No. ____

IN THE

Supreme Court of the United States

MARICOPA COUNTY, ET AL.
Petitioners,

v.

MANUELA VILLA,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 says that "the principal prosecuting attorney" of a state or locality may apply for an order authorizing the interception of wire, oral, or electronic communications. 18 U.S.C. § 2516(2). Does Title III allow a principal prosecuting attorney to delegate the task of applying for such an order to a subordinate?

PARTIES TO PROCEEDINGS BELOW

Maricopa County, the Maricopa County Board of Supervisors, and William Gerard Montgomery in his official capacity as Maricopa County Attorney (petitioners here) were defendants-appellees below.

Manuela Villa (respondent here) was plaintiff-appellant below.

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INTRODUCTION

Federal law says that "the principal prosecuting attorney" of a state or locality may apply for a wiretap order. 18 U.S.C. § 2516(2). In the decision below, the Ninth Circuit read this law to prohibit a principal prosecuting attorney from delegating the task of applying for wiretap orders to his subordinates. It accordingly invalidated an Arizona statute that allowed such delegations.

There are two compelling reasons to grant review. First, the Court should take the case to resolve a split over the question presented. Federal courts of appeals and state courts of last resort have divided over whether § 2516(2) allows delegations. Indeed, while the Ninth Circuit has ruled that the statute prohibits delegations, the Arizona Court of Appeals ruled that the statute allows them—leaving Arizona prosecutors subject to irreconcilable holdings on who may apply for wiretap orders.

Second, the Court should take the case to correct the Ninth Circuit's glaring error. This Court has long recognized a background presumption that executive officials may delegate their powers to their subordinates unless the statute granting the powers affirmatively says otherwise. The statute here does not affirmatively say otherwise. The Ninth Circuit's disregard of these principles upsets the federal-state balance by denying the states the ability to determine for themselves how to allocate authority among their executive officials. Making matters worse, the decision below imposes serious and unwarranted practical burdens on state and local prosecutors. The Court should grant the petition.

OPINIONS BELOW

The court of appeals' opinion is reported at 865 F.3d 1224. The district court's opinion is unreported, but is available at 2015 WL 11118113.

JURISDICTION

The court of appeals entered judgment on August 2, 2017. 1a. It denied a petition for panel rehearing and rehearing en banc on September 14, 2017. 51a–52a. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2516(2) of Title 18 of the United States Code provides:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping

> human trafficking, child sexual exploitation, child pornography production,, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Section 13-3010(A) of the Arizona Revised Statutes provides in relevant part:

> On application of a county attorney, the attorney general or a prosecuting attorney whom a county attorney or the attorney general designates in writing, any justice of the supreme court, judge of the court of appeals or superior court judge may issue an ex parte order for the interception of wire, electronic or oral communications * * * .

STATEMENT OF THE CASE

A. Legal Background

1. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 regulates interception of wire, oral, and electronic communications. It provides that "the principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof," may apply for a judicial order authorizing the interception of such communications, if authorized by state law to do so. 18 U.S.C. § 2516(2).

Title III requires wiretap applications to satisfy specified substantive and procedural requirements. For example, state and local officials may use wiretaps only when investigating particular offenses (such as murder, kidnapping, child sex crimes, robbery, and drug dealing). *Id.* They may resort to wiretaps only when "normal investigative procedures" have failed or are too dangerous to try. § 2518(3). And wiretap applications must contain, among other details, a "statement of the facts and circumstances" upon which the applicant relies "to justify his belief that an order should be issued." § 2518(1).

Federal law severely punishes people who violate these requirements. In some circumstances, a violation is a federal felony. § 2511(1). In addition, a victim of a violation may seek damages and equitable relief. § 2520(b). Finally, fruits of violations are inadmissible in court. § 2515. But "good faith reliance" on "a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization" is "a complete defense against any civil or criminal action" under the statute. § 2520(d).

