No. 07-439

IN THE
Supreme Court of the United States

JAMES A. McDERMOTT,
Petitioner,

v.

JOHN A. BOEHNER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF REPRESENTATIVES HOWARD BERMAN, BARNEY FRANK, ZOE LOFGREN AND GEORGE MILLER AS AMICI CURIAE SUPPORTING PETITIONER

Elisabeth Genn
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

Paul M. Smith *
JENNER & BLOCK LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Amici
*Counsel of Record

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF AMICI 1
STATEMENT 2
SUMMARY OF ARGUMENT 3
ARGUMENT 4
I. THE D.C. CIRCUIT'S *EN BANC* DECISION CONFLICTS WITH *BARTNICKI* AND WILL UNDULY RESTRICT THE FREE FLOW OF INFORMATION TO CONGRESS, THE MEDIA AND THE PUBLIC 4
II. THE *EN BANC* DECISION VIOLATES THE SEPARATION OF POWERS 8
CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Bartnicki v. Vopper, 532 U.S. 514 (2001) .. 3,10, 12

Christoffel v. United States, 338 U.S. 84 (1949) 12

Exxon Corp. v. FTC, 589 F.2d 582 (D.C. Cir. 1978) 11, 12

Marshall Field & Co. v. Clark, 143 U.S. 649 (1892) 12

Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982) 11

Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984) 13

Snepp v. United States, 444 U.S. 507 (1980) 6, 7

United States v. Aguilar, 515 U.S. 593 (1995) 5, 6, 7

United States v. Ballin, 144 U.S. 1 (1892).... 10, 12

United States v. Diggs, 613 F.2d 988 (1979)..... 12

United States v. Rose, 28 F.3d 181 (D.C. Cir. 1994) 10

United States v. Rostenkowski, 59 F.3d 1291 (D.C. Cir. 1995), *supplemented by*, 68 F.3d 489 (D.C. Cir. 1995) 12

United States v. Smith, 286 U.S. 6 (1932)..... 12

Yellin v. United States, 374 U.S. 109 (1963)..... 12

CONSTITUTIONAL PROVISIONS and STATUTES

U.S. Const. art. I, § 5, cl. 2 10

18 U.S.C. § 2232(c) 5

MISCELLANEOUS

Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & Pol. 725 (1989) 11

INTEREST OF AMICI

Congressman Howard Berman has represented the 28th District of California since 1983. He is a senior member of the Foreign Affairs Committee and the Vice Chair of the Judiciary Committee.[1] He is Chairman of the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property. He served as the ranking member on the Ethics Committee from 1997 to January 2003 and from April 2006 to December 2006.

Congressman Barney Frank has represented the 4th District of Massachusetts since 1981. For a number of years, he served on the House Judiciary Committee, where he was ranking member of the Subcommittee on Courts and Intellectual Property. He also served on the Banking Committee and the Select Committee on Homeland Security. In 2007, he became the Chairman of the House Financial Services Committee.

Congresswoman Zoe Lofgren has represented the 16th District of California since 1994. She is a member of the Committee on the Judiciary and the Subcommittee on Administrative Law, and she is the Chair of the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law. Congresswoman Lofgren also serves on the Committee on Homeland Security; the

---

[1] No counsel for a party authored this brief in whole or part. No party, counsel for a party, or anyone else other than the amici and their counsel made a monetary contribution to fund the preparation or submission of this brief.

Subcommitee on Emerging Threats, Cybersecurity, and Science and Technology; and the Subcommittee on Border, Maritime and Global Counterterrorism. She is likewise a member of the Committee on House Administration, and the Chair of the Subcommittee on Elections. Congresswoman Lofgren served on the Ethics Committee from 1999 to 2003.

Congressman George Miller has represented the 7th District of California since 1975. He has served as Chairman of the House Democratic Policy Committee since 2003. He has also served on the House Education and Labor Committee since 1975, acting as the ranking member on that panel since 2001 and as Chairman since January 2007. Congressman Miller also serves on the Natural Resources Committee, and was Chairman of that Committee from 1991 to 1994.

The interests of the *amici* members of Congress are twofold. First, they have an interest in maintaining the free flow of information to Congress from persons in government and the private sector who may be deterred by the D.C. Circuit's rule that an internal confidentiality obligation may trump the First Amendment. Second, they have an interest in protecting the institution of the House of Representatives from the judicial interference arising from a court's interpretation of an internal House rule.

