No. 22-85

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

LANGSTON AMANI HARRIS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Oregon

BRIEF IN OPPOSITION

Jeffrey L. Fisher
Pamela S. Karlan
Easha Anand
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin M. Sali
Counsel of Record
John Robb
KEVIN SALI LLC
1500 SW First Avenue,
Suite 1020
Portland, OR 97201
(971) 407-3371
kevin@salilaw.com

QUESTIONS PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("the Wiretap Act"), 18 U.S.C. § 2510 *et seq.*, authorizes only the "principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof" to apply for a wiretap order. 18 U.S.C. § 2516(2). The Act also prohibits the use in criminal prosecutions of any oral or wire communication that is "unlawfully intercepted" and expressly allows a defendant to "move to suppress the contents of any wire or oral communication intercepted . . . or evidence derived therefrom." *Id.* § 2518(10)(a)(i); *see also id.* § 2515. The questions presented are:

1. Whether the Oregon Supreme Court correctly held that wiretap orders were invalid under 18 U.S.C. § 2516(2) because they were obtained without any involvement of the Attorney General or county's principal prosecuting attorney.

2. Whether the Oregon Supreme Court correctly declined to read the Fourth Amendment's "good-faith" exception into the requirement in 18 U.S.C. § 2518(10)(a)(i) that unlawfully intercepted communications be suppressed.

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STATEMENT OF THE CASE

A. Factual background

In 2017, police in Washington County, Oregon began investigating a shooting. Pet. App. 3a. As part of the investigation, they obtained call records from the decedent's telephones. *Id.* 3a-5a. These records included calls from a number linked to respondent Langston Harris. *Id.* Investigators then decided to apply for wiretap orders for phone numbers linked to respondent. *Id.* 5a.

"In order to protect effectively the privacy of wire and oral communications," the Wiretap Act generally bars intercepting such communications. Pub. L. No. 90-351, tit. III, § 801(b), 82 Stat. 197, 211 (1968); *see also* 18 U.S.C. § 2511. But it allows the "[t]he principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof" to apply for a wiretap and sets out detailed criteria for doing so. 18 U.S.C. § 2516(2); *id.* § 2518. An Oregon statute authorizes a far broader class of officials to seek wiretap orders, allowing "a deputy district attorney"—defined in Oregon as *any* prosecutor—"authorized by [a county's principal prosecuting] attorney" to apply for a wiretap. Or. Rev. Stat. § 133.724(1) (2022); *see also id.* § 8.780 (defining "deputy district attorney").

The Oregon Department of Justice was advised years ago that courts in other states have held that the Wiretap Act precludes the use of delegation provisions like Oregon's Section 133.724(1). *See* Or. S. Ct. SER 1-11 (correspondence from federal prosecutor referencing such court holdings). Nevertheless, in this case, deputy district attorneys applied for each of four

wiretaps. Pet. 6. None of the applications indicated that the Washington County District Attorney had participated in any way in preparing or reviewing the wiretap applications. Pet. App. 8a, 19a. A Washington County circuit judge granted each application and issued the requested wiretap orders. Pet. 6.

Using these wiretaps, the State intercepted various communications between respondent and others. In the State's view, the communications provide circumstantial evidence that respondent was involved in the shooting. Tr. 421-24; 428-36. Based in part on this evidence, the State indicted respondent for murder, among other crimes. Pet. 7.

B. Procedural background

1. During pretrial proceedings, respondent moved to suppress the evidence derived from the wiretap orders. Invoking the Wiretap Act's prohibition against introducing communications that were "unlawfully intercepted," 18 U.S.C. § 2518(10)(a)(i), respondent argued that the interception of his communications was unlawful because the wiretap order had been obtained by someone other than a "principal prosecuting attorney." Pet. App. 8a.

The trial court granted the motion. Pet. App. 9a. The court concluded that, at least where "the official responsive to the political process [does] not indicate that he or she was aware of the wiretap application," the Wiretap Act does not permit deputy district attorneys to obtain wiretap orders. *Id.* The court also held that the State's reliance on the Oregon delegation statute did not entitle it to a good-faith exception from the Wiretap Act's suppression requirement. *Id.*

2. The State filed an interlocutory appeal in the Oregon Supreme Court, and the Oregon Supreme Court unanimously affirmed. Pet. App. 2a. The court first rejected the State's argument that Section 2516(2)—the "principal prosecuting attorney" provision—includes "implicit authorization for the delegation" of wiretapping authority. *Id.* 10a. Instead, the court stressed that "[t]he text of section 2516(2)" authorizes "only a 'principal prosecuting attorney'" to apply for a wiretap order. *Id.* The Oregon Supreme Court also took guidance from this Court's decision in *United States v. Giordano*, 416 U.S. 505 (1974). In that case, the Court held that parallel language in Section 2516(1), identifying which *federal* officials may apply for wiretaps, was an exhaustive list that foreclosed applications by subordinates. *Id.* at 514.

