No. 13-499

In the Supreme Court of the United States

IN RE SEALED CASE

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under *DiBella* v. *United States*, 369 U.S. 121 (1962), the court of appeals lacked jurisdiction to review the district court's denial of petitioner's motions for return of property seized pursuant to search warrants because the motions were not solely for the return of property.

2. Whether, assuming the court of appeals otherwise lacked jurisdiction, it nevertheless had jurisdiction to review the denial of petitioner's motions for return of property under the principles set out in *Perlman* v. *United States*, 247 U.S. 7 (1918).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 716 F.3d 603. The memorandum and order of the district court (Pet. App. 19a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2013. A petition for rehearing was denied on April 30, 2013 (Pet. App. 17a-18a). On July 18, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 28, 2013. On August 15, 2013, the Chief Justice further extended the time to September 27, 2013, and the petition was filed on September 26,

[1] Citations to Pet. and Pet. App. in this brief refer to the redacted version of the petition for a writ of certiorari and the appendix attached thereto.

2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the District of Columbia denied petitioner's pre-indictment motions for return of property filed pursuant to Federal Rule of Criminal Procedure 41(g). Pet. App. 19a-37a. Petitioner appealed, and the court of appeals dismissed the appeal for lack of jurisdiction. *Id.* at 1a-16a.

1. Petitioner is the subject of an ongoing grand jury investigation. Pet. App. 2a, 20a. On March 12, 2012, agents of the Federal Bureau of Investigation executed search warrants related to the investigation at two locations in the District of Columbia. *Id.* at 2a, 19a-20a; C.A. App. A44-A58; Gov't C.A. Br. 3-4.[2]

To ensure that the agents and attorneys conducting the investigation were not exposed to potentially privileged or irrelevant information, a "filter team" executed the warrants. Gov't C.A. Br. 4-5. The filter-team agents seized physical records, computers, hard drives, cell phones, and other electronic media devices, comprising a total of about 23 million pages of documents. Pet. App. 2a. Pursuant to Federal Rule of Criminal Procedure 41(e)(2)(B), which governs electronically stored information, the agents imaged (*i.e.*, copied) electronic media devices at the search sites to the greatest extent possible rather than seizing the original devices. Gov't C.A. Br. 5. Although the agents removed some devices that could not be copied

[2] Additional facts about petitioner and the grand jury investigation, which are not in dispute in any material respect, are described in a sealed version of the court of appeals' opinion, which is reproduced at pages 1a-16a of the appendix to the sealed version of the petition for a writ of certiorari.

onsite, they promptly processed the devices offsite and returned most of them to petitioner within two days. *Ibid.*; Pet. App. 2a. The government made the remainder of the property available to petitioner, including by expressing a willingness to return copies of any physical records the government needed to retain. Pet. App. 2a, 9a, 20a-21a; Gov't C.A. Br. 5. Petitioner and the government also conferred and agreed that, before the investigating agents and prosecutors would review any of the seized electronic records, the filter team would run investigative search terms intended to exclude documents outside the scope of the warrants. Pet. App. 20a.

2. On March 30, 2012, pursuant to Rule 41(g), petitioner filed two identical motions for return of property, one for each location searched. Pet. App. 19a; C.A. App. A16. In the motions, petitioner did not claim that the government was denying access to documents essential to petitioner's affairs. See Pet. App. 2a. Instead, petitioner argued that the screening measures described above did not sufficiently protect petitioner's Fourth Amendment rights because government agents would be permitted to review documents outside the scope of the search warrants. *Ibid.*; C.A. App. A3. Accordingly, petitioner sought an order under which the filter team would run investigative search terms, as agreed, but would be forbidden to forward the resulting "potentially-relevant subset of documents" to the investigation team unless the government first (i) enlisted a "third part[y]" to examine the subset and exclude any documents outside the scope of the warrants, or (ii) agreed to waive reliance on the plain-view doctrine for any incriminating evidence that the investigation team may discover when

examining the subset of documents. C.A. App. A3, A31-A33, A117-A118; see Pet. App. 9a, 21a, 34a-37a.

