No. 20-1141

In the Supreme Court of the United States

DOE COMPANY, 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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QUESTIONS PRESENTED

1. Whether petitioner was entitled to interlocutory appeal of the district court's order denying its motion to quash (and ordering enforcement of) grand-jury subpoenas issued to a third party custodian, when petitioner does not claim that the documents sought are privileged or otherwise legally protected from disclosure to the grand jury.

2. Whether a reasonable probability existed that the grand jury would succeed in establishing facts necessary for the district court to exercise personal jurisdiction over petitioner, a foreign corporation, based on petitioner's contacts with the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 966 F.3d 991. The orders of the district court (Pet. App. 19a-20a, 21a-23a, 24a-67a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2020. A petition for rehearing was denied on September 2, 2020. (Pet. App. 69a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on January 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the United States District Court for the Northern District of California issued subpoenas to petitioner and one of its employees. The district court denied petitioner's motion to quash the subpoenas and ordered their enforcement, Pet. App. 21a-23a, 24a-67a, and later found petitioner in contempt for refusing to comply with the subpoena directed to it, *id.* at 19a-20a. The court of appeals dismissed petitioner's interlocutory appeal relating to the employee's subpoenas for lack of jurisdiction and affirmed the enforcement and contempt orders against petitioner. *Id.* at 1a-18a.

1. This case arises out of a grand jury investigation into "the acquisition of one company by another" in which the acquired company is alleged to have "provided fraudulently misleading information about its true value, leading the acquiring company to pay a substantially inflated price." Pet. App. 4a. "The grand jury has so far issued two indictments" based on its investigation. *Ibid.*

Petitioner is a corporation "based outside the United States" formed by former officers of the acquired company shortly after the acquisition, from which they personally profited, "us[ing] their personal funds." Pet. App. 14a-15a. Among other matters, see *id.* at 27a-28a, the grand jury continues to investigate whether "money from the acquisition may have been laundered through [petitioner], and later laundered again through what was initially a wholly owned subsidiary of [petitioner]," *id.* at 16a.

The grand jury issued a subpoena to Pat Roe (a pseudonym), "a former officer at the acquired company and a current partner at [petitioner]." Pet. App. 4a; see *id.* at 28a. The subpoena instructed Roe to appear at a

grand jury proceeding and to bring "[a]ll documents relating in any way to" the acquired company, various former officers of that company, and the criminal investigation. *Id.* at 28a (citation omitted); see *id.* at 28a-30a. Roe produced some documents in response to that subpoena but withheld other documents relating to her employment with petitioner. *Id.* at 29a; C.A. Supp. E.R. 153-154. The grand jury later served Roe with a second subpoena requesting "all documents relating to" petitioner. Pet. App. 29a (brackets and citation omitted). Roe has produced some responsive documents but has withheld others at petitioner's request. C.A. Supp. E.R. 154. The grand jury also issued a subpoena to petitioner itself, seeking "any and all documents" related to the acquisition, as well as the "hiring" of, "retention" of, or "payment" to "any persons formerly employed by" the acquired company. Pet. App. 29a-30a (citation omitted); C.A. Supp. E.R. 339. Petitioner has not complied with that subpoena. Pet. App. 17a.

2. Petitioner moved to quash the two grand jury subpoenas issued to Roe. See Pet. App. 30a. As relevant here, petitioner argued that because those subpoenas sought documents that Roe held in her representative capacity, they required establishing personal jurisdiction over petitioner itself—but that the district court lacked such jurisdiction. C.A. E.R. 282 (citing *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987)). The government moved to compel compliance with all three subpoenas. See Pet. App. 30a; C.A. Supp. E.R. 142-161. The court denied petitioner's motion to quash the Roe subpoenas and ordered petitioner and Roe to comply with the subpoenas. Pet. App. 22a, 48a. As relevant here, the court determined that it had "specific personal

jurisdiction over [petitioner]" to support issuance of the grand jury's subpoenas. *Id.* at 34a.