The Oregon Supreme Court recognized that some other courts have upheld wiretap orders when there is at least "some active involvement on the part of 'the principal prosecuting attorney,'" though that individual's actual signature may not be on the application. Pet. App. 18a-19a. But the Oregon Supreme Court explained that those so-called "substantial compliance" holdings had no bearing on this case because the "principal prosecuting attorney" here had no "active involvement" whatsoever in obtaining the wiretap orders. *Id.* Instead, the deputy prosecutors simply made "a generic claim that the Washington County District Attorney had delegated his authority to file wiretap applications." *Id.* 19a. Such a "blanket delegation," the court reasoned, "fall[s] below even the standards set" in "substantial compliance" cases. *Id.* 19a-20a & n.6.

Having held that the wiretaps here violated federal law, the Oregon Supreme Court then rejected the State's request to read the Fourth Amendment's "good-faith" exception into Section 2518(10)(a)(i)'s requirement that "unlawfully intercepted" communications be suppressed. Pet. App. 21a. The court emphasized that the statute "specifically provides for the suppression and exclusion of evidence intercepted through an unlawful wiretap." *Id.* 22a. It also highlighted that *Giordano* requires suppression under Section 2518(10)(a)(i) whenever the interception of communications "violates a statutory provision that reflects Congress' core concerns." *Id.* 24a (quoting *Dahda v. United States*, 138 S. Ct. 1491, 1498-99 (2018) (reaffirming *Giordano*'s holding)). Provisions restricting who may obtain wiretaps reflect such "core concerns" because they ensure that prosecutorial decisions to intercept communications are made only by politically accountable officials who possess "mature judgment." *Id.* 13a (quoting *Giordano*, 416 U.S. at 515).

REASONS FOR DENYING THE WRIT

The State asks this Court to review the Oregon Supreme Court's holding that the Wiretap Act forbids deputy prosecutors from obtaining wiretap orders without any involvement of principal prosecuting attorneys. The Court should deny this request. The Oregon Supreme Court's decision does not conflict with any decision from any federal court of appeals or state court of last resort. Nor is the issue important enough to warrant this Court's attention. Finally, the Oregon Supreme Court's holding faithfully adheres to the text and structure of Title III, as well as this Court's holding in *United States v. Giordano*, 416 U.S.

505 (1974), that delegations like the one here violate the Wiretap Act.

The Court should also deny the State's request to review the Oregon Supreme Court's holding that 18 U.S.C. § 2518(10)(a)(i) of the Act does not contain an atextual good-faith exception. That holding is consistent with this Court's precedent and does not implicate any conflict of authority. At any rate, this case would be a poor vehicle for addressing this issue because the facts here do not even support a claim of good-faith reliance.

I. The delegation question presented does not warrant this Court's review.

This Court recently denied certiorari in a case presenting the issue of whether the Wiretap Act permits state officials other than "principal prosecuting attorneys" to obtain wiretaps. In *Villa v. Maricopa County*, 865 F.3d 1224 (9th Cir. 2017), the Ninth Circuit held that 18 U.S.C. § 2516(2) requires a "principal prosecuting attorney" to be personally involved in seeking wiretaps. *Id.* at 1234. The County sought certiorari, making the same "delegation" arguments the State presses here. This Court denied review. 138 S. Ct. 1696 (2018). Nothing meaningful has changed, so the Court should deny review again.

A. There is no split over the permissibility of the type of delegation at issue here.

The Oregon Supreme Court held that the wiretaps here violated the Wiretap Act because Section 2516(2) requires a "principal prosecuting attorney" to apply for wiretaps, and here the applicant was only a deputy prosecutor. Pet. App. 10a, 16a-17a. As the State recognizes, several courts have issued decisions

consistent with this holding. Pet. 12-13 (citing *Villa*, 865 F.3d at 1234; *State v. Bruce*, 287 P.3d 919, 924 (Kan. 2012); *State v. Daniels*, 389 So. 2d 631, 636 (Fla. 1980); *State v. Frink*, 206 N.W.2d 664, 669-70 (Minn. 1973)).

The State also claims that the Oregon Supreme Court's holding implicates a split of authority over whether or when principal prosecuting attorneys may delegate their authority to obtain wiretaps to subordinates. On that point, the State is incorrect. No jurisdiction would have sanctioned the "blanket delegation" here.

1. Most of the cases the State cites hold that Section 2516(2) is satisfied where the principal prosecuting attorney has at least some individualized involvement in the wiretap application process. *See, e.g.*, *United States v. Smith*, 726 F.2d 852, 857-58 (1st Cir. 1984) (en banc); *Alexander v. Harris*, 595 F.2d 87, 89 (2d Cir. 1979); *O'Hara v. People*, 271 P.3d 503, 505 (Colo. 2012); *State v. Marine*, 464 A.2d 872, 878 (Del. 1983); *Commonwealth v. D'Amour*, 704 N.E.2d 1166, 1174 (Mass. 1999); *Commonwealth v. Vitello*, 327 N.E.2d 819, 838 (Mass. 1975). The Oregon Supreme Court, however, did "not decide" whether such "substantial compliance" with Section 2516(2) satisfies the provision, because the State did not "substantially comply" in this case. Pet. App. 19a. The Oregon Supreme Court held merely that the statute does not allow "blanket delegations" of authority, where the applications are made "without any indication that the elected district attorney even had participated in the process." *Id.* 8a, 19a-20a, 20a n.6.

