APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MANUELA VILLA, *Plaintiff-Appellant,* v. MARICOPA COUNTY; MARICOPA COUNTY BOARD OF SUPERVISORS; WILLIAM GERARD MONTGOMERY, Maricopa County Attorney, *Defendants-Appellees.*	No. 15-15460 D.C. No. 2:14-cv-01681-DJH OPINION

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Argued and Submitted February 13, 2017
San Francisco, California

Filed August 2, 2017

Before: William A. Fletcher and Johnnie B. Rawlinson, Circuit Judges, and Robert W. Pratt,[*] District Judge.

Opinion by Judge W. Fletcher

[*] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

OPINION

W. FLETCHER, Circuit Judge:

Law enforcement officials in Maricopa County intercepted and recorded eight conversations between Plaintiff Manuela Villa and her daughter in 2011 and 2012. The target phone number over which Villa's conversations were intercepted belonged to neither Villa nor her daughter. The wiretap application was authorized by Maricopa County Attorney William G. Montgomery, but the application was made by Deputy County Attorney Jennifer Brockel. Before making the application, Brockel personally reviewed a lengthy supporting affidavit. Montgomery did not review the affidavit supporting the application.

After Villa learned that her conversations had been intercepted, she brought a would-be class action against County Attorney Montgomery, the Maricopa County Board of Supervisors, and Maricopa County ("Defendants"), alleging that portions of the Arizona wiretapping statute, as well as the county's practices adopted in reliance on the statute, were preempted by and violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. ("Title III"). Villa also alleged that her Fourth Amendment rights had been violated.

The district court concluded that Arizona's wiretapping statute and practices thereunder were not preempted by, and did not violate, Title III. The court dismissed Villa's suit in its entirety under Federal Rule of Civil Procedure 12(b)(6). The court did not discuss Villa's Fourth Amendment claim. Villa has appealed only the court's adverse rulings on her Title III claims.

We hold that Villa lacks Article III standing to seek injunctive or declaratory relief on behalf of herself or a putative class, but that she has standing to pursue individual damages. On the merits, we hold that Ariz. Rev. Stat. § 13-3010(A), as applied by Maricopa County officials, is preempted by Title III, and that Villa's rights under 18 U.S.C. § 2516(2) were violated because applications for wiretaps were not made by the "principal prosecuting attorney." We hold, further, that Ariz. Rev. Stat. § 13-3010(H) is not preempted by Title III if it is construed to require that recordings of intercepted conversations be submitted to a court for sealing within ten days of the termination of the court's order authorizing a wiretap on each particular target line. However, Villa's rights under 18 U.S.C. § 2518(8)(a) were violated because the recordings of her intercepted conversations were submitted for sealing more than a month after the termination of the order authorizing the wiretap on the target line on which her conversations were intercepted. Finally, we hold that because the law enforcement officials who violated §§ 2516(2) and 2518(8)(a) were acting in good faith within the meaning of 18 U.S.C. § 2520(d), they are protected from a damage judgment. We therefore affirm, though on different grounds, the decision of the district court.

I. Background

The following narrative is taken from Villa's complaint and from documents to which the complaint refers. We take as true the complaint's plausible and properly pleaded allegations, which we summarize here. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009).

On November 9, 2011, Deputy County Attorney Jennifer Brockel submitted an application for an order permitting wiretapping of four cell phones as part of a criminal investigation designated CWT-412. The application included three documents.

The first document was the application itself, dated November 9, 2011, and signed under oath by Deputy County Attorney Brockel. The preface to the application recited, "WILLIAM G. MONTGOMERY, the duly elected and qualified Maricopa County Attorney, by his appointed and authorized Deputy County Attorneys of Maricopa County, Jennifer Brockel and/or Vanessa Losicco and/or Jeffery Beaver and/or Tony Novitsky, being duly sworn, deposes and says: . . . ." Paragraph V of the application recited further, "That he, WILLIAM G. MONTGOMERY, designated in writing that Deputy County Attorneys of Maricopa County, Jennifer Brockel and/or Vanessa Losicco and/or Jeffery Beaver and/or Tony Novitsky, has authority pursuant to A.R.S. § 13-3010(A) to make further applications for amendments or extensions of the Order authorizing interception of communications." Brockel stated in the application that she had read a sworn affidavit signed by several detectives, that there was probable cause to believe that there had been and would be violations of specific provisions of Arizona criminal law, that there was probable cause to believe that electronic interception would provide evidence of these crimes, that other investigative techniques had been tried and failed, and that further pursuit of other investigative techniques would be unlikely to succeed or would be dangerous. The application requested that the Maricopa County Attorney, the Phoenix Police

Department, or the Drug Enforcement Administration or their representatives be authorized to engage in interception. The application sought a court order authorizing wiretaps on four specified targeted telephone numbers ("Target Lines 1–4"), used by two named persons. County Attorney Montgomery did not sign the application.

The second document was a lengthy affidavit dated November 9, 2011, signed under oath by three Phoenix Police Department detectives, to which Brockel referred in her application.

The third document was an authorization to apply for wiretaps, dated the day before, November 8, 2011, and signed under oath by County Attorney Montgomery. In the document, Montgomery authorized "Jennifer Brockel and/or Vanessa Losicco and/or Jeffery Beaver and/or Tony Novitsky, Deputy Maricopa County Attorneys, to make application on my behalf for an Ex Parte Order for interception of telephonic . . . communications relating to" a list of specific offenses "which have been, are being, and will continue to be committed by" three named persons the targets of the wiretap, and "other known and unknown co-conspirators." The caption of the document listed the four target lines specified in Brockel's application. The document also listed three named persons, two of whom are specified in Brockel's application as using Target Lines 1–4. Nowhere in the document did Montgomery state that he had personally reviewed any evidence supporting an application for a wiretap.

On November 9, 2011, a judge of the Maricopa County Superior Court signed an order authorizing wiretaps for thirty days on Target Lines 1–4. Between

November 18, 2011, and February 8, 2012, as part of investigation CWT-412, the same judge signed fourteen additional orders authorizing wiretaps on an additional twenty-eight target lines.

On November 23, 2011, Brockel applied for and obtained a wiretap order authorizing a wiretap for thirty days on Target Line 9, a line used by Hugo Gabriel Armenta-Castro. Armenta-Castro was one of the three persons specified in Montgomery's November 8 authorization and Brockel's November 9 application. The telephone number for Target Line 9 was specified neither in Montgomery's authorization nor in Brockel's initial application. The wiretap on Target Line 9 was later extended for thirty days in an order dated December 21, 2011, based on a further application by Brockel.

On eight occasions on December 12, 2011, and January 8, 2012, Villa's conversations with her daughter over Target Line 9 were intercepted and recorded by Maricopa County officers. All of the recordings of the intercepted communications for the thirty-two target lines in investigation CWT-412 were submitted to the Arizona Superior Court for sealing on March 1, 2012.

II. Standard of Review

We review *de novo* a district court's dismissal for failure to state a claim pursuant to Rule 12(b)(6). *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1040 (9th Cir. 2011). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S.

662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

III. Standing

Villa seeks statewide declaratory and injunctive relief on behalf of herself and the class she seeks to represent. She alleges standing to seek such prospective relief on two grounds — as a taxpayer in Arizona, and as an individual whose conversations were intercepted in violation of federal law. We hold that Villa lacks Article III standing to pursue either form of prospective relief. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir. 2011) (a plaintiff "must show standing with respect to each form of relief sought"). Because Villa herself lacks Article III standing to pursue this relief, she cannot represent a plaintiff class seeking such relief. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044–45 (9th Cir. 1999) (en banc).

