No. 99-1046

In the Supreme Court of the United States

JOHN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction, under the principles set out in *Perlman* v. *United States*, 247 U.S. 7 (1918), over an interlocutory appeal brought by an attorney who is a target of a grand jury investigation, from an order directing his corporate employer, also a target of the investigation, to comply with a subpoena.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 190 F.3d 375. The orders of the district court (which are not included in the petitioner's redacted petition) are unreported.[1]

[1] Petitioner has filed his petition under seal and prepared a redacted version of the petition and appendix. Petitioner has served only the redacted version on the United States. In the redacted documents, petitioner refers to himself as "John Smith" and to his employer and fellow grand jury target as "XYZ Corporation." To avoid the need to print a redacted response, the United States follows that convention and limits its description of the facts to those that are set out in the published court of appeals decision or that are otherwise subject to public disclosure. Our citations to the petition refer to the redacted petition.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1999. The petition for a writ of certiorari was filed on December 20, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This petition arises from an ongoing federal grand jury investigation into the XYZ Corporation (XYZ) and certain of its employees, including petitioner, who is one of XYZ's in-house counsel. The United States has evidence indicating that XYZ has knowingly violated federal environmental requirements. Since May 1996, a grand jury sitting in the Southern District of Texas has been investigating those possible violations.

1. On June 10, 1996, the grand jury issued a subpoena to XYZ requiring the production of all documents related to the waste materials of XYZ that are subject to the environmental regulations at issue. Pet. App. 2a. In response to the subpoena, XYZ collected responsive documents from its employees, including petitioner. *Ibid.* Ensuing events precipitated the three appeals at issue here.

a. *Fifth Circuit Appeal No. 98-40870.* In October 1996, XYZ submitted approximately 5000 documents in response to the subpoena, including the document at issue in Fifth Circuit Appeal No. 98-40870. In May 1997, seven months after XYZ disclosed the document, XYZ provided the United States a log identifying the documents it claimed were protected by applicable privileges. The document was not listed on the privilege log. In May 1998, more than a year and a half after producing the document, XYZ moved to compel the return of the document, asserting for the first time that the document was privileged and had been inadver-

tently disclosed. The district court granted petitioner's motion to intervene to assert the attorney work-product privilege. The court, however, denied XYZ's and petitioner's motion to compel the return of the document. It denied XYZ's assertion of the attorney-client privilege on the ground that the evidence showed that XYZ intentionally disclosed the document. It denied petitioner's assertion of the work-product privilege on the ground that petitioner had failed to produce sufficient evidence demonstrating that the document had been prepared in anticipation of litigation. See Pet. App. 2a-4a.

b. *Fifth Circuit Appeal No. 99-40262.* In May 1998, the United States moved, pursuant to the crime-fraud exception to the attorney-client and work-product privileges, to compel the production of documents asserted by XYZ to be privileged. The district court ordered in camera review of the documents and ultimately granted the United States' motion with regard to more than 200 documents. The court found that the crime-fraud exception, which applies when there is evidence that the defendant seeks the advice of counsel in the commission of a crime, see, *e.g.*, *United States* v. *Zolin*, 491 U.S. 554, 562-563 (1989); *Clark* v. *United States*, 289 U.S. 1, 15 (1933), defeated any privilege or immunity as to those documents. Pet. App. 4a-5a.

c. *Fifth Circuit Appeal No. 99-40271.* Before the district court ruled on the applicability of the crime-fraud exception, XYZ filed a motion seeking return of certain documents that it had transmitted to the district court for in camera inspection. Among the exhibits attached to XYZ's motion was a memorandum that was prepared by an XYZ employee other than petitioner. Petitioner and XYZ later moved for return

of the memorandum on the ground that the document had been inadvertently disclosed and that the disclosure did not constitute a waiver of the attorney-client and work-product privileges. The district court denied the motions, finding that the document was not petitioner's work product and that XYZ waived the attorney-client privilege through its disclosure.

2. The court of appeals consolidated the appeals challenging the three district court privilege rulings and, after briefing and argument, dismissed the appeals for lack of jurisdiction. Pet. App. 1a-28a. The court concluded that XYZ's and petitioner's appeals do not satisfy the requirements for interlocutory appeal under either the collateral order doctrine, see *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), or the exception to the final judgment rule set out in *Perlman* v. *United States*, 247 U.S. 7 (1918). See Pet. App. 11a-28a.

