No. 10-418

In the Supreme Court of the United States

UNDER SEAL #10, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 3504(a)(1) of Title 18 provides that in grand-jury and other proceedings, "upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act." The question presented is whether the letter submitted by the government in this case was sufficient to "affirm or deny" petitioner's allegations of electronic surveillance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 597 F.3d 189. The orders of the district court are unreported and under seal.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2010. A petition for rehearing was denied on April 26, 2010. On July 15, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 23, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 2006, a federal grand jury issued a subpoena requiring that petitioner, a Virginia-based not-for-profit corporation, produce corporate records and other documents. Pet. App. 4a-5a. The grand jury issued similar subpoenas to 11 other entities that were interrelated with petitioner and shared the same counsel. *Ibid*. Petitioner initially refused to produce any documents unless the government, pursuant to 18 U.S.C. 3504, affirmed or denied whether petitioner or the other entities were subject to electronic surveillance "under" Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq*. (Title III); the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.* (FISA); the National Security Agency's (NSA) then-recently disclosed surveillance program; or any other secret program. Pet. App. 5a-6a; 34a-36a.

Section 3504(a) provides in relevant part that "[i]n any * * * proceeding in or before any * * * grand jury," in response to "a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act," the government "shall affirm or deny the occurrence of the alleged unlawful act." The term "unlawful act" is defined (subject to certain exceptions) to include interception of "a wire, oral, or electronic communication," when such interception violates the Constitution or a federal law or regulation. 18 U.S.C. 3504(b); 18 U.S.C. 2510(5).

The government responded to petitioner's Section 3504 demand with a letter stating that petitioner and the related entities "were not and are not a subject of electronic surveillance pursuant to Title III." Pet. App. 6a, 36a. The letter further stated that petitioner and the

related entities were not entitled to notification of any other type of surveillance, because, even if they were the subject of such surveillance, they could not contest its legality in the context of a grand-jury proceeding. *Ibid*.

2. When petitioner and the other entities did not produce documents, the district court ordered them to show cause why they should not be held in contempt. Pet. App. 6a. Following a hearing, the other entities partially complied with the subpoenas by producing some responsive documents. *Id*. at 7a. Petitioner, however, did not produce any documents, and instead moved for a finding that it was not in civil contempt. *Ibid*. Petitioner contended that it had just cause to refuse to comply with the grand-jury subpoena on the ground that it probably had been a target of illegal electronic surveillance. *Ibid*. In support of its claim of illegal surveillance, petitioner alleged that the government's recently disclosed NSA program targeted those with known links to al Qaeda and other terrorist organizations; that the government had filed a civil suit against petitioner alleging that petitioner financially supported al Qaeda; that the government had executed search warrants of petitioner's offices seeking evidence of such terrorist financing; that petitioner's principals were regularly detained by the government before and after overseas travel; that there were clicking sounds on the telephone lines of petitioner and its principals; and that the government had acknowledged NSA surveillance of one of petitioner's associates.[1] *Id.* at 7a, 36a-37a.

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[1] In fact, the government has acknowledged only FISA surveillance of that individual; it has not acknowledged any surveillance of that individual under the NSA program. Gov't C.A. Br. 31.

Petitioner's motion relied on *Gelbard* v. *United States*, 408 U.S. 41 (1972). Pet. 6. This Court held in *Gelbard* that a grand-jury witness may invoke 18 U.S.C. 2515, which prohibits the presentation to a grand jury of evidence obtained in violation of Title III, as a defense to contempt charges stemming from the witness's refusal to testify. 408 U.S. at 47.

The district court denied petitioner's motion and found petitioner in civil contempt. Pet. App. 8a-9a. The district court determined that petitioner's allegations were sufficient to establish standing as a "party aggrieved" under 18 U.S.C. 3504(a)(1), thereby requiring the government to affirm or deny petitioner's allegations of electronic surveillance. Pet. App. 37a-38a. The district court concluded, however, that the government's letter had complied with that requirement. *Id.* at 22a, 38a. The court reasoned that, at the grand-jury stage, the government was only required under Section 3504 to affirm or deny Title III surveillance, and that the government's denial that petitioner had been subjected to surveillance pursuant to Title III was sufficient. *Id.* at 9a, 22a.