2. Arizona has adopted its own statute governing wiretap orders. Under this law, "a county attorney, the attorney general, *or a prosecuting attorney whom a county attorney or the attorney general designates in writing*," may apply for a wiretap order. Ariz. Rev. Stat. § 13-3010(A) (emphasis added). Arizona's courts have explained that this statute authorizes the County Attorney (the "principal prosecuting attorney" of the county) to "delegate" the task of applying for wiretap orders to his subordinates. *State* v. *Verdugo*, 883 P.2d 417, 420 (Ariz. App. 1993).

B. Facts

Maricopa County is the fourth-most populous county in the United States. The county contains 4 million people—almost two-thirds of the population of the State of Arizona. The Maricopa County Attorney's Office is one of the largest and busiest prosecutorial offices in the nation.

In November 2011, the Maricopa County Attorney, petitioner William Montgomery, gave his Deputy County Attorneys written authorization to apply for wiretap orders (and amendments and extensions to those orders) as part of criminal investigation CWT-412. 4a. A Deputy County Attorney accordingly submitted applications for, and a state court granted, orders to wiretap thirty-two target telephone lines. 5a–6a. On eight occasions in December 2011 and January 2012, Maricopa County officers, acting in accordance with these judicial orders, intercepted and recorded conversations between Manuela Villa (respondent here) and her daughter. 6a.

C. Proceedings Below

1. Respondent sued Maricopa County, the Maricopa County Board of Supervisors, and the Maricopa County Attorney (petitioners here) in federal district court, asserting jurisdiction under 28 U.S.C. § 1331. As relevant here, she argued that the interception of her telephone communications violated Title III because it was the County Attorney's delegate, rather than the County Attorney himself, who signed the application for the wiretap order.

The district court granted petitioners' motion to dismiss. The court held that Title III permits a principal prosecuting attorney to delegate to a subordinate the task of making a wiretap application, at least where he does so "on a case by case basis" and after "personally review[ing]" the application. 38a. The district court ruled that the County Attorney had fulfilled these requirements. The County Attorney thus had "sufficient involvement" in the applications to comply with federal law. 40a.

2. Respondent appealed. The Ninth Circuit (in an opinion by Judge Fletcher) rejected the district court's analysis, but ultimately granted petitioners immunity because they acted in good faith.

The Ninth Circuit began with the premise that § 2516(2) embodies an "anti-delegation" or "centralization" requirement. 15a. In the court's view, "the purpose of § 2516(2) is to ensure that a publicly responsible official subject to the political process personally approves a wiretap application." 15a. "The intent of § 2516(2)" "is to provide for the centralization" of wiretap policy "in the chief prosecuting officer." 15a. Delegations would defeat this policy.

The court then explained how its "anti-delegation" rule would work in practice. It ruled that the principal prosecuting attorney must at a minimum "indicate, as part of the application process," that he is "personally familiar" with the relevant facts and that he has made a "personal judgment" that an order should be issued. 19a. It would not be enough for the principal prosecuting attorney simply "to state that he or she is generally aware of the criminal investigation" and then to authorize a deputy to make the application. 19a.

The Ninth Circuit concluded that the Maricopa County officials had fallen short of these requirements, and that the Arizona state wiretap statute "is preempted." 25a. Even though the district court had ruled that the County Attorney had *in fact* reviewed the wiretap application personally, the Ninth Circuit faulted him for failing to "indicate" in his application that he had done so. 19a.

Still, the Ninth Circuit continued, Title III protects any defendant from a claim for damages if he acts in "good faith reliance" on "a court order" or "a statutory authorization." 24a (quoting § 2620(d)). Here, petitioners relied on a state court's "orders" authorizing the challenged wiretaps and on "the statutory authorization" contained in the state wiretap statute. 24a.

The Ninth Circuit therefore affirmed the district court's judgment, but awarded costs to respondent. 25a. Petitioners sought panel rehearing and rehearing en banc, but the Ninth Circuit denied their request. 52a. They then filed this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. This Case Raises An Important Question That Has Divided Appellate Courts

The question presented has divided the Arizona Court of Appeals (which has upheld delegation) from the Ninth Circuit (which has struck it down). The question presented has also divided federal and state appellate courts more broadly. This Court's review is needed to resolve this split concerning important criminal-law and federalism issues.