The district court denied the motions for return of property. Pet. App. 19a-37a. The court concluded that the Fourth Amendment did not require petitioner's proposed protocol for excluding documents outside the scope of the search warrants. *Id.* at 34a-36a; see *id.* at 36a ("The government need not employ a third-party filter team or waive reliance on the plain view doctrine[.]").[3] In the court's view, the relevant case law permitted the government itself "to search through the entire subset of documents returned following an appropriate keyword search." *Id.* at 36a (citing *United States* v. *Richards*, 659 F.3d 527, 538-539 (6th Cir. 2011), cert. denied, 132 S. Ct. 2726 (2012); *United States* v. *Burgess*, 576 F.3d 1078, 1094 (10th Cir.), cert. denied, 558 U.S. 1097 (2009)). The court further reasoned that "[j]ust because such a search may result in the government examining, 'at least cursorily, some innocuous documents' * * * does not render it the sort of 'general' search of electronic media that courts are wary of authorizing." *Ibid.* (quoting *Richards*, 659 F.3d at 539, and citing

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[3] In the motions for return of property, petitioner also challenged the government's proposed procedures for handling documents potentially protected by the attorney-client privilege. C.A. App. A25-A31; see Pet. App. 2a-3a, 20a-21a. The district court rejected petitioner's contentions relating to the privilege. *Id.* at 26a-34a. The parties later "reached agreement on how to identify privileged material." *Id.* at 3a. Thus, petitioner's appeal ultimately was "limited to [the] claim that the district court improperly declined to order the parties to implement the protocols [petitioner] proposed to identify documents beyond the scope of the search warrants." *Ibid.*

United States v. *Stabile*, 633 F.3d 219, 237 (3d Cir.), cert. denied, 132 S. Ct. 399 (2011)).

3. Petitioner appealed, and the court of appeals dismissed the appeal for lack of jurisdiction. Pet. App. 1a-16a.

a. The court of appeals held that this Court's decision in *DiBella* v. *United States*, 369 U.S. 121 (1962), foreclosed an appeal. Pet. App. 3a-10a. Under *DiBella*, the court explained, "a court of appeals [may] entertain the denial of a motion for the return of seized property '[o]nly if the motion [1] is solely for return of property and [2] is in no way tied to a criminal prosecution *in esse* against the movant.'" *Id.* at 6a (quoting *DiBella*, 369 U.S. at 131-132) (footnote omitted; second alteration in original).

The court of appeals concluded that petitioner's motions for return of property failed the first *DiBella* requirement because the motions were not "solely for return of property." Pet. App. 7a-10a. The court explained that the motions sought additional relief under which the government would either be forbidden "from reviewing all or most of the evidence" while petitioner or a "third party screen[ed] the seized material," or else the government would be required "to waive the plain view doctrine with respect to the electronic documents." *Id.* at 9a-10a.

The court of appeals rejected petitioner's argument that the motions were "solely for the return of property" because they did not also seek suppression of evidence gathered from the documents. Pet. App. 7a. The court stated that the relevant inquiry was whether the Rule 41(g) motion "is being used for strategic gain at a future hearing or trial." *Id.* at 8a. The court concluded that petitioner's motion satisfied that

standard because the relief requested "could shape the course of the criminal investigation" by limiting the evidence the government would discover, and could have a "profound effect" on any future hearing or trial by precluding the government from presenting evidence otherwise admissible under the plain-view doctrine. *Id.* at 9a-10a. The court further noted that petitioner did not assert any need for the seized documents and that the government had already returned or offered to return copies of the documents to petitioner. *Id.* at 9a. The court found it "telling" that the injury petitioner asserted "[wa]s not the deprivation of property but the unlawful revelation of * * * private information." *Ibid.*

The court of appeals concluded that, under those circumstances, exercising jurisdiction over petitioner's appeal would run afoul of this Court's "objective in crafting the first prong" of the *DiBella* test: to exclude motions whose "disposition . . . will necessarily determine the conduct of the trial and may vitally affect the result," thereby interfering with the investigative process and threatening to transform interlocutory appeals into "an instrument of harassment." Pet. App. 4a, 6a-7a (quoting *DiBella*, 369 U.S. at 127, 129) (internal quotation marks omitted).

b. The court of appeals further rejected petitioner's alternative argument that appellate jurisdiction existed under the principles set out in *Perlman* v. *United States*, 247 U.S. 7 (1918). Pet. App. 10a-16a. The court observed that, "[t]ypically, *Perlman* permits a privilege-holder to appeal a disclosure order 'directed at a disinterested third party . . . because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing

compliance.'" *Id.* at 12a (quoting *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992)). The court declined to "stretch[]" that formulation of *Perlman* "to cover appeals from denials of Rule 41(g) motions," at least where, as in this case, the motion does not meet *DiBella*'s requirements for immediate appealability. *Ibid.*; see *id.* at 14a.

