No. 18-1522

In the Supreme Court of the United States

DOE, 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 (REDACTED FOR PUBLIC FILING)

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QUESTION PRESENTED

Whether the lower courts correctly determined that the spousal-testimonial privilege provided no basis for petitioner to avoid responding to a subpoena for her foreign bank records because the testimonial aspects of her act of production would not adversely affect her husband's case.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

In re: Grand Jury Subpoena, Dated March 21, 2018, No. 18-cm-771 (Aug. 31, 2018) (decision below)

[redacted]

United States Court of Appeals (9th Cir.):

In re: Grand Jury Subpoena, Dated March 21, 2018, No. 18-50321 (Dec. 28, 2018) (decision below)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 747 Fed. Appx. 575. The orders of the district court (Pet. App. 4-7, Pet. App. 8-18) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 2018. A petition for rehearing was denied on February 12, 2019 (Pet. App. 19). The petition for a writ of certiorari was filed on May 13, 2019, and the motion for leave to file the petition under seal was granted on June 10, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following petitioner's refusal to comply with a subpoena issued by a grand jury in the Central District of

California, the district court held petitioner in contempt. Pet. App. 4-7. The court of appeals affirmed. *Id.* at 1-3.

1. Under the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*, a United States citizen or resident must keep records when she "makes a transaction or maintains a relation for any person with a foreign financial agency," as prescribed by the Secretary of the Treasury. 31 U.S.C. 5314(a). According to Treasury regulations, those records must contain:

> the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period.

31 C.F.R. 1010.420. The records must be maintained for five years and "shall be kept at all times available for inspection as authorized by law." *Ibid.* A person who willfully fails to maintain such records may be criminally prosecuted under 31 U.S.C. 5322(a).

2. a. A federal grand jury investigating petitioner's husband issued a subpoena to petitioner for records of her foreign bank activity for the years 2011 through 2016. Pet. App. 2. The subpoena demanded production of:

[redacted]

[redacted] The government moved the district court to compel petitioner to comply with the subpoena, and petitioner responded by asserting that the spousal-testimonial privilege protected her from producing documents in response to the subpoena because at that time the grand jury was investigating whether her husband committed tax crimes. Pet. App. 2.[1] Petitioner also sought to invoke her Fifth Amendment privilege against self-incrimination and the marital-communications privilege. *Id.* at 2 n.1.

b. The district court ordered petitioner to comply with the subpoena. Pet. App. 8-18. [redacted]

[1] Before the subpoena was issued to petitioner, a federal grand jury had indicted petitioner's husband on offenses unrelated to failing to report foreign bank accounts. Gov't C.A. Br. 4 n.3. Later, while petitioner's appeal was pending before the court of appeals, the grand jury returned a superseding indictment against petitioner's husband that additionally charged him with offenses involving foreign bank accounts. *Ibid.* In June 2019, petitioner's husband was convicted following a trial. See p. 5, *infra*.

[redacted]

After petitioner continued to refuse to produce her foreign bank account records as required by the subpoena, the district court held her in civil contempt. Pet. App. 2. [redacted]

c. In an unpublished memorandum opinion, the court of appeals affirmed. Pet. App. 1-4. The court observed that petitioner had waived her Fifth Amendment and martial-communications privilege claims by declining to press those claims on appeal. *Id.* at 2 n.1. And the court found that the district court had correctly rejected petitioner's invocation of the spousal-testimonial privilege. *Id.* at 2. The court of appeals explained that, "[f]or the spousal testimonial privilege to apply, the anticipated testimony must in fact be adverse to the nonwitness spouse." *Ibid.* (brackets, citation, and internal quotation marks omitted). The court found that the privilege did not apply on the facts of the case because "th[e] bare testimonial aspect of [petitioner's] act of production [would] not itself adversely affect her hus-

band's case." *Id.* at 3. Accordingly, the court determined that petitioner was "not relieved of her obligation to produce foreign bank account records over which she has care, custody, or control." *Ibid.*

d. In January 2019, after the court of appeals issued its mandate, [redacted] and the term of the grand jury that issued the subpoena expired. [redacted] In June 2019, petitioner's husband was convicted following a trial. [redacted] At petitioner's husband's trial, [redacted]

ARGUMENT

Petitioner renews her contention (Pet. 5-16) that the spousal-testimonial privilege should excuse her compliance with the grand jury subpoena for records of her foreign banking activity. The lower courts correctly found that the act of producing those records would not be adverse to her husband. That factbound finding does not warrant this Court's review, and the court of appeals' unpublished decision does not conflict with any decision of this Court or any other court of appeals. The procedural posture of this case also makes it an unsuitable vehicle for review. The petition for a writ of certiorari should be denied.

1. The lower courts correctly found that petitioner could not invoke spousal-testimonial privilege because she had not established that her act of producing documents would be adverse to her husband.

a. The spousal-testimonial privilege is a common-law evidentiary privilege authorized by Federal Rule of Evidence 501, which permits federal courts to apply or

modify common-law privileges "in the light of reason and experience." Fed. R. Evid. 501. The burden of demonstrating the existence of a privilege falls on the party asserting the privilege. See, *e.g.*, *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951) (self-incrimination); *United States* v. *Bright*, 596 F.3d 683, 691 (9th Cir. 2010) (self-incrimination); *In re Witness Before the Grand Jury*, 791 F.2d 234, 237 (2d Cir. 1986) (spousal-testimonial privilege). And in *Trammel* v. *United States*, 445 U.S. 40 (1980), this Court observed that the spousal-testimonial privilege "must be strictly construed" because "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public has a right to every man's evidence.'" *Id.* at 50 (citation and ellipsis omitted).

