No. 17-862

IN THE

Supreme Court of the United States

MARICOPA COUNTY, ARIZONA, ET AL.
Petitioners,

v.

MANUELA VILLA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF ARIZONA VOICE FOR CRIME VICTIMS, INC. AND THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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, and that federal Department of Justice officials may authorize subordinate attorneys to apply for such an order. Does Title III prohibit a state principal prosecuting attorney from expressly delegating the task of applying for such an order to a subordinate, but allow DOJ officials to do so?

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[*]

Arizona Voice for Crime Victims, Inc. (AVCV) is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement.

AVCV seeks to foster a fair justice system that supports crime victims, informs victims of their rights under the laws of the United States and Arizona, and promotes meaningful ways for crime victims to enforce their rights. A key part of AVCV's mission is giving the judiciary information and policy insights that may be helpful in the difficult task of balancing an accused's rights with crime victims' rights, while also protecting the wider community's need for deterrence. Through its work, AVCV is keenly aware of the impact of prolonged and delayed crim-

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of the filing of this brief in compliance with Supreme Court Rule 37.2 and each has consented to the filing of this brief.

inal investigations on crime victims and their families.

The Association of Deputy District Attorneys (ADDA) is the professional association for the deputy district attorneys of Los Angeles County. With over 10 million residents, Los Angeles County is the most populous county in the United States—and, with nearly 1000 attorneys, the Los Angeles County District Attorney's Office is the largest local prosecutorial office in the country.

The deputy district attorneys that the ADDA represents shoulder the primary responsibility for vigorously, effectively, and fairly prosecuting the more than 70,000 felonies and numerous other misdemeanors committed in Los Angeles County each year. Title III wiretap applications play an important role in many of these prosecutions.

The administrative burden that the panel's opinion would impose would significantly impair the efforts of state prosecutors to effectively prosecute cases to trial, hold criminals accountable, and seek justice for crime victims. Further, the court's decision could result in the exclusion of evidence uncovered through numerous Title III wiretap applications—and could subject deputy prosecutors across the Ninth Circuit to personal liability, merely because they applied for a wiretap that their District Attorney did not personally and exhaustively review. *See* 18 U.S.C. § 2520(b)(2) (allowing for damages against prosecutors who make defective Title III wiretap applications).

STATEMENT OF THE CASE

The Ninth Circuit's rule uniquely burdens state prosecutors' use of a critical investigative tool—but does not pose the same encumbrance on the DOJ.

1. Wiretap applications under Title III of the Omnibus Crime Control Act are an indispensable tool in state and federal criminal investigations. From 2011 to 2016 (the last year for which data is currently available), prosecuting attorneys applied for 17,847 Title III wiretaps, and used those wiretaps to secure 15,708 convictions. U.S. Courts, *Wiretap Report 2016*, Tables 7 and 9.[1]

The majority of Title III investigative work is carried out by state prosecuting attorneys protecting their local communities. From 2011 to 2016, 10,778 wiretap applications were made by state prosecutors, compared to the 7,063 applications made by the United States Department of Justice (DOJ). *Wiretap Report 2016*, Table 7. And state prosecutors are far more likely to report—and thus allow themselves to be held accountable for—their use of wiretaps. From 2011 to 2016, state prosecutors reported the installation and use of wiretaps in 9,651 instances, while federal prosecutors reported using a wiretap in only 2,699 instances—meaning that the DOJ did not report whether or not it used over 4,000 authorized wiretaps. *Wiretap Report 2016*, Table 7; *id*. Table 1A, Column L (stating "[n]o Prosecutor Report" was filed regarding the installation status of numerous federal wiretaps).

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[1] The annual Reports and tables are available at http://www.uscourts.gov/statistics-reports/analysis-reports/wiretap-reports.