The district court first explained that the proper test for personal jurisdiction over a foreign corporation was derived from *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), but with a focus on "minimum contacts with the United States" rather than "minimum contacts with a state." Pet. App. 36a (citation omitted). The *International Shoe* standard asks whether the party has sufficient "minimum contacts" with the forum such that exercise of jurisdiction would not "offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316 (citation omitted); see Pet. App. 36a. The court explained that because the grand jury's role is to investigate, the government need not establish personal jurisdiction by a preponderance of the evidence, but need only show "a reasonable probability that ultimately [the grand jury] will succeed in establishing the facts necessary for the exercise of jurisdiction." *Id.* at 42a (quoting *In re Marc Rich & Co.*, 707 F.2d 663, 670 (2d Cir.), cert. denied, 463 U.S. 1215 (1983)).

Applying that standard, the district court found a "'reasonable probability' that [petitioner] may have violated federal money laundering laws." Pet. App. 44a (citation omitted). The court observed that "several people who had been involved with the fraud at [the acquired company], including at least one who has since been convicted for his involvement, * * * invested personal funds in [petitioner]." *Id.* at 42a. The court further observed that "[a]ccording to a memorandum internal to [petitioner] in 2012, 'the management team will invest up to [a substantial amount] of its own money in the fund.'" *Ibid.* (brackets and citation omitted). And the court observed that petitioner did "not appear to

dispute" that if former employees of the acquired company created petitioner "with their own funds, and if they obtained those funds from their previous work at [the acquired company], there would be a reasonable probability that the Grand Jury could return indictments on money laundering." *Id.* at 44a. The court accordingly found a "reasonable probability that ultimately it will succeed in establishing the facts necessary for the exercise of jurisdiction" and that the court therefore had "specific personal jurisdiction over [petitioner] to issue the subpoenas." *Id.* at 45a (citation omitted).

After petitioner refused to comply with the grand-jury subpoena issued to it, the district court held petitioner in contempt. Pet. App. 19a-20a.

3. The court of appeals dismissed petitioner's appeal in part and affirmed in part. Pet. App. 1a-18a.

a. The court of appeals determined that it "lack[ed] appellate jurisdiction to review the district court's enforcement order directed to Roe" because that order was not an appealable final decision under 28 U.S.C. 1291. Pet. App. 5a. The court rejected petitioner's argument that *Perlman* v. *United States*, 247 U.S. 7 (1918), which held that the target of a grand jury investigation could immediately appeal his claim that documents held by a disinterested third party were protected by the Fourth and Fifth Amendments, supplied a basis for appealing the indisputably nonfinal order. See Pet. App. 7a-13a.

The court of appeals observed that under *Perlman*, "a discovery order directed at a disinterested third-party custodian of privileged documents is immediately appealable because the third party, presumably lacking a sufficient stake in the proceeding, would most likely

produce the documents rather than submit to a contempt citation." Pet. App. 7a-8a (citation omitted). The court acknowledged that it had sometimes described *Perlman* in "shorthand fashion," omitting "the requirement that the challenged order seek[] privileged documents." *Id.* at 8a. But the court explained that "[d]espite [its] abbreviated statements of the doctrine," *Perlman* permits "interlocutory appeals from orders enforcing grand jury subpoenas only when they require production of materials that are claimed to be privileged or otherwise legally protected from disclosure" to the grand jury. *Id.* at 8a-9a. Because petitioner had "ma[de] no such claim," the court determined that it lacked jurisdiction over the interlocutory appeal. *Id.* at 11a.

b. The court of appeals also affirmed the order enforcing the subpoena against petitioner, declining to disturb the district court's determination that the record here supported its "in personam jurisdiction" over petitioner to issue the subpoena. Pet. App. 15a; see *id.* at 14a-16a. The court thus also affirmed the contempt finding. *Id.* at 18a.

The court of appeals explained that in the grand-jury subpoena context, the government must demonstrate a "reasonable probability" that the grand jury's investigation would "succeed in establishing the facts necessary for the exercise of jurisdiction." Pet. App. 15a (quoting *Marc Rich*, 707 F.2d at 670). The court further explained that the "relevant forum" in the inquiry is "not the state in which the grand jury is empaneled but 'the entire United States,' which is itself 'injuriously affected' by the criminal offense." *Ibid.* (citation omitted). And the court observed that the parties did "not dispute that in the grand jury subpoena context, the 'reasonable

probability' test * * * governs a determination of in personam jurisdiction." *Ibid.* (citation omitted).