STATEMENT

This case involves a long-running dispute in which one member of Congress is suing another for

allegedly violating a federal wiretapping law. The claim is that petitioner McDermott violated the law by publicly disclosing truthful information about a matter of public interest because he received that information, unsolicited, from third parties who had illegally intercepted a cellular phone call. Following a remand of the case for further consideration in light of *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the *en banc* U.S. Court of Appeals for the D.C. Circuit ruled 5-4 that petitioner is not entitled to invoke the First Amendment protections recognized in *Bartnicki* because, according to the majority below, his conduct also violated a rule of the House Ethics Committee. *Amici* believe that such an argument for avoiding constitutional scrutiny is both incorrect and fraught with serious collateral consequences.

SUMMARY OF ARGUMENT

1. The Court should grant review to make clear that the First Amendment principles recognized in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), barring enforcement of a wiretap statute to punish disclosure of truthful information about a matter of public interest, do not evaporate just because the plaintiff points to some other rule that he argues barred the same disclosure. The D.C. Circuit's endorsement of such an exception to *Bartnicki* is unjustified as a matter of basic First Amendment jurisprudence.

2. The D.C. Circuit's reliance on a House rule to eliminate First Amendment protections here was particularly problematic because of separation-of-powers concerns. The courts have traditionally been very reluctant to intrude into the Legislative Branch

and interpret and enforce internal rules. This case typifies the strong reasons for maintaining that bar to judicial intrusion, except in compelling circumstances not present here.

ARGUMENT

I. THE D.C. CIRCUIT'S *EN BANC* DECISION CONFLICTS WITH *BARTNICKI* AND WILL UNDULY RESTRICT THE FREE FLOW OF INFORMATION TO CONGRESS, THE MEDIA AND THE PUBLIC.

In *Bartnicki*, this Court held that the fact that information originated from an illegal interception does not preclude an innocent third party, once in receipt of that information, from claiming a First Amendment right to disseminate it. While that right is not absolute, and depends on the nature of the information at issue and the other circumstances of the case, the protections of *Bartnicki* should not be lightly thrown aside as they were in this case. This Court therefore should grant review to consider the validity of the D.C. Circuit's 5-4 decision that First Amendment protections evaporate once a plaintiff can point to any obligation, even if not judicially enforceable, that arguably bars the speaker from disclosing the information at issue.

The D.C. Circuit ruling will have broad consequences, because there are a great many obligations that might be read to bar a speaker from disclosing information that comes into his possession. Such obligations may exist in corporations, in all branches of government, and in

other contexts as well. They may or may not be enforceable themselves under the First Amendment, depending on the circumstances. But it is quite another matter to say that the existence of such an obligation withdraws First Amendment protection, subjecting the speaker to civil and even criminal liability if a third party obtained the information improperly.[2]

Leaving the D.C. Circuit decision in place would have an adverse impact on the free flow of information to the media, the Congress and, ultimately, the American people. There are, for example, many public-spirited individuals who are willing to provide crucial information concerning health, safety and other matters even though they risk losing their jobs because they have violated a contractual or fiduciary non-disclosure obligation. But if, as the D.C. Circuit now authorizes, they will also lose their First Amendment defenses in any subsequent civil or criminal litigation, they may decline to provide the information to the media or to the Congress. The inevitable result will be a decline in transparency and accountability — values that the First Amendment is meant to promote and protect.

The *en banc* majority said it found support for its ruling in *United States v. Aguilar*, 515 U.S. 593, 605 (1995). Pet. App. 10. But that greatly exaggerates what this Court said in *Aguilar*. The Court there held that 18 U.S.C. § 2232(c) — a statute making it

---

[2] Of course, some civil and criminal prohibitions are expressly and properly tied to breaches of contractual or fiduciary obligations, but this is not such a case.

illegal for whoever has knowledge of a wiretap investigation to disclose that information in order to impede interception — was properly interpreted as covering the conduct of a federal judge who disclosed the existence of a wiretap. In so ruling, the Court considered whether the statute would violate the First Amendment if interpreted to punish disclosures occurring after the wiretap ended. 515 U.S. at 605. The Court said no.

But central to the ruling was the finding that § 2232's restrictions are limited to those who disclose wiretap information "in order to obstruct, impede, or prevent" the interception, and not generally. *Id.* at 605. It was on *this* basis that the Court held the statute does not violate the First Amendment. Only as a secondary point did *Aguilar* note "special duties of nondisclosure." *Id.* at 606. That statement should not be interpreted as a categorical endorsement of the principle that one obligation to avoid disclosure voids the First Amendment as to all others that might apply.