For both state and federal prosecutors, the wiretap application process is detailed and fact-intensive. Each application includes a detailed presentation of the "facts and circumstances" justifying the wiretap, in factual affidavits that are dozens (or even hundreds) of pages long. *See* 18 U.S.C. § 2518(1)(b) (Title III applications must include "a full and complete statement of the facts and circumstances relied upon" to justify the wiretap); *United States v. Barajas*, 710 F.3d 1102, 1105 (10th Cir. 2013) (describing wiretap applications supported by a "153–page affidavit" and a "161-page affidavit"); *United States v. O'Malley*, 764 F.2d 38, 40 n.3 (1st Cir. 1985) (describing earlier federal wiretap applications that included factual affidavits "averaging between 30 and 50 pages in length"); s*ee also* United States Attorneys' Manual, Criminal Resource Manual 29, *Electronic Surveillance—Title III Affidavits* (application should "be tailored to the facts of the specific case and be more than a recitation of 'boiler plate'"), *available at* https://www.justice.gov/usam/criminal-resource-manual-29-electronic-surveillance-title-iii-affidavits.

2. Given the time and effort involved in reviewing the facts, familiarizing oneself with the investigation, and preparing the application, it is unsurprising that many head county or district attorneys delegate the task of preparing wiretap applications to their subordinates. Section 2516(2) of Title III governs the wiretap authorization process, and states that a "principal prosecuting attorney" of a state polity (such as the county attorney of a county) must be responsible for a wiretap application. 18 U.S.C. § 2516(2). At least 23 states—including Arizona—have interpreted Section 2516(2) as allowing the state or county attor-

ney the flexibility to delegate the task of actually *making* the wiretap application to a subordinate, as long as the head attorney is still responsible for *authorizing* the application. *See* Petition at 13. This delegation process is frequently used: In 2016, for example, the Wiretap Report suggests that, in California alone, over 230 applications were made by state attorneys who were subordinate to the "principal" attorney in the county or polity. *Wiretap Report 2016*, Table B1, Column E.

This use of delegation by senior *state* prosecutors is completely consistent with Title III's solicitous approach to delegation of *federal* wiretap applications. Although Section 2516(1) of Title III limits the number of DOJ officials who may authorize a wiretap application, these officials have no obligation to personally review the facts supporting an application. Indeed, Title III "is not violated when the [federal authorizing attorney] *does not even bother to look at* the application." *United States v. Williams*, 565 F. Supp. 353, 369 (N.D. Ill. 1983), *aff'd*, 737 F.2d 594 (7th Cir. 1984) (emphasis added) (collecting cases so holding).

Courts have roundly "rejected" the argument that a senior federal attorney must engage in any "evaluation of the factual foundation" for a wiretap application before authorizing the application. *United States v. Santora*, 600 F.2d 1317, 1320 (9th Cir.), *amended on other grounds*, 609 F.2d 433 (9th Cir. 1979) (emphasis added); *see also United States ex rel. Machi v. United States Dep't of Prob. & Parole,* 536 F.2d 179, 184 (7th Cir. 1976) ("We find nothing in the statutes or the cases to indicate that the [federal authorizing attorney] must make a totally independent

'probable cause' determination or that he cannot rely on his subordinate to summarize applications for him or make recommendations to him concerning their merits.").

3. Like the federal government (and many other states), Arizona allows "principal prosecuting attorneys" (such as a county attorney) to authorize their subordinates to engage in the actual wiretap application process. *See* Ariz. Rev. Stat. Ann. § 13-3010 (A). An Arizona county attorney may thus "expressly delegate[]" the task of making an application—including reviewing investigative officers' affidavits, determining probable cause, and evaluating the availability of alternative methods—to her subordinates. *See State v. Verdugo*, 883 P.2d 417, 420-21 (Ariz. App. 1993).

Of course, Arizona county attorneys do not wash their hands of involvement in the wiretap applications that they delegate—to the contrary, the very act of granting specific authorization for each application necessitates their personal involvement. The principal attorney must have "reviewed the case generally" with her subordinate, including by discussing "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." *Verdugo*, 883 P.2d at 421 (Ariz. App. 1993).

4. Here, the Ninth Circuit recognized that the Maricopa county attorney had engaged in this review of the case and provided his deputy with specific authorization to apply for a wiretap. Pet. App. at 18a. Yet the court decided this was not enough under Title III, because the county attorney had delegated the application process to a deputy, and had not sworn to

personally reviewing all the facts and circumstances underlying the application. Pet. App. at 19a-20a. In effect, the panel held that principal state prosecuting attorneys, unlike the senior *federal* attorneys listed in 2516(1), cannot delegate the task of applying for a wiretap at all.

