No. 23-401

In the Supreme Court of the United States

MICHAEL CAREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court would have interpretive authority to recognize an exception within the suppression provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, which provides that the contents of an intercepted communication, and evidence derived therefrom, may not "be received in evidence in any trial * * * if the disclosure of that information would be in violation of [Title III]," 18 U.S.C. 2515.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2023 WL 2423338. A prior opinion of the court of appeals (Pet. App. 20a-41a) is reported at 836 F.3d 1092. The order of the district court (Pet. App. 7a-19a) is reported at 342 F. Supp. 3d 1003. A prior order of the district court (Pet. App. 42a-52a) is not published in the Federal Supplement but is available at 2012 WL 1900059.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2023. A petition for rehearing was denied on May 18, 2023 (Pet. App. 62a). On July 25, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including Sep-

tember 15, 2023. On August 21, 2023, Justice Kagan further extended the time to and including October 15, 2023, and the petition was filed on October 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 53a. The district court sentenced petitioner to 150 months of imprisonment, to be followed by five years of supervised release. *Id.* at 55a-56a. The court of appeals vacated the district court's denial of petitioner's suppression motion and remanded for further proceedings on petitioner's motion to suppress evidence. *Id.* at 20a-41a. On remand, the district court again denied the motion and reinstated its original judgment. *Id.* at 7a-19a. The court of appeals affirmed. *Id.* at 1a-6a.

1. Petitioner was a member of a drug-trafficking organization in which he controlled the United States side of the organization's operations for smuggling cocaine from Mexico into California. Presentence Investigation Report (PSR) ¶¶ 4-5, 9-19. Drivers under petitioner's control transported large quantities of cocaine across the Mexican border into the United States. PSR ¶¶ 5, 13, 17; see D. Ct. Doc. 164, at 6 (Aug. 12, 2013) (government's argument that petitioner's "conspiracy involved far more than 150 kilograms of cocaine, the minimum required for a base offense level 38"); Sent. Tr. 8-9 (sentencing court's application of base offense level 38).

The government obtained evidence of petitioner's criminal activities through a wiretap. Pet. App. 23a.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. 2510 *et seq.*, provides that a judge may authorize a wiretap if the judge finds (a) probable cause that an individual is committing, has committed, or is about to commit a particular listed criminal offense; (b) probable cause that the interception will collect communications concerning that offense; (c) that normal investigative procedures have failed, are unlikely to succeed, or are too dangerous; and (d) probable cause to believe that the device over which communications will be intercepted is connected to the suspected offense. 18 U.S.C. 2518(3)(a)-(d). If those requirements are satisfied, an order authorizing a wiretap must, *inter alia*, provide that the execution of the order "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under [Title III]." 18 U.S.C. 2518(5).

On March 5, 2010, in the course of an investigation into a distinct drug-trafficking conspiracy involving Ignacio Escamilla Estrada (Escamilla), the government submitted a Title III application for district-court authorization to intercept communications involving certain phone numbers believed to be associated with Escamilla's conspiracy. Pet. App. 8a, 24a; see C.A. E.R. 1331-1342 (application); *id.* at 1404-1455 (FBI affidavit).[1] In the month before that submission, from February 9 to March 4, a confidential informant had consensually recorded more than 40 calls with Escamilla over one of the cellular phone numbers in the application, which was designated Target Telephone #14 (T-14). Pet. App. 8a. The FBI case agent for the

[1] All citations in this brief to court of appeals documents are to those in No. 18-50393 unless otherwise specified.

Escamilla investigation, Agent Christopher Melzer, submitted an affidavit supporting the Title III application, in which he explained that the T-14 number was, at that time, being used by Escamilla. C.A. E.R. 1408, 1421, 1428.

Later on March 5, the district court issued an order approving the government's Title III application in the Escamilla investigation and authorizing the requested wiretaps, including the wiretap on the T-14 number. Pet. App. 8a, 24a; see C.A. E.R. 1456-1465 (order). As required by Title III, the court found, *inter alia*, probable cause of a connection between the number and various named Escamilla conspirators along with "others yet unknown," and probable cause to believe that the interception of wire communications over the T-14 number would uncover evidence of the Escamilla conspiracy's criminal activities. C.A. E.R. 1456-1460. The court accordingly authorized the government to intercept wire communications to and from the T-14 number involving certain named persons affiliated with the Escamilla conspiracy and "others as yet unknown." *Id.* at 1461.