The court of appeals explained that *DiBella* had "crafted" "a jurisdictional doctrine * * * explicitly for" motions for return of property, whereas *Perlman* did not address such motions. Pet. App. 14a. The court further explained that "us[ing] *Perlman* to find jurisdiction here would threaten to swallow *DiBella*'s carefully reasoned limitation on Rule 41(g) appeals." *Ibid.* The court stated that such a result would be especially problematic in light of this Court's most recent cases concerning interlocutory review, because they generally "caution[] that 'the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Id.* at 15a (quoting *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 113 (2009), which in turn discussed *Will* v. *Hallock*, 546 U.S. 345, 350 (2006), and *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995)). The court therefore "h[e]ld that *DiBella* is the exclusive test for determining whether we have jurisdiction over appeals from orders denying Rule 41(g) motions." *Id.* at 14a.

c. Judge Kavanaugh joined the court of appeals' opinion in full. Pet. App. 16a. He filed a concurring opinion to explain that, although the attorney-client privilege was no longer an issue in petitioner's case, the court's decision "does not foreclose interlocutory appellate jurisdiction under *Perlman* when (i) the underlying action is not a Rule 41(g) motion for return

of property and (ii) the party whose documents were seized raises an attorney-client privilege objection." *Ibid.* (citing *In re Berkley & Co.*, 629 F.2d 548, 549-551 (8th Cir. 1980)).

ARGUMENT

Petitioner contends (Pet. 8-17) that the court of appeals erred in failing to treat the denial of the motions for return of property under Federal Rule of Criminal Procedure 41(g) as immediately appealable under either *DiBella* v. *United States*, 369 U.S. 121 (1962) (Pet. 8-14) or *Perlman* v. *United States*, 247 U.S. 7 (1918) (Pet. 14-17). The decision below is correct, turns heavily on its particular facts, and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. a. Congress has, with only limited exceptions, limited appellate review to "final judgments and decrees" of federal district courts, a principle currently embodied in 28 U.S.C. 1291. See *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989) (quoting Judiciary Act of 1789, 1 Stat. 84). In *DiBella*, this Court addressed when the denial of a pre-indictment motion for return of property is immediately reviewable under Section 1291, notwithstanding the general rule "prohibit[ing] appellate review until conviction and imposition of sentence." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984). The Court held that an order denying such a motion is immediately appealable "[o]nly if the motion [1] is solely for return of property and [2] is in no way tied to a criminal prosecution *in esse* against the movant." *DiBella*, 369 U.S. at 131-132. Only under those circumstances can the return-of-property "proceeding[] be regarded as inde-

pendent" from the criminal proceeding itself. *Id.* at 132.

b. Petitioner does not dispute that the court of appeals correctly stated *DiBella*'s two-part test. Instead, petitioner contends (Pet. 8-14) that the court erred in concluding that the Rule 41(g) motions in this case were not solely for return of property and thus did not satisfy *DiBella*'s first requirement. The court of appeals' fact-bound conclusion on that issue does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). The Court previously denied review of a similar petition raising the fact-bound question whether a motion was solely for the return of property under *DiBella*. See *In re Grand Jury Proceedings*, 546 U.S. 1167 (2006) (No. 05-572). The same result is warranted here.

In any event, petitioner's contention lacks merit. As the court of appeals recognized (Pet. App. 9a-10a), petitioner's Rule 41(g) motions sought an order under which the government would either be forbidden "from reviewing all or most of the evidence" while petitioner or a "third party screen[ed] the seized material," or else would be required "to waive the plain view doctrine with respect to the electronic documents." Accordingly, the motions were not solely for return of property. They were arguably not for return of property at all. By the time the Rule 41(g) motions were filed, the government had returned most of petitioner's property and had made the rest available to petitioner. *Id.* at 2a, 9a, 21a; Gov't C.A. Br. 5. Petitioner did not contend that, absent relief, petitioner would be denied access to documents essential for

petitioner's business or personal affairs. C.A. App. A16, A18-A33; see Pet. App. 2a. Rather, petitioner argued in the motions that, absent the protocol petitioner had urged, the government's efforts to screen out materials beyond the scope of the warrants would "become a vehicle for the government to gain access to data which it has no probable cause to collect." C.A. App. A20 (citation omitted). That statement in particular underscores that the relief petitioner sought was closely akin to an order of suppression and was not solely or even primarily meant to protect petitioner's proprietary interests.

c. Petitioner contends (Pet. 8-14) that, in concluding that the Rule 41(g) motions were not solely for return of property, the court of appeals either created or exacerbated a circuit conflict. That argument, too, lacks merit.

