No. 17-862

IN THE

Supreme Court of the United States

MARICOPA COUNTY, ET AL.
Petitioners,

v.

MANUELA VILLA,
Respondent.

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

REPLY BRIEF FOR THE 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. 18 U.S.C. § 2516(2). Does Title III allow a principal prosecuting attorney to delegate the task of applying for such an order to a subordinate?

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REPLY BRIEF FOR THE PETITIONERS

Our petition explains that this Court should grant review to resolve a conflict between the Ninth Circuit's decision in this case and the Arizona Court of Appeal's decision in *State* v. *Verdugo*, 883 P.2d 417 (Ariz. App. 1993), over the validity of Arizona's wiretap statute; to resolve a broader conflict among federal and state appellate courts over whether principal prosecuting attorneys may delegate the task of applying for a wiretap order to their subordinates; and to correct the Ninth Circuit's obvious and important error, which intrudes on state sovereignty and imposes severe practical burdens on law enforcement. Respondent offers no convincing response to any of these arguments.

A. Respondent errs in denying a conflict between the Ninth Circuit and the Arizona Court of Appeals

Respondent first asserts that the decision below (which *strikes down* Arizona's wiretap statute) "does not conflict" with the Arizona Court of Appeals' decision in *Verdugo* (which *upholds* the very same statute). (BIO 13.) This claim is simply not credible.

The decision below and *Verdugo* both address the same legal question: Does Arizona's wiretap statute—which allows a principal prosecuting attorney to delegate to a subordinate the task of applying for a wiretap order (Ariz. Rev. Stat. § 13-3010(A))—comply with 18 U.S.C. § 2516(2)? The decisions also address precisely the same facts: The Ninth Circuit explicitly "assume[d] that the procedures followed in [this case] are identical to those in *Verdugo*." 18a.

Addressing the same question, on the same facts, the decision below and *Verdugo* reach diametrically opposed conclusions—one invalidating the search, the other approving it. In this case, the Ninth Circuit held that § 2516(2) embodies an "anti-delegation" or "centralization" requirement. 15a. In *Verdugo*, by contrast, the Arizona Court of Appeals held that § 2516(2) leaves the "determination of delegation of authority [to] state law," and that states may therefore "lawfully permit the principal prosecuting attorneys … to delegate their authority to others." 883 P.2d at 420. In this case, the Ninth Circuit held that the Arizona statute "is preempted by" federal law to the extent it allows delegations. 3a. In *Verdugo*, by contrast, the Arizona Court of Appeals held that the Arizona statute "d[oes] not conflict with the intent of the federal statute," and, thus, is *not* preempted. 883 P.2d at 420. These decisions plainly conflict.

In an effort to reconcile the decisions, respondent claims that the Arizona Court of Appeals said in *Verdugo* "that the county attorney must [himself] authorize the application and therefore there is no conflict between the Ninth Circuit and the Arizona Court of Appeals on that point." (BIO 13.) But respondent conflates the state court's discussion of *federal-law* requirements with its discussion of *state-law* requirements. In *Verdugo*, the Arizona Court of Appeals first addressed "the federal statute," and in doing so it held that a state may freely "permit the principal prosecuting attorneys … to delegate their authority to others." 883 P.2d at 420. Then turning to the state statute, the Arizona Court of Appeals held that a prosecutor must satisfy additional requirements—for instance, making the delegation "in writ-

ing." *Id.*; *see* Ariz. Rev. Stat. § 13-3010(A) (authorizing delegations to a subordinate that the county attorney "designates in writing"); *State* v. *Salazar*, 298 P.3d 224, 225 (Ariz. App. 2013) ("Arizona's wiretap statute … imposes even more restrictive requirements [than] federal law"). The Arizona Court of Appeals' recognition of these additional *state-law* safeguards has no bearing on the *federal-law* conflict at issue here. The Arizona Court of Appeals held that the federal statute allows delegations. The Ninth Circuit held that the federal statute prohibits delegations (and that the additional safeguards provided by Arizona law were "not sufficient"). 19a. To repeat, these decisions flatly contradict each other on an issue of federal law.

Respondent points out last of all that "the Arizona Court of Appeals is not a state court of last resort." (BIO 2–3.) That is true, but it does not justify withholding review. As the petition explains—and as respondent never denies—decisions of the Arizona Court of Appeals apply statewide, binding all trial courts in the state. (Pet. 9.) A conflict between the Ninth Circuit and the Arizona Court of Appeals thus has serious consequences. Prosecutors have been given conflicting commands about the lawfulness of searches conducted under delegated authority. If the issue arises in a state criminal case on a motion to suppress evidence, the search will be treated as lawful; if it arises in a federal civil damages lawsuit, the very same search will be treated as unlawful. This incongruity is intolerable, and the Court should grant review to resolve it.