The court found that the collateral order doctrine does not apply because that doctrine requires, as a threshold requirement, that the issues raised on appeal must be separate from the merits of the underlying grand jury investigation. Pet. App. 11a-12a, 17a (citing, inter alia, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). The court of appeals noted that petitioner's and XYZ's challenges to the district court's ruling on the crime-fraud exception, which rested on their assertions that "their actions did not constitute a crime," would potentially involve the court of appeals with issues "at the very heart of the grand jury's investigation." *Id.* at 17a; see also *id.* at 17a-19a.

The court of appeals also concluded that the *Perlman* exception to the normal finality requirements for review of discovery orders does not provide a basis for jurisdiction over petitioner's and XYZ's appeals.

Under established practice, a party may obtain immediate review of an interlocutory discovery order only by defying the district court's order, being adjudged in contempt of that order, and appealing the contempt order. See Pet. App. 12a-13a; see, *e.g.*, *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940). This Court's decision in *Perlman* recognizes a narrow exception to that practice. The interested party may seek immediate review if the subpoenaed materials are in the custody of a disinterested third party—such as a clerk of the court—who has no independent interest in preserving their confidentiality. *Perlman*, 247 U.S. at 12-13. As this Court has since explained, "a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the party presumably lacks a sufficient stake in the proceedings to risk contempt by refusing compliance." *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992). See Pet. App. 14a-16a.

The court of appeals concluded that XYZ, the recipient of the subpoena, was entitled to contest production of the disputed documents through the normal mechanisms. The court ordered the documents returned to XYZ so that it could decide whether to seek appellate review under *Cobbledick* by resisting production and being held in contempt. Pet. App. 23a-28a. The court further concluded that petitioner could not rely on the *Perlman* exception to obtain immediate review of the district court's discovery orders because the subpoena had been issued to XYZ, which "can hardly be described as having 'no independent interest in preserving [the documents'] confidentiality.'" *Id.* at 20a (quoting *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 77 n.3 (1987) (Stevens, J., dissenting) (alteration in original)). The court found that XYZ, the primary grand jury

target and owner of the documents, is not a "disinterested third party." *Ibid.* (quoting *Church of Scientology*, 506 U.S. at 18 n.11).

3. After the court of appeals dismissed XYZ's and petitioner's appeals, XYZ and petitioner moved to recall and stay the mandate. The court of appeals denied those motions and later motions for reconsideration. The district court has since ordered XYZ to produce the crime-fraud documents. XYZ initially refused to obey the order and was then held in contempt. When the court of appeals rejected XYZ's application for a stay of the contempt order pending appeal, XYZ produced the documents.[2]

ARGUMENT

Petitioner claims that the court of appeals erred in dismissing his interlocutory challenges to the district court's privilege rulings. That claim finds no support in this Court's decisions. The court of appeals' decision in this case does not conflict with the decisions of any other court of appeals. Further review, therefore, is unwarranted.

1. As this Court has stated, "[f]inality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). The final judgment rule, written into the first Judiciary Act of 1789, ch. 20, 1 Stat. 83-85, and currently codified at 28 U.S.C. 1291, embodies the principle that "[t]o be effective, judicial administrations

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[2] In a new set of consolidated appeals, petitioner has challenged the district court's most recent order requiring production of the crime-fraud documents, asserting that XYZ's production of the documents should alter the court of appeals' *Perlman* analysis. That matter is pending before the court of appeals (Nos. 99-41150 & 99-41179 (5th Cir.)).

must not be leaden-footed." *Cobbledick*, 309 U.S. at 325. In codifying the final judgment 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." *Ibid.* While the principle of finality has great importance in civil litigation, it is "especially compelling in the administration of criminal justice." *Ibid.* Indeed, "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 "[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 *Cobbledick*, this Court held that the courts of appeals lack jurisdiction to review interlocutory challenges to grand jury subpoenas. The Court made clear that appellate review may be obtained only if "the witness chooses to disobey and is committed for contempt." 309 U.S. at 328. This Court has repeatedly affirmed that holding. 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."); *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992) ("A party that seeks to present an

objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order.").