In fact, the State does not contest that many of these cases are "substantial compliance" holdings, and

it implicitly recognizes that such holdings do not control here. Pet. 13 & n.5. But the State protests that *Alexander* and *D'Amour* were not "substantial compliance" cases. *Id.* The State is wrong.

Alexander fits neatly into the "substantial compliance" category of case law. *See Smith*, 726 F.2d at 857, 859 (classifying *Alexander* in this manner). The Second Circuit stated that "the principal prosecuting attorney" of the jurisdiction in question "*did* approve the application" at issue. *Alexander*, 595 F.2d at 89 (emphasis added). The State protests that the Second Circuit cited "no facts" to support that statement. Pet. 14 n.5. But insofar as the two paragraphs the Second Circuit devoted to the delegation issue do not make the principal prosecuting attorney's involvement clear, the full record does. As the State of New York explained, the chief prosecutor "made the decision to apply for the wiretap orders" and "swore that he had reviewed the detective's proposed application (which included, *inter alia*, the facts relied upon in seeking each extension)." Br. in Opp. at 5, *Alexander v. New York*, 434 U.S. 836 (1977) (No. 76-1858).

D'Amour similarly required "substantial compliance." The Massachusetts Supreme Judicial Court found "ample evidence that the district attorney properly reviewed the application" for the wiretaps and did not vest the assistant district attorney with "unfettered power," making the "scope of the authorization limited." 704 N.E.2d at 1174-75. The court also explained that its holding was consistent with the First Circuit's decision in *Smith* and the Massachusetts Supreme Judicial Court's own earlier decision in *Vitello*—decisions that require "substantial

compliance" with Section 2516(2)'s "principal prosecuting attorney" rule. *See D'Amour*, 704 N.E.2d at 1174-75; Pet. 12-13.

2. The remaining cases the State cites involve situations where the principal prosecuting attorney delegated authority during an absence, such as time away from the office to attend to an ill family member. *See United States v. Perez-Valencia*, 727 F.3d 852, 854-55 (9th Cir. 2013); *United States v. Fury*, 554 F.2d 522, 526-27 (2d Cir. 1977); *People v. Gonzalez*, 499 P.3d 282, 301 & n.10 (Cal. 2021).

Those cases do not contribute to any split either. The State claims no absence here. And allowing prosecutors to delegate their authority during an absence does not mean, by extension, that a court would permit blanket delegations. A separate provision in the Wiretap Act expressly allows delegation in emergencies, giving textual support to the notion that a subordinate may obtain a wiretap when a principal prosecuting attorney is temporarily unavailable. *See* 18 U.S.C. § 2518(7). The practical need for "continuity of administration" in government also sometimes allows "acting" governmental officials and the like to perform tasks that are reserved for certain offices that are temporarily vacant. *Daniels*, 389 So. 2d at 636. Consequently, these courts have reasoned that "Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability" of the principal prosecuting attorney. *Fury*, 554 F.2d at 527 n.4 (internal quotation marks omitted).

This reasoning does not carry over to blanket delegations. The Ninth Circuit, for example, allows

delegations during "absences." *See United States v. Perez-Valencia*, 744 F.3d 600, 604 (9th Cir. 2014); *Perez-Valencia*, 727 F.3d at 855. But it has repeatedly made clear that this rule does not allow principal prosecuting attorneys to delegate their "authority to apply for a wiretap order" in a wholesale manner. *Perez-Valencia*, 727 F.3d at 855; *see also Villa*, 865 F.3d at 1234 (Wiretap Act prohibits delegations where the principal prosecuting attorney provides no indication "that he had personally reviewed the supporting affidavits or otherwise learned their contents"). As the State acknowledges, the Florida Supreme Court likewise has construed Section 2516(2) to prohibit blanket delegations but expressly "le[ft] open whether the legislature could enact a 'narrowly confined' delegation for when 'the state attorney is absent.'" Pet. 13 (quoting *Daniels*, 389 So. 2d at 636).

B. The delegation issue is not particularly important.

There is no good reason to think the Oregon Supreme Court's ruling will have the "widespread consequences" (Pet. 18) the State imagines.

1. The decision's likely effects in Oregon itself are minimal. Oregon has thirty-six counties. Yet over the past five years, the State has reported obtaining only eighteen wiretaps—far fewer than one per county. *See* U.S. Courts, *Wiretap Reports*, https://www.uscourts.gov/statistics-reports/analysis-reports/wiretap-reports (last visited Nov. 3, 2022). Requiring district attorneys' direct personal involvement in applying for wiretaps once every several years does not impose the sort of burden on governmental resources that warrants this Court's attention.