Applying that test, the court of appeals found no clear error in the district court's determination that a reasonable probability existed that the government could establish facts necessary to support personal jurisdiction. Pet. App. 15a-16a. The court of appeals observed that the district court had found that "several people who had profited from the sale of the acquired company used their personal funds shortly thereafter to help found [petitioner]." *Id.* at 15a. The court of appeals also observed that the government alleged that the funds from the acquisition "may have been laundered through [petitioner], and later laundered again through what was initially a wholly owned subsidiary of [petitioner]," and that record evidence showed that "[petitioner] and the [subsidiary] at one time shared the same office in the United States" and had "substantial overlap" between their employees. *Id.* at 16a. The court thus determined that "taken together, these [and other] findings adequately support the district court's determination that it had in personam jurisdiction over [petitioner]." *Ibid.*

ARGUMENT

Petitioner challenges (Pet. 11-22) the court of appeals' determination that it lacked appellate jurisdiction over petitioner's interlocutory challenge to the Roe subpoenas, as well as the findings of both lower courts concerning the exercise of personal jurisdiction (Pet. 22-34). Both contentions lack merit, and the decision below does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly determined that it lacked appellate jurisdiction over petitioner's interlocutory challenge to the Roe subpoenas, and its determination does not conflict with any decision of this Court or another court of appeals.

a. Federal courts of appeals generally have jurisdiction to review only "final decisions of the district courts." 28 U.S.C. 1291. Congress has created certain express exceptions to that final-judgment rule, *e.g.*, 28 U.S.C. 1292(a); cf. 28 U.S.C. 1292(b), and this Court has recognized other circumstances in which interlocutory review may be available, see, *e.g.*, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). As relevant here, an order compelling enforcement of a grand jury subpoena ordinarily is not immediately appealable, and so the party subject to the subpoena must either "obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt," which would be immediately appealable. *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); see *Cobbledick* v. *United States*, 309 U.S. 323, 327-328 (1940).

Perlman v. *United States*, 247 U.S. 7 (1918), recognized a limited exception to that rule. There, the district court had ordered that some of Perlman's papers, which were still in the clerk of court's custody after a previous lawsuit by Perlman's company, be provided to a grand jury that was investigating Perlman for perjury. *Id.* at 8-11. Perlman opposed the order, arguing that the order would "constitute[] an unreasonable seizure" in violation of the Fourth Amendment and would violate his privilege against self-incrimination under the Fifth Amendment. *Id.* at 13. In a terse discussion, this Court stated that Perlman could immediately appeal

because he "was powerless to avert the mischief of the order." *Ibid.* As the Court elaborated many decades later, interlocutory appeal was justified in *Perlman* because the clerk of court "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; see *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992). The Court thus summarized *Perlman*'s holding as having recognized an exception to the final-judgment rule to allow "immediate review of an order directing a third party to produce exhibits which were the property of appellant and, he claimed, immune from production." *Ryan*, 402 U.S. at 533.

b. The court of appeals correctly determined that in order for *Perlman*'s exception to the final-judgment rule to apply, the challenged order must both be directed at a "disinterested third-party custodian," Pet. App. 7a (citation omitted), and require production of documents that the appellant claims are "privileged or otherwise legally protected from disclosure" to a grand jury, *id.* at 9a. Those requirements track this Court's own description of *Perlman* as involving documents held by a third party "which were the property of appellant *and*, he claimed, immune from production." *Ryan*, 402 U.S. at 533 (emphasis added).

The requirement that an appellant, before obtaining interlocutory review, at least claim that the documents at issue are privileged or otherwise legally protected from disclosure to a grand jury makes sense in light of the unique role of grand juries in our criminal justice system. Grand juries have "wide latitude to inquire into violations of criminal law," and their "operation generally is unrestrained by the technical procedural and ev-

identiary rules governing the conduct of criminal trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). A witness ordinarily "has no right of privacy before the grand jury" and "may not decline to answer on the grounds that his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs." *Id.* at 353. This Court has thus observed that "the longstanding principle that 'the public has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, is particularly applicable to grand jury proceedings." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) (citations and ellipsis omitted). As that principle suggests, the grand jury may not "violate a valid privilege, whether established by the Constitution, statutes, or the common law." *Calandra*, 414 U.S. at 346. A limited class of other protections, including the work product doctrine and civil protective orders, also may shield information from the grand jury. See 3 Wayne R. LaFave et al., *Criminal Procedure* § 8.6(b), at 160-168 (4th ed. 2015); *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1223 (9th Cir. 1995) (information protected by court order).

