No. 23-401

IN THE
Supreme Court of the United States

MICHAEL CAREY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

ROBERT A. BATISTA
JOSHUA R. ZUCKERMAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

ALLYSON N. HO
Counsel of Record
BRADLEY G. HUBBARD
STEPHEN J. HAMMER
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The disclosure statement included in the petition remains accurate.

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The government's response is most remarkable for what it doesn't say. It doesn't dispute that there's a deep, acknowledged conflict over whether courts lack power to create exceptions to the Wiretap Act's mandatory-suppression provisions. It doesn't dispute that the exceptions adopted by some courts lack any basis in the text Congress enacted. And it doesn't dispute that this issue is exceptionally important and worthy of this Court's review.

Instead, the government's principal argument is that the question presented isn't implicated here because, according to the government (at 14), the Ninth Circuit devised its plain-hearing rule not as an exception to the Wiretap Act's suppression provisions but as a way of determining whether "the government complied with [the Act's] minimization requirements." See 18 U.S.C. § 2518(5). But that theory bears no resemblance to what the Ninth Circuit actually held.

Far from justifying the plain-hearing rule as an application of the minimization requirements, the Ninth Circuit held in no uncertain terms that "the wiretap order *could not authorize* surveillance of an unknown conspiracy"—which the government concedes (at 6) Carey and his associates were part of—"because the statute requires agents to demonstrate probable cause and necessity to procure a wiretap order." Pet. App. 32a (emphasis added).

The Ninth Circuit's decision makes clear that it found a violation of the Wiretap Act's probable cause and necessity requirements, yet it declined to apply the statute's mandatory-suppression rule based on its judicially created plain-hearing exception. By doing

so, the Ninth Circuit joined three other courts of appeals that have construed the Wiretap Act's suppression provisions to contain unwritten exceptions lacking any basis in the statutory text. Pet. 13–15. The question presented is squarely implicated here. And the government's fallback attempt to construct a vehicle problem out of a forfeiture argument the Ninth Circuit *rejected* only confirms that no meaningful obstacles stand in the way of this Court's review.

The Court should grant the petition.

I. THE NINTH CIRCUIT CREATED AN EXCEPTION TO THE WIRETAP ACT'S EXCEPTIONLESS SUPPRESSION PROVISIONS.

The Ninth Circuit fashioned its plain-hearing rule as an exception to the Wiretap Act's suppression provisions. Under those provisions, interceptions that are (1) "unlawfu[l]" or (2) "not made in conformity with the order of authorization or approval" must be suppressed. 18 U.S.C. §§ 2515, 2518(10)(a)(i), (iii); see *United States* v. *Giordano*, 416 U.S. 505, 524–28 (1974).

The Ninth Circuit held that both conditions were met. It concluded that the government recorded the communications of Carey and his associates "without having complied with the Wiretap Act requirements of probable cause and necessity as to" Carey's alleged conspiracy, and that the wiretap order "did not authorize agents to listen to Carey or his associates." Pet. App. 23a–24a, 33a. By the Act's plain language, then, the Ninth Circuit should have suppressed all the intercepted communications.

Instead of applying the Wiretap Act's clear command, however, the Ninth Circuit exempted from suppression any communications obtained before agents

"kn[e]w or should [have] know[n] they [we]re listening to conversations outside the scope of the wiretap order." Pet. App. 33a. That's a good-faith exception to the Wiretap Act's mandatory-suppression rule in all but name. Pet. 14–15.

Rather than addressing the Ninth Circuit's decision on its own terms, the government rewrites it. According to the government (at 14), the Ninth Circuit devised its plain-hearing rule not as an exception to the Wiretap Act's suppression provisions but as a way of determining whether "the government complied with [the Act's] minimization requirements." See 18 U.S.C. § 2518(5). That theory is irreconcilable with the Ninth Circuit's decision.

