No. 22-85

IN THE
Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

LANGSTON AMANI HARRIS

Respondent.

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

REPLY BRIEF

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ARGUMENT

Both questions presented warrant this Court's attention. Decisions from the lower courts about the extent to which principal prosecuting attorneys may delegate their authority to apply for wiretaps are, to put it charitably, all over the map. Respondent does not dispute that this case is a good vehicle for the Court to decide whether Congress intended to prohibit delegation or instead to permit it to the extent allowed by state law. This case also presents a good vehicle for resolving, once and for all, whether and to what extent good faith is an exception to suppression under the Wiretap Act.

A. The delegation question warrants review.

1. There is a meaningful split of authority on the question.

Respondent misunderstands the question as being about whether 18 U.S.C. § 2516(2) itself authorizes "blanket delegation" by the principal prosecuting attorney. Br. in Opp. 6. The question here is whether Congress intended to resolve the delegation issue nationwide or instead to leave it to the states to decide for themselves the extent to which to allow delegation. As respondent acknowledges, some courts, like the court below here, treat the delegation issue as one of federal law and read the Wiretap Act as forbidding delegation. Br. in Opp. 6 (citing cases). Other courts—following the unusually clear legislative history on point—treat delegation as an issue of state law and look solely to state law to

resolve delegation disputes. *See* Pet. 11–12 (citing cases).

Respondent suggests that, notwithstanding broad language in some of those decisions, they all can be understood as prohibiting delegation but finding "substantial compliance" with federal law when the principal prosecuting attorney had "at least some individualized involvement in the wiretap application process." Br. in Opp. 6. But that is not a satisfactory explanation for the body of case law.

For example, *Commonwealth v. D'Amour*, 704 N.E.2d 1166, 1170 (Mass. 1999), is not consistent with respondent's proposed "individualized involvement" requirement. The district attorney in that case delegated authority to two Assistant District Attorneys to apply for any appropriate wiretap orders—including any later renewal applications—"in connection with the investigation of the murder of Robert P. D'Amour and related matters including the fraudulent receipt and larceny of life insurance proceeds." *Id.* at 1174 n.10. The Massachusetts Supreme Judicial Court understood that delegation to cover wiretaps on the "class of people who could have participated in the murder and the related insurance crimes." *Id.* at 1174. It nonetheless upheld the delegation, concluding that it complied with state law by sufficiently limiting the scope of authority to a particular crime and that "[t]he district attorney, subject to public accountability, accepted responsibility for the application through the authorization letter." *Id.* The court noted that wording of the delegation

reflected that the district attorney had "familiarity with the case," *id.* at 1175, but it did not require evidence that the district attorney was personally involved in each particular wiretap application. Indeed, the court rejected the argument that the district attorney had to do anything beyond the original delegation to authorize the assistant district attorney to apply for renewed wiretap orders. *Id.* The only "individualized involvement," Br. in Opp. 6, that the court required in *D'Amour* was the delegation decision itself.

Respondent's account of *Alexander v. Harris*, 595 F.2d 87 (2d Cir. 1979) (*per curiam*), is no more satisfying. To shoehorn that decision into the "substantial compliance" framework, respondent resorts to facts from the briefing in an earlier state-court proceeding arising out of the same criminal prosecution. Br. in Opp. 7. Assuming that those facts were before the Second Circuit in the later habeas proceeding, it is unlikely that the court would have omitted them from its decision if it thought they were determinative. Nor does *Alexander* support respondent's view that the cases uniformly turn on substantial compliance with *federal* law. To the extent that the court in that case inferred limits to a prosecutor's delegation authority, it found those limits in *state* law, not in the Wiretap Act. *See Alexander*, 595 F.2d at 89 (discussing whether there was a requirement for personal appearance by the county attorney "under the New Jersey statute").