When such a protection is at issue, interlocutory review of a disclosure order thus makes sense, "for if a document produced to the grand jury is later held to have contained privileged information, protection provided by the privilege will have been irretrievably lost." Pet. App. 10a; see *id.* at 11a ("[A]n appeal after final judgment would come too late to remedy that harm."). Accordingly, as this Court has explained, *Perlman*'s exception is premised on the observation that "[t]o have denied [interlocutory] review would have left Perlman 'powerless to avert the mischief of the order,'" *Ryan*,

402 U.S. at 533 (citation omitted), where the mischief in question was the irreparable harm of disclosing exhibits that were claimed to be "immune from production," *ibid.* But a disclosure order works no such "mischief" when the documents to be disclosed are not claimed to be privileged or otherwise protected from disclosure to the grand jury. In that circumstance, the appellant would not suffer any irreparable harm from disclosure—indeed, might not suffer any cognizable harm at all, given both the grand jury's historically broad investigatory power and that the physical burdens of disclosure will fall on a third party.

Relying on a footnote in *Church of Scientology*, *supra*, petitioner suggests (Pet. 19) that "[t]he touchstone of *Perlman* has always been the loss of a substantial interest absent an immediate appeal, not the type of interest being asserted." That suggestion is mistaken. For one thing, the portion of the footnote on which petitioner relies (Pet. 19-20) simply noted that "under the so-called *Perlman* doctrine, 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*, 506 U.S. at 18 n.11 (citation omitted). That footnote did not purport to define the specific circumstances in which *Perlman* might apply, let alone support petitioner's contention (Pet. 19) that "the type of interest being asserted" is *irrelevant*. Indeed, *Perlman* was not even relevant to *Church of Scientology*, given that the case involved an order that was indisputably final and thus not subject to *Perlman* in the first place. See 506 U.S. at 18 n.11.

Petitioner's overreading of that footnote also cannot be squared with this Court's admonition that it has "allowed exceptions" to the final-judgment rule "[o]nly in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *Ryan*, 402 U.S. at 533. As explained above, a person has no cognizable interest in keeping documents from a grand jury *unless* they are protected from disclosure by privilege or some other legal doctrine. If the documents enjoy such privilege or legal protection, disclosure to the grand jury would irretrievably destroy that privilege or protection, making it "impossible" for appellate review following a final judgment to vindicate those interests. Cf. *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978) (explaining that interlocutory criminal appeals could be available only when "the legal and practical value" of the "asserted right" would "be destroyed if it were not vindicated before trial"). That is not true of *other* interests in resisting grand-jury disclosure—including the due-process interest that petitioner asserts here.

Specifically, petitioner asserts (Pet. C.A. Br. 44-56) that it would violate due process to enforce the grand-jury subpoenas against Roe if the district court does not have personal jurisdiction over petitioner. Whether or not that assertion is correct, the interest protected by due process in the personal-jurisdiction context is the interest in "not being subject to the binding judgments of a forum with which [the defendant] has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 471-472 (1985) (citation omitted). An interlocutory order is by definition not itself such a "binding judgment[]," *id.* at 471, and this Court has long held that the "denial of a motion

to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable," *Catlin* v. *United States*, 324 U.S. 229, 236 (1945). Unlike a claim of privilege or other legal protection against disclosure, the due-process interests asserted by petitioner do not fall within the "limited class" of "claims" that would be "impossible" to review on appeal following a final judgment. *Ryan*, 402 U.S. at 533.

c. Contrary to petitioner's contention (Pet. 13-17), the decision below does not conflict with the decisions of any other courts of appeals. Petitioner identifies no case allowing an interlocutory appeal under *Perlman* based on the appellant's challenge to personal jurisdiction. And each of the cases it cites as establishing a conflict involves materially different circumstances.