2. Nor is resolving the petition's delegation question important to the nationwide administration of the Wiretap Act. The State notes that, over the last eleven years, courts have authorized "more than 55,000 wiretaps, the majority of them based on applications by state prosecutors." Pet. 15. But this figure vastly overstates the implications of the question presented. For one thing, the State's figure includes wiretaps obtained by federal prosecutors. Furthermore, the large majority of the state authorizations included in the figure were issued in jurisdictions that already forbid the kind of blanket delegation the State argues for here.

The State insists that the wiretap regimes in "at least 20 states" do allow blanket delegations. Pet. 18. But the laws in many of the states it points to—California, Colorado, Hawaii, Indiana, New Jersey, and Pennsylvania—allow delegation only "when the principal prosecuting attorney is absent or unavailable." *Id.* 16-17, 17 n.8.

Even in the remaining handful of states that seem to have blanket delegation laws on the books, there is no indication that the question presented arises with any frequency. Case law indicates that the Wiretap Act's "principal prosecuting attorney" requirement can be met if the deputy merely walks down the hall or sends a short email to the principal prosecuting attorney to receive the requisite approval. *See, e.g.*, *United States v. Santora*, 600 F.2d 1317, 1320 (9th Cir. 1979) (prosecutor need not scrutinize "the factual foundation for the recommendation upon which he relies"). The State provides no evidence that junior prosecutors in states like Oregon do not customarily take these simple steps when seeking wiretaps.

Nor is there any reason to believe they do not. Wiretap surveillance is costly and typically reserved for investigations in particularly serious crimes. *See* U.S. Courts, *Wiretap Report 2021* tbl.5, https://www.uscourts.gov/statistics-reports/wiretap-report-2021 (last updated Dec. 31, 2021). Regardless of state law requirements, therefore, principal prosecuting attorneys throughout the country are likely involved in many of the wiretap applications that prosecutors file.

C. The Oregon Supreme Court's holding is correct.

The text and structure of the Wiretap Act, as well as this Court's interpretation of it, all make clear that Section 2516(2) does not allow deputy prosecutors to obtain wiretap orders without any involvement of principal prosecuting attorneys. Neither the snippet of legislative history the State highlights nor any "presumption of delegability" counsels otherwise.

1. When "the plain language" of a statute is clear, the Court's inquiry "begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs. v. Dept. of Defense*, 138 S. Ct. 617, 631 (2018) (citation omitted). Such is the case here.

The Wiretap Act prohibits all interception of communications via wiretap "[e]xcept as otherwise specifically provided in this chapter." 18 U.S.C. § 2511(1). And the allowances the Act makes are limited and discrete: Section 2516(2) provides only that "[t]he principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof" may apply for a court-authorized wiretap. *Id.* § 2516(2).

"The state does not dispute that, in Oregon, the 'principal prosecuting attorney' of a county is the district attorney and *not* deputy district attorneys." Pet. App. 10a (emphasis added). Nor could it: Oregon law classifies *any* attorney appointed by the district attorney as a "deputy district attorney." *See* Or. Rev. Stat. § 8.780 (2022); *see also Deputy District Attorney 1*, Multnomah County, https://perma.cc/2NP5-N8SE (job posting classifying certain "deputy district attorney" positions as "entry level").

That reality defeats the State's claim. It is well established that when interpreting a statute, "[t]he expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). Indeed, the language of 18 U.S.C. § 2516(1)—the federal-officials counterpart to Section 2516(2)—provides a textbook example of this canon's application. Section 2516(1) expressly permits certain federal officials to obtain wiretaps. And in *Giordano*, this Court held that because "[t]he statute named two types of high-ranking officials, . . . all others were excluded." Scalia & Garner, *supra*, at 111 (citing *Giordano*, 416 U.S. at 514).

The same reasoning applies here. Section 2516(2) allows the "*principal* prosecuting attorney"—not deputies or any other prosecuting attorney—to apply for a wiretap. 18 U.S.C. § 2516(2) (emphasis added). The State asks permission for deputy prosecutors to seek wiretaps, too. But the "circumstances support a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002).

2. The Wiretap Act's structure likewise indicates that blanket delegations by state principal prosecuting attorneys are forbidden. "[W]hen 'Congress includes particular language in one section of a statute but omits it in another'—let alone the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."). That is the case here.

After *Giordano*, Congress amended Section 2516(1) to allow certain high-ranking federal officials "*specially designated by* the Attorney General" to obtain wiretaps. 18 U.S.C. § 2516(1) (emphasis added). Section 2516(2), however, contains no similar state-side allowance. Instead, the only provision in the Act that allows state principal prosecuting attorneys to delegate authority to other officials is 18 U.S.C. § 2518(7). That statute provides that, in certain emergencies, "any investigative or law enforcement officer, *specially designated by* the . . . principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State" can obtain a wiretap. *Id.* (emphasis added). Compared to the all-purpose allowance for federal delegations, this specific provision reveals that when Congress wanted to permit principal prosecuting attorneys to delegate their authority to subordinates, it said so expressly. And Congress chose not to say so in Section 2516(2).