A. The Ninth Circuit and the Arizona Court of Appeals have reached conflicting decisions about the validity of Arizona's wiretap statute

This Court has explained that direct conflict between federal and state appellate courts in the same state is a particularly urgent reason to grant review. *Yee* v. *City of Escondido*, 503 U.S. 519, 537–38 (1992); *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994). This case features just such a conflict about the validity of the provision of Arizona law that says that "a prosecuting attorney whom a county attorney or the attorney general designates in writing" may apply for a wiretap order. Ariz. Rev. Stat. § 13-3010(A).

On the one hand, the Ninth Circuit has invalidated this provision. It has held that § 2516(2) embodies an "anti-delegation" or "centralization" rule. 15a. It has insisted that a principal prosecuting attorney complies with this provision only if he personally reviews the facts and forms a judgment about whether a wiretap order is justified. 19a. And it has accordingly concluded that Arizona's delegation provision "is preempted by" federal law. 25a.

On the other hand, the Arizona Court of Appeals has upheld the very same provision. It has expressly "disagree[d]" with the argument "that the Arizona statute cannot lawfully permit the principal prosecuting attorneys … to delegate their authority to others." *Verdugo*, 883 P.2d at 420. It has concluded that, so far as § 2516(2) is concerned, "delegation of authority" is a matter "of state law." *Id.*

This means that state and federal courts in Arizona now disagree over the lawfulness of the very same searches. From now on, every time a Deputy County Attorney exercises delegated authority to apply for a wiretap order, he could introduce the fruits of the wiretap in state court, but he could not turn those fruits over to federal agents to introduce in federal court. Similarly, the defendant's motion to suppress the evidence would fail in state court, but (for wiretaps authorized after the Ninth Circuit's opinion below) his civil lawsuit over the interception would succeed in federal court.

To be sure, the Arizona Supreme Court has not addressed the question presented; only the Arizona Court of Appeals has. Even so, the conflict warrants this Court's attention. Decisions of the Arizona Court of Appeals have "statewide application," binding "*all* trial courts in the state." *State* v. *Patterson*, 218 P.3d 1031, 1036 (Ariz. App. 2009). A conflict with the Arizona Court of Appeals is thus just as serious, and just as worthy of this Court's review, as one with the Arizona Supreme Court. *See, e.g.*, *DirecTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 467–68 (2015) (granting review where "the Ninth Circuit" and "the California Court of Appeal" had reached "opposite conclusion[s]" on "precisely the same interpretive question").

B. Federal and state appellate courts have reached conflicting decisions about whether § 2516(2) allows delegations

More broadly, the question presented has divided federal courts of appeals and state courts of last resort across the country. Leaving aside the Ninth Circuit and Arizona, one circuit and two states allow delegations, two states forbid delegations, and two circuits and one state lie somewhere in between.

1. The Second Circuit, Delaware, and Massachusetts generally allow delegations.

Second Circuit. The Second Circuit has upheld a New York statute that "permits delegation of the authority to seek" wiretap orders. *United States* v. *Fury*, 554 F.2d 522, 527 n.4 (CA2 1977) (citing N.Y. CPL § 700.05). It has also (in a cross-jurisdictional case) upheld a "New Jersey county prosecutor's delegation of authority" to apply for a wiretap order. *Alexander* v. *Harris*, 595 F.2d 87, 88 (CA2 1979) (*per curiam*). It has explained that "the issue of delegation" is "a question of state law." *Fury*, 554 F.2d at 527 n.4.

Delaware. The Delaware Supreme Court has upheld a statute that "permits delegation of the wiretap authorization." *State* v. *Marine*, 464 A.2d 872, 877 (Del. 1983). The court agreed that § 2516 "leaves the matter of delegation up to state law." *Id.* at 877.

Massachusetts. The Massachusetts Supreme Judicial Court has upheld a statute that permits "delegation of authority" to apply for wiretaps. *Commonwealth* v. *Vitello*, 327 N.E.2d 819, 837 (Mass. 1975). It, too, reasoned that § 2516(2) leaves "the issue of delegation" to "state law." *Id.* at 838.