Petitioner principally relies (Pet. 13-14) on the Third Circuit's decision in *In re Grand Jury*, 619 F.2d 1022 (1980) (*Schmidt*), with which the decision below expressed disagreement, see Pet. App. 13a. But the four-decade-old decision in *Schmidt* does not present a conflict warranting this Court's review. There, the district court denied a brewery's motion to quash grand jury subpoenas to its employees, where the brewery alleged that the grand jury was "not investigating federal crimes" and that "the investigation was being conducted in bad faith." 619 F.2d at 1024. The Third Circuit found jurisdiction under *Perlman* to entertain the brewery's interlocutory appeal, on the theory that if the grand jury ultimately did not issue an indictment, the brewery "will have been subjected to the alleged harassment of having its records removed from its place of business and its employees diverted from their business tasks without an opportunity for appellate review." *Id.* at 1025. The court then denied relief on the merits. *Id.*

at 1027. Unlike the brewery in *Schmidt*, petitioner has never alleged that the subpoenas will unduly burden petitioner's business or employees, and petitioner identifies no decision of the Third Circuit applying *Perlman* to an appeal asserting a lack of personal jurisdiction.

The other cases on which petitioner relies (Pet. 14-16) likewise do not establish a conflict warranting this Court's review. Only three were about grand-jury subpoenas, as opposed to civil discovery subpoenas, and all of them involved claims of privilege or other legal protection against disclosure. See *In re Faltico*, 561 F.2d 109, 110-111 & n.2 (8th Cir. 1977) (per curiam) (claim that disclosure would violate First Amendment associational rights); *In re Berkley & Co.*, 629 F.2d 548, 551 (8th Cir. 1980) (attorney-client privilege); *In re Grand Jury Proceedings*, 616 F.3d 1172, 1179 (10th Cir. 2010) (attorney-client privilege and work-product doctrine). The court of appeals here expressly acknowledged that such cases involving a "claim of evidentiary privilege" or "other legal claim specifically protecting against disclosure to the grand jury" would fall within *Perlman*. Pet. App. 14a.

The remaining four cases petitioner cites (Pet. 14-16) are even further afield, as they involved not grand-jury subpoenas, but subpoenas in civil lawsuits. Furthermore, three of them, like the cases above, involved claims of privilege or other legal protection against disclosure. See *Gill* v. *Gulfstream Park Racing Association*, 399 F.3d 391, 393-394, 399 (1st Cir. 2005) (identity of tipsters allegedly protected by informant's privilege); *Gotham Holdings, LP* v. *Health Grades, Inc.*, 580 F.3d 664, 665 (7th Cir. 2009) (confidentiality condition in arbitration proceedings); *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254, 1259 (C.C.P.A.),

cert. denied, 459 U.S. 943 (1982) (confidentiality of business information). And the fourth did not even involve a disinterested third party, but instead was an appeal by the party against whom the disclosure order was directed. See *United States ex rel. Pogue* v. *Diabetes Treatment Centers of America, Inc.*, 444 F.3d 462, 473-474 & n.8 (6th Cir. 2006) (explaining that the appellant could disobey and suffer contempt if it wished to appeal).

Not only are the decisions on which petitioner relies inapposite, but as the court of appeals recognized (Pet. App. 12a-13a), nearly all courts of appeals have in published opinions described *Perlman* as being applicable to cases in which "the appellant has asserted a privilege" over the information at issue. *United States* v. *Beltramea*, 831 F.3d 1022, 1024 (8th Cir. 2016); see Pet. App. 12a-13a (citing additional cases from the First, Second, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits). Petitioner does not cite any of those cases or attempt to explain how they can be squared with petitioner's assertion of a direct circuit conflict. At a minimum, they illustrate that circuits' views in this area are sufficiently unsettled that this Court's intervention is not warranted.

d. In any event, this case would be a poor vehicle in which to review the first question presented for at least three reasons.

First, the only ground on which petitioner has challenged the Roe subpoenas relates to personal jurisdiction—specifically, the assertion that because the subpoenas directed to Roe involve corporate documents, the government must prove that the district court had personal jurisdiction over *petitioner* (even if the court indisputably has personal jurisdiction over

Roe herself). See Pet. 18-19; Pet. C.A. Br. 44-56. But obtaining interlocutory review of that issue is academic when, as here, the court of appeals already has determined that the district court in fact has personal jurisdiction over petitioner. See Pet. App. 15a-16a. Enforcing the Roe subpoenas thus would be proper even under petitioner's theory that the court must establish personal jurisdiction over petitioner. More to the point, petitioner was able to obtain interlocutory review of the personal-jurisdiction determination itself, and so did not "los[e] its ability to pursue its personal jurisdiction arguments on appeal *ever*." Pet. 20. It pursued those arguments and lost on the merits. Accordingly, even if the first question presented were resolved in petitioner's favor, it would make no practical difference to the outcome here.