The court justified its decision on the grounds that the county attorney had not satisfied Title III's requirement that wiretap decisions be "centraliz[ed]" in a politically responsible office—even though the county attorney had expressly and specifically authorized his subordinate's application in writing. Pet. App. at 15a, 17a.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding would require the head attorney in each county to personally review *every document* supporting *every* wiretap application—and prevent her from relying on her trusted subordinates' recommendations. This Court should grant review in order to guarantee that state prosecuting attorneys nationwide—especially those in the largest counties and most overworked offices—are not forced to abandon meritorious investigations merely because there are simply too many materials for the office's already-swamped head attorney to review.

By holding that the state attorneys named in 2516(2) are subject to more onerous wiretap application requirements than the DOJ officials listed in 2516(1), the panel's rule conflicts with other circuits, state courts, Title III's history, and the statutory text. As many courts have held, the federal wiretap authorization requirements of 2516(1) and the state

authorization requirements of 2516(2) are functionally the same: state prosecutors under 2516(2) can delegate the task of reviewing and applying for wiretaps in the same way that the senior federal attorneys listed in 2516(1) can. This is borne out in the statute's legislative history, which equates the delegation authority of state and federal prosecutors. Likewise, the statute's text explicitly contemplates that *all* applications, state and federal, may be "made" by junior attorneys and merely "authorized" by senior ones.

Further, the Ninth Circuit's rule does not increase accountability. Although the panel was correct that Title III requires that a head attorney is politically accountable for wiretaps in her county, the court did not grasp that a county attorney can be *accountable* for a wiretap she authorized regardless of whether she *personally reviewed* the documents supporting it. Indeed, the degree to which a county attorney delegates review responsibility to her designees is exactly the kind of decision that she can be held accountable for, as her constituents can choose whether or not they agree with her delegation policy and her trust in her designees. Moreover, the appointed senior DOJ attorneys who authorize wiretap applications are far more insulated from political accountability than local, directly-elected county attorneys. Thus, to the extent the Ninth Circuit's rule stops state prosecutors from seeking wiretaps—and pushes the DOJ to shoulder more of the wiretap investigatory burden—it will cause a larger proportion of wiretaps to be applied for by politically-remote federal officials.

The Ninth Circuit's unworkable and needless rule has enormous implications. At least 23 states allow a principal prosecuting attorney to delegate the application process—including review of the facts and circumstances supporting the application—to a designee. Petition at 13. Each of these states' statutes would be either invalidated or judicially rewritten under the Ninth Circuit's opinion. The impact on ongoing prosecutions would also be enormous: the Title III Wiretap Report suggests that hundreds of wiretap applications were made by a designee of the head county attorney, rather than head attorney herself, in 2016 alone—and every last one of these applications would be invalid.

Ultimately, crime victims and their communities will pay the price of this extra-statutory rule. The DOJ almost never uses wiretaps to pursue victims of violent crime—but state prosecutors do. But the victims of these violent offenses will have to contend with the delay—and even abandonment—of justice, when crucial wiretap evidence is excluded in their cases. And many more victims will suffer when state prosecutors' offices—in Arizona and across the country—severely curtail their wiretap applications because their head attorneys cannot personally review every last document supporting them.

Accordingly, this Court should grant the petition for a writ of certiorari and reverse the judgment of the Ninth Circuit.

ARGUMENT

I. THE NINTH CIRCUIT'S RULE NOT ONLY CONFLICTS WITH OTHER COURTS, BUT ALSO SUBJECTS STATE PROSECUTORS TO GREATER BURDENS THAN FEDERAL PROSECUTORS

As discussed in the petition, the Ninth Circuit's reading of 2516(2) has been explicitly rejected by other circuits and state courts. *See* Petition at 8-12. The First, Second, and Fifth Circuits, as well as the appellate courts of Arizona, Delaware, Massachusetts, and Florida all have rejected the rule announced in this case. This direct conflict alone warrants this Court's review.

But the Ninth Circuit has also created another conflict that, while more subtle, is just as pernicious. By holding in this case that head attorneys in *state* prosecutor offices must personally attest to having reviewed every wiretap application—but holding, in other cases, that senior *DOJ* attorneys may authorize applications without even looking at them—the Ninth Circuit has split with numerous courts which have concluded that the Title III authorization requirements applying to federal and state prosecutors are to be interpreted the same.