The Court in *Aguilar* stated that "[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on nondisclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." *Aguilar*, 515 U.S. at 606. It cited *Snepp v. United States*, 444 U.S. 507 (1980), for that proposition. But the *Snepp* Court held that confidentiality rules *themselves* may be subject to less stringent First Amendment standards, not that a government restriction that would otherwise be unconstitutional as applied in a particular

circumstance may be rendered constitutional due to less stringent standards born of a voluntary duty of nondisclosure. *See id.* at 507-08 (noting nondisclosure restrictions of CIA employment agreement are constitutional). *Snepp* is therefore analogous to an examination of the constitutionality of restrictions associated with Rule 9 of House Ethics Committee, not to the constitutionality of § 2511(1)(c). This Court should grant review to clarify that it did not intend to go further in *Aguilar*.

Moreover, an evaluation of § 2511(1)(c) in light of what Rule 9 of the House Ethics Committee permits does not makes sense because the two provisions serve different goals. The federal wiretapping statute was drafted to protect the privacy of those using electronic means of communication. In contrast, Rule 9 of the House Ethics Committee seeks to "protect the rights of individuals accused of misconduct, preserve the integrity of the investigative process, and cultivate collegiality among Committee members." Pet. App. at 139a (Report of the Investigative Subcommittee of the House Ethics Committee, Dec. 6, 2006 ("Committee Report") (quoting Report of Ethics Reform Task Force on H. Res. 168, 105th Cong., 1st Sess., at 10-11 (June 17, 1997))).

It follows that the application of the First Amendment to each of these laws or rules might differ considerably. And the agreement of a member of Congress to abide by one should not lightly be treated as a waiver of all constitutional protections vis-à-vis the other.

II. THE *EN BANC* DECISION VIOLATES THE SEPARATION OF POWERS

Review by this Court is also imperative in order to preserve the delicate balance of power between the legislature and the judiciary that underlies our constitutional system. In holding that petitioner could constitutionally be punished under § 2511(1)(c) because, in the court's estimation, he violated an internal House Rule, the D.C. Circuit disregarded more than a century of jurisprudence that circumscribes inviolable spheres of legislative activity and requires judges to exercise great caution before injecting themselves into internal legislative affairs.

This case is, at its core, a political dispute about the proper way to address Rep. McDermott's contentious disclosure to the general public of politically sensitive information implicating other members of Congress. Allies of respondent have already sought and obtained a resolution of that dispute in the political arena. They filed a complaint with the House Ethics Committee, which proceeded to investigate the allegations of misconduct and issue a Report on the matter that reflected a nuanced political compromise among competing interests. The Committee declined to charge Rep. McDermott with any violation or to impose any sanction whatsoever. Instead, the Committee cautiously concluded that "Representative McDermott's conduct . . . was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the

House Select Committee on Ethics." *See* Pet. App. 142a.

The Committee's deliberately crafted language reflects both the inherent ambiguity in applying a Rule that prohibits disclosing "evidence relating to an investigation" to Rep. McDermott's conduct in this case and the need to stake out a flexible, and politically viable, middle ground in the controversy. *Id.*, *see* Rule 9, Rules of the Committee on Standards of Official Conduct, U.S. House of Representatives, 104th Congress (1995-98). It also represents the final word on any claim for relief directly under the House Rules.

That final word on the applicability and implications of Rule 9 in this controversy is doubly deserving of judicial respect due to the unique composition and features of the Ethics Committee itself. It is the only Committee in the House of Representatives that is composed of an equal number of Democractic and Republican members. Moreover, the Committee tends to foster more deliberative decision-making than other House Committees, striving for — and most often achieving — unanimous or near-unanimous results. The Ethics Committee's findings in this case exemplify the type of politically nuanced outcome that the Committee's structure and process are designed to produce.

The fact that this case revolves around the controversial conduct of a Congressman that has been the subject of internal disciplinary proceedings does not mean, of course, that the courts cannot

enforce laws of general application governing that same conduct. *See, e.g. United States v. Rose*, 28 F.3d 181-90 (D.C. Cir. 1994). Yet in this arena, too, respondent Boehner has already obtained all the relief to which he was entitled. This Court made clear in *Bartnicki* that petitioner, standing on the same footing as any other citizen, could not constitutionally be punished under § 2511(1)(c) for disclosing truthful information on a matter of public concern when he himself was not involved in its unlawful interception. 532 U.S. 514 (2001).

Unsatisfied with these results, respondent persuaded the D.C. Circuit to give him a third bite at the apple by creating a hybrid theory of § 2511(1)(c) liability that requires the court affirmatively to reach into the legislative sphere, interpret ambiguous internal House Rules, and attach implications to political proceedings within the House that their participants could not have anticipated, much less sought. This outcome trenches on fundamental separation of powers principles. It must not be allowed to stand.