More generally, "substantial compliance" with federal law is a poor explanation for the breadth of

delegations allowed by some lower courts. Section 2516(2) allows principal prosecuting attorneys to "apply" for wiretap orders. If—as respondent contends—federal law prohibited delegation of that authority to a subordinate prosecutor, the substantial-compliance question would be whether the principal prosecuting attorney effectively *applied* for the order. Delegating the ministerial act of filing the application might constitute "substantial compliance" as long as the principal prosecuting attorney personally made the decision to apply. But merely having some "involvement in the wiretap application process," Br. in Opp. 6, even if someone else makes the ultimate decision to apply and submits the application, could not reasonably be described as "substantial compliance" with a rule prohibiting delegation. The variety of delegations allowed by lower courts are better explained as the result of applying a variety of state laws, just as Congress contemplated.

The reasoning of the decision below is also in considerable tension with the many cases approving delegation when the principal prosecuting attorney is absent or unavailable. True, as respondent notes, this case does not involve an absence. Br. in Opp. 8. But if § 2516(2) flatly prohibited delegation, there would be no sound textual basis for distinguishing between delegations during absences and delegations for any other reason allowed by state law. Respondent cites the emergency-authorization provision in 18 U.S.C. § 2518(7) as supporting the legality of delegation in the absence of the principal

prosecuting attorney, Br. in Opp. 8, but that provision has nothing to do with absences.

In the end, even if it were possible to come up with a unifying principle that reconciled the results of all the published decisions, the issue would still warrant review. The case law that has developed over decades lacks uniformity, and there is no apparent textual basis for the line that would have to be drawn. That alone is reason for this Court to grant review even if it is not convinced that there is a square circuit split.

2. The delegation issue has practical importance.

Whether principal prosecuting attorneys can delegate wiretap-application authority to subordinate prosecutors is a question that matters to effective law enforcement. The best evidence of that is what Congress itself and more than a dozen states have chosen to do. When Congress—shortly after enacting the Wiretap Act—enacted the implementing legislation for the District of Columbia, it expressly authorized delegation by the principal prosecuting attorney of the authority to apply for wiretap orders. *See* Pet. 17 & n.9 (citing and quoting the relevant provisions). And even accepting respondent's argument for excluding the states that authorize delegation only for absences, there are still 14 states that have enacted laws that expressly authorize delegations like the one at issue here. *See* Pet. 16 nn.6–7 (citing statutes).

It is difficult to believe that Congress and the states went to the trouble of authorizing those

delegations if, as respondent contends, they are wholly unnecessary. Respondent may be correct that in in smaller jurisdictions it would not be a great burden to require the principal prosecuting attorney personally to apply for the handful of wiretap orders sought each year. Br. in Opp. 9–11. But the rule of law is the same for small and large jurisdictions. The delegation question likely matters a great deal more in prosecutorial offices in major metropolitan areas. Those offices may be so large, and have so many investigations, that the principal prosecuting attorney cannot personally review all wiretap applications in a meaningful way without detracting from other important work. Respondent's assurance that all it would take is "a short email to the principal prosecuting attorney to receive the requisite approval," Br. in Opp. 10, ignores that at least some courts in the anti-delegation camp require far more. *See, e.g.*, *Villa v. Maricopa County*, 865 F.3d 1224, 1234 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018) (holding that the principal prosecuting attorney must be "personally familiar with all of the facts and circumstances justifying his or her belief that an order should be issued" and that it is "not sufficient for the principal prosecuting attorney to state that he or she is generally aware of the criminal investigation [or] that he or she authorizes a deputy to seek wiretaps") (quotation marks omitted).

This Court's denial of *certiorari* in *Villa* does not signal that the issue is unimportant. Although respondent suggests that this petition is essentially identical, Br. in Opp. 5, this case is a better vehicle for resolving the issue than *Villa* was. *Villa* was a

suit for damages for unlawful wiretapping. 865 F.3d at 1229 (concluding that had standing only "to seek individual damages for past interception of her communications"). Although the Ninth Circuit panel opined that the Arizona statute allowing delegation was invalid, it ultimately held that the state officials had relied on it in good faith and so upheld dismissal of the damages claim. *Id.* at 1237 (holding that plaintiff lacked standing to seek prospective relief and "may not recover individual damages because Defendants are protected by the good faith provisions of § 2520(d)"). Thus, a decision on the validity of the statute by this Court would have had no concrete effect on the outcome of that suit. This case, by contrast, arises out of a motion to suppress where the ruling has a direct and significant effect on what evidence can be introduced at respondent's pending murder trial.