Second, to fall within *Perlman*'s exception to the final-judgment rule, petitioner would have to show that Roe was a "disinterested third party," *Church of Scientology*, 506 U.S. at 18 n.11, who could not "have been expected to risk a citation for contempt in order to secure [petitioner] an opportunity for judicial review," *Ryan*, 402 U.S. at 533. Although the court of appeals did not reach the issue, the government argued below that Roe was not a disinterested third party. See Gov't C.A. Br. 5-7. Roe is both a high-ranking employee and (at least at some point) a part owner of petitioner, and thus unlikely to be a truly disinterested third party in the grand jury's investigation. C.A. Supp. E.R. 151, 300, 305. And unlike a prototypical disinterested third party, like the clerk of court in *Perlman*, Roe has not demonstrated a willingness to fully comply with the subpoenas. See *Grand Jury Proceedings*, 616 F.3d at 1179 (stating that *Perlman* applies when "the party

subject to the subpoena indicates that he or she will produce the records or testify rather than risk contempt"); *Gotham Holdings*, 580 F.3d at 665 (applying *Perlman* after observing that the documents' custodian was "willing to hand them over"). Instead, Doe has withheld production at petitioner's request. C.A. Supp. E.R. 154. Under those circumstances, petitioner cannot show that Roe is sufficiently disinterested that she could not be expected to take a contempt citation on petitioner's behalf. At a minimum, the Court would have to address that antecedent factbound issue before it could address the first question presented here.

Third, and at all events, the underlying contention of which petitioner seeks interlocutory review—that personal jurisdiction over petitioner is required to enforce the subpoenas against Roe—lacks merit. The relevant subpoenas are directed to Roe, not to petitioner, and involve documents "stored on a laptop and cellphone within her possession." Pet. App. 50a. Petitioner has never disputed that the district court had personal jurisdiction over Roe, and that the requested documents are within Roe's control. That is sufficient to enforce the subpoenas, given petitioner's lack of any other objection to them. See *Nelson* v. *United States*, 201 U.S. 92, 115 (1906) (rejecting as "untenable" the argument that corporate-officer witnesses were entitled to refuse to produce documents on the theory that "the possession of the witnesses was not personal, but was that of the respective corporations of which they were officers"); cf. *Societe Internationale pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197, 204-205 (1958) (holding in a related context that a person with control over corporate documents stored overseas must produce them even if production would

violate the foreign sovereign's law). Whether the district court had personal jurisdiction over not only Roe, but petitioner as well, is therefore ultimately irrelevant. See *Kiobel* v. *Cravath, Swaine & Moore LLP*, 895 F.3d 238, 244 (2d Cir. 2018) (rejecting the argument that a "court cannot compel a law firm to produce a client's documents when (as here) the client is not subject to the court's personal jurisdiction"), cert. denied, 139 S. Ct. 852 (2019) (No. 18-706); *United States* v. *First National City Bank*, 396 F.2d 897, 900-901 (2d Cir. 1968) (holding that a federal court may require "production of documents located in foreign countries if the court has in personam jurisdiction of the person in possession or control of the material") (emphasis omitted).

2. Petitioner also seeks this Court's review of the lower courts' finding of personal jurisdiction over petitioner. The court of appeals applied the very test that petitioner advocates here, and its factbound resolution of the issue does not warrant further review. See Sup. Ct. R. 10.

a. A grand jury "cannot compel the appearance of witnesses and the production of evidence," but instead "must appeal to the court when such compulsion is required." *United States* v. *Williams*, 504 U.S. 36, 48 (1992). The courts below thus accepted that the grand jury's compulsory subpoena power is limited by the district court's jurisdictional reach. But given the nature of a grand jury's task—"to *inquire* into the existence of possible criminal conduct" in the first place, *Branzburg*, 408 U.S. at 688 (emphasis added)—and the "historic" and "essential" role that subpoenas play in fulfilling that task, *ibid.*, the facts required to establish jurisdiction need not be proved ex ante to support a grand-jury subpoena. Instead, as this Court explained in *Blair* v.