For standing to seek prospective relief based on taxpayer status, Villa alleges that she is a resident of Maricopa County and that she pays taxes "in the state of Arizona." She does not explicitly so state, but we infer that she pays both state and county taxes. She further alleges that "defendants are using state and county taxes to investigate, detain, prosecute and imprison persons based on communications obtained from illegal wiretaps." Villa's status as a taxpayer does not confer standing to seek prospective relief against Defendants. In *Asarco Inc. v. Kadish*, 490 U.S. 605 (1989), the Supreme Court held that a state taxpayer must allege "'direct injury,' pecuniary or otherwise" to have taxpayer standing under Article III. *Id.* at 613–14 (quoting *Doremus v. Bd. of*

Education, 342 U.S. 429, 434 (1952)). We see no reason why the standing analysis in a non-establishment clause case should be different for a county taxpayer challenging an allegedly illegal act of the county. *Compare Flast v. Cohen*, 392 U.S. 83 (1968); *Everson v. Bd. of Education*, 330 U.S. 1 (1947). Villa's allegation that her taxes have been used to finance Maricopa County officials who have "intercept[ed] communications in violation of Title III," is an insufficient allegation of direct injury within the meaning of *Asarco*.

For standing for prospective relief based on interception of her communications, Villa alleges that eight conversations were illegally intercepted in 2011 and 2012. The wiretap that intercepted these conversation has been terminated. Villa does not allege that she is more likely than any other member of the public to have her future conversations illegally intercepted. In order to have Article III standing to seek prospective relief, Villa must allege either "continuing, present adverse effects" due to her exposure to Defendants' past illegal conduct, *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974), or "a sufficient likelihood that [s]he will again be wronged in a similar way." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983). The allegations in Villa's complaint satisfy neither of these criteria. *See id.* at 105–106.

Although Villa lacks Article III standing to pursue prospective relief on her own behalf or on behalf of a class, she does have Article III and statutory standing to seek individual damages for past interception of her communications. Title III provides, "[A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in

violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2520(a). Relief under Title III includes actual, statutory, and punitive damages. *Id.* § 2520(b)(2), (c).

IV. Merits

Villa contends that two provisions of Title III preempt two provisions of Arizona's wiretapping statute, and that Defendants violated these two provisions of Title III. First, 18 U.S.C. § 2516(2) authorizes only the "principal prosecuting attorney" of a state or its political subdivision to apply to state courts for a wiretap order. The complaint alleges that County Attorney Montgomery, acting pursuant to Ariz. Rev. Stat. § 13-3010(A), improperly delegated to Deputy County Attorney Brockel the authority that he, as the "principal prosecuting attorney," was required to exercise. Second, 18 U.S.C. § 2518(8)(a) requires that "[t]he contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter" be recorded, and that the recording be submitted to the authorizing court "[i]mmediately upon the expiration of the period of the order, or extensions thereof." The complaint alleges that Brockel, ostensibly acting under Ariz. Rev. Stat. § 13-3010(H), did not timely submit the recordings of Villa's conversations to the Superior Court that authorized the wiretap.

A. Preemption and Title III

Title III sets forth minimum procedural requirements for state and federal orders authorizing wiretapping. These requirements are a floor, not a

ceiling. States may choose to enact wiretapping statutes imposing more stringent requirements, or they may choose to forego state-authorized wiretapping altogether. "[S]tates are 'free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.'" *State v. Verdugo*, 883 P.2d 417, 420 (Ariz. Ct. App. 1993) (quoting S. Rep. No. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2187); *see also United States v. Marion*, 535 F.2d 697, 702 (2d Cir. 1976) ("But whether the proceedings be federal or state, interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III."); *Sharpe v. State*, 350 P.3d 388, 390 (Nev. 2015) ("[S]tates were allowed to adopt their own wiretap laws, as long as they were at least as restrictive as federal legislation."); *State v. Serrato*, 176 P.3d 356, 360 (Okla. Crim. App. 2007) ("Under . . . Title III, a state wiretapping law can never be less restrictive than federal law."); *State v. Rivers*, 660 So.2d 1360, 1362 (Fla. 1995) ("[T]he federal wiretap statute envisions that States would be free to adopt more restrictive legislation . . . but not less restrictive legislation." (citation and internal quotation marks omitted)); *People v. Teicher*, 425 N.Y.S.2d 315, 321 n.3 (N.Y. App. Div. 1980) ("It was intended that the minimum standards contained in the Act be binding on the states."); *State v. Hanley*, 605 P.2d 1087, 1091 (Mont. 1979) ("If a state chooses to allow electronic surveillance by adopting a statutory scheme, the scheme must be at least as or more restrictive than the regulations of Title III."); *State v. Farha*, 544 P.2d 341, 348 (Kan. 1975) ("If a state wiretap statute is more permissive than the federal act, any wiretap

authorized thereunder is fatally defective and the evidence thereby obtained is inadmissible under 18 U.S.C. § 2515.").

Courts have articulated different standards for determining whether state wiretapping statutes are "less restrictive legislation" and therefore preempted by Title III. The Supreme Court of Kansas has held that state officials must follow the federal statute to the letter in obtaining admissible wiretaps. *See, e.g., State v. Bruce*, 287 P.3d 919, 924–25 (Kan. 2012) (declining to adopt court-specified parameters governing the delegation of application authority to assistant attorney generals and thus finding Kansas law preempted by Title III). The Supreme Court of Rhode Island has characterized Title III as "preempt[ing] the field in wiretap," and has held that state courts must adhere closely to the limitations on the use of intercepted communications articulated in Title III. *Pulawski v. Blais*, 506 A.2d 76, 77 (R.I. 1986).

Other state courts have taken a more flexible approach. Most prominently, the Supreme Judicial Court of Massachusetts has held that a state wiretapping statute is not preempted by Title III so long as it is "substantially similar in design and effect to the Federal enactment." *Commonwealth v. Vitello*, 327 N.E.2d 819, 835 (Mass. 1975). Arizona courts have relied on *Vitello* in determining whether state wiretap provisions are "sufficiently compatible" with Title III. *See State v. Politte*, 664 P.2d 661, 669 (Ariz. Ct. App. 1982) (holding provisions in Ariz. Rev. Stat. § 13-3010 were not preempted because they were "sufficiently compatible with the federal [statute] or . . . the statute as a whole would ensure sufficient

compliance with the federal standards" and further holding any divergent provisions "were ministerial or reporting requirements which would not lead to preemption even if different than the federal law").

In *United States v. Smith*, 726 F.2d 852 (1st Cir. 1984) (en banc), the First Circuit, reviewing wiretap procedures in Massachusetts under *Vitello*, discussed at length the standard by which a state's wiretapping procedures are to be assessed under Title III. The *Smith* court described the "basic presuppositions" of Title III as follows:

> that the objectives of federal legislation controlling electronic surveillance are to protect privacy, to establish uniform standards not only on a federal level but in a state or county governing the authorization of interceptions, and to ensure adherence to these standards through centralizing responsibility in top level state and county prosecutors who can be held accountable for departures from preestablished policy; and that, so long as federal standards are not jeopardized or eroded, state regulation is not proscribed but rather specifically contemplated.

Id. at 856. In order to ensure that "federal standards are not jeopardized or eroded," the First Circuit asked whether state procedural protections under the statute were "equal to those required under Title III," or, in the words of *Vitello*, quoted in *Smith*, whether state procedural protections were "in substantial compliance with the federal law." *Id.* at 856, 861, 857 (quoting *Vitello*, 327 N.E.2d at 825). Reviewing not only the Massachusetts statute, but also the judicial interpretation of that statute by the Supreme Judicial

Court, the First Circuit upheld the wiretap procedures in Massachusetts as consistent with Title III. *Id.* at 863.

We agree with the approach taken by the First Circuit. We do not insist that the procedures set forth by state statute literally follow or perfectly mimic the provisions of Title III. Rather, so long as the state wiretapping statute, considered as a whole and as interpreted by state courts, is in substantial compliance with, and is therefore equal to, Title III, state wiretaps are permitted.

B. 18 U.S.C. § 2516(2) and "Principal Prosecuting Attorney"

Title III provides, "The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof . . . may apply" for an order authorizing a wiretap interception. 18 U.S.C. § 2516(2). An application by such "principal prosecuting attorney" must include, *inter alia*, a "full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense . . . , (ii) . . . a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, [and] (iv) the identity of the persons, if known, committing the offense and whose communications are to be intercepted," § 2518(1)(b); "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried

or to be too dangerous," § 2518(1)(c); and a "full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application . . . ," § 2518(1)(e). Based on the information provided by the applicant, the judge must determine whether "there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular [crime]," § 2518(3)(a); whether "there is probable cause for belief that particular communications concerning that offense will be obtained through such interception," § 2518(3)(b); and whether "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," § 2518(3)(c).