What is more, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Yet if the State were correct that Section 2516(2) allows delegations under any circumstances permitted by state law, then the emergency delegation provision, Section 2518(7), would be superfluous.

The State responds that Congress permitted delegation when "enacting legislation implementing Title III for the District of Columbia." Pet. 17. In the State's view, this amendment to the Act "suggests that Congress intended for the states to enjoy similar flexibility." *Id.* 18. Not so. The express grant of delegation authority to prosecutors in the District of Columbia confirms that Congress knows how to permit delegations for wiretap applications when it desires. Yet Congress has conferred no such authority on state principal prosecuting attorneys in Section 2516(2).

3. The Oregon Supreme Court's decision also follows this Court's precedent. In *Giordano*, this Court explained that Congress designed the Wiretap Act to ensure "that the statutory authority [to obtain wiretaps] be used with restraint." 416 U.S. at 515. In particular, Congress sought to ensure that the responsibility for obtaining wiretaps be invested only in "those public officials who will be principally accountable to the courts and the public for their actions." *Id.* at 522 n.10. Congress likewise deemed it "critical" that only those with "mature judgment" be able to apply for wiretaps. *Id.* at 515-16. The *Giordano*

Court therefore refused to allow federal officials not specifically identified in the Wiretap Act to obtain wiretaps—not even by means of delegation. *Id.* at 523.

These principles apply with no less force to state officials and state wiretaps. Yet the State would allow low-level officials with no political accountability to obtain wiretaps. Indeed, the State's argument has no limiting principle. The State frames the question presented as whether delegations to "deput[ies]" are permissible. Pet. i. But if the State is correct that delegation is "purely" a question of state law, *id.* 11, a state legislature could authorize delegation of the sensitive task of seeking wiretaps not just to all line-level prosecutors, but even to summer clerks or paralegals. The result would be antithetical to *Giordano* and the congressional design it enforced.

4. Unable to mount a serious argument from the statute's text, structure, or precedent, the State argues that legislative history and a "presumption of delegability" support its claims. Pet. 18-20. Neither argument is persuasive.

As to the first, where, as here, there is a "straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). Even so, the snippet of legislative history the State propounds hardly shows that Congress intended to permit blanket delegations of wiretap authority. The State quotes a single line from a Senate Report observing that "[t]he issue of delegation" by the principal prosecuting attorney "would be a question of State law." Pet. 10 (quoting S. Rep. No. 90-1097, at 98 (1968)). Placed in context, however, this sentence does not support blanket delegations. The very same report explains

that, beyond wiretap authorizations by "the attorney general anywhere in the State and the district attorney anywhere in his county," the Act "does not envision a further breakdown" of authority. *Id.* And in general, there is "ample legislative history underscoring the need for centralization" of wiretapping authority in principal prosecuting attorneys. *Smith*, 726 F.2d at 857.

As to the second, the State's appeal to a "presumption of delegability" misses the mark. Pet. 18-19. It is unclear whether any such canon of construction exists, and this Court has never coined the phrase the State uses. The cases the State cites stand for the unremarkable proposition that federal officials in administrative agencies who are granted broad "rule-making power" can delegate responsibility to subordinates. *See, e.g.*, *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121-22 (1947).

Even if there were a presumption of delegability, the authority the State cites would still defeat its argument. In *Fleming*, the Court upheld an administrative delegation under a statute that contained no express discussion of delegation. 331 U.S. at 121. In doing so, the Court distinguished *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942). In *Cudahy*, the Court prohibited a delegation because the statute "specifically authorize[d] delegation as to a particular function," but not as to the function at issue. *Fleming*, 331 U.S. at 121. This Court explained that, where a neighboring provision expressly permits delegation, the omission of that authority under the provision at issue "lend[s] support to the view that when Congress desired to give authority to delegate, it said so explicitly." *Id.*

This case resembles *Cudahy*, not *Fleming*. Neighboring provisions of the Wiretap Act expressly permit delegation. *See supra* at 13-14. But Section 2516(2) does not; therefore, a power to delegate cannot be judicially read into Section 2516(2).

II. The "good-faith" question presented does not warrant review.

The State next challenges the Oregon Supreme Court's refusal to read the Fourth Amendment's good-faith exception into Section 2518(10)(a)(i)'s directive that "unlawfully intercepted" communications must be suppressed. Pet. 21. Specifically, the Oregon Supreme Court held that "suppression under section 2518(10)(a)(i) [is] required when," as here, the wiretap "violates a statutory provision that reflects Congress' core concerns" under the Wiretap Act. Pet. App. 24a (quoting *Dahda v. United States*, 138 S. Ct. 1491, 1499 (2018)). There is no reason to review this holding.