2. Meanwhile, Kansas and Minnesota generally forbid delegations.

Kansas. The Kansas Supreme Court has ruled that § 2516(2) "allows no … delegation of wiretap order applications by 'the principal prosecuting attorney,'" and that the federal statute "preempt[s]" any contrary reading of the state wiretap law. *State* v. *Bruce*, 287 P.3d 919, 924 (Kan. 2012). Or, as it put the point in an earlier case: "We do not think delegation of state authority to apply for wiretaps … comports with congressional intent." *State* v. *Farha*, 544 P.2d 341, 404 (Kan. 1975).

Minnesota. The Minnesota Supreme Court has ruled that "the responsibilities vested in the persons designated in [§ 2516(2)] could not be delegated to anyone," and that accordingly no one "other than the 'principal prosecuting attorney'" may exercise "the power to initiate an electronic surveillance." *State* v. *Frink*, 206 N.W.2d 664, 674 (Minn. 1973).

3. Finally, the First Circuit, Fifth Circuit, and Florida have taken intermediate positions—in fact, three different intermediate positions.

First Circuit. The First Circuit has upheld Massachusetts' wiretap statute, which allows delegation. *United States* v. *Smith*, 726 F.2d 852, 858 (CA1 1984) (*en banc*). In doing so, however, it stressed that the state statute (as interpreted by the state supreme court) allowed only "case by case" delegations made after "full examination by the [principal prosecuting] attorney of the application." *Id.* at 857–58. The court suggested in *dicta* that a challenge to the statute "would have formidable force" in the absence of these safeguards. *Id.* at 857.

Fifth Circuit. The Fifth Circuit has upheld a Florida law that allows the Governor to apply for wiretaps. *United States* v. *Pacheco*, 489 F.2d 554, 562 (CA5 1974). It held that a principal prosecuting attorney may delegate powers upwards to a "superior," but did not address whether he could also delegate powers downwards to a subordinate. *Id.* at 562 n.14.

Florida. The Florida Supreme Court has stated in *dicta* that § 2516(2) does not allow "unlimited" delegation, but does allow "narrowly confined" delegations "when the [principal prosecuting] attorney is absent for an extended period of time." *State* v. *Daniels*, 389 So.2d 631, 636 (Fla. 1980).

* * *

Commentators have recognized this split. One of them has written that "courts have varied in their answers" to the delegation question; some "hold that a state court wiretap order issued on the application of a subordinate prosecutor is invalid," some "have concluded that state wiretap statutes can validly allow … subordinate prosecutors to apply for wiretap orders," and some "have taken intermediate approaches." Kevin Sali, "Challenging State Wiretaps," *The Champion* 42, 43–44 (March 2015) www.salilaw.com/images/March2015Champion.pdf.

This conflict, which has festered since the 1970s and which continues to crop up today, has shown no signs of clearing itself up. Indeed, in this very case, the Ninth Circuit denied Maricopa County's petition for en banc rehearing, thus turning down the opportunity to alleviate the split. This conflict will not go away on its own; only this Court's intervention can resolve it.

C. This split involves a sufficiently important issue to warrant this Court's review

The question presented is important. Four decades ago, this Court granted certiorari to decide whether § 2516(1)—the companion provision that governs *federal* investigations—allows the Attorney General to delegate wiretap matters to *his* subordinates. *United States* v. *Giordano*, 416 U.S. 505 (1974). If the issue of delegation at the federal level is important enough issue to justify certiorari, so is the issue of delegation at the state and local levels.

Indeed, at least 23 states have enacted laws that expressly allow (or have been interpreted to allow) subordinate prosecutors to apply for wiretap orders.* If delegations were impermissible, all of these state laws would be invalid, and a "significant number of wiretap orders" would be "vulnerable to attack." Sali 42. The question presented thus has sufficiently widespread consequences to warrant this Court's review.