The court imposed a fine on petitioner that would continue to increase until petitioner complied with the subpoena. Pet. App. 9a. After some further delay, petitioner eventually complied with the subpoena and purged itself of its contempt. *Ibid.* Petitioner was ultimately assessed a fee of $18,000. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-47a. The court of appeals first determined that it was irrelevant, in the context of a grand-jury proceeding, whether the subpoena was the fruit of surveillance conducted in violation of either the Constitution or FISA. *Id.* at 13a-21a. In either circumstance, the court concluded, the

evidence would still be admissible in front of the grand jury, so neither allegation was an adequate defense to the contempt order. *Ibid.* The court observed, citing *United States* v. *Calandra*, 414 U.S. 338 (1974), that the exclusionary rule for unconstitutionally obtained evidence does not apply at the grand-jury stage (Pet. App. 13a-16a); and it observed that FISA, unlike Title III, omits grand juries from the list of proceedings from which improperly obtained evidence may be excluded (*id.* at 17a-21a).

As to "any violations of Title III's domestic wiretap provisions," the court of appeals concluded that the government had, in accordance with Section 3504(a)(1), adequately denied such violations by stating that petitioner was not "a subject of electronic surveillance pursuant to Title III." Pet. App. 21a. The court rejected petitioner's argument that the government's statement amounted to a denial only of *legal* surveillance that failed to affirm or deny whether any *illegal* surveillance in violation of Title III had occurred. *Id.* at 21a-22a. The court found the government's letter to be a "plain" and "emphatic" statement that "no Title III surveillance, lawful, unlawful, or any other kind, took place," cautioning that judges should not "squint so hard at language that the plain becomes ambiguous." *Id.* at 22a, 23a. The court also rejected petitioner's suggestion that the government's response was "an attempt at evasion," observing that the government's denial of any surveillance "pursuant to" Title III closely tracked the language of petitioner's Section 3504 request, which had asked the government to confirm or deny surveillance "under * * * Title III." *Id.* at 23a.

Chief Judge Traxler concurred in part and dissented in part. Pet. App. 29a-47a. In his view, the govern-

ment's denial that petitioner was subject to surveillance "pursuant to" Title III was not a sufficient denial of surveillance that would be illegal under Title III. *Id.* at 40a-41a.

ARGUMENT

Petitioner renews (Pet. 9-21) its contention that the government failed adequately to affirm or deny the allegations of unlawful electronic surveillance as required by 18 U.S.C. 3504. The court of appeals' decision on that fact-bound issue does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. a. As a threshold matter, the court of appeals correctly recognized that the only type of illegal surveillance that the government could have been required to affirm or deny in this case was surveillance that would violate Title III. Section 3504(a)(1) requires a party to "affirm or deny the occurrence of [an] alleged unlawful act" only in connection with "a claim by a party aggrieved *that evidence is inadmissible* because it is the primary product of," or "obtained by the exploitation of," that act. 18 U.S.C. 3504(a)(1) (emphasis added). In the grand-jury context, that means that the government must disclose unlawful surveillance only if that surveillance would render evidence inadmissible in front of the grand jury.

Only surveillance in violation of Title III, and not surveillance in violation of FISA or the Constitution, is inadmissible in a grand-jury proceeding. Title III specifically provides that evidence gathered in violation of its provisions cannot be put before a grand jury. 18 U.S.C. 2515. FISA, by contrast, omits grand juries from its list of proceedings in which the government is re-

quired to give notice before introducing evidence derived from electronic surveillance, and in which an aggrieved party may move to suppress such evidence. 50 U.S.C. 1806(c) and (e); see Pet. App. 17a-21a. And this Court has expressly held that a grand jury may consider evidence collected in violation of the Constitution. *United States* v. *Calandra*, 414 U.S. 338, 350 (1974); see Pet. App. 14a-16a.