The district court's order directed the government, in implementing the wiretap, to "minimize the interception of communications not otherwise subject to interception" under Title III. C.A. E.R. 1464. Specifically, the order stated that the government must "immediately terminate" the monitoring of a conversation upon "determin[ing] that the conversation is unrelated to communications subject to interception" under Title III. *Id.* at 1465. The order further provided that "[i]nterception must be suspended immediately when it is determined * * * that none of the named interceptees or any of their confederates * * * is a participant in the

conversation unless it is determined during the portion of the conversation already overheard that the conversation is criminal in nature." *Ibid.*

On March 5, 2010, law-enforcement officers activated the wiretap on the T-14 number and, from March 10 through March 17, 2010, intercepted calls over that number. Pet. App. 8a-9a, 24a; see *id.* at 10a, 43a. On March 10, 2010, during the first intercepted T-14 call, a speaker stated that "this was 'Mr. Keys' new number.'" *Id.* at 9a. The subsequent intercepted calls over the T-14 number concerned drug trafficking. *Id.* at 3a, 9a. At some point, the investigators concluded that Escamilla himself was not using the T-14 number but that, while they did not know the identity of the new user, the activities discussed on the intercepted T-14 calls—smuggling narcotics from Mexico to the United States and transporting currency to Mexico—were consistent with the drug-trafficking activities of the Escamilla conspiracy. *Ibid.*

Thus, as the courts below later found, the investigators "reasonably believed they 'had found a previously undiscovered aspect of [Escamilla's] drug trafficking activities.'" Pet. App. 3a; see *id.* at 17a, 48a. Agent Melzer, the FBI case agent, testified that it did not occur to him that the callers and calls on the T-14 number might be unrelated to Escamilla's conspiracy because Escamilla had been using the T-14 number the day before the court authorized the T-14 wiretap. *Id.* at 9a. On March 17, 2010, investigators intercepted a call over the T-14 number that prompted two investigative actions later that day: a traffic stop of one of petitioner's other co-conspirators and a search of a related residence in Irvine, California. *Id.* at 10a, 25a,

43a-44a. After that day, the user of the T-14 number ceased using the phone. *Id.* at 10a.

As it happened, however, the person using the T-14 number was involved in petitioner's separate drug-trafficking conspiracy. Pet. App. 23a. Petitioner was a speaker on some of the intercepted phone calls, *ibid.*, and he later testified that on March 10—the day on which the government intercepted the first T-14 call—he had purchased a phone with the T-14 number from a vendor in Tijuana, Mexico, and had then given the phone to one of his co-conspirators, *id.* at 11a. Agent Melzer discovered that the persons intercepted on the T-14 number might be linked to a separate investigation by the Department of Homeland Security (DHS) and DHS's Immigration and Customs Enforcement (ICE)—of which he had previously been unaware—following the identification of the subjects of the March 17 stop and search that had been prompted by one of the T-14 calls. *Id.* at 11a, 25a. The DHS investigation, which had been conducted with the Drug Enforcement Administration (DEA) but "had not involved the FBI * * * at all," concerned cross-border drug trafficking involving petitioner. *Id.* at 12a.

Two days after the events of March 17, 2010, Agent Melzer met with ICE (later, Homeland Security Investigations (HSI))[2] Agent Krall and DEA agents. Pet. App. 17a. At the time, the agents did not identify any "additional overlap between the two investigations"

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[2] HSI was established in June 2010 as a component within ICE that inherited the investigative functions of certain DHS components. See Jerome P. Bjelopera, Cong. Research Serv., R44269, *Homeland Security Investigations, a Directorate within U.S. Immigration and Customs Enforcement: In Brief* 1 n.1 (2015), https://crsreports.congress.gov/product/pdf/R/R44269.

beyond the T-14 calls. *Id.* at 17a, 44a; see D. Ct. Doc. 330 ¶ 21 (May 29, 2018) (Melzer's sworn May 2018 statement that he still did not know if agents "were intercepting a 'different' conspiracy" given the "possib[ility]" that the activities might have been linked "in ways [the investigators] did not detect"); C.A. E.R. 330 (similar May 2018 testimony).

2. In 2011, a federal grand jury in the Southern District of California indicted petitioner and others on one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846. C.A. E.R. 892-894. Petitioner moved before trial to suppress evidence obtained through the T-14 wiretap. *Id.* at 881-886 (motion); *id.* at 857-859 (reply).