Petitioner takes issue with the court of appeals' reasoning that the Rule 41(g) motions—which did not "by their terms, seek suppression of evidence" (Pet. App. 9a)—were nevertheless not solely for return of property because they sought "strategic gain at a future hearing" (*id.* at 8a). In petitioner's view, that holding conflicts with the approach, "taken by the other courts of appeals, that a motion is 'solely for return of property' where it does not seek *suppression* in a subsequent hearing or trial." Pet. 12 (emphasis added); see *ibid.* (advocating a rule under which "[t]he motion should be deemed solely for return of property so long as there is not also an express motion to suppress") (quotation omitted). Petitioner overstates the analytical tension among the circuits.[4]

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[4] As petitioner notes (Pet. 9-10 & n.2), from 1972 to 1989, Rule 41(e) provided that when a district court granted a motion for re-

The court of appeals held that, in deciding whether a Rule 41(g) motion is solely for return of property, a court must "look beyond" whether a movant expressly "seeks only to suppress evidence" and additionally consider a motion's actual "effect" and "true purpose." Pet. App. 8a; see *id.* at 9a. That approach comports with a commonsense understanding of *DiBella* itself, which held that appealability turns not on whether the motion expressly seeks suppression, but on whether it "solely" seeks return of property—meaning it does not seek suppression *or some other relief* besides return of property. 369 U.S. at 131. As the court of appeals emphasized (Pet. App. 8a), that practical approach is consistent with the views of other courts of appeals. See, *e.g.*, *In re Grand Jury*, 635 F.3d 101, 103 (3d Cir. 2011) ("the question whether a motion is for the return of property * * * must be resolved by examining the essential character" of the district court pleadings, and by considering the "effect" of the motion, even if it does not expressly seek suppression) (citation omitted); *Andersen* v. *United States*, 298 F.3d 804, 807-808 (9th Cir. 2002) ("[t]he substance of the motion, not its form, controls its disposition," and a motion is not solely for return of property if it "asks for significant additional relief," be it suppression or some other remedy), cert. denied, 538 U.S. 977 (2003); *Sealed Appellant 1* v. *Sealed Appellee*, 199 F.3d 276,

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turn of property, the property at issue would "not be admissible in evidence at any hearing or trial." Fed. R. Crim. P. 41(e) (1989). By contrast, the post-1989 version of the same provision, now appearing at Rule 41(g), does not mention suppression and instead provides only that the court on granting the motion "must return the property to the movant." Fed. R. Crim. P. 41(g); see 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3918.4, at 486-489 (2d ed. 1992) (discussing 1989 amendment).

278 (5th Cir. 2000) (noting that "[w]e have interpreted *DiBella* broadly," and concluding that the motion at issue was not solely for return of property where, *inter alia*, the movants made no effort "to demonstrate a business need for return of the property" and designed their motion "to withhold evidence from the anticipated grand jury hearings").[5]

The Sixth and Ninth Circuit decisions that petitioner cites (Pet. 10-11) are not to the contrary. Those decisions do not hold that a motion is solely for return of property so long as it does not expressly seek suppression. In *Shapiro* v. *United States*, 961 F.2d 1241 (1992), the Sixth Circuit "h[e]ld that we must look behind the * * * motion and determine whether [it] essentially sought return of seized property or suppression, delay, *or some other such purpose* apart from the return of the property." *Id.* at 1244 (emphasis added). The court dismissed the appeal in that case, concluding that the movants had necessarily sought such additional relief beyond the return of property because the government had already returned their property or had otherwise given them access to it. *Id.* at 1244-1245. Petitioner suggests (Pet. 11) that the Sixth Circuit later modified that approach in *Frisby* v. *United States*, 79 F.3d 29 (1996), but that is incorrect. In *Frisby*, the movant sought return of publications, currency, and coins that the