Arizona Revised Statutes § 13-3010(A) provides:

> 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.

Under Arizona law, the designated "prosecuting attorney" may provide the "full and complete statements" required under § 2518(1). Ariz. Rev. Stat. § 13-3010(B).

Villa contends that the principal-prosecuting-attorney provision of 18 U.S.C. § 2516(2) conflicts with Arizona law, which allows delegation of the power to apply for wiretap orders to a "prosecuting attorney." We agree.

The purpose of § 2516(2) is to ensure that "a publicly responsible official subject to the political process" personally approves a wiretap application. *United States v. King*, 478 F.2d 494, 503 (9th Cir. 1973) (quoting S. Rep. No. 90-1097, 1968 U.S.C.C.A.N at 2185). Just as the designation of "the principal prosecuting attorney of any State" who is "empowered to authorize interceptions" under § 2516(2) is a matter of state law, so is "[t]he issue of delegation by that officer." S. Rep. No. 90-1097, 1968 U.S.C.C.A.N. at 2187. However, any state statute authorizing wiretapping "must meet the minimum standards reflected as a whole in" Title III. *Id.* As relevant here, state statutes that authorize delegation must respect the intent of § 2561(2), which "is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State . . . [or] the next political level of a State, usually the county." *Id.* The anti-delegation, or centralization, requirement is a "significant safeguard for the general public" and "not [a] mere technicalit[y]." *King*, 478 F.2d at 503, 505.

Our decision in *King* dealt with a wiretap conducted by federal officials, to whom Title III applies according to its precise terms. In assessing whether wiretapping by state officials comports with Title III and its centralization requirement, we ask whether the state law's delegation provisions, as interpreted and applied, "achiev[e] the required centralized accountability." *Smith*, 726 F.2d at 856; *see also United States v. Tortorello*, 480 F.2d 764, 777 (2d Cir. 1973); *United States v. Pacheco*, 489 F.2d 554, 562 (5th Cir. 1974). That is, we ask whether the state

procedures are "in substantial compliance with the federal law," and therefore "equal to those required under Title III." *Smith*, 726 F.2d at 857, 861 (quoting *Vitello*, 327 N.E.2d at 825).

The text of § 13-3010(A) closely resembles the text of the Massachusetts statute at issue in *Vitello* and later upheld, as applied, in *Smith*. The Massachusetts statute provided, "The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications." Mass. Gen. Laws Ann. ch. 272, § 99(F)(1); *Smith*, 726 F.2d at 857.

However, the First Circuit in *Smith* did not hold that the bare text of the Massachusetts statute complied with Title III. Indeed, it strongly implied that the broad delegation authorized by the Massachusetts statute, standing alone, did not comply and was therefore preempted by § 2516(2). *See Smith*, 726 F.2d at 857 ("If this were the complete statutory framework, appellants' arguments would have formidable force."). The First Circuit concluded the Massachusetts statute was consistent with § 2561(2) only because the Massachusetts Supreme Judicial Court had previously read limitations into the delegation authorized under the statute. In *Vitello*, the Supreme Judicial Court had imposed a "detailed judicial gloss in the nature of a set of required procedures" on this statute. *Id.* This gloss included "specific requirements" that (1) "an assistant district attorney . . . bring the matter for examination before his senior officer, the district attorney"; (2) "the

district attorney . . . determine whether a particular proposed use of electronic surveillance would be consistent with the overall policy" by way of a "full examination . . . of the application"; and (3) the district attorney "authorize each such application in writing." *Smith*, 726 F.2d at 857–58 (quoting *Vitello*, 327 N.E.2d at 819).

Arizona courts have not read into the Arizona statute limitations comparable to those read into the Massachusetts statute in *Vitello*. In the case before us, County Attorney Montgomery authorized four named Deputy County Attorneys, including Brockel, to apply for wiretaps in connection with investigation CWT-412. Montgomery's authorization listed four telephone numbers and three named persons using those numbers, but Montgomery did not state that he was personally familiar with any evidence providing probable cause that would justify a wiretap on any of those numbers or persons. Nor did he state that he knew that other investigative techniques had failed in the past and were likely to fail or be dangerous in the future. The next day, Deputy County Attorney Brockel filed an application, signed under oath, for a wiretap on the four telephone numbers specified in Montgomery's authorization. Brockel attached a lengthy sworn affidavit by three Phoenix Police Department detectives, that she attested to having read, providing probable cause to support the requested wiretaps and showing the failure of other investigative techniques.

In *Verdugo*, the Arizona Court of Appeals, relying on the decision of the Massachusetts Supreme Judicial Court in *Vitello*, held that a wiretap authorized by delegated authority pursuant to Ariz. Rev. Stat.

13-3010(A) complied with § 2516(2). 883 P.2d at 420. The procedures by which the wiretap order in that case was obtained are very similar to the procedures in the case before us. In *Verdugo*, the County Attorney signed a document authorizing Deputy County Attorneys to apply for a wiretap. *Id.* Thereafter, a Deputy County Attorney applied for a wiretap, stating in his application that he had read affidavits establishing probable cause, and that investigative techniques other than wiretapping had been tried and had failed. *Id.* at 421. When the wiretap was later challenged in a motion to suppress in a criminal case, the County Attorney filed an affidavit "in which he stated that he decides the county's policy on wiretap investigations, including when to seek court approval." *Id.* The County Attorney "noted" in the affidavit "that before the application [in *Verdugo*] was filed, his deputy had informed him of the agency seeking the order, the crimes expected to be uncovered, the general background of the investigation and the reason for a wiretap request, and the resources to be used in the investigation." *Id.* In *Verdugo*, as in the case before us, the County Attorney nowhere stated — in his initial authorization or in his affidavit later filed in court — that he had personally reviewed the supporting affidavits or otherwise learned their contents.

We are willing to assume that the procedures followed in the case before us are identical to those in *Verdugo*, including the procedure described in the County Attorney's affidavit filed in resistance to the suppression motion. We hold that such procedures are not in substantial compliance with the principal-prosecuting-attorney requirement of § 2516(2).

We hold that, when a wiretap application is filed by a state, substantial rather than literal compliance with Title III is required. However, substantial compliance with Title III requires that the principal prosecuting attorney indicate, as part of the application process, that he or she is personally familiar with all of "the facts and circumstances" justifying his or her "belief that an order should be issued." 18 U.S.C. § 2518(1)(b). Section 2516(2) tells us that it is the "principal prosecuting attorney" who "may apply" for a wiretap order. Section 2518 tells us what information must be in the application of the principal prosecuting attorney and what the issuing judge must find based on the information provided. These "facts and circumstances," specified in § 2518(1)(b), are at the core of the protections provided by Title III.

It is therefore not sufficient for the principal prosecuting attorney to state that he or she is generally aware of the criminal investigation, that he or she authorizes a deputy to seek wiretaps, and that his or her deputy has been authorized to review and present to the court the evidence in support of the wiretaps. As we wrote in *King*, describing the principal-prosecuting-attorney requirement of Title III: "The Congress wanted each application passed upon by one of the highest law enforcement officials in the government[.] . . . The Congress expected them to exercise judgment, personal judgment, before approving any application." 478 F.2d at 503.

County Attorney Montgomery did not indicate, as part of the process of applying for the wiretap orders in this case, that he was himself familiar with the

relevant facts and circumstances and that he had himself made the judgment that an application for a wiretap was justified. We therefore conclude that the applications for the two judicial orders authorizing a wiretap on Target Line 9 violated Title III.

C. 18 U.S.C. § 2518 and Sealing

Title III provides, "Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." 18 U.S.C. § 2518(8)(a). Arizona Revised Statutes § 13-3010(H) provides, "Within ten days after the termination of the authorized interception, the recordings shall be made available to the judge who issued the order and shall be sealed under the judge's directions."

Villa contends that the sealing requirement of § 2518(8)(a) conflicts with Arizona law as applied in her case. We agree.