A. The Oregon Supreme Court's holding does not implicate any conflict of authority.

The State is wrong (Pet. 21) to suggest that the Oregon Supreme Court's holding implicates a split in the lower courts. Like the Oregon Supreme Court, the Sixth Circuit has held that Section 2518(10)(a)(i) does not incorporate the good-faith exception where communications are unlawfully intercepted in violation of the Wiretap Act's core concerns. *See United States v. Rice*, 478 F.3d 704, 711 (6th Cir. 2007). But none of the cases that the State cites demonstrates that another jurisdiction would have decided this case differently.

The State first cites *United States v. Brunson*, 968 F.3d 325 (4th Cir. 2020), and *United States v. Friend*,

992 F.3d 728 (8th Cir. 2021). Pet. 22. In those cases, the Fourth and Eighth Circuits held that even if a "technical defect" in listing the authorizing official on a wiretap order rendered the order "insufficient on its face" under 18 U.S.C. § 2518(10)(a)(ii), the motions to suppress would be "appropriately [] denied under the good-faith doctrine." *Brunson*, 968 F.3d at 333; *see also Friend*, 992 F.3d at 731.

Those decisions do not bear on this case for two reasons. First, the State seems to assume decisions construing Section 2518(10)(a)(ii)'s facial insufficiency standard for suppression apply equally to Section 2518(10)(a)(i)'s unlawful interception standard—the standard at issue in this case. But this Court has explained that these two standards possess "separate legal force" and have "independent meaning." *Dahda*, 138 S. Ct. at 1497-98. Consequently, as the Oregon Supreme Court suggested, any good-faith exception that might inhere in subsection (ii)'s "less rigid" standard would not necessarily extend to subsection (i). Pet. App. 24a. And neither the Fourth Circuit nor the Eighth Circuit has applied its subsection (ii) holding to subsection (i).

Second, even if the Fourth and Eighth Circuits would apply their subsection (ii) precedent to subsection (i), they still would not have found the good-faith exception applicable here. The Fourth and Eighth Circuits' "good-faith" holdings were grounded in the "technical rather than substantive" nature of the violations at issue. *Friend*, 992 F.3d at 732; *accord Brunson*, 968 F.3d at 334. Indeed, the Fourth Circuit stressed that the government officials complied with "the central substantive requirements of the Wiretap Act" and did not "fail to secure proper authorization

for the applications submitted." *Brunson*, 968 F.3d at 334. Here, by contrast, the State failed to secure proper authorization for the submitted applications, violating a "central" requirement in the statutory regime. *United States v. Giordano*, 416 U.S. 505, 528 (1974); *see also Dahda*, 138 S. Ct. at 1497. In this circumstance—where the "omission [] was not merely a technical defect" because "the government failed to comply with the core statutory requirements of federal wiretap law"—the good-faith exception does not apply even under the Fourth and Eighth Circuits' rubric. *United States v. Lomeli*, 676 F.3d 734, 743 (8th Cir. 2012).[1]

Nor does the Ninth Circuit's decision in *United States v. Reed*, 575 F.3d 900 (9th Cir. 2009), conflict with the Oregon Supreme Court's decision here. *Reed* did not involve an unlawful interception of a communication under Section 2518(10)(a)(i). Instead, that case concerned the Wiretap Act's sealing requirements. *Id.* at 904. And the Act provides that violating those requirements does not require suppression where the prosecution gives a "satisfactory explanation" for the violation. 18 U.S.C. § 2518(8)(a). Section 2518(10)(a)(i) contains no such language.

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[1] Unlike the Fourth and Eighth Circuits, the D.C. Circuit has indicated that subsection (ii) requires suppression even for technical defects. *See, e.g.*, *United States v. Scurry*, 821 F.3d 1, 13 (D.C. Cir. 2016). But as just explained, this case concerns neither subsection (ii) nor a technical defect. Furthermore, this Court recently denied certiorari in a case presenting the "technical defect" issue. *See Friend v. United States*, 142 S. Ct. 819 (2022).

At any rate, the Ninth Circuit's reference in *Reed* to the government's good-faith reliance on existing law was dicta. The Ninth Circuit held that the call data content in question was "not a communication under § 2518," and thus did not fall within the Wiretap Act at all. *Reed*, 575 F.3d at 916. And even if the government had violated the Act, the Ninth Circuit merely suggested that its prior decision in *United States v. Butz*, 982 F.2d 1378 (9th Cir. 1993), would have governed. *Reed*, 575 F.3d at 917. But *Butz* dealt with pen register orders, not wiretaps. 982 F.2d at 1383. The suppression of evidence from pen registers turns solely on the Fourth Amendment (or state law), not the Wiretap Act. *See Giordano*, 416 U.S. at 553-54 (Powell, J., concurring in part and dissenting in part).