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[5] All of these cases were decided after the 1989 amendment to Rule 41 (see n.4, *supra*), which makes clear that courts have rejected petitioner's contention that the 1989 amendment made all Rule 41(g) motions immediately appealable because the rule no longer requires suppression upon a finding that the property should be returned. See Pet. 9-10; Pet. 12 (citing *Federal Practice and Procedure* § 3918.4, at 486-489).

government had seized and had not yet returned. *Id.* at 31. The district court denied his motion, and the court of appeals, holding that the denial of the motion was immediately reviewable, affirmed. *Id.* at 31 n.1, 33. The court cited *Shapiro* with approval without substantively discussing it and concluded that "the first prong of *DiBella* [was] satisfied" because the court "underst[oo]d" the motion before it "to be seeking no more than the return of [the movant's] property." *Id.* at 31 n.1. Unlike petitioner's case, the property at issue in *Frisby* was physical property that the government had already viewed, not electronic documents awaiting inspection by investigators. *Id.* at 31. The motion in *Shapiro* thus did not seek to shape the course of the ongoing investigation by limiting the evidence that the government could discover or precluding the government from relying on the plain-view doctrine.

Similarly, *In re 3021 6th Avenue North*, 237 F.3d 1039 (9th Cir. 2001), cannot be read to hold that a motion is solely for return of property so long as it does not expressly seek suppression. The court there dismissed the movant's appeal because, under the second *DiBella* requirement, the motion was "tied to a criminal prosecution *in esse* against the movant." *Id.* at 1041 (quoting *DiBella*, 369 U.S. at 132). The court thus had no occasion to address whether the motion was solely for return of property. Nevertheless, it went out of its way to point out that "the Supreme Court's formulation of the rule in *DiBella* reveals its concerns about more than suppression of evidence." *Id.* at 1041-1042.

Petitioner's claim that the decision below conflicts with Ninth Circuit law is especially untenable in view

of the above-cited *Andersen* case (see p. 11, *supra*). In *Andersen*, on facts analogous to the ones here, the Ninth Circuit dismissed an appeal where the movant had sought not only return of property but "significant additional relief," some of which was tantamount to "exclusion of evidence." 298 F.3d at 808. Specifically, the motion sought "to enjoin the [government] from conducting any future searches or seizures" and "from using the material that was already seized." *Ibid.* The court did not suggest that the question of appealability turned on whether the motion expressly sought suppression. Instead, the question turned on whether the motion sought any "significant additional relief" beyond return of property. *Ibid.*

To be sure, the Tenth Circuit suggested in *Kitty's East* v. *United States*, 905 F.2d 1367 (1990), that because Rule 41(g) no longer mandates suppression when a court grants a motion for return of property, "every" motion styled as one for return of property is in fact "one solely for the return of property." *Id.* at 1370. As an initial matter, however, that observation may well have been dictum, because the movant there—a chain of stores selling adult books, magazines, and videotapes—sought the return of videotapes it rented out as part of its business, and the court held that the company's motion "must be viewed as one solely for the return of property." *Ibid.*; see *id.* at 1369-1370, 1372, 1376.

Moreover, to the extent *Kitty's East* could be read to establish a blanket rule that any Rule 41(g) motion is necessarily a motion "solely" for return of property, it would be in tension with an earlier Tenth Circuit decision, *Blinder, Robinson & Co.* v. *United States*, 897 F.2d 1549 (1990). In that case, the movants

sought the return of business records that the government had seized, including due diligence files that the government had not yet copied and returned. *Id.* at 1551. The court of appeals concluded that the motion was solely for return of property, based in part on the movants' representation that they were not seeking suppression. *Id.* at 1554. Because the court partly grounded its disposition on that case-specific representation, *Blinder, Robinson & Co.* may suggest that, even in the Tenth Circuit, not every motion styled as one for return of property necessarily satisfies *DiBella*'s first requirement just because it does not expressly seek suppression. See *Shapiro*, 961 F.2d at 1244 (6th Cir.) (noting this possible "inconsisten[cy]" between *Kitty's East* and *Blinder, Robinson & Co.*). Any inconsistency between those opinions is for the Tenth Circuit, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Furthermore, it is far from clear that the Tenth Circuit would follow *Kitty's East* in a case like petitioner's. *Kitty's East* did not address a motion that, like petitioner's, sought to preclude the government either from reviewing seized materials or from relying on the plain-view doctrine. Accordingly, this case would be an unsuitable vehicle in which to address any tension between *Kitty's East* and the decisions in other circuits.