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* Alaska Stat. § 12.37.010; Ariz. Rev. Stat. § 13-3010; Cal. Penal Code § 629.50; Colo. Rev. Stat. § 16-15-102; Del. Code tit. 11, § 2405 (as interpreted in *State* v. *Marine*, 464 A.2d 872, 876–78 (Del. 1983)); Haw. Rev. Stat § 803-44; La. Rev. Stat. Ann. § 15:1308(A); Ind. Code § 35-33.5.2-1; Mass. Gen. Law. ch. 272, § 99(F); N.H. Rev. Stat. § 570-A:7; N.Y. CPL § 700.05; N.C. Gen. Stat. § 15A-291; N.J. Stat. § 2A:156A-8; N.D. Cent. Code § 29-29.2-02; Ohio Rev. Code § 2933.53; Okla. Stat. tit. 13, § 176.9(G); Or. Rev. Stat. § 133.724; 18 Pa. Cons. Stat. § 5708; R.I. Gen. Laws § 12-5.1-2; S.C. Code § 17-30-70; S.D. Codified Laws § 23A-35A-3; Utah Code § 77-23a-8; Va. Code § 19.2-66; W. Va. Code § 62-1D-8.

II. The Ninth Circuit Seriously Erred

Even putting aside the split on the question presented, this Court should grant review so that it can correct the Ninth Circuit's plain error. Nothing in § 2516(2) precludes a state prosecutor from delegating to a subordinate the task of applying for a wiretap. The Ninth Circuit's contrary decision warrants correction because it wrongly invalidates a state law, improperly encroaches on state sovereignty, and places severe practical burdens on law enforcement.

A. The decision below is wrong

The Ninth Circuit's decision is plainly wrong.

First, background legal principles establish that § 2516(2) allows delegations. This Court has held that, where a statute grants authority to an executive official, the official may presumptively "delegate [that] function" to a subordinate unless the statute affirmatively provides otherwise. *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947). That is why (for example) the President and cabinet secretaries need not personally perform all of the duties vested in their offices, but may instead delegate these tasks to their inferiors. This presumption of delegability reflects the norm that an executive principal "speaks and acts through" his subordinate agents, and that the acts of the subordinates are "in legal contemplation" the acts of their superior. *Wilcox* v. *Jackson*, 13 Pet. 498, 513 (1839). The presumption of delegability also reflects the practical reality that "it is impossible for a single individual"—an "overburdened principal"—"to perform in person all the duties imposed on him by his office." *Parish* v. *United States*, 100 U.S. 500, 504 (1879).

This Court has also held that a federal statute presumptively does not interfere with a state's power to determine "the structure of its government" and "the character of those who exercise government authority," unless the statute contains a "clear statement" to the contrary. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460–61 (1991). The power to decide who may exercise government power is one of "the most fundamental" elements of sovereignty, and is "obviously essential to the independence of the States." *Id.* at 460. No court should presume that Congress has taken the "extraordinary" step of interfering with this core sovereign power unless Congress has made its intention to do so "unmistakably clear in the language of the statute." *Id.*

Section 2516(2) simply provides: "The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof … may apply … for … an order authorizing … the interception of wire, oral, or electronic communications." The statute does not say that the principal prosecuting attorney must perform this function personally, or that he may not delegate the task to his subordinates. Thus, the statute does not contain the affirmative language necessary to overcome the presumption of delegability. Even more obviously, the statute does not contain the *unmistakably clear* language necessary to overcome the federalism clear-statement rule.

In sum, viewed against the backdrop of established principles of interpretation, § 2516(2) allows state prosecutors to delegate wiretapping matters as they see fit.

Second, the legislative history of § 2516(2) confirms that the statute allows delegations. The Senate Report on the bill says explicitly: "[Section 2516(2)] provides that the principal prosecuting attorney … may authorize an application … *The issue of delegation by that officer would be a question of State law.*" S. Rep. No. 1097, 90th Cong. 2d Sess. 98 (1968) (emphasis added).