1. Although the Ninth Circuit held that "principal" state prosecutors governed by 2516(2) may not apply for wiretaps without personally reviewing the application, neither that court nor its sister circuits has ever held senior DOJ officials under 2516(1) to the same standard. Indeed, an authorizing DOJ official need "not even bother to look at the application" of her subordinate for it to be valid under Title III.

United States v. Williams, 565 F. Supp. 353, 369 (N.D. Ill. 1983) (collecting cases so holding), *aff'd*, 737 F.2d 594 (7th Cir. 1984).

Like other federal courts, the Ninth Circuit has held that the DOJ officials listed in 2516(1) do *not* have to engage in any "evaluation of the factual foundation" for a wiretap application before authorizing the application. *Santora*, 600 F.2d at 1320; *see also Machi*, 536 F.2d at 184 ("We find nothing in the statutes or the cases to indicate that the [federal authorizing attorney] must make a totally independent 'probable cause' determination or that he cannot rely on his subordinate to summarize applications for him or make recommendations to him concerning their merits."). Thus, when a "publicly responsible official" listed in 2516(1) gives authorization, there is "no requirement in 18 U.S.C. s 2516 or anywhere else that the authorizing official explain the reasons for his action." *United States v. Martinez*, 588 F.2d 1227, 1233 (9th Cir. 1978) (upholding federal wiretap application in which authorizing officer gave no reasons and provided no facts supporting his decision to authorize the investigators' application).

By allowing DOJ officials under 2516(1) to "authorize" applications without reading them, but requiring "principal" state prosecutors under 2516(2) to engage in searching review, the Ninth Circuit interpreted these two sections of 2516 as imposing different requirements—even though other circuits have held that these provisions are functionally the same. In *United States v. Tortorello*, the Second Circuit rejected the claim that a principal prosecuting attorney must personally appear to apply for a wiretap—and, as part of its analysis, explicitly held that 2516(1)

and 2516(2) have functionally "no difference in substance." 480 F.2d 764, 777 (2d Cir. 1973). Similarly, in *United States v. Smith*, the First Circuit explained that the textual difference between the sections is not meaningful: although 2516(1) discusses DOJ attorneys who "authorize" applications and 2516(2) speaks of principal prosecuting attorneys who only "apply," the word "apply" is capacious enough to include acts essentially identical to authorization. 726 F.2d 852, 858–59 (1st Cir. 1984) (en banc).

State courts are in accord. For example, a Florida appellate court rejected an argument that 2516(2) and 2516(1) were meaningfully different, and held that an application was lawful even though the head state attorney's only involvement was signing his name at the bottom of the application, next to "the words 'authorized by.'" *State v. McGillicuddy*, 342 So. 2d 567, 568, 569 (Fla. Dist. Ct. App. 1977). And the Supreme Court of Colorado, relying on the analysis of *Tortorello* and *Smith*, recently held that 2516(1) and (2) are functionally the same—and concluded that although a principal state prosecuting attorney must "*authorize* an application to initiate or extend a wiretap," the law "does *not* require the elected official to 'apply' for a wiretap order by personally compiling or submitting the application." *O'Hara v. People*, 271 P.3d 503, 511 (Col. 2012) (emphasis added); *see also State v. Peterson*, 841 P.2d 21, 24 n.1 (Utah Ct. App. 1992) (finding Title III was followed when a *deputy* county attorney applied for a wiretap—because the county attorney "specifically authoriz[ed]" the deputy to do so).

2. By stripping delegation authority from state officials but preserving it for federal ones, the Ninth

Circuit ignores the statutory history and text—which makes clear that no meaningful difference exists between 2516(1) and (2).

The statutory history demonstrates that Congress intended that head state prosecutors be allowed to "authorize" their subordinates to apply in the same way that DOJ officials may authorize Assistant United States Attorneys to do so. The Senate Report for 2516 begins by equating the authority of the DOJ officials in 2516(1) and the state "principal prosecuting attorney[s]" in 2516(2), stating:

> Section 2516 of the new chapter authorizes the interception of particular wire or oral communication under court order pursuant to the *authorization* of the appropriate *Federal, State, or local prosecuting officer*.

S.Rep. No. 1097, reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2185 (emphasis added). And the report explicitly states that principal state prosecutors may *authorize* applications, not just apply themselves. *Id.* at 2187 ("[T]he principal prosecuting attorney of any political subdivision of a State *may authorize* an application to a State judge.").