B. Respondent errs in denying a longstanding conflict among federal and state appellate courts

1. Respondent next asserts that "there is no conflict of any substance" and that "all courts that have addressed the issue of delegation" have "universally recognized and followed" the same legal rules. (BIO 12.) This assertion is flatly wrong.

Our petition explains that federal and state appellate courts have split into three camps over whether 18 U.S.C. § 2516(2) allows a principal prosecuting attorney to delegate the task of applying for wiretap orders to his subordinates. One group of courts holds that § 2516(2) allows delegations (or, to put the point another way, leaves the issue of delegation to state law). A second group of courts holds that § 2516(2) prohibits delegations. A third group holds that § 2516(2) allows delegations in some circumstances but not others. (Pet. 10–12.)

Even before the filing of our petition, commentators acknowledged that "courts have varied in their answers" to the question presented here: some courts "have concluded that state wiretap statutes can validly allow … subordinate prosecutors to apply for wiretap orders," some "hold that a state court wiretap order issued on the application of a subordinate prosecutor is invalid," and some "have taken intermediate approaches." Kevin Sali, "Challenging State Wiretaps," *The Champion* 42, 43–44 (March 2015), www.salilaw.com/images/March2015Champion.pdf.

2. Trying to show that there is no split, respondent argues that (1) every court agrees that the principal prosecuting attorney must make the substan-

tive decision to "authorize" the application, and (2) every court also agrees that the principal prosecuting attorney need not "actually" perform the ministerial task of "writ[ing] and fil[ing] the application." (BIO 9.) The second part of this characterization is fair enough, but the first part is not. It is quite clear that other courts flatly disagree with the Ninth Circuit's holding that federal law requires the principal prosecuting attorney to personally make the substantive decision to apply for a particular wiretap order. The Second Circuit, the Delaware Supreme Court, and the Massachusetts Supreme Judicial Court have all held that federal law freely permits delegating that substantive decision to subordinates. And the First Circuit, Fifth Circuit, and Florida Supreme Court have all concluded that federal law allows such delegation *in some circumstances*. (Pet. 10–12.)

3. Respondent next discusses some of the cases involved in the split, in an effort to show that they do not conflict with each other. (BIO 9–11.) Respondent's arguments are unconvincing.

Respondent begins with the Second Circuit's decision in *United States* v. *Fury*, 554 F.2d 522, 527 n.4 (CA2 1977). She claims that this case does not conflict with the decision below, because it holds only that delegation is permissible in the narrow circumstance "when the principal is absent," not that delegation is permissible as a general matter. (BIO 9.) That reading is wrong. To be sure, the facts of *Fury* involved a delegation during the absence of the principal prosecuting attorney. *Fury*, 554 F.2d at 527. The Second Circuit, however, did not limit its decision to that situation. Quite the contrary, it held broadly that delegation "comports with the federal

wiretap law," because "the legislative history" of the federal statute suggests that "the issue of delegation … would be a question of state law." *Id.* at 527 n.4. In any event, even if respondent's narrow reading of *Fury* were correct, the case would *still* conflict with the Ninth Circuit's decision—which prohibits delegations *regardless* of whether the principal prosecuting attorney is present or absent in the jurisdiction.

Respondent then turns to the Delaware Supreme Court's decision in *State* v. *Marine*, 464 A.2d 872 (Del. 1983). Respondent points out that the Delaware Supreme Court "held that *the Delaware statute* required the [state] Attorney General to authorize the wiretap application." (BIO 10 (emphasis added).) Respondent makes the same mistake she made when addressing the Arizona Court of Appeals' decision in *Verdugo*: mixing up state-law and federal-law requirements. In *Marine*, the Delaware Supreme Court made it clear that the federal statute "leaves the matter of delegation up to state law." 464 A.2d at 877. Having done so, it also suggested that "the Delaware statute" required some degree of "personal authorization by the Attorney General for the wiretap." *Id.* at 877–78. The court's discussion of these state-law issues has no bearing on the federal question that is the subject of the conflict: whether § 2516(2) itself prohibits or restricts delegations of authority by state officials.

Respondent finally addresses the Massachusetts Supreme Judicial Court's decision in *Commonwealth* v. *Vitello*, 327 N.E. 2d 819, 839 (Mass. 1975). She claims that "the *Vitello* court held that a principal prosecuting attorney is required to carefully review the application." (BIO 2.) Yet again, respondent

makes the same mistake: mixing up federal-law and state-law requirements. In *Vitello*, the Massachusetts Supreme Judicial Court explained that "the issue of delegation" is "a question of State law." 327 N.E. 2d at 838. Then, the court "*construe[d] the [state-law] provision for special designation* to mean that the Attorney General or the district attorney is to determine whether a particular proposed use of electronic surveillance would be consistent with the over-all policy in respect to monitoring followed in his jurisdiction, and *to this end* the respective attorney must review and authorize each such application." *Id.* at 838–39 (emphasis added). Once more, this discussion of *state law* has no bearing on the question of *federal law* that is the subject of the conflict here.