Neither the federal nor the state sealing requirement is quite as clear as might at first appear. With respect to § 2518(8)(a), we have held that "immediately upon the expiration" does not really mean "immediately." Rather, it "means 'within one or two days.'" *United States v. Reed*, 575 F.3d 900, 913 (9th Cir. 2009) (quoting *United States v. Pedroni*, 958 F.2d 262, 265 (9th Cir. 1992)). Moreover, the Supreme Court has held that recordings not turned over for sealing "immediately" are not *per se* inadmissible. Late-sealed recordings may be admitted, provided that the government "explain . . . why a delay occurred [and] also why it is excusable." *United States v. Ojeda Rios*, 495 U.S. 257, 265 (1990). A delay beyond one or two days thus does not necessarily result in exclusion;

rather, it "calls for explanation." *Reed*, 575 F.3d at 913 (quoting *Pedroni*, 958 F.2d at 265). However, deliberate delay is not a "satisfactory explanation." *Ojeda Rios*, 495 U.S. at 264.

With respect to § 13-3010(H), the date of termination "of the authorized interception" (the triggering date for the ten days within which the recording must be submitted for sealing) has not, in practice, meant the interception of a particular telephone line. In *Arizona v. Salazar-Rosas*, CR2012-006372-040 DT (Ariz. Sup. Ct., Oct. 18, 2013), criminal defendants moved to suppress conversations intercepted during investigation CWT-412 (the investigation in the case before us). In a decision denying the motion, the Arizona Superior Court wrote that the uniform practice in Arizona for more than twenty years had been to submit for sealing within ten days of the termination of the entire criminal investigation rather than within ten days of the termination of interception of particular target lines. However, the court declined to rule on the legality of this practice under § 13-3010(H). That is, it declined to decide whether the triggering date under § 13-3010(H) is the termination of the entire investigation or the termination of interception on a particular line. *See also Arizona v. Valadez- Sandoval*, CR2012-141355-005 DT (Ariz. Sup. Ct., Nov. 1, 2013) (same). In the appeal now before us, Defendants represented to the federal district court that the long-standing Arizona practice was abandoned sometime in 2014, and that recordings of intercepted conversations are now submitted within ten days of the termination of interception orders on particular target lines.

We conclude that allowing a ten-day period after termination of an interception order on a particular target line under Ariz. Rev. Stat. § 13-3010(H), as apparently now practiced by Arizona officials, does not substantially undermine the purpose of § 2518(8)(a). That purpose "is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance. . . . [T]he seal is a means of ensuring that subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded." *Ojeda Rios*, 495 U.S. at 263; *see also* S. Rep. No. 90-1097, at 2193 ("Paragraph (8) sets out safeguards designed to insure that accurate records will be kept of intercepted communications."). We recognize that any delay in submitting recordings allows an opportunity for tampering, but we do not regard a ten-day delay as significantly different from the delay allowed for federal wiretaps under Title III. We therefore conclude that a ten-day grace period after the termination of an interception on a particular telephone line, plus a possible extension of that period based on a sufficient explanation for lateness as permitted by the Court in *Ojeda Rios*, is in substantial compliance with § 2518(8)(a).

However, the long-standing practice that was still in effect when the recordings of Villa's intercepted conversations were submitted for sealing was not in substantial compliance with § 2518(8)(a). Under that practice, county officials submitted recordings of intercepted conversations for sealing only at the conclusion of an entire criminal investigation. In the case before us, the recordings of all intercepted calls were submitted to the Superior Court for sealing on

March 1, 2012. That court had issued an order on November 9, 2011, authorizing wiretaps of Target Lines 1–4 for thirty days, and no extension order was entered for those lines. Thus, more than two-and-a-half months passed between the termination of the order and the submission of the recordings for sealing. For Target Line 9, the line at issue in this case, the court issued a thirty-day extension order on December 21, 2011, and no further extension order was granted. Thus, over a month passed between the termination of the extension order and the submission for sealing. The Supreme Court in *Ojeda Rios* emphatically rejected an argument that would have permitted the government to "delay requesting a seal for months, perhaps even until a few days before trial." 495 U.S. at 263. Such a delay, the Court made clear, was fatally inconsistent with Congress's intent to minimize the possibility of tampering. Taking our cue from *Ojeda Rios*, we conclude that the long-standing Arizona practice, still in effect when Villa's conversations were submitted for sealing, did not substantially comply with § 2518(8)(a). *See United States v. Hermanek*, 289 F.3d 1076, 1085–87 (9th Cir. 2002) (sealing requirement of § 2518(8)(a) is triggered by the expiration of an intercept order for a particular phone number, not investigation as a whole). That is, the practice of waiting until the conclusion of an entire criminal investigation before submitting recordings of intercepted conversations for sealing was preempted by, and violated, § 2518(8)(a).

V. Relief

Title III provides that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may

in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2520(a). That relief includes actual, statutory, and punitive damages. *Id.* § 2520(b)(2), (c). For the reasons given above, Villa does not have standing to seek prospective relief against Maricopa County or its officials, but she does have standing to seek individual damages. However, Title III protects a defendant who has acted in good faith: "A good faith reliance on . . . a court . . . order . . . or a statutory authorization . . . is a complete defense against any civil or criminal action brought under this chapter or any other law." *Id.* § 2520(d).

Villa's rights under Title III were violated in two respects, but both violations were in good faith within the meaning of § 2520(d). First, the application for an interception order was not made by the "principal prosecuting attorney," as required by § 2516(2). But the application by Deputy County Attorney Brockel was made pursuant to the statutory authorization of Ariz. Rev. Stat. § 13-3010(A), and the interception of communications on Target Line 9 was made pursuant to Superior Court orders. Second, the submission for sealing on March 1, 2012, was made more than ten days after the termination of the order authorizing interception on Target Line 9 because the submission was made only at the completion of the entire criminal investigation, of which the wiretapping of Target Line 9 was a part. The submission for sealing at the conclusion of investigation CWT-412 may or may not have been in compliance with Ariz. Rev. Stat. § 13-3010(H). But it was done in accordance with a consistent and long-standing practice previously

approved by Arizona courts. We therefore conclude that Villa may not recover damages for violations of her rights under §§ 2516(2) and 2518(8)(a).

Conclusion

We hold that Ariz. Rev. Stat. § 13-3010(A), as applied by Maricopa County officials, is preempted by 18 U.S.C. § 2516(2), and that Villa's rights under § 2516(2) were violated by the interception of her communications on Target Line 9. We further hold that Ariz. Rev. Stat. § 13-3010(H), if interpreted to require submission for sealing within ten days of the termination of a wiretap authorization for each target line, is not preempted by § 2518(8)(a). However, the recordings of Villa's intercepted communications were not submitted for sealing within ten days of the termination of the authorization for Target Line 9, resulting in a violation of § 2518(8)(a). Finally, we hold that Villa is not entitled to prospective relief on behalf of herself or the would-be class because she lacks Article III standing, and that she may not recover individual damages because Defendants are protected by the good faith provision of § 2520(d).

Costs on appeal to be assessed against Defendants/Appellees.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuela Villa, Plaintiff, v. Maricopa County, et al., Defendants.	No. CV-14-01681-PHX-DJH **ORDER**

This matter is before the Court on Defendants' Motion to Dismiss (Doc. 8).[1] Plaintiff has filed a Response (Doc. 14) and Defendants have filed a Reply (Doc. 19).[2] In addition, Plaintiff has filed a Notice of Supplemental Authority (Doc. 20).

I. Background

Plaintiff initiated this action on July 25, 2014 by filing a Complaint for Injunctive and Declaratory Relief (Doc. 1). Plaintiff filed the action "to enjoin the Maricopa County attorney from allowing subordinate Deputy County Attorneys to authorize and apply for

[1] The named defendants are Maricopa County, the Maricopa County Board of Supervisors, and Maricopa County Attorney William G. Montgomery. (Doc. 1 at 3-4).