For those who use legislative history to interpret statutes, this committee report should carry great weight. Committee reports represent "the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia* v. *United States*, 469 U.S. 70, 76 (1984). They are thus "more authoritative" than other forms of legislative history. *Id.* Here, the Senate Report shows that the legislators who drafted and studied Title III intended exactly what background principles of statutory interpretation tell us to presume that they intended: Section 2516(2) allows states to decide for themselves whether prosecutors may delegate to their subordinates the task of applying for wiretaps.

Even for those who do not normally consult legislative history, the Senate Report remains relevant. As just discussed, Congress may interfere with the sovereignty of the states only if it makes its intention unmistakably clear in the language of the statute. But how can anyone claim that Congress has expressed an "unmistakably clear" intention to *prohibit* delegations, when intelligent readers at the time of the statute's enactment (namely, the people who wrote the Senate Report) read the law to *allow* delegations?

Third, *Giordano* reinforces this analysis. There, this Court considered whether the provision of Title III on *federal* wiretaps allows delegations. The Court ruled that the federal provision forbids certain types of delegations, but simultaneously made clear that the state provision allows delegations.

The Court began with the "general" presumption that statutes that confer executive powers also permit delegation of those powers. 416 U.S. at 514. It continued that the federal provision overcomes this presumption because it "expressly addresses" "the matter of delegations." *Id.* The federal provision says that the Attorney General "or any Assistant Attorney General … specially designated by the Attorney General" may authorize an application. § 2516(1). The Court read the quoted language to permit delegations to an Assistant Attorney General, but not to anybody else. 416 U.S. at 516.

The United States responded that, because the *state* provision "leaves the matter of delegation up to state law," it would have been anomalous for the *federal* provision to "confine the authority so narrowly." *Id.* at 522–23. The Court accepted the premise of this argument; indeed, it approvingly quoted the Senate Report's statement that "the issue of delegation … would be a question of State law." *Id.* at 522 n.11. The Court simply rejected the notion that it would be anomalous to create a dual system whereby delegations are allowed at the state level but forbidden at the federal level. The Court explained that "Congress desired to centralize and limit [wiretap] authority where it was feasible to do so, *a desire easily implemented in the federal establishment*." *Id.* at 523 (emphasis added).

Giordano's reasoning matters here in two ways. In the first place, *Giordano* endorsed the "general" presumption of delegability, holding that this general presumption applies to Title III's wiretap provisions. The federal-wiretap provision could overcome this general presumption only because it "expressly addressed" "the matter of delegation." *Id.* at 514. The state-wiretap provision, however, does not expressly address the matter of delegations. Under *Giordano*'s reasoning, then, the general presumption of delegability must control.

In the second place, *Giordano* took it for granted that Title III freely allows delegation at the state level. Indeed, it quoted the Senate Report's statement that such delegation is permissible, and it took pains to explain why things work differently at the federal level. This Court's understanding of the statute in *Giordano* further underscores the severity of the Ninth Circuit's error here.

B. The decision below warrants correction

This error warrants correction. *First*, the Ninth Circuit has wrongly invalidated a state law. This Court engages in error-correction even "in cases involving only individual claims"; "much more is that appropriate when what is at issue is the total invalidation of a state-wide law." *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996) (*per curiam*). Indeed, the Court "often review[s] decision[s] striking down state laws, even in the absence of disagreement among lower courts." *Maricopa County* v. *Lopez-Valenzuela*, 135 S. Ct. 428 (statement of THOMAS, J.). There is all the more reason to do so here, where there *is* disagreement among the lower courts.

Second, the Ninth Circuit's decision intrudes into the heartland of state sovereignty preserved by the Tenth Amendment. This Court has emphasized that "a State is entitled to order the processes of its own governance." *Alden* v. *Maine*, 527 U.S. 706, 752 (1999). "It is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2673 (2015).