3. The Wiretap Act permits delegation to the extent allowed by state law.

The delegation question warrants review regardless of whether petitioner or respondent has the better of argument on the merits. But petitioner briefly addresses respondent's merits arguments here.

Respondent's textual analysis focuses on the wrong question. The question is not whether § 2516(2)'s grant of authority to the "principal prosecuting attorney" implies that others do not have the same authority. Br. in Opp. 12 (invoking the *expression unius* canon). Rather, the question is one that the statutory text does not address directly:

whether the authority under § 2516(2) to "apply" to a state court for a wiretap order must be exercised by principal prosecuting attorneys personally or whether they may delegate that authority to a subordinate prosecutor. Unlike § 2516(1), which expressly authorizes limited delegation within the federal government and therefore implicitly forbids broader delegation, § 2516(2) is silent on the question of delegation altogether. That silence, in turn, raises the question whether Congress intended in § 2516(2) to prohibit delegation by a principal prosecuting attorney or whether it instead intended to leave the delegation issue to state law. To the extent this Court's decision in *United States v. Giordano*, 416 U.S. 505 (1974), bears on that question, it supports the conclusion that Congress intended to permit delegations allowed by state law. *See id.* at 522 (noting, without disagreement, the federal government's position that § 2516(2) "leaves the matter of delegation up to state law").

Contrary to respondent's argument, that conclusion does not render the emergency provision of § 2518(7) superfluous. Br. in Opp. 13–14. That provision allows, during certain emergencies, investigative and law-enforcement officers to intercept communications *without* first getting a court order if a principal prosecuting attorney has "specially designated" them to do so. Reading § 2516(2) as permitting delegation in accordance with state law in nonemergency cases simply allows designated subordinates to *apply* for wiretap orders; it does not (like § 2518(7)) permit the subordinate to wiretap without a court order. If anything,

§ 2518(7)'s explicit reference to delegation by principal prosecuting attorneys confirms that the statute does not generally prohibit such delegations. It would be odd for the statute to forbid any delegation to subordinates of authority to apply for a court order but nonetheless permit delegation to investigative and law-enforcement officers—who may not even be the principal prosecuting attorney's subordinates—of the ultimate authority to wiretap at will.

Respondent's suggestion that it is "unclear" whether the presumption of delegability is a real canon of statutory construction, Br. in Opp. 16, reinforces the need for review. This Court may not have used that phrase before. But the federal courts of appeal are "unanimous" in reading this Court's cases as establishing a general presumption in favor of delegability that can be overcome only if the statutory text or legislative history affirmatively indicates that Congress intended otherwise. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190 (10th Cir. 2014), *cert. denied*, 576 US 1055 (2015); *see also, e.g.*, *Frankl v. HTH Corp.*, 650 F.3d 1334, 1350 (9th Cir. 2011), *cert. denied*, 556 U.S. 904 (2012) (noting the "general presumption that delegations to subordinates are permissible in cases of statutory silence"); Jason Marisam, *Duplicative Delegations*, 63 Admin. L. Rev. 181, 241 (2011) (noting that the power to delegate to subordinates is "uncontroversial"). If those decisions are mistaken, it is long past time for this Court to set matters straight. And if they are correct, this Court should say so to end any uncertainty. *Cf. West Virginia v.*

EPA, 142 S. Ct. 2587, 2609 (2022) (identifying the "major questions doctrine" that scholars and jurists had discerned from this Court's earlier cases even though those cases had not used that label).