[2] Plaintiff has requested an oral argument. The Court denies the request because the issues have been fully briefed and oral argument will not aid the Court's decision. *See* Fed.R.Civ.P. 78(b) (court may decide motions without oral hearings); LRCiv 7.2(f) (same).

orders of interception of communications pursuant to A.R.S. § 13-3010 and to require that the Maricopa County Attorney follow the procedures for sealing wiretaps set forth in Title III."[3] (Doc. 1 at 1). Plaintiff alleges that Title III sets forth minimum standards for authorizing and applying for orders of interception, and for sealing recordings of intercepted communications. Plaintiff claims that Arizona's statutory scheme for conducting these activities, as set forth in A.R.S. § 13-3010, is unconstitutional, both facially and as applied, because it fails to comport with the requirements in Title III. Plaintiff contends she has standing to assert these claims because "her communications were intercepted pursuant to a wiretap issued by a Maricopa County Superior Court judge and she is a taxpayer whose tax dollars are being used to pay for these wiretaps and the investigation, prosecution and incarceration of individuals whose communications have been illegally intercepted." (Doc. 1 at 2).

Defendants' motion to dismiss does not challenge Plaintiff's standing. In addition to her assertions of standing, Plaintiff also cites to 18 U.S.C. § 2520(a). That statute authorizes any person whose wire, oral or electronic communication is intercepted to seek recovery in a civil action. Appropriate relief may include equitable or declaratory relief, damages, and attorney's fees and costs. 18 U.S.C. § 2520(b).

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[3] Though not indicated, "Title III" presumably means Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510 *et seq*, which regulates the interception of wire, electronic and oral communications.

Accordingly, the Court finds Plaintiff has standing to assert her claims.

Plaintiff also alleges this case satisfies the prerequisites for a class action under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Plaintiff claims the proposed class members "number in the thousands" and consist of Maricopa County taxpayers who object to the allegedly unlawful method of intercepting communications, and all persons whose communications have been intercepted in Maricopa County pursuant to A.R.S. § 13-3010. Plaintiff contends that her claims and the proposed class members' claims "raise common questions of law and fact concerning whether A.R.S. § 13-3010 is unconstitutional either facially or as applied pursuant to the preemption doctrine." (Doc. 1 at 5).

In the "Statement of Facts" section, Plaintiff asserts that 18 U.S.C. § 2516(2) allows a "principal prosecuting attorney" to apply for an order of interception of communications in conformity with 18 U.S.C. § 2518 and the corresponding state statute that authorizes such interceptions. (Doc. 1 at 6). Plaintiff further asserts that A.R.S. § 13-3010(A) permits certain state court judges to issue an order of interception after receiving an application from the county attorney or a prosecutor designated by the county attorney in writing. (*Id.*). Plaintiff contends that Title III does not provide for delegation of authority to deputy county attorneys.

Plaintiff alleges that upon information and belief, the wiretap order pursuant to which her conversations were intercepted was issued pursuant to the standard procedures followed by the Maricopa County

Attorney's Office ("MCAO") and the Maricopa County Superior Court. (Doc. 1 at 6). Plaintiff contends that each wiretap investigation is assigned a "CWT" number by the Superior Court and all applications for interceptions, requested extensions, modifications, orders, and other related documents are filed under that CWT number. (*Id.*). Plaintiff alleges that initial applications for wiretaps, supporting affidavits and proposed orders are prepared by the deputy county attorneys and investigating officers involved in the case. (*Id.* at 7). Appended to an application is an authorization document, signed by the principal prosecuting attorney (i.e. the county attorney), which grants authority to one or more deputy county attorneys to submit the application on behalf of the county attorney, and submit any subsequent applications for modification, amendment or extension of wiretap orders as may become necessary in the investigation. (*Id.*). Plaintiff claims that the authorization document "may indicate that the county attorney is aware of the persons, phone numbers and criminal charges that are referenced in the initial application." (*Id.*). According to Plaintiff, subsequent applications in a particular investigation contain no authorization document and are submitted by deputy county attorneys. (*Id.*).

Plaintiff next asserts that 18 U.S.C. § 2518(8) requires recordings of intercepted communications to be made available to the issuing judge and sealed at the judge's direction immediately upon the expiration of the order of interception or any extension thereof. (Doc. 1 at 7-8). Plaintiff states that under the statute, the seal is a prerequisite for the use or disclosure of the contents of any intercepted communications. (*Id.*

at 8). The sealing provision in the Arizona wiretap statute, A.R.S. § 13-3010(H), allows the recording to be submitted to the issuing judge within ten days of the "termination of the authorized interception." (*Id.*). Plaintiff contends that the Arizona statute does not require sealing as a prerequisite for the use or disclosure of the intercepted communications. (*Id.*). Plaintiff alleges that under current procedures followed in Maricopa County Superior Court, the deputy county attorneys assigned to a wiretap investigation do not submit the recorded communications for sealing until the last order of interception in the investigation expires. (*Id.*). Thus, according to Plaintiff, because an investigation may span many months and include numerous orders of interception, recorded communications may remain unsealed for days or months after the orders authorizing the interceptions have expired. (*Id.*).

Regarding the wiretap investigation relevant to her, Plaintiff alleges that on November 9, 2011, a deputy county attorney applied to the Maricopa County Superior Court for an order of interception for communications from four cell phones. (Doc 1 at 9). A judge granted the application and assigned a CWT number. (*Id.*). An authorization was attached to the application that stated County Attorney William G. Montgomery granted authority to four named deputy county attorneys to make an application on his behalf for an order to intercept telephonic communications, and any further applications for modification, extension or amendment as may be necessary in connection with the investigation. (*Id.*).

On November 23, 2011, Plaintiff alleges the same deputy county attorney who applied for the initial

order, applied for and was granted another order of interception under the same CWT number. (Doc. 1 at 9). An extension of this order of interception was granted by the judge on December 21, 2011. (*Id.*). Plaintiff alleges her communications were intercepted on eight occasions on December 12, 2011 and January 8, 2012 while she was using a phone number included in the November 23 wiretap order and the subsequent extension. (Doc. 1 at 10). Plaintiff claims that, all told, 14 separate orders for interception encompassing 32 telephone lines were issued for the wiretap investigation, which was terminated on March 1, 2012. (*Id.*). Plaintiff alleges "on information and belief" that all of the recordings of intercepted communications in this investigation were submitted en masse for sealing on March 1, 2012, even though the 14 interception orders had expired on various dates throughout the investigation. (*Id.*). Plaintiff further alleges the recordings were not actually sealed until May 25, 2012. (*Id.*).

Based on these factual allegations, Plaintiff asserts three causes of action. In Count One, Plaintiff alleges A.R.S. § 13-3010 conflicts with the requirements of Title III. (Doc. 1 at 10-11). Plaintiff alleges A.R.S. § 13-3010(A) unlawfully permits the county attorney to delegate his authority to apply for an order of interception to a deputy county attorney, in violation of 18 U.S.C. §§ 2516(2) and 2518. Plaintiff also alleges that A.R.S. § 13-3010(H) unlawfully allows up to ten days to submit recordings of intercepted communications to the judge for sealing, and that the practice of waiting until the investigation is complete before submitting any recordings is unlawful.

In Count Two, Plaintiff alleges a violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983. (Doc. 1 at 11). Plaintiff claims that A.R.S. § 13-3010 and the practices set forth in Count One violate her right to protection from unreasonable searches and seizures under the Fourth Amendment. In Count Three, Plaintiff alleges her communications were unlawfully intercepted in violation of Title III, for which she is entitled to statutory damages pursuant to 18 U.S.C. § 2520. (Doc. 1 at 12).

For relief, Plaintiffs seeks class action designation, declaratory and injunctive relief, statutory damages, and attorneys' fees and costs. (Doc. 1 at 12-13).

II. Discussion

A. Legal Standards for Failure to State a Claim Under Rule 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). A complaint must contain a "short and plain statement showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). "All that is required are sufficient allegations to put defendants fairly on notice of the claims against them." *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). The Rule 8 standard reflects a presumption against rejecting complaints for failure to state a claim and, therefore, motions seeking such relief are disfavored and rarely granted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248-49 (9th Cir. 1997). Rule 8, however, requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678(2009)

(citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

In addition, the Court must interpret the facts alleged in the complaint in the light most favorable to the plaintiff, while also accepting all well-pleaded factual allegations as true. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). That rule does not apply, however, to legal conclusions. *Iqbal*, 129 S.Ct. at 1949. A complaint that provides "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Nor will a complaint suffice if it presents nothing more than "naked assertions" without "further factual enhancement." *Id.* at 557.