Finally, the State is mistaken to suggest that the Eleventh Circuit addressed the good-faith doctrine's applicability to the Wiretap Act in *United States v. Malekzadeh*, 855 F.2d 1492 (11th Cir. 1988). Instead, the defendant there argued that wiretap evidence should be suppressed because it was the fruit of an *earlier* search that was "constitutionally infirm." *Id.* at 1496. The Eleventh Circuit rejected this argument on purely constitutional grounds. *Id.* at 1497. It found no violation of the Wiretap Act, much less discussed whether Section 2518(10)(a)(i) incorporates the good-faith exception to the exclusionary rule.

B. The Oregon Supreme Court is correct.

1. This Court has repeatedly held that evidence procured from an unlawful interception that violates a "core concern[]" of the Wiretap Act must be suppressed. *See Dahda*, 138 S. Ct. at 1499 (citing *Giordano*, 416 U.S. at 527). And this Court held in *Giordano* that Title III's pre-application approval

requirements play a "central role in the statutory scheme." 416 U.S. at 528. Consequently, where, as here, a wiretap application was "not authorized by one of the statutorily designated officials," it is settled law that evidence from that wiretap "*must* be suppressed." *Id.* at 508 (emphasis added).

The State protests that the Oregon Supreme Court was wrong to deem *Giordano* "controlling precedent" because the Court "did not consider the availability of a good-faith exception to suppression." Pet. 23, 25 n.10 (citing Pet. App. 23a). But that is exactly the point. *Giordano* extensively evaluated whether suppression was warranted. It concluded that suppression of wiretap evidence "does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, *but upon the provisions of Title III*." *Giordano*, 416 U.S. at 524 (emphasis added). Those provisions—most notably, Section 2518(10)(a)(i)—mandate suppression where the government intercepts communications in a manner that transgresses Congress's core concerns. *Id.* at 527; *see also Dahda*, 138 S. Ct. at 1499.

The State also suggests that four other Wiretap Act cases support reading the good-faith exception into Section 2518(10)(a)'s suppression requirements. Pet. 24. But the question whether a subsection of Section 2518(10)(a) contains the good-faith exception cannot arise unless the evidence would be suppressed under the subsection absent such a rule. And in three of those cases, the Court held that Section 2518(10)(a) would not have required suppression even without a good-faith exception. *See Dahda*, 138 S. Ct. at 1499; *United States v. Donovan*, 429 U.S. 413, 439-40 (1977); *United States v. Chavez*, 416 U.S. 562, 579 (1974). In

the fourth case, Section 2518(10)(a) was "not applicable" at all. *United States v. Ojeda Rios*, 495 U.S. 257, 260 n.1 (1990). Instead, only the Act's sealing rules were at issue. *Id.* at 260.

2. Even if the question were not already settled, basic principles of statutory interpretation make clear that suppression is required here.

The Wiretap Act provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. And Section 2518(10)(a)(i) allows "aggrieved person[s] in any trial" to "move to suppress the contents of any wire or oral communication" if "the communication was unlawfully intercepted." *Id.* § 2518(10)(a)(i).

Neither provision makes any reference to the good-faith exception. Textually, that is the end of the matter. Courts "may not engraft [their] own exceptions onto the statutory text." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). In fact, this Court recently contrasted its inability to rewrite statutory rules with its authority to create exceptions from "judicially created" rules. Statutory rules must be taken at "face value," while judicially created doctrines "remain amenable to judge-made exceptions." *Ross v. Blake*, 578 U.S. 632, 639 (2016). That reasoning applies with full force here. While this Court may create exceptions to the Fourth Amendment's exclusionary rule, it cannot "add unwritten limits," *id.*, to Section 2518(10)(a)(i). It must enforce that provision as written.

Neighboring provisions confirm that Section 2518(10)(a)(i) does not incorporate the good-faith exception. 18 U.S.C. § 2520(d) provides that, in "any civil or criminal action" brought directly under the Wiretap Act, "good faith reliance on a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization" constitutes "a complete defense." This Court "generally presum[es] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (internal quotation marks omitted). Indeed, the Court in *Giordano* noted Title III's separate criteria for suppression as a deliberate feature: "Clearly, the circumstances under which suppression of evidence would be required are *not necessarily the same* as those under which a criminal violation of Title III would be found." 416 U.S. at 529 n.18 (emphasis added).

The Wiretap Act also contains something akin to the good-faith exception for violations of the Act's sealing requirements. The statute forbids the use in litigation of any electronic communication that was not properly sealed. 18 U.S.C. § 2518(8)(a). But it suspends this prohibition when the prosecution provides "a satisfactory explanation," *id.*, for the absence of a seal—a test this Court has suggested is satisfied where law enforcement made an "objectively reasonable" mistake of law. *Ojeda Rios*, 495 U.S. at 266-67. Again, Section 2518(10)(a) contains no such exception.

3. Finding no footing in text, structure, or precedent, the State argues that reading the good-

faith exception into Section 2518(10)(a)(i) comports with the legislative history of the Wiretap Act and "Congress's purpose in enacting Title III's restrictions on wiretaps." Pet. 24. Neither argument is availing.