Any effort to "displace a State's allocation of governmental power and responsibility" thus "strikes at the heart" of the federal system that is "essential to our liberty and our republican form of government." *Alden*, 527 U.S. at 751. Such interference with core state authority may well violate the Constitution. *Id.*

In this case, Arizona has decided to allocate the power to apply for wiretaps both to County Attorneys and to subordinates designated by those County Attorneys. It would be bad enough for *Congress* to interfere with this sovereign decision about the proper allocation of state power. Here, however, it is *the Ninth Circuit* that has taken the extraordinary step of telling Arizona how to organize its prosecutors' offices. That decision encroaches upon "the integrity, dignity, and residual sovereignty" of Arizona (*Bond* v. *United States*, 564 U.S. 211, 221 (2011))—not to mention the States of Alaska, California, Hawaii, and Oregon, all of whose statutes likewise allow subordinate prosecutors to make wiretap applications. The Court should take up this case so that it can reverse this unwarranted intrusion upon state sovereignty.

Third, the Ninth Circuit's decision imposes unwarranted burdens on law enforcement.

The Maricopa County Attorney is a busy man with myriad responsibilities. He is elected to serve a county of 4 million people—a larger population than 24 out of the 50 states. He oversees the county's criminal prosecutions—around 30,000 of them each year. He oversees the county's civil litigation. He issues advisory opinions to county officers on their official duties. He provides legal advice to the county's board of supervisors, sheriff, treasurer, and superintendent of schools. He supervises an office that comprises half a dozen separate divisions, more than two dozen separate bureaus, and nearly 1,000 employees. *See* www.maricopacountyattorney.org.

It will often be impracticable for the Maricopa County Attorney to review every single wiretap application in person. For example, in 2014, judges in Maricopa County issued 56 wiretap orders (counting amendments and extensions). U.S. Courts, *Wiretap Report 2014*, Table 2. In each such case, the Ninth Circuit's rule would require the County Attorney to review and understand an affidavit that may span 50 to 75 pages. It would then require him to reach a personal judgment about whether the application meets each of the statutory criteria—probable cause to believe that a crime has been committed, probable cause to believe that an interception would reveal communications concerning the crime, inadequacy of normal investigative procedures, and so on. This work may seem manageable in isolation, but it can quickly become unmanageable when piled atop everything else that the County Attorney must do.

Moreover, the burden is particularly severe because prosecutors must often act very quickly when applying for a wiretap order, amendment, or extension. Prosecutors may find out in the morning that Smith has just dumped his old phone and picked up a new one, leaving just a few hours to assemble an application and to secure a judicial order. It will often be impracticable for the Maricopa County Attorney, a busy elected official, to drop all of his other public duties and to attend to the wiretap application with the necessary speed.

And these are just the problems that arise while the County Attorney is present and available. Sometimes, however, the County Attorney will not be available—he may be sick, or on vacation, or traveling overseas. Under the Ninth Circuit's anti-delegation rule, however, *nobody* may apply for a wiretap in such circumstances.

These practical obstacles will compromise the important work of law enforcement in Maricopa County and the other jurisdictions covered by the Ninth Circuit's ruling. Wiretap evidence is "one of the most persuasive pieces of evidence that can be presented to a jury." Kyle G. Grimm, *The Expanded Use of Wiretap Evidence in White-Collar Criminal Prosecutions*, 33 Pace L. Rev. 1146, 1147 (2013). It is often "crucial to the investigation and prosecution of large criminal conspiracies." Michael Goldsmith & Kathryn Ogden Balmforth, *The Electronic Surveillance of Privileged Communications*, 64 S. Cal. L. Rev. 903, 906 (1991). Interposing unwarranted administrative obstacles in the way of getting wiretap orders thus makes it needlessly hard for law enforcement to perform an essential function.

III. The Court Should Grant Review Despite The Ninth Circuit's Ruling That Petitioners Are Immune From The Claim For Damages

Even though the Ninth Circuit ruled that delegations violate § 2516(2), the court went on to hold that petitioners are immune from respondent's claim for damages because they acted in "good faith." 24a. Respondent may argue that petitioners thus *prevailed* in the Ninth Circuit, and accordingly have no right to seek review in this Court. But any such argument would be wrong.

1. In *Camreta* v. *Greene*, 563 U.S. 692 (2011), this Court ruled that it may entertain a petition filed by a state official who loses on the merits of a plaintiff's § 1983 claim but prevails on a defense of qualified immunity. So too here, the Court should entertain a petition filed by state entities who have lost on the merits of a plaintiff's claim but who have prevailed on a defense of good-faith immunity.