When considering a motion to dismiss, a district court "consider[s] only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). A court may, however, "consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned." *Id.* (citations omitted).

B. Application

Defendants seek dismissal of the Complaint with prejudice. Defendants argue that Arizona's statute authorizing ex parte orders for interception of communications, A.R.S. § 13-3010, is constitutional and comports with the requirements of Title III. (Doc. 8 at 1-2). Defendants further argue that Plaintiff has improperly named the Maricopa County

Board of Supervisors, a non-jural entity,[4] as a defendant, and that Maricopa County is an improper defendant because it does not control the Maricopa County Attorney. (*Id.* at 2). Defendants further contend that the State of Arizona should be joined as a necessary party because Plaintiff is challenging the constitutionality of a state statute. (*Id.*).

In the response, Plaintiff argues that A.R.S. § 13-3010(A), "which allows the county attorney to appoint deputy county attorneys to make applications for wiretaps and extensions thereof on his behalf, is facially unconstitutional and unconstitutional as applied by the county attorney in violation of 18 U.S.C. § 2516(2)." (Doc. 14 at 2). Plaintiff further argues that A.R.S. § 13-3010(H), "which allows the state to submit the recordings of the intercepted oral communications up to 10 days after the termination of the authorized interception and does not condition admissibility of the intercepted communications on timely sealing, is also facially unconstitutional and unconstitutional as applied by the county attorney in violation of 18 U.S.C. § 2518(8)."[5] (*Id.*).

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[4] Defendants cite no authority for their contention that the Board of Supervisors is a non-jural entity that cannot be sued. (Doc. 8 at 11 n.8). Courts in this District have repeatedly held otherwise. *See Mendiola-Martinez v. Arpaio*, 2012 WL 5868890, *1 (Nov. 19, 2012) (holding the Maricopa County Board of Supervisors is a jural entity subject to suit and citing five other District of Arizona cases that held the same). Regardless, whether the Board of Supervisors is a jural entity is not determinative here.

[5] As the notes to A.R.S. § 13-3010 indicate, this statute has been in place since 1972. It was renumbered as § 13-3010 in 1977. The provision authorizing a prosecuting attorney whom a

1. Relevant Provisions of Title III and A.R.S. § 13-3010

The portions of Title III relevant to Plaintiff's allegations are 18 U.S.C. §§ 2516(2) and 2518(8). Section 2516(2) permits the "principal prosecuting attorney" of a county, if authorized by state statute, to apply to a state court judge for an order authorizing or approving the interception of wire, oral or electronic communications. The judge may grant the request "in conformity with section 2518 of this chapter and with the applicable State statute." 18 U.S.C. §§ 2516(2).

Section 2518(8) provides that any recordings of the contents of intercepted communications must "[i]mmediately upon the expiration of the period of the order, or extensions thereof," be made available to the judge who issued the order and sealed under the judge's directions. In addition, "[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents" of the intercepted communications. 18 U.S.C. §§ 2518(8).

The corresponding Arizona statute governing wiretap orders, A.R.S. § 13-3010, provides that "a county attorney, the attorney general or a prosecuting

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county attorney or the attorney general designates in writing to apply for a wiretap order was added in a 1988 amendment. Likewise, a 1988 amendment changed the time to submit the recordings of the intercepted oral communications from "immediately" to "ten days" after the termination of the authorized interception. A.R.S. § 13-3010 (Historical and Statutory Notes). Thus, the specific portions of the statue Plaintiff finds objectionable have been in place since 1988.

attorney whom a county attorney or the attorney general designates in writing" may apply for a wiretap order. A.R.S. § 13-3010(A). In addition, § 3010(H) provides that any recordings of the contents of intercepted communications must "within ten days after the termination of the authorized interception," be made available to the judge who issued the order and sealed under the judge's directions. A.R.S. § 13-3010(H). Custody of the recordings must be maintained pursuant to court order, but the seal is not a prerequisite for the use or disclosure of the contents of the intercepted communications. *See id.*

2. Designation of Deputy County Attorneys for Wiretap Applications

Defendants argue that the portion of the Arizona statute authorizing "a prosecuting attorney whom a county attorney or the attorney general designates in writing" to apply for a wiretap order is consistent with the federal wiretap statutes. As such, Defendants argue the Arizona provision complies with, and is not preempted by, federal law.

The Arizona Court of Appeals decided this issue in *State v. Verdugo*, 180 Ariz. 180, 183, 883 P.2d 417, 420 (App. 1993), *review denied* (November 1, 1994), and concluded the Arizona statute "substantially complies with the federal statute and, therefore, is constitutional." The Court explained that the legislative history of the federal statute provides that states are "'free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.'" *Verdugo*, 180 Ariz. at 183, 883 P.2d at 420 (citations omitted). The Court of Appeals found persuasive the analysis in a Massachusetts case,

Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819 (1975), that construed a statute similar to Arizona's. *Id.* Because the Massachusetts statute, like Arizona's, "required the assistant district attorneys to be specially designated and because the federal legislative history reflected a recognition that the determination of delegation of authority was one of state law,[6]" the Massachusetts court ruled its statute did not conflict with the intent of the federal statute. *Id.* The Court of Appeals agreed with that analysis, concluding the Arizona statute is consistent with federal law and therefore constitutional. *Id.*

Likewise, a more recent Arizona case, *State v. Salazar*, 231 Ariz. 535, 536-37, 298 P.2d 224, 225-26 (App. 2013), held that "Arizona's wiretap statute substantially complies with federal law, and imposes even more restrictive requirements." *Id.* (footnote omitted). Moreover, at least three other Arizona courts upheld the statute as constitutional, though they did not specifically address the designation provision because it was not part of the statute when the three cases were decided. *Verdugo*, 180 Ariz. at 183, 883 P.2d at 420 (citing *State v. Gortarez*, 141 Ariz. 254, 686 P.2d 1224 (1984); *State v. Olea*, 139 Ariz. 280, 678 P.2d 465 (App. 1983); and *State v. Politte*, 136 Ariz. 117, 664 P.2d 661 (App. 1982)).

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[6] According to the applicable senate report: "'Paragraph (2) provides that the principal prosecuting attorney of any State ... may *authorize* an application ... for an order authorizing the interception of wire or oral communications. *The issue of delegation by that officer would be a question of State law.*'" S.Rep. 1097 at 2187, quoted in *Vitello*, 367 Mass. At 255, 327 N.E.2d at 838 (emphasis supplied in *Vitello*).

Moreover, although the Ninth Circuit has not addressed the constitutionality of Arizona's wiretap statute, the First Circuit, in an *en banc* decision, upheld the constitutionality of the Massachusetts statute referenced by the Arizona Court of Appeals in *Verdugo*. In *U.S. v. Smith*, 726 F.3d 852, 858 (1st Cir. 1984), the Court found that the provision authorizing the district attorney to designate an assistant district attorney to apply for a wiretap was "consistent with what Congress was trying to achieve" in the federal statute. The Court explained, "The detailed review by a district attorney of every application for a proposed use of electronic surveillance on a case by case basis, and his written special designation of an assistant to submit and prosecute the application before a justice, would seem to satisfy fully the congressional objectives." *Id.* In a more recent First Circuit case, *U.S. v. Lyons*, 740 F.3d 702, 721 (1st Cir. 2014), the Court relied on *Smith*'s holding that a principal prosecuting attorney "may specially designate a subordinate to exercise his authority on a case by case basis, but only in writing after he has personally reviewed the wiretap application."