Further, Title III's structure demonstrates that state authorizing attorneys may delegate the process of making the application in the same manner as DOJ officials. Section 2518, which describes the content of the wiretap application itself, expressly contemplates that *all* wiretap applications—both state and federal—may be made and authorized by separate individuals. As explained in 2518(1)(b), the application must lay out "the facts and circumstances relied upon *by the applicant*"—but, as explained in

2518(1)(1), the applicant ("the attorney making the application") is separate and distinct from "the attorney authorizing the application." 18 U.S.C. § 2518(1)(a), (b) (emphasis added). And 2518 applies equally to federal and state applications—indeed, 2516(2) states that state applications are to be made "in conformity with section 2518." 18 U.S.C. § 2516(2). But by forcing the state authorizing attorney to demonstrate "that he or she is personally familiar with all of 'the facts and circumstances'" justifying the application, the Ninth Circuit has collapsed the separate roles of applicant and authorizer—and ignored the structure of Title III.

II. THE NINTH CIRCUIT'S RULE HINDERS POLITICAL ACCOUNTABILITY BY FAVORING POLITICALLY REMOTE FEDERAL OFFICIALS

The Ninth Circuit claimed that requiring principal state prosecuting attorneys to personally review every document in an application—and exercise their judgment without relying on their subordinates—is necessary to "achiev[e] the required centralized accountability" for wiretap applications that Title III demands. Pet. App. at 15a. This is wrong.

There is no appreciable gain in accountability under the Ninth Circuit's scheme. If the county attorney authorizes her subordinate's wiretap application, she is responsible and accountable for it—regardless of whether she personally reviewed every piece of the investigative record. And if it were actually necessary that the authorizing official personally review and complete the application, then the relatively lax delegation rules governing DOJ wiretap applications would be woefully deficient.

1. A politically accountable official can be responsible for a wiretap even if she does not personally review the documents supporting it—accountability does not depend on document review. As the First Circuit ably explained:

> In insisting that only certain senior officials could authorize a wiretap, Congress did not go on to prescribe the methods they should use to satisfy themselves that a wiretap was in order. *Nowhere did Congress forbid them the assistance of subordinates in reviewing the application*. Other courts have uniformly held that once the proper official is found to have authorized a wiretap application, his authorization is not subject to further judicial review.

United States v. O'Malley, 764 F.2d 38, 41 (1st Cir. 1985) (emphasis added).

Political accountability merely requires that the authorizing official be *identified*—and thus subject to political pressure if the public disagrees with the application—not that she engage in any particular authorization *process*. "The act of approval by the [Title III] designated individual assures that there will be a uniform policy on electronic surveillance," and "the decisionmaking process can be traced and, when necessary, responsibility placed where it belongs." *United States v. Ceraso*, 467 F.2d 647, 652 (3d Cir. 1972) (upholding federal wiretap application when the statutorily designated prosecutor, the Attorney General, had merely forwarded a memo granting authorization for the application).

2. The freedom of DOJ officials to authorize applications without careful review demonstrates that the Ninth Circuit's rule is unnecessary.

In fact, the Ninth Circuit, like many other courts, has repeatedly recognized that the centralization of authority that Title III requires can be effectuated even if the politically accountable authority does not review the application—at least when that authority is a DOJ official. In *United States v. Turner*, the court correctly held that after "a proper authorizing officer is properly *identified*," and she thereby assumes "the responsibility for a particular authorization," *how* she arrived at the decision to authorize the application is irrelevant. 528 F.2d 143, 151 (9th Cir. 1975) (emphasis added); *id.* ("[T]he basis on which, or the method by which, he gave the authorization is not, in our judgment, subject to review for compliance with s 2516(1)."). Identification of the responsible official assures accountability, regardless of what documents the official has reviewed.

3. Although the Maricopa county attorney was clearly identified, in writing, as the responsible authority for this wiretap, the Ninth Circuit held this was insufficient to satisfy Title III's centralization requirements. Yet that same court has held that a federal officer who authorizes a wiretap is under "no requirement in 18 U.S.C. s 2516 or anywhere else" to "explain the reasons for his action." *Martinez*, 588 F.2d at 1233. The only justification for the panel's different decision here is that the authorizing attorney was a *state* prosecutor rather than a federal one—and state prosecutors must, apparently, be held to a higher standard of accountability. But this is nonsensical, because elected state prosecutors are

already more likely to be responsive to the political pressures arising from opposition to a wiretap than appointed DOJ officials sitting at 950 Pennsylvania Avenue.