In *Camreta*, the Court held that neither Article III nor the federal certiorari statute prevents it from hearing petitions brought by parties who lose on the merits but win on immunity. A "prevailing" party can still satisfy Article III so long as he "retains the necessary personal stake in the appeal," and a state official retains such a stake where the appellate court's ruling tells him "either [to] change the way he performs his duties or risk a meritorious damages action." *Id.* at 703. In addition, the certiorari statute "confers unqualified power on this Court to grant certiorari 'upon the petition of *any* party'"—language that "covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below." *Id.* at 700 (quoting 28 U.S.C. § 1254(1)).

The critical question is instead simply whether, "as a matter of practice and prudence," the Court *should* consider a case at the behest of a prevailing party. *Id.* at 703. *Camreta* explained that the Court *should* do so, where the "prevailing" party has prevailed only on an immunity defense but has lost on the merits of the plaintiff's claim. The Court explained that a "ruling preparatory to a grant of immunity creates law that governs the official's behavior." *Id.* at 708. The ruling confronts the official with two choices: "He must either acquiesce in a ruling he had no opportunity to contest in this Court, or defy the views of the lower court, adhere to practices that have been declared illegal, and thus invite new suits and potential punitive damages." *Id.*

The same logic governs this case. The Ninth Circuit's merits ruling "creates law that governs the official's behavior." (The Ninth Circuit has explained that "where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion"—as the panel did here—"that ruling becomes the law of the circuit." *United States* v. *Johnson*, 256 F.3d 895, 914 (CA9 2001) (*en banc*).) The ruling confronts prosecutors in Maricopa County with two choices. They "must either acquiesce in a ruling [they] had no opportunity to contest in this Court, or defy the views of the lower court, adhere to practices that have been declared illegal, and thus invite new suits and potential punitive damages." In light of the Ninth Circuit's ruling in this case, they likely could not claim good-faith immunity in those new cases. *Camreta* says that no state official should be put to such a choice.

2. Even putting *Camreta* aside, the Ninth Circuit' decision to award costs to respondent rather than to petitioners (*see* 25a) provides an independent basis for this Court's review.

Normally, a federal court must award costs to the party that prevails on appeal. Fed. R. App. P. 39(a). In this case, however, the Ninth Circuit awarded costs to respondent Villa, even though it affirmed the district court's judgment in *petitioners'* favor. This cost award necessarily rested on the Ninth Circuit's ruling that petitioners had violated respondent's rights under the wiretap statute; in the absence of that ruling, there would have been no justification whatever for ordering petitioners to pay costs.

The Ninth Circuit's costs award further underscores this Court's authority to review this case. The award confirms that the Ninth Circuit's ruling about the lawfulness of delegations was not a mere dictum or a bare statement in an opinion; the ruling was, instead, the basis for ordering petitioners to pay a sum of money to the respondent. Even without *Camreta*, this Court unquestionably may review such a ruling.

3. The procedural wrinkles just discussed should not deter the Court from granting review. If they did, the Ninth Circuit's gravely erroneous decision would in effect be insulated from this Court's review forever; the resulting intrusion upon state sovereignty and encumbrance upon law enforcement would stand indefinitely, without petitioners' ever having any opportunity to contest that ruling in this Court.

To elaborate: Officials who violate Title III face severe penalties—not just civil liability, but, in some circumstances, criminal liability too. § 2511(1), (4). As a practical matter, they will have no choice but to follow the Ninth Circuit's decision and to refrain from making any delegations. Even though state laws and state court decisions allow the officials to delegate their authority to their subordinates, few if any officials would be willing to risk ruinous civil liability (and, perhaps, even criminal prosecution) by following state laws and decisions. In short, officials will be forced to acquiesce in the Ninth Circuit's decision, and will likely never again have an opportunity to contest the ruling in this Court.

The Court should not tolerate such a result. It should instead grant this petition and, ultimately, reverse the Ninth Circuit's decision.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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