The Ninth Circuit nowhere purported to be interpreting the Wiretap Act's minimization requirements. The opinion makes only a single passing reference to minimization—in a background section explaining in general terms how the Wiretap Act works. Pet. App. 27a (the Act "requires the government to adopt minimization techniques"). That's it. The opinion never mentions minimization again. Nor does it cite (much less rely on) the minimization case the government now invokes as the justification for the court's decision—*Scott* v. *United States*, 436 U.S. 128 (1978).

Far from construing the Wiretap Act's minimization requirements, the Ninth Circuit was focused instead on the statute's separate probable cause and necessity requirements. See Pet. App. 32a (citing 18 U.S.C. § 2518(1)(b)–(c)). Carey argued in his first appeal that "suppression [wa]s warranted" because "the government did not comply with th[e] statutory requirements" of "probable cause and necessity" "as to him or his coconspirators." Pet. App. 27a; see Carey

C.A. Br. (*Carey I*) 45, 65–66. The Ninth Circuit fully embraced the second part of that argument.

The Ninth Circuit explained that "the wiretap order *could not authorize* surveillance of an unknown conspiracy because the statute requires agents to demonstrate probable cause and necessity to procure a wiretap order." Pet. App. 32a (emphasis added). And it squarely held that the government had intercepted the communications of Carey and his associates "without having complied with the Wiretap Act requirements of probable cause and necessity" as to them. Pet. App. 23a–24a.

The Ninth Circuit specifically rejected the government's (and district court's) view that agents "could rely" on the "show[ing] [of] necessity and probable cause for a wiretap of the [Escamilla] conspiracy" "to listen to Carey's conversations." Pet. App. 23a, 29a; see U.S. C.A. Br. (*Carey I*) 20 (arguing that wiretap order "allowed agents to intercept and use calls about new, unrelated crimes without additional showings of necessity (or probable cause)").

That position was wrong, the Ninth Circuit explained, because "the order does not authorize agents to listen to conversations by individuals outside the Escamilla conspiracy." Pet. App. 33a. That meant the agents hadn't intercepted Carey's communications "in the manner authorized" by the Wiretap Act. *Ibid.* (quoting 18 U.S.C. § 2517(5)). Yet instead of applying the Act's mandatory-suppression rule to exclude all those communications, the court deemed "admissible" any "evidence obtained in accordance with the 'plain hearing' doctrine." Pet. App. 33a–35a.

That analysis can't be reconciled with the government's theory that the plain-hearing exception is really an application of the minimization requirements.

The Wiretap Act's probable cause, necessity, and minimization requirements are separate and independent statutory requirements. See 18 U.S.C. § 2518(1)(b), (3)(a)–(b), (d) (probable cause); *id.* § 2518(1)(c), (3)(c) (necessity); *id.* § 2518(5) (minimization); see also *Brown* v. *Waddell*, 50 F.3d 285, 289–90 (4th Cir. 1994) (listing Act's distinct requirements). A violation of *any one* of those requirements is grounds for mandatory suppression under the statute. See 18 U.S.C. §§ 2515, 2518(10)(a)(i), (iii). Compliance with the minimization requirements couldn't have excused a failure to satisfy the probable cause and necessity requirements—and the Ninth Circuit never suggested otherwise. However the Ninth Circuit's decision is sliced, it's clear that the plain-hearing rule wasn't about minimization.

The only rational way to understand the Ninth Circuit's decision is that it found a violation of the Act's probable cause and necessity requirements—which should have triggered the Act's mandatory-suppression rule—yet nonetheless divined an exception for communications intercepted before agents knew or should have known that those communications were obtained in violation of the Act or the wiretap order. But the Act's suppression provisions, unlike the judicially created exclusionary rule, admit of no exceptions for good-faith violations. Pet. 20–22. The Court should grant certiorari to resolve the deep and acknowledged conflict on that important issue. Pet. 11–15.