Under Title III, an aggrieved person may move to suppress evidence obtained through a wiretap if (i) the communication was "unlawfully intercepted," (ii) the authorizing order was "insufficient on its face," or (iii) the wiretap was not conducted "in conformity with the order." 18 U.S.C. 2518(10)(a); see 18 U.S.C. 2510(11). If the motion is granted, "the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of [Title III]." 18 U.S.C. 2518(10)(a). Title III further provides that "no part of the contents of [an intercepted] 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 [Title III]." 18 U.S.C. 2515. And Title III generally prohibits "intentionally disclos[ing]" the contents of an intercepted communication "knowing or having reason to know that the information was obtained through [an] interception * * * in violation of

[Title III]." 18 U.S.C. 2511(1)(c); see 18 U.S.C. 2517 (addressing disclosures).

Petitioner argued that the government's Title III application had failed to include information, as required by 18 U.S.C. 2518(1)(c), showing that a wiretap was necessary because normal investigative procedures had failed, were unlikely to succeed, or were too dangerous. Pet. App. 27a-28a. Petitioner asserted that "the government [instead] merely adjoined the Carey investigation onto the unrelated Escamilla investigation, without attempting to justify an independent wiretap." C.A. E.R. 885; see Pet. App. 27a-28a. In his reply, petitioner argued that while he "concede[d]" that "the FBI reasonably believed the intercepted calls from T-14 could be related to the Escamilla conspiracy" initially, that belief "became less reasonable" as the interceptions continued, and agents "should have stopped" the wiretap once they "knew" that the intercepted communications involved "a separate conspiracy" because "new conspiracies, with entirely new conspirators, require new necessity showings." C.A. E.R. 858; see Pet. App. 28a, 38a-39a, 45a.

The district court denied petitioner's motion. Pet. App. 42a-48a. The court found that the government had "complied with the original wiretap authorization requirements, including necessity and minimization." *Id.* at 47a. The court also found "no requirement for a separate showing of necessity once the agents concluded that T-14 was not primarily used by Escamilla," explaining that "[t]he agents reasonably believed that the callers and calls might be affiliated with Escamilla or other offenses" and that "[n]o communications were intercepted after the agent determined that the two investigations were separate." *Id.* at 48a.

Petitioner subsequently pleaded guilty while reserving his right to appeal the district court's suppression decision. Pet. App. 26a.

3. The court of appeals vacated the district court's suppression order and remanded for further proceedings. Pet. App. 20a-41a.

a. The court of appeals noted that Title III "requires the government to adopt minimization techniques to 'reduce to a practical minimum the interception of conversations unrelated to the criminal activity under investigation.'" Pet. App. 27a (citation omitted). And the court acknowledged that "[i]f the government uses a wiretap in violation of the statute, evidence obtained from the wiretap is inadmissible against the conversation's participants in a criminal proceeding." *Ibid.* (citing *United States* v. *Giordano*, 416 U.S. 505, 507-508 (1974)). The court observed, however, that the government had complied with Title III "to get a valid wiretap for Escamilla on T-14." *Id.* at 31a.

The court of appeals accordingly viewed "[t]he question here [a]s whether the government could use that valid wiretap to listen to unrelated people's phone calls" on the T-14 number. Pet. App. 31a. The court then determined that, under Title III, "agents could lawfully use the Escamilla wiretap to listen to [petitioner's] conversations" until "they kn[e]w or reasonably should [have] know[n] that the phone calls only involved speakers outside the target conspiracy," at which point "the agents [had to] discontinue monitoring the wiretap." *Id.* at 24a, 29a; see *id.* at 29a-33a.

The court of appeals explained that its view of the lawfulness of using the court-authorized Escamilla wiretap to intercept petitioner's conversations was "drawn by analogy to Fourth Amendment case law."

Pet. App. 30a. The court observed that *Maryland* v. *Garrison*, 480 U.S. 79 (1987), found no Fourth Amendment violation when officers executing a search warrant on a residence, unaware that the building was "divided into two apartments," saw drugs in plain view when they inadvertently entered the wrong apartment. Pet. App. 30a-31a. The court explained that, under *Garrison*, "so long as the officers' failure to realize the mistake 'was objectively understandable and reasonable,'" their search of the second individual's apartment before discovering that "'factual mistake' did not violate the Fourth Amendment"—but, "as soon as" they made that discovery, "the officers 'were required to discontinue the search of [that] apartment.'" *Id.* at 31a (quoting *Garrison*, 480 U.S. at 87-88). The court of appeals noted that the situation here "mirror[ed]" *Garrison*'s plain-view doctrine because the government "did comply with [Title III] to get a valid wiretap," leaving the question "whether the government could use that valid wiretap to listen to unrelated people's phone calls." *Ibid.*