For what it is worth, the additional procedures that the Delaware and Massachusetts courts required as a matter of state law fall short of what the Ninth Circuit requires as a matter of federal law. In *Marine*, the Delaware court ruled that the Attorney General satisfied state law simply by making an "actual, personal authorization"; the court did not insist that the Attorney General demonstrate familiarity with the facts of the case. 464 A.2d at 878. Similarly, in *Vitello*, the Massachusetts court held that state law required the Attorney General simply to provide a "written authorization" on a "case by case basis," and that requiring the Attorney General to "affirmatively demonstrate total familiarity with all aspects of [the] case" would "serve no purpose." 327 N.E. 2d at 839 & n.17. In this case, by contrast, the Ninth Circuit held that federal law "requires that the principal prosecuting attorney indicate … 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"—precisely the purposeless requirement that *Vitello* eschewed. 19a. Thus, even putting aside respondent's conflation of state-law and federal-law requirements, there is *still* a conflict: the Ninth Circuit requires the principal prosecuting attorney to demonstrate personal familiarity with the facts of the case at hand, while the Delaware and Massachusetts courts do not.

4. Respondent, finally, cites the Ninth Circuit's decision in *United States* v. *Perez-Valencia*, 727 F.3d 852 (CA9 2013). (BIO 9.) That case, however, is a red herring. In *Perez-Valencia*, the Ninth Circuit held that an *acting* principal prosecuting attorney counts as the "principal prosecuting attorney" for purposes of federal law. An official counts as an acting principal prosecuting attorney only if he exercises "all the powers of [the] district attorney" during the district attorney's absence and if state law treats him as the district attorney "for all purposes." 727 F.3d at 855. This acting-official exception has nothing to do with the split at issue here. The question here is whether federal law allows a principal prosecuting attorney who remains in office, and who has *not* been replaced by an "acting" principal prosecuting attorney, to delegate the task of applying for a wiretap order to a subordinate. On *that* question, there is plainly a split: Some courts say yes, some (such as the Ninth Circuit) say no, and some say sometimes. The Court should grant certiorari to resolve that conflict.

C. The Ninth Circuit's decision is wrong

Respondent, last of all, argues that the decision below is correct, because Congress "specifically assigned" the job of applying for a wiretap order to the principal prosecuting attorney. (BIO 14.) But Congress made that assignment against the backdrop of (1) the presumption that an executive official may delegate a function to a subordinate (*Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947)), and (2) the presumption that a state retains the power to determine "the structure of its government" and "the character of those who exercise government authority" (*Gregory* v. *Ashcroft*, 501 U.S. 452, 460–61 (1991)). Respondent fails to identify any language in § 2516(2) that overcomes these elementary presumptions.

The Ninth Circuit's error warrants correction because it involves an affront to state sovereignty. (Pet. 19.) The *amicus curiae* brief filed by Arizona Voice For Crime Victims, Inc. and The Association of Deputy District Attorneys highlights the seriousness of this affront. As *amici* explain, the Ninth Circuit's decision subjects state officials to even more onerous requirements than their federal counterparts: "head attorneys in *state* prosecutor offices must personally attest to having reviewed every wiretap application," while "senior *DOJ* attorneys may authorize applications without even looking at them." (*Amicus* Brief 10.) This discrepancy only underscores the importance of reviewing this case.

The Ninth Circuit's error also warrants correction because it imposes severe practical burdens on law enforcement. As the petition details, reviewing a wiretap application and forming a belief about

whether it meets the statutory criteria are burdensome and time-consuming endeavors. A busy head of a prosecutor's office cannot simply drop all of his other duties in order to perform these tasks. (Pet. 20–21.) Confirming the point, *amici* explain that "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." (*Amicus* Brief 2.)

Respondent charges that correcting the Ninth Circuit's error would open the door to "abuse." (BIO 14.) This claim is baseless. Wiretap orders must already comply with the Fourth Amendment, with a series of substantive and procedural requirements imposed by federal law (*see* 18 U.S.C. § 2516–18), and with a series of supplemental safeguards imposed by state law (*see, e.g.*, Ariz. Rev. Stat. § 13-3010(A)). These requirements already protect against abusive wiretaps, and the Maricopa County Attorney already takes scrupulous care to comply with them. Indeed, the Ninth Circuit accepted that all of these procedures were "followed in [this] case." 18a. There is no basis in the record for respondent's unsupported insinuations that the Maricopa County Attorney has "abused his authority" or for her claim that correcting the Ninth Circuit's error would encourage such abuses in the future. (BIO 14.)

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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