II. THE GOVERNMENT'S FORFEITURE OBJECTION LACKS MERIT.

This case is an excellent vehicle for resolving the conflict. The government doesn't dispute that this

Court may address issues—like the plain-hearing exception—decided in Carey's first appeal. As the government has explained elsewhere, any argument to the contrary would be "unsound." U.S. Cert. Reply Br. at 10, *FBI* v. *Fikre*, No. 22-1178 (Sept. 5, 2023) (citing *MLB Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam)). Nor does the government contest that the Ninth Circuit's plain-hearing exception was outcome dispositive. As *Carey I* made clear, the plain-hearing doctrine was the "only" basis for admission of the evidence. Pet. App. 33a.

The government's only vehicle objection (at 18–19) is that Carey supposedly forfeited his challenge to the adoption of the plain-hearing exception. That objection is meritless for two reasons.

First, as *Carey I* correctly held, Carey properly preserved his challenge to the plain-hearing exception. The government asserts (at 18) that Carey forfeited that argument by "advocating a similar approach in district court," but that's incorrect. As the panel majority explained, Carey "did *not* concede that any evidence should be admitted under a plain hearing rule." Pet. App. 35a (emphasis added); see also Pet. App. 27a–28a, 34a–36a. He argued instead—just as he does here—that "'any and all evidence derived from the use of wiretaps' should be suppressed." Pet. App. 35a.

While the government insists (at 19) that Carey "conceded that the government at least initially reasonably believed that the calls intercepted from the T-14 wiretap related to the Escamilla conspiracy," that's irrelevant. The statement the government homes in on was at most an argument in the alternative—that *even if* a plain-hearing exception existed, suppression would *still* be required because the government

should have realized that the speakers on the wiretap were unrelated to the Escamilla conspiracy. Pet. App. 38a–39a.

That explains why—contrary to the government's assertion (at 19)—even the *Carey I* dissent didn't conclude that Carey forfeited his challenge to the plain-hearing exception. See Pet. App. 37a (joining majority in adopting plain-hearing exception without reference to forfeiture). The dissent would have held only that Carey forfeited any argument about the *application* of that exception and would have denied a remand on that basis. See *ibid.* (dissenting only from part of opinion remanding with instructions).

Second, even if there were a forfeiture (there isn't), that would pose no obstacle to this Court's review. After holding that Carey never forfeited his challenge to the plain-hearing exception, the Ninth Circuit passed on, adopted, and relied on that exception. See Pet. App. 29a–34a; see also Pet. App. 37a (dissent joining majority's adoption of plain-hearing exception). It's well established that this Court's "practice 'permit[s] review of an issue not pressed so long as it has been passed upon'"—as the plain-hearing exception undoubtedly has been here. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted); see Shapiro et al., *Supreme Court Practice* § 6.26(b) (11th ed. 2019).

The government errs in suggesting (at 19) that this Court "would * * * presumably need to resolve [its] forfeiture argument" to "reach the question petitioner presents." This Court may "'decline to entertain[]' alternative grounds for affirmance," *United States* v. *Tinklenberg*, 563 U.S. 647, 661 (2011) (citation omitted), particularly where, as here, the asserted ground is fact-specific and otherwise not "of

sufficient general importance to" independently "justify [a] grant of certiorari," *United States* v. *Nobles*, 422 U.S. 225, 241 n.16 (1975). This Court routinely grants review—and resolves important questions—in cases where respondents press alternative grounds for affirmance that weren't presented to or decided by the court of appeals. See, *e.g.*, *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 41 (1999); *Ryder* v. *United States*, 515 U.S. 177, 184 n.4 (1994). Where the court of appeals has already considered and rejected a proposed alternative ground for affirmance, there is even less reason to deny review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT A. BATISTA
JOSHUA R. ZUCKERMAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

ALLYSON N. HO
Counsel of Record
BRADLEY G. HUBBARD
STEPHEN J. HAMMER
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

Counsel for Petitioner

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