The court accordingly determined that "[t]he government may use evidence obtained from a valid wiretap 'prior to the officers' discovery of a factual mistake' that causes or should cause them to realize that they are listening to phone calls 'erroneously included within the terms of the' wiretap." Pet. App. 33a (brackets omitted); see *id.* at 23a-24a. It referred to that determination as "the 'plain hearing' doctrine." *Id.* at 33a; see *id.* at 33a-34a; see also *id.* at 24a (using "plain hearing" label). And because the court found that "[t]he record does not indicate what evidence was obtained before the agents knew or should have known that they were listening to calls outside of the Escamil-

la conspiracy," it remanded for further evidentiary proceedings on that question. *Id.* at 34a-35a.

b. Judge Kozinski dissented. Pet. App. 37a-41a. Judge Kozinski joined the court of appeals' determination that "the government may use evidence obtained from a valid wiretap until 'officers know or should know they are listening to conversations outside the scope of the wiretap order.'" *Id.* at 37a (quoting *id.* at 33a). But he dissented from the majority's decision to remand the case, because petitioner had not preserved a right to present evidence on the issue. *Id.* at 37a-41a.

4. On remand, after an evidentiary hearing (C.A. E.R. 72-158, 230-383), the district court denied petitioner's renewed suppression motion. Pet. App. 7a-19a.

The district court found the testimony of FBI Agent Melzer and HSI Agent Krall to be "entirely consistent and credible." Pet. App. 18a. And based on that testimony, the court found that "Agent Melzer reasonably believed that the T-14 calls were related to the Escamilla investigation" and "did not know and had no reason to know that the person using T-14 from March 10, 2010 to March 17, 2010 could be unrelated to the Escamilla conspiracy." *Id.* at 17a.

The district court further found that "[t]here were no interceptions on the T-14 line after any agent knew or should have known that the phone calls on the T-14 line could involve callers outside the scope of the Escamilla conspiracy and the scope of the wiretap order." Pet. App. 17a-18a. The court accordingly determined that "the agents were not required to cease the wiretap." *Id.* at 18a.

5. The court of appeals affirmed. Pet. App. 1a-6a. The court upheld the district court's factual finding

that the government's interception of every T-14 call occurred before "any agent knew or should have known that the phone calls on the T-14 line could involve callers outside the scope of the Escamilla conspiracy." *Id.* at 2a. And in light of the "'plain hearing' doctrine" discussed in its first opinion in this case, the court reiterated that "the 'government may use evidence obtained from a valid wiretap prior to the officers' discovery of a factual mistake that causes or should cause them to realize that they are listening to phone calls erroneously included within the terms of the wiretap order.'" *Id.* at 3a-4a (quoting *id.* at 33a).

ARGUMENT

Petitioner contends (Pet. 15-22) that the court of appeals, in its first decision in this case, erroneously recognized an exception within Title III's general requirement to suppress evidence obtained or derived from an unlawful wiretap. The court of appeals did not, however, apply an exception to Title III's suppression requirement after concluding that the interception of petitioner's calls violated Title III. The court instead correctly determined that the government's interception of those calls was *lawful* under Title III. Its decision does not conflict with any decision of any other court of appeals and does not otherwise warrant review. In any event, this case would be a poor vehicle to address the question presented because petitioner forfeited his challenge to the rule adopted by the court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that, after having "compl[ied] with [Title III] to get a valid wiretap for Escamilla on T-14," "agents could lawfully use the Escamilla wiretap to listen to [petitioner's] con-

versations" on the T-14 number until they "kn[ew] or reasonably should [have] know[n] that the person speaking on the tapped line [was] not involved in the target conspiracy." Pet. App. 29a, 31a, 33a. Those communications were lawfully intercepted under Title III and could therefore be admitted into evidence against petitioner.

a. Title III "allows judges to issue wiretap orders authorizing the interception of communications to help prevent, detect, or prosecute serious federal crimes." *Dahda* v. *United States*, 584 U.S. 440, 442 (2018). The statute sets forth "detailed requirements governing both the application for a wiretap and the judicial order that authorizes it," including the requirement that a judge, before issuing a wiretap order, "find 'probable cause' supporting [its] issuance." *Ibid.* (citing 18 U.S.C. 2518). And here, there is no dispute that the district court's order authorizing the T-14 wiretap in this case was valid. The order therefore authorized the government to implement that wiretap to intercept communications on the T-14 number.