As with the State's legislative history argument regarding the substance of Section 2518(10)(a)(i), legislative history is irrelevant with respect to the good-faith exception where, as here, the statutory text is clear. *See, e.g.*, *Milner v. Dept. of Navy*, 562 U.S. 562, 572 (2011).

Even if it were relevant, the Act's legislative history would not aid the State. The Senate Report excerpt the State invokes makes no reference to good faith. It says only that the bill was not intended "to press the scope of the suppression role beyond *present* search and seizure law." S. Rep. No. 90-1097, at 96 (1968) (emphasis added). In the same paragraph, the report maintains that the bill "largely reflects *existing* law." *Id.* (emphasis added). The "present" and "existing" Fourth Amendment law in 1968 contained no good-faith exception. Indeed, Title III predates this Court's creation of the exception by sixteen years. *See United States v. Leon*, 468 U.S. 897, 913 (1984) ("As yet, we have not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule.").

Moreover, when the "plain text" of a statute is clear, courts "have no warrant to elevate vague invocations of statutory purpose over the words Congress chose." *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792-93 (2022). At any rate, the State's suggestion that suppression here "would not further Congress's purpose in enacting Title III," Pet. 24, cannot be reconciled with this Court's precedent. To

repeat: This Court held in *Giordano* that restrictions on who may procure wiretap orders "play a central role in the statutory scheme," and that Section 2518(10)(a)(i) mandates suppression when those restrictions are violated. 416 U.S. at 528. In light of that holding, it is clear that "Congress has already balanced the social costs and benefits and has provided that suppression is the *sole remedy* for violations" of the Wiretap Act that fall within Section 2518(10)(a)(i). *Rice*, 478 F.3d at 713 (emphasis added).

C. This case is a poor vehicle to address the question presented.

Even if the State were correct that Section 2518(10)(a)(i) somehow incorporates the good-faith exception, the exception would not apply here. Good-faith reliance under the Fourth Amendment turns on whether, despite apparent authorization from a magistrate or state law, "a reasonably well-trained officer would have known that the search was illegal." *Leon*, 468 U.S. at 922 n.23 (magistrate authorization); *see also Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (state statutes). If anything, that test would apply with additional vigor here because the applicants for wiretaps are prosecutors, not police officers—and because wiretap applicants operate under a "comprehensive statutory scheme providing explicit requirements, procedures, and protections," *Rice*, 478 F.3d at 712, not the generalized language of the Fourth Amendment.

Here, any belief on the State's part that a deputy prosecutor could obtain a wiretap without any involvement whatsoever of the district attorney was not "objectively reasonable." *Leon*, 468 U.S. at 922. When the wiretaps were procured, case law from the

Ninth Circuit—which covers Oregon—made clear that blanket delegations of wiretap application authority were impermissible. *See, e.g.*, *Villa v. Maricopa County*, 865 F.3d 1224, 1234 (9th Cir. 2017); *United States v. Perez-Valencia*, 727 F.3d 852, 855 (9th Cir. 2013). Precedent from every other jurisdiction to consider the issue agreed. *See O'Hara v. People*, 271 P.3d 503, 509-11 (Colo. 2012); *State v. Bruce*, 287 P.3d 919, 924-25 (Kan. 2012); *State v. Daniels*, 389 So. 2d 631, 636 (Fla. 1980); *State v. Frink*, 206 N.W.2d 664, 674 (Minn. 1973).

This case law alone rendered the State's reliance on state law and the magistrate's issuance of the wiretap orders objectively unreasonable. *See, e.g.*, *State v. Gonzales*, 337 P.3d 129, 132 (Or. Ct. App. 2014) (concluding that Ninth Circuit precedent made officer's reliance on state statute objectively unreasonable); *United States v. Leake*, 998 F.2d 1359, 1367 (6th Cir. 1993) (suppression required where officer "could not properly have placed objective good faith reliance on the warrant" issued).

But there is more. Three years before the State applied for the wiretap orders here, a federal prosecutor notified the Oregon Department of Justice that there were "quite a few cases out there in state courts" addressing this issue, highlighting the Kansas Supreme Court's decision in *Bruce*. *See* Or. S. Ct. SER 1-11. That case, exactly like this one, held that a blanket delegation of prosecutorial authority to obtain wiretaps violated the Wiretap Act. *See Bruce*, 287 P.3d at 924. Oregon Department of Justice officials responded, "Well, that's troubling," Or. S. Ct. SER at 1, but left their wiretap practices unchanged. The State should not be heard now to claim good-faith

reliance on a delegation scheme it knew was problematic years before applying for the wiretap orders here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
Easha Anand
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin M. Sali
Counsel of Record
John Robb
KEVIN SALI LLC
1500 SW First Avenue,
Suite 1020
Portland, OR 97201
(971) 407-3371
kevin@salilaw.com

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