United States, 250 U.S. 273 (1919), "the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." *Id.* at 282-283; cf. *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77, 79 (1988).

Although *Blair* addressed subject-matter jurisdiction, lower courts have recognized that those principles also apply to personal jurisdiction. See, *e.g.*, *In re Marc Rich & Co.*, 707 F.2d 663 (2d Cir.), cert. denied, 463 U.S. 1215 (1983). Those courts have therefore understood that a grand-jury subpoena is enforceable against a person as long as "the Government shows that there is a reasonable probability that ultimately it will succeed in establishing the facts necessary for the exercise of [personal] jurisdiction" over that person. *Id.* at 670; see *In re: Sealed Case*, 932 F.3d 915, 923 (D.C. Cir. 2019); Pet. App. 15a.

Personal jurisdiction requires "sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice," to subject a person to the court's jurisdiction. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 320 (1945). When that person is a foreigner, and the court is a federal court, the relevant contacts are those "with the entire United States, not simply the state" in which the court is located. *Marc Rich*, 707 F.2d at 667; see *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U.S. 873, 884, 886 (2011); cf. *Omni Capital International, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987). And a person generally establishes the requisite contacts with the United States by "sufficiently caus[ing] adverse consequences within" the

country, such as through "the possible violation of federal" law. *Marc Rich*, 707 F.2d at 667; cf. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957).

Accordingly, a federal grand-jury subpoena issued to a foreign person is enforceable when the government can demonstrate "a reasonable probability that ultimately it will succeed in establishing" that the person has sufficient minimum contacts with the United States as a whole, including because the person is involved in possible violations of federal law, "to make it 'reasonable and just, according to our traditional conception of fair play and substantial justice' to require [the person] to respond to the grand jury's inquiries." *Marc Rich*, 707 F.2d at 670 (citation omitted); see *Sealed Case*, 932 F.3d at 923. Petitioner agreed with that standard in the courts below, see Pet. App. 15a, and urges its use in this Court as well, see Pet. 29-31. And the court of appeals correctly applied it to determine that the subpoena against petitioner was enforceable in the particular circumstances of this case, which stem from a grand-jury investigation into the fraudulent inflation of the value of an acquired company.

As the court of appeals observed (Pet. App. 15a-16a), the district court correctly found a reasonable probability that the government would be able to establish the following facts, all of which have support in the record, demonstrating possible violations of federal law:

- "[S]everal people who had profited from the sale of the acquired company used their personal funds shortly thereafter to help found [petitioner]." *Id.* at 15a.

- "An internal memorandum stated that [petitioner's] start-up team—which included senior officials from the acquired company whom the grand jury has already indicted—would invest substantial amounts of their own money in [petitioner]." *Id.* at 15a-16a.
- One of petitioner's "employee[s] also submitted an affidavit stating that [petitioner] was capitalized through equity contributions." *Id.* at 16a.
- "'[T]he financial structure of the entities at issue was enough to create a likelihood of criminal conduct'" because "money from the acquisition may have been laundered through [petitioner], and later laundered again through what was initially a wholly owned subsidiary of [petitioner]." *Ibid.*
- Petitioner and the subsidiary "at one time shared the same office in the United States," and "there is substantial overlap between the employees of" the two companies. *Ibid.*

The court of appeals agreed that "taken together, these findings adequately support the district court's determination that it had in personam jurisdiction over" petitioner. *Ibid.* And this Court generally does not "undertake to review concurrent findings of fact by two courts below." *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, 153 (1950) (citation omitted).

Petitioner errs in suggesting that the court of appeals "effectively craft[ed] a 'grand jury exception' to the Due Process Clause's personal jurisdiction requirement," Pet. 24, under which a district court supposedly may "exercise personal jurisdiction over a corporation regarding any matter" unrelated to its contacts with the

United States, Pet. 22. As the factual findings recounted above make clear, the court relied only on petitioner's contacts with the United States and possible violations of federal criminal law that are the very focus of the grand jury's investigation—thereby satisfying petitioner's own requirement that "the subpoena derive[] from the 'activity or occurrence that takes place in the forum.'" Pet. 26 (brackets omitted) (quoting *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1780 (2017) (citation omitted)).