The implementation of the order was, of course, subject to the limits of Title III and of the order itself. The statute provides that every wiretap order must contain a provision that the wiretap "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under [Title III]." 18 U.S.C. 2518(5). The district court's wiretap order (C.A. E.R. 1456-1465) included that minimization requirement verbatim. *Id.* at 1464. The order also elaborated on that requirement by specifying that the government must (1) "immediately terminate" the monitoring of a conversation upon "determin[ing] that the conversation is unrelated to com-

munications subject to interception" under Title III and (2) "suspend[]" the "interception * * * immediately when it is determined * * * that none of the named interceptees or any of their confederates * * * is a participant in the conversation unless it is determined during the portion of the conversation already overheard that the conversation is criminal in nature." *Id.* at 1465.

b. As this Court has made clear, Title III "does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations." *Scott* v. *United States*, 436 U.S. 128, 140 (1978). The statute requires only "probable cause," not certainty, of a nexus between the suspected crime and a phone number as a prerequisite to a wiretap order. 18 U.S.C. 2518(3)(d). And when agents target a specific phone number like T-14 for interception, "agents can hardly be expected to know" in advance whether any particular calls that they intercept "are not pertinent," because such an assessment would often be impossible "prior to [each call's] termination." *Scott*, 436 U.S. at 140.

Where the government has obtained a valid wiretap order for a phone like T-14, the relevant question is therefore whether the government complied with Title III's minimization requirements. The government's "compliance with [Title III's] minimization requirement" requires an "analysis of the reasonableness of the agent's conduct in intercepting" the relevant calls, which turns on "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *Scott*, 436 U.S. at 136-137, 139. Accordingly, even where "none of [certain]

conversations turned out to be material to the investigation at hand," it may still be the case that "agents did not act unreasonably at the time they made the[] interceptions." *Id.* at 143.

In explicating the basis for that approach, this Court relied on decisions "evaluating alleged violations of the Fourth Amendment," *Scott*, 436 U.S. at 137, rejecting the argument that Title III required a different approach, *id.* at 139. See *id.* at 137-139 (discussing Fourth Amendment decisions).

c. As the court of appeals correctly recognized, the agents in this case appropriately complied with the minimization requirements of the valid Title III wiretap order that the government had obtained.

The court of appeals correctly identified the relevant question as "whether agents could lawfully use the Escamilla wiretap to listen to Carey's conversations," where the government "compl[ied] with the statute to get a valid wiretap for Escamilla" but then intercepted "unrelated people's phone calls" on the T-14 number. Pet. App. 29a, 31a. And the court of appeals, like this Court, "dr[ew] by analogy to Fourth Amendment case law," *id.* at 30a, to answer that question. At bottom, the question concerns the agents' minimization efforts and, like other such questions, turns on the reasonableness of the agents' conduct, which is informed by Fourth Amendment law. See *Scott*, 436 U.S. at 137-139.

Here, the court of appeals correctly observed that that question "mirror[ed] the question in [*Maryland* v.] *Garrison*," 480 U.S. 79 (1987), where this Court held that "officers could rely on a valid [search] warrant [for a residence] for entry into an unrelated person's apartment," unless and until they "'discover[ed]

* * * the[ir] factual mistake,'" "so long as the officers' failure to realize the mistake 'was objectively understandable and reasonable.'" Pet. App. 31a-32a (quoting *Garrison*, 480 U.S. at 88). The court applied similar reasoning, which it labeled "the 'plain hearing' doctrine," to find the government's execution of the valid wiretap order here objectively reasonable and thus lawful under Title III. *Id.* at 30a, 33a. And while the court of appeals took note of Title III's suppression requirements, *id.* at 27a, its determination that the government complied with Title III did not require an examination of the scope of the remedies that the statute requires.

2. a. Petitioner errs in asserting (Pet. 16-18) that the court of appeals fashioned an exception from Title III's suppression requirement. As explained above, the court of appeals found suppression unwarranted here based on its determination that the government's interception of petitioner's calls on the T-14 wiretap was lawful. The court specifically framed the question it resolved as "whether agents could *lawfully* use the Escamilla wiretap to listen to Carey's conversations." Pet. App. 29a (emphasis added); see *id.* at 31a ("The question here is whether the government could use that valid wiretap to listen to unrelated people's phone calls."). And looking to *Garrison*, which held that a similar search "did not violate the Fourth Amendment," *id.* at 30a-31a, the court determined that the agents could lawfully do so.