This Court's decision in *Perlman* v. *United States*, 247 U.S. 7 (1918), establishes a narrow exception to the *Cobbledick* rule. Under that exception, a court of appeals may review a challenge to an order for the production of documents if a subpoena has been served on 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 that had come into the 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 thus 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*, 506 U.S. at 18 n.11. The court of appeals properly applied that understanding of the *Perlman* exception to the facts of this case. See Pet. App. 19a-20a.

2. Contrary to petitioner's suggestion (Pet. 8-13), there is no conflict between the court of appeals' decision and *Perlman*. As this Court has stated, *Perlman*'s

narrow exception to finality authorizes interlocutory appeals only when a discovery order directs "a disinterested third party" to testify or produce documents over which the appellant asserts a protected legal interest. *Church of Scientology*, 506 U.S. at 18 n.11. As the court of appeals correctly ruled, XYZ, the recipient of the subpoena, "can hardly be described as 'having no independent interest in preserving [the documents'] confidentiality'" and simply is not a disinterested third party. Pet. App. 20a (quoting *Ritchie*, 480 U.S. at 77 n.3).

As the owner of the documents and as the primary target of the grand jury investigation, XYZ plainly has an interest in the confidentiality of its documents. The court of appeals therefore was correct in ruling that XYZ is not a disinterested third party for purposes of the *Perlman* exception. While petitioner asserts (Pet. 12) that he and XYZ do not share identical interests, this Court's cases do not establish that interlocutory appeal may be brought whenever a recipient of a subpoena and a party asserting a privilege have different interests. Rather, *Perlman* allows an appeal only if the recipient of the subpoena lacks an interest in protecting the confidentiality of the documents. Because XYZ has an interest in the documents' confidentiality, petitioner cannot appeal.

Petitioner nevertheless contends (Pet. 11) that the court of appeals erred because, in his view, this Court's cases do not limit jurisdiction under *Perlman* to the circumstance when the recipient of a discovery order is "disinterested" in protecting the requested materials. Petitioner is mistaken. This Court expressly articulated that requirement in *Church of Scientology*. See 506 U.S. at 18 n.11. Furthermore, the Court has indicated that the requirement is central to the logic of

the *Perlman* decision. See *Ryan*, 402 U.S. at 533 ("[T]he custodian could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review."). The court of appeals properly applied the Court's decisions to the facts of this case. See Pet. App. 20a.

3. Petitioner is also mistaken in suggesting (Pet. 14-15) that the court of appeals' decision conflicts with the decisions of seven other courts of appeals. An examination of the cases he cites reveals no conflict. To the contrary, those cases show that the courts of appeals share a common understanding of the *Perlman* exception. The cases have produced different results because of differences in the underlying facts.

Most of the cases petitioner cites involve the situation of a subpoena served on a party who could not be expected to assert an interest in the subpoenaed materials. For instance, in *In re Grand Jury Subpoenas*, 123 F.3d 695 (1st Cir. 1997), a subpoena was served on the grand jury target's law firm, which was not itself a grand jury target. As a non-target, the law firm did not have a personal stake in the grand jury investigation and could not be expected to undergo contempt proceedings to protect the confidentiality of the subpoenaed materials. Similar situations were presented in *In re Grand Jury Subpoenas Dated December 7 and 8*, 40 F.3d 1096 (10th Cir. 1994) (subpoena served on police chief, who was not a grand jury target, to produce statements by police officers who were targets of grand jury); *In re Federal Grand Jury Proceedings*, 975 F.2d 1488 (11th Cir. 1992) (subpoena served on grand jury target's attorneys, who were not themselves targets); *In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847 (9th Cir. 1991) (grand jury subpoena served on grand jury target's law firm, which was not

itself a grand jury target); *In re Grand Jury Matter*, 802 F.2d 96 (3d Cir. 1986) (grand jury subpoena served on hospital; no suggestion that recipient was grand jury target). In all those cases, the courts of appeals found that the targets of the grand jury could bring interlocutory challenges under *Perlman* when the recipients of the grand jury subpoenas were not themselves under investigation and therefore could not be expected to assert their interests through the disobedience-and-contempt procedure established by *Cobbledick*.