Plaintiff acknowledges in the Complaint that when an initial wiretap application is prepared, the county attorney signs an authorization naming one or more deputy county attorneys involved in the investigation to apply for an order of interception on behalf of the county attorney. (Doc. 1 at 7). The authorization also allows the deputy county attorney(s) to apply for modifications, extensions or amendments as may be necessary. (*Id.*). Plaintiff concedes that the authorization indicates the county attorney "is aware

of the persons, phone numbers and criminal charges that are referenced in the initial application." (*Id.*).

In addition, attached to Plaintiff's response to the motion to dismiss are decisions from Maricopa County Superior Court judges pertaining to the wiretap investigation Plaintiff challenges here.[7] Defendants in the criminal case that arose from the investigation challenged Arizona's wiretap statute on precisely the same grounds that Plaintiff raises in this action. In addressing the county attorney's authorization of deputy county attorneys to submit applications for wiretaps, Maricopa County Superior Court Judges Peter C. Reinstein and Sherry K. Stephens each found the authorization letters signed by the county attorney were sufficient to comply with Arizona and federal law. (Doc. 14-1 at 6; Doc. 14-3 at 4). Both judges found the written authorizations contained specific information about the offenses being investigated and the suspects in the offenses. (*Id.*). Judge Reinstein found the authorizations provided sufficient evidence of the county attorney's familiarity with the proposed wiretaps and "nothing in the record" showed the county attorney simply conducted a cursory examination of the applications. (Doc. 14-1 at 6). Likewise, Judge Stephens found the authorization document "indicates the Maricopa County Attorney had sufficient knowledge of the crimes to be

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[7] Although a court's review when deciding a motion to dismiss is typically limited to the complaint itself, as referenced above, a court may take judicial notice of matters of public record. *See* Fed.R.Evid. 201; *Swartz*, 476 F3d at 763; *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). Moreover, Plaintiff has attached the decisions to her response indicating she has no objection to the Court's consideration of the decisions.

investigated and the grounds supporting the application." (Doc. 14-3 at 4). Plaintiff here cites to nothing in the record of the state court criminal case, and makes no allegation in the Complaint, that the county attorney's authorizations of the wiretap applications here were done without sufficient knowledge of the case.[8]

This Court finds no valid basis to deviate from the Arizona Court of Appeals ruling in *Verdugo* upholding the authorization provision of A.R.S. § 13-3010, or the Massachusetts state court and First Circuit decisions upholding the constitutionality of a similar statute. The Court finds both decisions persuasive and adopts their reasoning here. The statute itself and the procedure utilized by the county attorney for designating a deputy county attorney demonstrate sufficient involvement by the county attorney in the wiretap applications to comport with federal law. Although Plaintiff argues that *Verdugo* was wrongly decided, in the Court's view, she provides no

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[8] Plaintiff argues that "[t]he Maricopa County Attorney does not review every wiretap application, in fact he does not review any at all." (Doc. 14 at 13). She further claims that "[h]e does not personally authorize any wiretap applications nor does he supervise the deputy county attorneys who authorize, apply for and conduct the wiretapping." (*Id.*). She claims he merely signs "form letters of designation." (*Id.*). None of these allegations, however, appears in the Complaint. The allegations are therefore not relevant in determining whether Plaintiff's Complaint states a claim for relief and will not be considered. *See Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.").

compelling reasons to support that position. None of the cases cited by Plaintiff to support of her contention that the authorization provision is inconsistent with federal law addresses the Arizona statute. Thus, they are all distinguishable on that basis, among others. Nor has Plaintiff demonstrated that the absence of a separate designation to deputy county attorneys for modifications, amendments or extensions of wiretap orders renders the provision unconstitutional. *See United States v. Gianelli*, 585 F.Supp.2d 150, 159-160 (D. Mass. 2008) (holding that new designations letters for amendment or renewal applications are not required where a designation letter was provided with the initial application). For these reasons, the Court finds that A.R.S. § 13-3010(A), which authorizes the county attorney to designate in writing a deputy county attorney to submit a wiretap application, complies with federal law and is therefore constitutional both on its face and as applied.

3. Sealing Requirement for Wiretap Evidence

Defendants next contend that Plaintiff's claims regarding Arizona's wiretap sealing provision should be dismissed because the ten day limit is, in practice, more restrictive than the federal requirement. (Doc. 8 at 5-7). In addition, Defendants argue that even though the federal statute requires sealing as a prerequisite for admission of wiretap evidence, Arizona is not required to have the same provision. (*Id.*).

In the response, Plaintiff argues that the sealing provision of the Arizona statute is unconstitutional in two ways. First, the statute's ten day allowance for

the sealing of recorded communications fails to comply with the federal statute's requirement for "immediate" sealing. Second, the Arizona statute, unlike its federal counterpart, does not require compliance with the sealing requirement as a prerequisite for admission. Plaintiff cites no cases from other jurisdictions in which wiretap sealing provisions similar to Arizona's were deemed unconstitutional. Rather, Plaintiff relies on *United States v. Ojeda-Rios*, 495 U.S. 257 (1990), as the basis for claiming the sealing provision in Arizona's wiretap statute is unconstitutional.

a. Ten Day Limit

As set forth above, A.R.S. § 3010(H) provides that any recordings of the contents of intercepted communications must "within ten days after the termination of the authorized interception," be made available to the judge who issued the order and sealed under the judge's directions. Neither party has identified, nor is the Court aware of, any Arizona appellate court decisions addressing the constitutionality of the ten day limit. However, the decisions from two Maricopa County Superior Court judges discussed in the previous section also address challenges to § 3010(H). (Doc. 14-2; Doc. 14-3). Both Judge Reinstein and Judge Stephens found Arizona's ten-day limit did not violate, and thus was not preempted by, the federal wiretap statute. (Doc. 14-2 at 5; Doc. 14-3 at 8). Both relied on Massachusetts cases for guidance because of similarities in the Arizona and Massachusetts statutes. (*Id.*).

In *United States v. Mora*, 821 F2d 860, 863 n.3 (1st Cir. 1987), the Court explained that "Massachusetts law does not require immediate sealing, but provides

a seven day grace period after the termination of the warrant within which to make a return to the issuing magistrate" and concluded "there is no untenable conflict between the state scheme and the federal scheme." Likewise, the Massachusetts Supreme Judicial Court in *Vitello*, 367 Mass. at 267, 327 N.E.2d at 844, held that "with respect to the requirement for prompt return to the issuing judge, the State statute is not in conflict with § 2518(8)(a) in that seven days is the outside limit on return of the warrant and is not to be read as sanctioning a delay in return if it is practicable that a return be made before expiration of the seven-day period."

In support of their argument that Arizona's ten day limit is, in practice, more restrictive that the federal statute, Defendants cite several circuit court cases interpreting the federal statute. (Doc. 19 at 7-8). Although the federal statute requires wiretap evidence to be submitted to the judge for sealing "[i]mmediately upon the expiration of the period of the order, or extensions thereof," the cited cases reveal that such evidence has been admitted despite delays of much longer than ten days. (*Id.*). Defendants therefore argue that Arizona's definitive ten day limit is, in practice, more demanding and severe than the federal requirement. (*Id.*). Moreover, as Defendants further point out, Plaintiff acknowledges in the Complaint that the recordings of intercepted communications at issue in this case were submitted to the issuing judge for sealing on the same day that the investigation was terminated. (Doc. 1 at 10).

Plaintiff argues that in light of the Supreme Court decision in *Ojeda-Rios*, "[n]o federal court considers ten days to be 'immediate' for purposes [of] [§]

2518(8)(a)," yet she cites no authority for that assertion. Plaintiff appears to argue that the holding in *Ojeda-Rios*, a decision issued twenty-five years ago, necessarily renders Arizona's ten day limit for submitting wiretap evidence unconstitutional, even though no court has said so.