B. The good-faith question warrants review.

Respondent does not dispute that there is a square circuit split on the availability of a good-faith exception to suppression under the Wiretap Act. But respondent argues that the split is not implicated here and that the circumstances of this case would not qualify for the good-faith exception if it exists. Br. in Opp. 17–20, 25–27. Neither argument is a sound basis for denying review.

Respondent posits that the circuits that recognize a good-faith exception might do so only for motions to suppress under subsection (ii) of 18 U.S.C. § 2518(10)(a) (the wiretap order is "insufficient on its face") but not for motions under subsection (i) ("the communication was unlawfully intercepted"). Br. in Opp. 18. But the cases themselves do not draw that line, and their reasoning does not track it.

The decision in *United States v. Brunson*, 968 F.3d 325, 334 (4th Cir. 2020), for example, held expressly—as an alternative basis for the ruling in that case—that "where law enforcement officials have acted reasonably and in good faith to comply with the central substantive requirements of the Wiretap Act, as is the case here, suppression is not justified." The reference to "central substantive requirements" resembles more closely the test for suppression under subsection (i), not subsection (ii). *See Dahda v.*

United States, 138 S. Ct. 1491, 1498 (2018) ("[S]ubparagraph (ii) does not contain a *Giordano*-like 'core concerns' requirement."). Similarly, the reasoning of *United States v. Moore*, 41 F.3d 370 (8th Cir. 1994), *cert. denied*, 514 U.S. 1121 (1995), turns on features common to § 2518(10)(a) as a whole—not anything specific to subsection (ii). *See id.* at 376 (explaining that "§ 2518(10)(a) is worded to make the suppression decision discretionary ('If the motion is granted'), and its legislative history expresses a clear intent to adopt suppression principles developed in Fourth Amendment cases").

Nor does *United States v. Malekzadeh*, 855 F.2d 1492 (11th Cir. 1988), *cert. denied*, 489 U.S. 1029 (1989), fit the line that respondent proposes, because the issue in that case was not the facial sufficiency of the wiretap order but rather the use of illegally obtained evidence to secure the order. Although respondent views *Malekzadeh* as addressing the good-faith exception solely under the Fourth Amendment rather than the Wiretap Act, Br. in Opp. 20, the Eleventh Circuit itself has rejected that characterization of the case. *United States v. Lara*, 588 Fed. App'x 935, 938 (11th Cir. 2014), *cert. denied*, 576 U.S. 1057 (2015) ("Contrary to Lara's argument, the good-faith exception can apply to wiretap evidence. *See United States v. Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1988)[.]") (footnote omitted).

Thus, whatever the merits of respondent's proposed distinction between subsections (i) and (ii), the issue deserves this Court's consideration to resolve the split among the federal courts of appeal

about the availability of a good-faith exception to suppression under the Wiretap Act.

This case is an excellent vehicle to resolve the circuit split, because the circumstances present a textbook case for the good-faith exception. There is no dispute that Or. Rev. Stat. § 133.724(1) expressly authorizes the delegation at issue here. "[O]bjectively reasonable reliance on a statute" that is later held invalid is a paradigmatic example of when the good-faith exception applies. *Illinois v. Krull*, 480 U.S. 340, 349 (1987). Respondent argues that the reliance here was unreasonable because there were cases from other jurisdictions ruling against the validity of delegations under § 2516(2) and because some Oregon Department of Justice personnel had been made aware in particular of a Kansas decision on point. Br. in Opp. 25–26. But there was no controlling precedent on point at the time from this Court or from the Oregon appellate courts. And "[u]nless a statute is *clearly* unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Krull*, 480 U.S. at 349–50 (emphasis added). The fact that the Ninth Circuit and courts outside of Oregon had held that delegation was impermissible did not make the Oregon statute clearly unlawful. If the Wiretap Act includes a good-faith exception to suppression, petitioner is entitled to prevail here. *Cf. Villa*, 865 F.3d at 1236 (finding that the good-faith exception to damages under the Wiretap Act applied when the application by a deputy county attorney "was made pursuant to the statutory authorization of" a state law).

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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