The remaining two cases that petitioner cites involve situations in which the subpoena recipients may have had an interest in protecting the confidentiality of the subpoenaed information, but nevertheless announced that they would comply with the subpoena rather than risk contempt. *In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985); *Velsicol Chem. Corp.* v. *Parsons*, 561 F.2d 671 (7th Cir. 1977), cert. denied, 435 U.S. 942 (1978). In that situation, the courts found, *Perlman* allows for interlocutory appeal because the recipient of the subpoena has shown that it has "no incentive to preserve the privilege by committing contempt of court." *Sealed Case*, 754 F.2d at 399; see *Velsicol Chem. Corp.*, 561 F.2d at 674.

In this case, the court of appeals correctly ruled that XYZ's and petitioner's appeals do not fall within *Perlman* because XYZ, the recipient of the subpoena, is the principal target of the grand jury investigation and therefore had a clear interest in preserving the confidentiality of the subpoenaed documents. At the time of the court of appeals' decision, XYZ retained its right to obtain review by disobeying the district court's production order and standing in contempt. See p. 6 &

note 2, *supra*. Accordingly, there is no conflict among the courts of appeals warranting this Court's review.[3]

4. There is also no merit to petitioner's contention (Pet. 15-18) that the court of appeals' decision undermines the rule that an attorney's work product is protected from disclosure. In dismissing petitioner's appeals, the court of appeals did not address the substance of petitioner's work-product claims. While the work-product doctrine establishes a significant protection for materials prepared in anticipation of litigation, see generally *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981); *Hickman* v. *Taylor*, 329 U.S. 495 (1947), nothing in the doctrine guarantees a right to an immediate appeal whenever a district court rejects an assertion of work-product protection.

This Court has repeatedly held that the final judgment rule requires that many important protections, including constitutional protections, must await a final judgment before receiving appellate review. See *Cobbledick*, 309 U.S. at 325-326 ("The 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.").[4] Just as this Court said of district

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[3] As we have noted (p. 6 & note 2, *supra*), XYZ produced the documents after the court of appeals issued its decision in this case. Petitioner has since filed new appeals from the district court's orders compelling production, arguing (among other things) that an appeal should be allowed because XYZ has abandoned its challenges to those orders. Those appeals are now pending in the court of appeals and are not before this Court.

[4] See also *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794 (1989) (orders denying motions to dismiss for alleged violations of grand jury secrecy not immediately appealable); *Flanagan* v. *United States*, 465 U.S. 259 (1984) (orders disqualifying counsel in

court orders disqualifying counsel, nothing about the district court's resolution of petitioner's assertions of work-product protection "distinguishes it from the run of pretrial judicial decisions that affect the rights of criminal defendants yet must await completion of trial court proceedings for review." *Flanagan* v. *United States*, 465 U.S. 259, 270 (1984).

Petitioner further errs in claiming (Pet. 17) that the court of appeals diminished work-product protection by prohibiting in-house counsel from taking an interlocutory appeal that would have been available to outside counsel. The court of appeals made no such distinction. It did not suggest that it would have allowed the interlocutory appeal by an attorney—whether in-house or outside counsel—from an order directed at the client, when both the attorney and client are targets of the grand jury investigation. Instead, the court observed, citing *In re Grand Jury Proceedings in the Matter of Fine*, 641 F.2d 199 (5th Cir. 1981), that *Perlman* would allow an interlocutory appeal by the client from an order directed at the attorney, when the client is a grand jury target and the attorney is not a target and cannot be expected to undergo contempt proceedings. Pet. App. 16a. In this case, by contrast, XYZ, the recipient of the subpoena, has "a stake in keeping the documents at issue here from production." *Id.* at 20a. Rather than distinguishing between the rights of in-house and outside counsels, the court of appeals distinguished between the circumstance when a subpoena is directed at a disinterested third party (*e.g.*, the attorney in *Fine*) and when a subpoena is directed at a

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criminal cases not immediately appealable); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) (orders denying motion to dismiss on jurisdictional grounds not immediately appealable).

party with a stake in the resolution of the contested order (*e.g.*, XYZ). That distinction, established by *Perlman* and subsequent cases, does not undermine the work-product doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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