There can be little question that elected state prosecutors, like the Maricopa county attorney, are subject to political accountability for the acts of their subordinates. "As a matter of common knowledge and experience we know that [a district attorney]"—or county attorney—"gets public credit for the good job done and impression made by his assistants and gets public criticism for the poor performance or impression made by his assistants." *Shahar v. Bowers*, 114 F.3d 1097, 1104 n.15 (11th Cir. 1997) (internal quotation marks omitted). Critically, "[a]t election time he is judged by what he *and his assistants* have done." *Id.* (emphasis added). As the Fourth Circuit recently explained, the actions of assistant state attorneys reflect deeply on politically-elected state prosecutors:

> Elections mean something. Majorities bestow mandates. Elected prosecutors translate those mandates into policies. And assistant prosecutors implement those policies.

Borzilleri v. Mosby, 874 F.3d 187, 192 (4th Cir. 2017).

Indeed, the degree to which county attorneys are politically accountable for their subordinates' actions is so profound that a constitutional rule has developed because of it. Because the actions of deputy county attorneys are so crucial to the polity's view of the county attorney, county attorneys are allowed to fire their deputies in situations that would otherwise run afoul of the First Amendment. *Id.* at 191 (join-

ing "a unanimous chorus of courts of appeals" in holding that, because the political fortunes of elected state attorneys are so intertwined with the actions of their deputies, elected state attorneys can fire their deputies for otherwise-unconstitutional political patronage reasons).

By contrast, there is little reason to believe that the senior DOJ officials listed in 2516(1) are more politically accountable than (or even *as* politically accountable as) local county attorneys—and thus little reason to believe that Congress intended 2516(1) DOJ officials to exercise less involvement in wiretap application than their state counterparts in 2516(2). Precious few voters are aware of the identity of any "Deputy Assistant Attorney General . . . in the Criminal Division or National Security Division" of the DOJ, for instance, and it is doubtful that any wiretap approved by such an officer will ever have a meaningful impact on electoral political accountability. *See* 18 U.S.C. § 2516(1) (listing that officer as one who can authorize federal wiretap applications). While county attorneys are usually directly elected by a smaller and geographically concentrated constituency—which could conceivably unify in political reaction to a few unpopular wiretaps—it is far less likely that any national Presidential election will turn on the wiretap authorization choices of DOJ officials. "Distant and largely invisible bureaucrats within DOJ lack the incentive . . . to serve purely local interests." Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, Law & Contemp. Probs., Winter 1998, at 47, 54.

Given state attorneys' heightened responsiveness to local political pressure, the panel's negative view of county attorney accountability was badly misplaced.

III. THE UNNECESSARY ADMINISTRATIVE BURDEN THE NINTH CIRCUIT HAS PLACED ON STATE PROSECUTORS IS ENORMOUS

The unique burden the Ninth Circuit has now placed on state prosecutors is not only positively unlawful and normatively unhelpful—it is also exceptionally onerous. Requiring the single head attorney of each county or other political subdivision to review every wiretap application cover-to-cover—and to decide whether to apply without the help and recommendation of her subordinates—will inevitably bog down and frustrate state investigations, especially in the country's largest counties.[2]

In many counties, local prosecutors regularly seek more than a hundred wiretaps annually. In 2016, for example, state prosecutors sought 220 wiretap applications in Los Angeles County, 132 applications in New York County, 126 applications in Clark County, 105 applications in Riverside County, and 80 applications in Denver County—to name only a few.

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[2] The Ninth Circuit includes five of the ten largest counties in the United States, including Los Angeles, Maricopa, San Diego, Orange, and Riverside Counties. U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016*, *available at* https://www.census.gov/data/tables/2016/demo/popest/counties-total.html. Each of these counties includes well over 2 million residents; Maricopa County, the petitioner here, includes over 4.2 million. *Id*.