2. Review is likewise unwarranted to address petitioner's alternative contention (Pet. 14-17) that, even assuming the court of appeals lacked jurisdiction under *DiBella*, it had jurisdiction to review the denial of petitioner's Rule 41(g) motions under the principles set out in *Perlman*, *supra*.

a. As discussed above (p. 8, *supra*), the final judgment rule codified in 28 U.S.C. 1291 "is an historic characteristic of federal appellate procedure" dating back to the Founding era. *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). In codifying the rule, Congress "set itself against enfeebling judicial administration [and] * * * the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Id.* at 325. While the principle of finality has great importance in civil litigation, it is "especially compelling in the administration of criminal justice." *Ibid.* Indeed, the "encouragement of delay is fatal to the vindication of the criminal law." *Ibid.* The principle of finality is of such importance in criminal proceedings that, ordinarily, "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Id.* at 325-326.

In view of those concerns, this Court has repeatedly held that the courts of appeals lack jurisdiction to review interlocutory challenges to grand jury subpoenas or similar discovery orders and that appellate review may be obtained only if "the witness chooses to disobey and is committed for contempt." *Cobbledick*, 309 U.S. at 328; see *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971) ("[W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to

produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.").

The Court's decision in *Perlman* establishes a narrow exception to the foregoing rule. Under that exception, a court of appeals may review a challenge to a subpoena or other order for the production of documents if it is directed at a neutral third party and the appellant cannot obtain review through the disobedience-and-contempt procedure. The *Perlman* exception arose from Perlman's attempt to enjoin a government attorney from taking possession of documents that belonged to Perlman and had come into possession of a court custodian in an earlier proceeding. Because Perlman did not possess the documents and therefore was not in a position to disobey an order to produce them, denying appeal would have left Perlman "powerless to avert the mischief of the order." 247 U.S. at 13. As the Court later stated, "the custodian could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." *Ryan*, 402 U.S. at 533.

The Court has characterized the rule in *Perlman* as follows: "a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992).

b. The court of appeals correctly held that *Perlman* did not provide a basis for jurisdiction over petitioner's appeal. Pet. App. 10a-16a. *Perlman* simply

does not apply to petitioner's case, which does not involve a subpoena or discovery order directed at a disinterested third party. *Church of Scientology*, 506 U.S. at 18 n.11.

In any event, the court of appeals was correct more generally to resist "stretch[ing]" *Perlman* "to cover appeals from denials of Rule 41(g) motions." Pet. App. 12a. The *DiBella* standard is specifically addressed to motions for return of property under Rule 41(g) and it reflects a delicate balance. The Court in *DiBella* made clear its view that a more relaxed standard would entail significant risks of delay and abuse. See, *e.g.*, 369 U.S. at 126 ("the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law"). The Court cautioned that making immediate appeals too readily available in return-of-property cases could transform such appeals into "instrument[s] of harassment, jeopardizing by delay the availability of * * * essential evidence." *Id.* at 129.

In other words, as the court of appeals observed (Pet. App. 14a), *DiBella* carefully "crafted" "a jurisdictional doctrine * * * explicitly for" Rule 41(g) motions with an eye toward minimizing appellate interference with ongoing or potential criminal proceedings. *Perlman*, by contrast, did not address such motions at all. It would therefore be inconsistent with the purposes of the final judgment rule—and with this Court's efforts to ensure that exceptions to the rule remain "modest" and "narrow," *e.g.*, *Will* v. *Hallock*, 546 U.S. 345, 350 (2006) (citation omitted)—to permit an immediate appeal from the denial of a Rule 41(g) motion where the motion does not meet *DiBella*'s

criteria. Indeed, in *DiBella*, the Court acknowledged other exceptions to the finality rule, *Perlman* included. 369 U.S. at 124 n.2. But after rejecting appellate jurisdiction to review the order denying the motion for return of property under the two-part standard it announced, *id.* at 122, 131-133, the Court did not suggest that *Perlman* could provide an alternative basis for appellate review of the order.

c. Petitioner contends (Pet. 14-16) that the court of appeals' holding that *Perlman* did not provide a basis for appellate jurisdiction conflicts with the Eighth Circuit's decision in *In re Berkley & Co.*, 629 F.2d 548 (1980). There is no such conflict.