Moreover, the record supports a reasonable probability that the government would establish even more such contacts:

- The acquiring company—the alleged victim whose funds became the proceeds of the potential offense under investigation—is incorporated in the United States. C.A. Supp. E.R. 3-4.
- The acquired company maintained dual headquarters in the United States and a foreign country. *Ibid.*
- The grand jury is investigating possible laundering of funds through a wholly owned subsidiary of petitioner that was headquartered in one State and registered to do business in another State for four years. *Id.* at 50-52, 136.
- Petitioner invested substantial sums in that United States-headquartered subsidiary, and sold shares of that subsidiary to investors in the United States. *Id.* at 50-52, 89, 98, 107, 116, 125.
- Petitioner listed two United States addresses on its website for months before service of the Roe subpoenas, and a United States phone number and State in the "contact" section of the website

for three years before service of those subpoenas. *Id.* at 51, 82-84.

- One of petitioner's founding partners sent an internal email stating that petitioner soon would have five employees "in the US." *Id.* at 51; see *id.* at 50-51, 138.
- That same founding partner formatted a business card with a United States address and phone number, *id.* at 51, 86, and petitioner set up a United States bank account from which that partner was paid, *id.* at 51.

Petitioner thus errs in suggesting (Pet. 23) that "the contacts * * * giving rise to jurisdiction are unrelated to the act that the court is being asked to take." The many contacts set forth above are precisely the matters under investigation by the grand jury and about which the grand jury's subpoena sought information. See C.A. Supp. E.R. 339 (copy of subpoena).

b. The decision below does not conflict with any decision of another court of appeals. Petitioner's reliance (Pet. 27-29) on decisions from the Second, Seventh, and Tenth Circuits is misplaced. As a threshold matter, none of those cases involved grand-jury subpoenas, and thus could not conflict with the decision below. See *Gucci America, Inc.* v. *Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014) (civil discovery subpoena under Federal Rule of Civil Procedure 45); *Leibovitch* v. *Islamic Republic of Iran*, 852 F.3d 687, 689 (7th Cir. 2017) (same); *Application to Enforce Administrative Subpoenas Duces Tecum of the SEC* v. *Knowles*, 87 F.3d 413, 416-417 (10th Cir. 1996) (administrative subpoena duces tecum).

Furthermore, petitioner cites those cases only for the proposition that to enforce a subpoena, "there must

be a nexus between (1) the contacts giving rise to jurisdiction, (2) the claim or offense involved, and (3) the documents or testimony sought in the subpoena." Pet. 26. As explained above, that is exactly what both lower courts found here, and those findings are consistent with the outcomes in the cases on which petitioner relies. For example, in *Knowles*, the Tenth Circuit determined that the president of two Bahamian companies had "purposefully directed his activities on behalf of [the companies] toward the United States" by visiting the United States to meet with clients and a shareholder, and by opening a brokerage trading account for one of the companies in Florida. 87 F.3d at 418, see *id.* at 417-418. The court explained that because the Securities and Exchange Commission (SEC) was investigating "whether bank accounts in the names of these two companies were used to bribe brokers in the United States * * * in violation of federal securities laws," *id.* at 415, the company president's "activities [we]re directly related to matters in the underlying SEC investigation," *id.* at 418.

Likewise here, petitioner purposefully directed its activities toward the United States with respect to the corporate acquisition and potential money-laundering that the grand jury is investigating. Petitioner had a wholly-owned subsidiary incorporated in the United States for years, had officers who worked at times in the United States, and is under investigation for laundering funds obtained from the sale of one U.S.-based company to another. See Pet. App. 15a-16a; see also pp. 20-23, *supra*. Those actions "represent a deliberate affiliation with the forum that render[ed] foreseeable the possibility of being haled into court in the United States at least as to those specific contacts." *Knowles*, 87 F.3d at 419.

In any event, all of the cases on which petitioner relies—as petitioner itself tacitly acknowledges (Pet. 29-31)—apply the same legal framework as the decision below. See Pet. App. 15a-16a. Petitioner's challenge thus ultimately reduces to the contention (Pet. 31) that the court did not "faithfully apply[]" that uniform standard. That factbound contention does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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