The Court in *Ojeda-Rios* explained that "[t]he primary thrust of § 2518(8)(a), ... , and a congressional purpose embodied in Title III in general, ... , is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance." *Ojeda-Rios*, 495 U.S. at 263. "The presence or absence of a seal does not in itself establish the integrity of electronic surveillance tapes" but "the seal is a means of ensuring that subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded." *Id.*. The Court highlights the language of the statute which requires "that tapes shall be sealed 'immediately' upon expiration of the underlying surveillance order" and that the seal "is a prerequisite to the admissibility of electronic surveillance tapes." *Id.*. The key issue in *Ojeda-Rios*, however, is the meaning of the "satisfactory explanation" language in the statute, which pertains to whether non-compliance with the sealing requirement results in exclusion of the wiretap evidence. *Id.* at 265. As the Court held, "[w]e conclude that the 'satisfactory explanation' language in § 2518(8)(a) must be understood to require that the Government explain not only why a delay occurred but also why it is excusable. This approach surely is more consistent with the language and purpose of § 2518(8)(a)." *Id.*

Thus, this Court finds unpersuasive Plaintiff's argument that the holding of *Ojeda-Rios* conclusively shows Arizona's ten day limit to submit wiretap evidence for sealing is unconstitutional. Though the case interprets language in the sealing provision of the federal wiretap statute, it says nothing about whether comparable language in a state wiretap statute is preempted. The Court, therefore, declines to rely on *Ojeda-Rios* as a basis to find Arizona's ten day limit unconstitutional.

The Court instead relies on the Massachusetts cases which are more directly on point. Although the Massachusetts Supreme Judicial Court and the First Circuit decisions are not binding on this Court, the Court finds them instructive on whether the ten day limit under Arizona law is constitutional. Admittedly, ten days is longer that the seven day limit approved in the Massachusetts cases. The Court finds, however, that the difference is not substantial enough to direct a different outcome. Accordingly, consistent with the First Circuit in *Mora*, and the Massachusetts Supreme Judicial Court in *Vitello*, the Court finds Arizona's ten day limit is not in conflict with § 2518(8)(a) of Title III. Arizona's time limit is consistent with "[t]he primary thrust of § 2518(8)(a)" and "a congressional purpose embodied in Title III in general ... to ensure the reliability and integrity of evidence obtained by means of electronic surveillance." *See Ojeda-Rios*, 495 U.S. at 263. The ten day limit is therefore not unconstitutional.

b. Sealing as a Prerequisite for Admission

Plaintiff further claims A.R.S. § 3010(H) is unconstitutional because it contains no provision making compliance with the sealing requirement a prerequisite for admission of wiretap evidence. Plaintiff argues that because the federal statute contains such a provision, the Arizona statute is unconstitutional.

The Arizona Court of Appeals addressed this aspect of the Arizona statute, among others, in *State v. Politte*, 136 Ariz. 117, 125, 664 P.2d 661, 669 (App. 1982). The Court explained that even though the statute "does not contain a provision excluding the wiretap evidence if it has not been sealed," the sealing and custody provisions in the statute have as their clear purpose "the preservation of the materials in order to prevent alterations." *Id.* The Court found that an exclusionary provision, like the one in the federal statute, "is not a requirement which 'directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *Id.* (quoting *United States v. Giordano*, 416 U.S. 505 (1974)). The Court therefore concluded, "We do not believe it is necessary that a state statute mirror the federal law by establishing an absolute evidentiary rule making the admission of authorized wiretap evidence depend on the sealing requirement." *Id.* at 125-126, 664 P.2d at 669-670.

Similarly, in *State v. Olea*, 139 Ariz. 280, 292, 678 P.2d 465, 477 (App. 1983), the Court of Appeals

affirmed the analysis in *Politte* and rejected the claims that because the Arizona statute "does not precisely track the language found in the federal code sections that it is constitutionally infirm." The Court further noted that despite the absence of a specific exclusion provision for failure to comply with sealing requirement, Arizona law allows a motion to suppress among other safeguards to ensure the integrity of wiretap evidence. *Id.*

Plaintiff argues that "[c]learly *Politte* and *Olea* are no longer good law in light of *Ojeda-Rios*," though she cites no authority for this assertion. This Court's own research has revealed no cases overruling or even calling into question *Politte* or *Olea* as a result of *Ojeda-Rios*, even though courts have had twenty-five years since *Ojeda-Rios* was decided to do so. This Court does not read *Ojeda-Rios* so broadly as to render the Arizona sealing provision unconstitutional. *Ojeda-Rios* did not address whether state statutes that fail to track the precise language of the sealing provision of the federal statute are necessarily unconstitutional, and the Court does not interpret it to mean that.

Here, the Court agrees with the analysis in *Politte* and *Olea*. The Court finds that the absence of a provision in the Arizona statute making compliance with the sealing requirement a prerequisite for admission does not render the statute unconstitutional. The Court agrees with *Politte* that other provisions in the statute further the important purpose of preserving the intercepted materials in order to prevent alterations. The Court is not persuaded that *Ojeda-Rios* mandates a different result.

c. Sealing Wiretap Evidence at End of Investigation

Finally, the Court addresses Plaintiff's allegation that "under current procedures followed in Maricopa County Superior Court," recordings of intercepted communications are not submitted to the issuing judge for sealing until the last order of interception in the investigation expires. (Doc. 1 at 8).[9] Plaintiff claims this procedure conflicts with federal law and is unconstitutional. (Doc. 1 at 11).

As set forth above, the Arizona sealing provision differs somewhat from the federal statute. The federal statute, § 2518(8), provides that any recordings of the contents of intercepted communications must "[i]mmediately upon the expiration of the period of the order, or extensions thereof," be made available to the judge who issued the order and sealed under the judge's directions. The Arizona statute on the other hand requires that "within ten days after the termination of the authorized interception," recordings of the contents of intercepted

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[9] Regarding this alleged practice, Defendants assert that "[w]hile deputy county attorneys formerly waited until all the lines were closed before terminating the order and turning the tapes over to the court, a practice that has not been ruled improper, they now terminate each line as it is finished and they submit the separate recordings to the court." (Doc. 19 at 3). Defendants further assert that this policy change has been in place for the last year. (Doc. 19 at 9). As explained above, however, a district court "consider[s] only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Defendants may not, in a motion to dismiss, simply assert their own unsupported version of the facts and ask the Court to reject Plaintiff's claim on that basis.

communications must be made available to the judge who issued the order and sealed under the judge's directions. A.R.S. § 13-3010(H).

In the two Maricopa County Superior Court decisions attached to Plaintiff's response, neither Judge Reinstein nor Judge Stephens found the decision to seal all the recordings at the end of the investigation to be in violation of the Arizona statute. (Doc. 14-2 at 5-7; Doc. 14-3 at 8-9). Though this Court is not bound by unreported decisions of state trial courts on state law issues, the Court finds them persuasive and relies on them here. *See Spinner Corp. v. Princeville Development Corp.*, 849 F.2d 388, 390 n.2 (9th Cir. 1988). The Court agrees that the alleged policy does not violate the Arizona statute. Moreover, in the previous sections, the Court found that Arizona's sealing provision, § 13-3010(H), is consistent with and not preempted by the federal sealing provision. Therefore, the Court also finds that the alleged policy is not preempted by the federal statute.

III. Conclusion

Based on the foregoing discussion, the Court finds, as a matter of law, Plaintiff's constitutional challenges in her Complaint are without merit.

Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss (Doc. 8) is **GRANTED**.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated this 4th day of March, 2015.

s/ Diane J. Humetewa
Honorable Diane J. Humetewa
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUELA VILLA, Plaintiff-Appellant, v. MARICOPA COUNTY; MARICOPA COUNTY BOARD OF SUPERVISORS; WILLIAM G. MONTGOMERY, Maricopa County Attorney, Defendants-Appellees.	No. 15-15460 D.C. No. 2:14-cv-01681-DJH District of Arizona, Phoenix ORDER

FILED
SEP 14 2017
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Before: W. FLETCHER and RAWLINSON, Circuit Judges, and PRATT,* District Judge.

Plaintiff-Appellant's Motion for Reconsideration of Dispositive Judge Order (Dkt. 36), filed August 16, 2017, is **DENIED**.

Defendants-Appellees' Motion to take Judicial Notice of Superior Court Records and Administrative Office of the U.S. Courts Records (Dkt. 37), filed August 16, 2017, is **GRANTED**.

* The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

Defendants-Appellees' Petition for Panel Rehearing and Petition for Rehearing En Banc (Dkt. 38), filed August 16, 2017, are **DENIED**.