Wiretap Report 2016, Table B1. And each of these applications is accompanied by an in-depth affidavit from investigating officers, which often runs over hundreds of pages. *United States v. Barajas*, 710 F.3d 1102, 1105 (10th Cir. 2013) (noting wiretap applications involving a "153-page affidavit" and a "161-page affidavit").

Requiring a single head prosecutor to personally review each and every one of these applications—while also performing her numerous other duties—is grossly unreasonable. As one defendant wryly observed when challenging a federal wiretap, if the Assistant Attorney General responsible for authorizing DOJ wiretaps personally reviewed every application that crossed his desk "it is doubtful he would have had time for any other duties." *O'Malley*, 764 F.2d at 40 n.3. This is even more true for state "principal prosecuting attorneys," as they are, by definition, the heads of their respective offices—and thus are burdened with numerous leadership and chief administrative tasks not shared by the Assistant and Deputy Attorney Generals listed in 2516(1).

The burden the panel has now placed on county attorneys within the Ninth Circuit will force them to abandon applications that otherwise have merit—and, if adopted by other circuits, will lead to nationwide disruption in state investigations.

IV. DELAYING AND FRUSTRATING STATE INVESTIGATIONS WILL ADVERSELY AFFECT THE RIGHTS OF VIOLENT CRIME VICTIMS

Ultimately, crime victims and their communities will pay the price of the Ninth Circuit's misguided rule.

The DOJ rarely uses its wiretap authority to investigate violent crimes against persons—that is left almost entirely up to local prosecutors. In 2016, only twelve of the 171 homicides and assaults investigated via wiretap were investigated by the DOJ—the other 159 were investigated by state prosecuting authorities. *Wiretap Report 2016*, Table 3. Similarly, only a *single* federal wiretap investigated larceny, theft, or robbery in 2016—compared to 20 that were investigated under state wiretaps. *Id*. In 2015, the numbers were similar: *five* homicides and assaults were investigated by federal wiretaps, while 216 such crimes were investigated via wiretaps sought by state prosecutors—and a single personal theft or robbery was investigated by a DOJ wiretap, while 39 others were investigated under state wiretap authority. *Wiretap Report 2015*, Table 3. Simply put, the investigation of violent criminals, and the vindication of the rights of their victims, is almost exclusively pursued by state wiretaps, not federal ones.

Local violent crime victims will thus suffer the most as local state prosecutor offices curtail their use of wiretap investigations. The victims of criminals already subject to prosecution will have to contend with the delay—and even abandonment—of justice, when crucial wiretap evidence is excluded in their case. *See United States v. Giordano*, 416 U.S. 505, 528 (1974) (allowing for suppression of certain evidence obtained without proper authorization under Title III). These victims may be forced to testify themselves, when wiretap evidence may have otherwise rendered such exposure to harassment unnecessary—and, if the perpetrators are freed, will have to live in fear of further attacks, abuse, and violation of

the victim's rights protections enshrined in state constitutions. *Cf.* Ariz. Const. art. II, § 2.1(A)(1) (guaranteeing crime victims "rights to justice and due process," including the right "to be free from intimidation, harassment, or abuse, throughout the criminal justice process.").[3]

And many more victims will suffer when state prosecutors' offices—in Arizona and across the Ninth Circuit—severely curtail their wiretap applications because their head attorneys cannot personally review every last document supporting them. *See O'Malley*, 764 F.2d at 40 n.3 (senior prosecutors would likely have no time for other duties if they must personally review every page of every wiretap application); Ariz. Const. art. II, § 2.1(A)(1).

State and local prosecutors are best situated to investigate violent crimes and protect local victims—including through the use of wiretaps. Under the Ninth Circuit's regime, however, victims will have to trust that the DOJ will more heavily investigate these crimes—despite its historical hesitancy—because state and local prosecutors will have lost the ability to do so.

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[3] Arizona is not unique in guaranteeing crime victims certain constitutionally protected rights. *See*, *e.g.*, Cal. Const. art. I, § 28(b)(1) ("a victim shall be entitled to . . . be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process"); Or. Const. art. I, § 43(1)(a) (guaranteeing crime victims "[t]he right to be reasonably protected from the criminal defendant or the convicted criminal throughout the criminal justice process"). *Cf.* 18 U.S.C. § 3771(a)(1), (8) (guaranteeing crime victims "[t]he right to be reasonably protected from the accused").

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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