Petitioner is mistaken in suggesting (Pet. 2) that the court of appeals adopted a plain-hearing exception from Title III's suppression requirement that applies "even if [a call] was intercepted 'without having complied with the Wiretap Act.'" *Ibid.* (quoting Pet. App.

23a-24a). The full quotation shows that the court of appeals did not conclude that the government intercepted petitioner's calls "without having complied with the Wiretap Act"; rather, the quotation reflects the court's understanding that the government may use evidence from a call between "speakers unrelated to the target conspiracy" that the government hears "while listening to a valid wiretap" "*without having complied with the Wiretap Act requirements* of probable cause and necessity *as to those specific speakers*." Pet. App. 23a-24a (emphases added). That is because the government may lawfully intercept such a call based on a "valid wiretap" targeting others until they "know or reasonably should know that the phone calls only involved speakers outside the target conspiracy." *Ibid.*

Petitioner's reliance (Pet. 2, 9-10, 14, 16, 25) on the court of appeals' observation that the wiretap order here "did not authorize agents to listen to Carey or his associates," Pet. App. 33a, is similarly misplaced. Petitioner overlooks the fact that the agents had a valid wiretap order. While that order did not cover petitioner and his coconspirators, as discussed above, this Court has made clear that Title III deals with the possible interception of persons not contemplated by a wiretap order through its minimization requirements, see *Scott*, 436 U.S. at 140, which were included in the order and reasonably followed by the agents here. The court of appeals emphasized that the wiretap could no longer be used "once the government knows or reasonably should know that the person speaking on the tapped line is not involved in the target conspiracy," Pet. App. 33a, and the agents complied with that requirement in this case.

b. Petitioner asserts (Pet. 11) that "courts are sharply divided over the propriety of judicially created exceptions to the Wiretap Act's suppression provisions." But as just explained, the court of appeals did not rely on any such exception in this case.

The court of appeals used the term "exception" only once, in the introduction to its decision, where it noted that "[t]he Fourth Amendment provides an exception to the warrant or probable cause requirement when police see contraband in 'plain view,'" and described its holding as "adopt[ing] a similar principle." Pet. App. 23a. But the court did not view that principle to be an "exception" to Title III's suppression requirements. It instead determined that the "agents could lawfully use the Escamilla wiretap to listen to Carey's conversations" while they remained reasonably unaware that those conversations would part of a different conspiracy. *Id.* at 29a; see *id.* at 29a-33a. And it recognized that any evidence obtained beyond that point would, in accord with Title III's remedial provisions, be subject to suppression. See *id.* at 27a, 33a-34a.

This case accordingly does not implicate the asserted circuit conflict. Nor does it even implicate the question that petitioner presents, which concerns a court's "power to fashion judge-made exceptions" to Title III's suppression requirements. Pet. i. There is thus no basis for the Court to review that issue here.

3. In any event, this case would be an unsuitable vehicle for this Court's review because it involves a threshold dispute about whether petitioner forfeited his current complaints about the court of appeals' approach by advocating a similar approach in district court.

In district court, petitioner conceded that the government at least initially reasonably believed that the calls intercepted from the T-14 wiretap related to the Escamilla conspiracy, but argued that the government should have stopped collecting from that wiretap once agents knew that the intercepted communications involved a separate conspiracy. See pp. 7-8, *supra*; Pet. App. 38a-39a (reproducing petitioner's arguments). The court of appeals in petitioner's first appeal divided over whether petitioner forfeited his challenge, with the majority concluding that petitioner did not forfeit his ability to challenge the court's "plain hearing" rule, Pet. App. 35a, and the dissent concluding that petitioner forfeited any such challenge because his position was not materially different from the "plain hearing" rule and because petitioner did not dispute the government's relevant evidence, *id.* at 37a-40a.

If this Court were to grant review, the government could rely on petitioner's forfeiture because the government would be entitled as respondent to argue for affirmance "on any ground permitted by the law and the record." *Dahda*, 584 U.S. at 450 (citation omitted); see *Union Pac. R.R.* v. *Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 80 (2009); *Whitley* v. *Albers*, 475 U.S. 312, 326 (1986). This Court would then presumably need to resolve that forfeiture argument because there would be no point in "remanding this litigation [to the court of appeals] for further consideration" of that threshold point given that the court of appeals, over a dissent, has already rejected it. *Dahda*, 584 U.S. at 450. And if this Court were to find the issue forfeited, the Court would not reach the question petitioner presents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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