-Based Services*, 727 F. Supp. 2d 571, 573 (W.D. Tex. 2010) ("Wiretaps are often referred to as "super-warrants" because of the additional requirements beyond

probable cause necessary for their issuance."); *In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority*, 396 F. Supp. 2d 747, 751 (S.D. Tex. 2005) ("to illustrate the full panoply of protections given to the content of private conversations under the Fourth Amendment . . . one commentator has referred to these wiretap requirements collectively as a form of 'super-warrant.'") (quoting Orin S. Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607, 630 (Winter 2003)).

Congress also created explicit limits in the text of the Wiretap Act regarding the types of law enforcement officers who can apply for a wiretap order, the types of offenses for which a wiretap can issue, and the length of time an interception can occur. *See* 18 U.S.C. §§ 2516(1), (3), 2518(3). None of this extra protection in the text of Title III is mentioned in the Fourth Amendment, which generally allows search warrants to issue when supported under oath by probable cause, and describing the place to be searched in particular detail. *See* U.S. CONST. AMEND. IV. But in order to protect privacy, Congress chose to write a statute that had a more exacting standard than the Fourth Amendment's probable cause standard. It would be reasonable then for Congress to create an equally strong suppression remedy.

Therefore, *certiorari* is appropriate to clarify the law and give effect to the plain text of § 2515.

CONCLUSION

The lower courts' insertion of an impeachment exception into the Wiretap Act defies the plain text of § 2515 and violates this Court's established canons of statutory interpretation. Without this Court's intervention, an increasing number of innocent people are at risk of intrusions into their privacy. It is up to Congress, not the courts, to create exceptions to the Title III. Therefore, this Court should grant Mr. Simels' petition for *certiorari*.

Respectfully submitted,

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