b. It is not entirely clear whether petitioner is claiming that Section 3504(a)(1) did, in fact, entitle it to notice, in the grand-jury context, of surveillance that violates a rule of law other than Title III. See Pet. 12-14. To the extent that petitioner is raising such a claim, petitioner provides no substantial supporting argument. In particular, petitioner does not discuss the relevant language ("upon a claim * * * that evidence is inadmissible") from Section 3504(a)(1), and does not explain the interaction of that language with either FISA or this Court's decision in *Calandra*. If petitioner's discussion (Pet. 14-16) of *Gelbard* v. *United States*, 408 U.S. 41 (1972), is meant to address this issue, the reliance on *Gelbard* is misplaced. See *Calandra*, 414 U.S. at 355 n.11 (observing that *Gelbard* "rested exclusively on an interpretation of [Title] III"). In light of petitioner's failure either to meaningfully challenge the correctness of the lower court's treatment of this issue, or to identify a conflict in the courts of appeals' resolution of it, further review of the issue is unwarranted.

2. The petition focuses primarily, if not exclusively, on a different, and narrower, question: whether the letter submitted by the government in this case, which denied surveillance "pursuant to Title III," was a sufficient denial of surveillance in violation of Title III. *E.g.*, Pet. 13-14 (quoting language from Chief Judge Traxler's dis-

sent that focuses on Title III). That issue, which was not emphasized at all in petitioner's briefing or argument in the lower courts, likewise does not warrant further review.

Petitioner contends (Pet. 12-14) that the government's letter was inadequate because it denied only the occurrence of *legal* surveillance under Title III while failing to affirm or deny whether any *illegal* surveillance in violation of Title III had taken place. The court of appeals rejected that contention, interpreting the government's statement to mean that no surveillance governed by Title III, "lawful, unlawful, or any other kind took place." Pet. App. 22a; see also *id*. at 23a ("The point of the government's letter was to indicate in a comprehensive manner that Title III was not the basis of any surveillance."). As the court of appeals observed, the government's language ("pursuant to Title III") tracked the language in petitioner's Section 3504 request, which demanded that the government affirm or deny surveillance "under" Title III (as well as FISA, the NSA program, or any other secret program). *Ibid.*

Petitioner offers no good reason why this Court should review the court of appeals' fact-bound interpretation of the language used in the particular Section 3504 letter at issue here. Petitioner first suggests (Pet. 14-16) that the decision below conflicts with *Gelbard*. That contention lacks merit. This Court held in *Gelbard* that surveillance in violation of Title III could provide a defense to a charge of grand-jury contempt (408 U.S. at 47), and further discussed the government's obligation under Section 3504 to respond to claims of such surveillance (*id.* at 53-55). The court of appeals' decision is consistent with both of those propositions. Pet. App. 21a-24a. *Gelbard* did not have occasion to address, and

did not address, the particular form of words that the government must use in a Section 3504 response.

Petitioner further contends (Pet. 17-20) that the decision below conflicts with decisions of several other courts of appeals by "holding [petitioner] in contempt * * * without first requiring the government to admit or deny whether it engaged in the alleged unlawful conduct." Pet. 17. That contention misapprehends the decision below: it assumes that the government's response was *not* adequate and characterizes the decision as upholding petitioner's contempt without requiring any response at all to petitioner's allegations. However, as explained above, the court of appeals held that the government *did* respond adequately under the circumstances to the allegations. None of the cases cited by petitioner (Pet. 17-20) considered the question addressed by the court of appeals here: whether a denial of surveillance "pursuant to" Title III is an adequate response to a demand that the government disclose surveillance "under" Title III.[2] There is no reason to believe that any other court of appeals would reach a conclusion different from the conclusion reached by the court of appeals here. Cf., *e.g.*, *In re Grand Jury Investigation 2003r01576*, 437 F.3d 855, 857 (9th Cir. 2006) ("[T]he specificity required of the government's response is measured by the specificity and strength of the witness's allegations. * * * Thus, a witness' general or unsupportable claim requires only a general response.")

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[2] Petitioner's additional contention (Pet. 16-17) that the court of appeals ignored its own precedent lacks merit for the same reason. Furthermore, any intra-circuit conflict of authority would be a matter for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

(citation, brackets, and internal quotation marks omitted). There is accordingly no reason for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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