In *Berkley*, the movant company, Berkley, was the subject of a grand jury investigation. 629 F.2d at 550. The grand jury sought two groups of documents, one that the government seized from Berkley's headquarters pursuant to a search warrant, and another that a former Berkley employee had volunteered to the government. *Ibid.* Berkley moved the district court for various forms of relief: to suppress the documents seized from headquarters under the then-applicable version of Rule 41(e); to order the government to provide Berkley with copies of the documents the former employee had volunteered; and to prevent disclosure to the grand jury of any privileged materials from either group of documents. *Id.* at 550. The district court "expressly declin[ed]" to rule on the motion to suppress and the motion for copies of the former employee's documents. *Id.* at 550. But it conducted an *in camera* inspection of all allegedly privileged documents, concluded that some 264 of them were not privileged, and ordered that the unprivileged documents be disclosed to the grand jury. *Ibid.* Berkley

appealed that disclosure order, and the Eighth Circuit concluded that it had jurisdiction under *Perlman* because, in its view, (1) the order was "the functional equivalent of an order denying a motion to quash a grand jury subpoena," *id.* at 551; and (2) the order was "not directed to Berkley," which "thus [did] not have the option of defying the order and securing appellate review in contempt proceedings," *id.* at 552.

Petitioner's case is plainly distinguishable from *Berkley*. Contrary to petitioner's characterization (Pet. 14), *Berkley* did not "rel[y] upon the *Perlman* doctrine to exercise appellate jurisdiction over a motion for return of property." The Eighth Circuit had no occasion to review the denial of any such motion because, as noted, the district court "expressly declin[ed]" to rule on Berkley's Rule 41(e) motion to suppress. 629 F.2d at 550. The court was instead reviewing a disclosure order issued by the court after *in camera* review of the documents. *Ibid.* Necessarily, then, the Eighth Circuit had no occasion to consider whether and under what circumstances the denial of a Rule 41(g) motion is immediately appealable even though the motion does not meet *DiBella*'s carefully-limited criteria.

For those reasons—and also because the court of appeals in petitioner's case went out of its way to distinguish *Berkley* without questioning its application of *Perlman*, Pet. App. 13a-14a; see also *id.* at 16a (Kavanaugh, J., concurring)—the decision below cannot be read to conflict with *Berkley*. Nor does petitioner cite any other case in which a court of appeals held that the denial of a Rule 41(g) motion is immediately appealable under *Perlman* even where it does not satisfy *DiBella*'s requirements.

d. Finally, petitioner contends (Pet. 16-17) that the decision below conflicts with Third and Ninth Circuit decisions "declin[ing] to hold that" *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009), "narrowed the *Perlman* doctrine." Pet. 17 (quoting *In re Grand Jury*, 705 F.3d 133, 145-146 (3d Cir. 2012), cert. denied, 134 S. Ct. 63 (2013), and citing *United States* v. *Krane*, 625 F.3d 568, 572 (9th Cir. 2010)). In *Mohawk*, the Court held that disclosure orders adverse to the attorney-client privilege in civil proceedings are not immediately appealable under the collateral-order doctrine because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." 558 U.S. at 109.

But the court of appeals did not hold that *Mohawk* "narrowed the *Perlman* doctrine." It relied on *Mohawk* for the more general "admonition" that courts should not generously *expand* exceptions to 28 U.S.C. 1291's rule of finality. Pet. App. 15a (citation omitted). *Mohawk* amply supports the court of appeals' exercise of caution in that respect, even though that case concerned the collateral-order doctrine and not the *Perlman* doctrine. Both doctrines are exceptions to the finality rule that would otherwise apply. See *Mohawk*, 558 U.S. at 106 ("[W]e have stressed that [the collateral order doctrine] must never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.") (citation and internal quotation marks omitted). Finally, the foregoing Third and Ninth Circuit decisions did not consider the appealability under *Perlman* of the denial of Rule 41(g) motions that do not meet *DiBella's* requirements, and they thus do not

conflict with the narrow holding of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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