The historical reluctance of the courts to appoint themselves arbiters and enforcers of internal legislative rules reflects both a textual constitutional commitment and an institutional reality. The Rulemaking Clause in art. I, § 5, cl. 2 of the Constitution confers on each house of Congress the exclusive power to "determine the Rules of its Proceedings," and for good reason. *United States v. Ballin*, 144 U.S. 1, 5 (1892). Decisions concerning the process by which elected representatives make political decisions are themselves inherently

political. They are, in a very real sense, inseparable from the political substance of legislative activity. Based on this premise, courts have time and again rejected politicians' attempts to obtain in court the victories that eluded them on the House or Senate floor. In *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982), for instance, the court refused to impose on the House of Representatives its own interpretation of House Rules in order to declare that a statute was not validly enacted. The *Metzenbaum* court recognized that in passing the statute, the political majority had given its sanction not only explicitly to the legislation itself, but also implicitly to the process followed in its enactment. The court would not disregard the express constitutional commitment of rulemaking authority to the houses of Congress, nor show disrespect for the legislative branch of government by declaring the House of Representatives' understanding of its own rules erroneous. *Id.*

In matters that concern such purely internal political processes, House Rules are intended to be flexible and adaptive. *See* Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 726-27 (1989). Thus Congress may legitimately waive, ignore, or read out of existence a particular rule to accomplish its legislative business. Procedural rules cannot be treated as binding, enforceable norms and still retain their vital role in facilitating political compromise. Nor are they amenable to a single correct interpretation. That is why the courts have consistently refused to "interfere with the internal procedures of Congress." *Exxon Corp. v. FTC*, 589

F.2d 582, 590 (D.C. Cir. 1978). *See Ballin*, 144 U.S. at 3-9; *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-73 (1892); *Christoffel v. United States*, 338 U.S. 84, 88 (1949) ("Congressional practice in the transaction of ordinary business is of course none of [the Court's] concern . . .").

The decision below impermissibly invaded this constitutionally mandated sphere of congressional autonomy. This is not a case where the rights of persons *other* than members of Congress are jeopardized by Congress's alleged failure to follow its own procedures. *See Yellin v. United States*, 374 U.S. 109, (1963); *Christoffel*, 338 U.S. 84; *United States v. Smith*, 286 U.S. 6 (1932). Nor is this a situation where a court cannot assess the scope of a statutory prohibition except by reference to an internal House Rule. *See United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), *supplemented by*, 68 F.3d 489 (D.C. Cir. 1995); *United States v. Diggs*, 613 F.2d 988 (1979). The proscriptions of § 2511(1)(c) are set forth in the statutory language and the case law applying it. The D.C. Circuit's resort to the application of internal House Rules to circumvent this Court's holding in *Bartnicki* is thus, quite literally, without precedent.

The D.C. Circuit's approach is also flagrant in its disregard for the actual outcome of the House Ethics Committee's proceedings. The court's paean to the Committee's Report — "We agree with and accept the Ethics Committee's interpretation of the rules as applied to this case" — rings hollow for two reasons. *See* Pet. App. 13a. First, the court's pronouncement ratifies the incorrect notion that a court can attach

collateral consequences to internal legislative activity as long as it purportedly defers to the legislature's interpretation of its rules. Second, the court does not actually adopt the Ethics Committee's interpretation of the House Rules but instead re-interprets the Committee's Report to support the court's conclusion that Rep. McDermott violated the nondisclosure duty in Rule 9 — a conclusion the Committee itself pointedly refused to reach. In effect, the D.C. Circuit predicates its ultimate finding of liability on what it believes the Ethics Committee must have meant to say. Such substitution of a court's unequivocal judgment for a carefully crafted political compromise flies in the face of separation of powers principles.

This institutional encroachment must be resisted not only because it threatens to turn the judicial process into a political one by embroiling the courts in internecine congressional disputes, *see Moore v. United States House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984), but also — and equally importantly — because it threatens to turn the political process into a judicial one by converting malleable internal rules, and their flexible internal applications, into judicially enforceable norms. Giving binding force to internal legislative activity or attaching implications to congressional rules and procedures beyond the political arena would have a debilitating effect on the political process. Rather than engage in the admittedly messy push and pull of persuading their colleagues to adopt their views, disaffected members of Congress would focus on staking out better litigation positions. Yet the

courts, faced with a sharply limited universe of possible outcomes, are uniquely ill-suited to serve as the arbiter of such intrinsically political disputes. Congress must be able to conduct its legislative affairs, and to discipline its members, without fear that those members who are dissatisfied with the outcomes of the political process will seek to undermine it, and indeed to achieve a more permanent victory than the political process allows, in the nation's courts. That is exactly what has happened here, and this Court must grant the Petition for Certiorari to ensure that it does not happen again.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Elisabeth Genn
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

Paul M. Smith *
JENNER & BLOCK LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Amici
*Counsel of Record