As petitioner recognizes (Pet. 8), "[c]ourts have consistently recognized that the [spousal-testimonial] privilege only applies to testimony that is 'adverse' to the other spouse." *In re Grand Jury*, 111 F.3d 1083, 1087 (3d Cir. 1997) (citing cases). Courts accordingly have rejected claims of privilege when the witness failed to demonstrate that her testimony would in fact be adverse to her spouse. See, *e.g.*, *United States* v. *Van Cauwenberghe*, 827 F.2d 424, 431 (9th Cir. 1987), cert. denied, 484 U.S. 1042 (1988); *In re Grand Jury Proceedings*, 664 F.2d 423, 429-431 (5th Cir. 1981) (per curiam), cert. denied, 455 U.S. 1000 (1982).

b. In this case, the lower courts correctly determined that petitioner had failed to demonstrate that her act of producing records in response to the subpoena would convey information adverse to her husband, as would be necessary to trigger application of the spousal-testimonial privilege.

Under the "act of production" doctrine, this Court has recognized that an individual may invoke the Fifth Amendment privilege against self-incrimination when the act of producing records responsive to a subpoena may incriminate that individual by communicating that the documents exist, are in the individual's possession or control, and reflect that the individual believes "that the papers are those described in the subpoena." *Fisher* v. *United States*, 425 U.S. 391, 410 (1976); see *id.* at 409-410. But the doctrine does not apply when incrimination comes from the content of the documents, rather than from the act of producing them. See *id.* at 410-411. This Court has explained that whether "[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced"—and whether any such communicative aspects are "incriminating"—are questions that "do not lend themselves to categorical answers," and "instead depend on the facts and circumstances of particular cases or classes thereof." *Id.* at 410.

Here, the court of appeals found that petitioner had not established that her act of responding to a subpoena for her foreign bank accounts would communicate information adverse to her husband. Pet. App. 3. The court correctly recognized the distinction between incrimination based on the act of production and incrimination based on the content of records, observing that "'the testimonial aspect of [petitioner's] response to [the] subpoena *duces tecum* does nothing more than establish the existence, authenticity, and custody' of any responsive foreign bank account records." *Ibid.* (quoting *United States* v. *Hubbell*, 530 U.S. 27, 40-41 (2000)). And the court affirmed the district court's enforcement

of the subpoena because petitioner had not shown that "this bare testimonial aspect of [her] act of production" would "itself adversely affect her husband's case." *Ibid.*; see *id.* at 17 [redacted].

The lower courts' resolution of that factual issue was correct. The compelled act of production in this case would have required petitioner to admit only that *she* had foreign bank accounts and access to records of those accounts. See Pet. App. 2 (subpoena sought "records of *her* foreign bank activity for the years 2011 through 2016") (emphasis added). The government did not ask petitioner to produce *her husband*'s foreign banking records; [redacted] Petitioner's analogy (Pet. 6) to a hypothetical scenario where a subpoena specifically demands the production of money received by or provided to a spouse is therefore inapposite. Whatever testimony may be implicit in one spouse being compelled to identify and produce the *other spouse's* documents or assets, that is not what happened here.

The possibility that "the *contents* of the papers produced" could have incriminated petitioner's husband does not show that the "communicative aspects" of her *act of production* would themselves be adverse to her husband. *Fisher*, 425 U.S. at 410 (emphasis added).[2] If

[2] Petitioner suggests (Pet. 14) that her act of responding to the subpoena could "authenticate" whatever documents she produced for use in a criminal prosecution against her husband, see Fed. R. Evid. 901(a). But as the government made clear to the court of ap-

petitioner had complied with the subpoena and delivered a box of documents to the grand jury, the government would have known as soon as it saw the box that petitioner had foreign bank accounts and kept records of those accounts. But the government would have learned nothing at all about petitioner's husband without opening the box and reading the documents. The lower courts thus correctly found that the "bare testimonial aspect of [petitioner's] act of production does not adversely affect her husband's case." Pet. App. 3; see *id.* at 17.

Petitioner erroneously states (Pet. 4) that "[t]he government has never asserted that [petitioner's] production would not be, as a matter of fact, adverse to [her husband], and neither the district court nor the Ninth Circuit found otherwise." To the contrary, the government consistently maintained below that the testimonial aspects of petitioner's act of production would not convey information adverse to her husband, Gov't C.A. Br. 17-22, and that was the very basis for the lower courts' decisions rejecting her claim of spousal-testimonial privilege, Pet. App. 3, 17. While petitioner disputes (Pet. 11-12) the lower courts' factual determination that her act of production would not incriminate her husband, that factbound issue does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (explaining that the Court "do[es] not grant * * *

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peals, it "was not seeking [petitioner's] authentication of the responsive documents, nor was the government seeking information about where or how [she] obtained" the documents. Gov't C.A. Br. 7-8.

certiorari to review evidence and discuss specific facts"); see also *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (noting special deference to "concurrent findings of fact by two courts") (citation omitted).

2. Petitioner errs in contending (Pet. 8-14) that the unpublished decision below conflicts with this Court's decision in *Hubbell* and the Third Circuit's decision in *In re Grand Jury*.

In *Hubbell*, this Court held that the government could not make derivative use of the testimonial aspects of a defendant's act of production after he had received immunity. 530 U.S. at 40-46. Petitioner contends (Pet. 9) that the court of appeals in this case "overlooked" this Court's recognition in *Hubbell* that the act of production can have communicative aspects. But the court of appeals in fact *relied* on *Hubbell* in recognizing that petitioner's act of production had a "'testimonial aspect'" insofar as it "'establish[ed] the existence, authenticity, and custody' of any responsive foreign bank account records." Pet. App. 3 (quoting *Hubbell*, 530 U.S. at 40-41). The court rejected petitioner's invocation of privilege not because it thought the act of production could not be testimonial, but because the testimonial aspects of the act of production would not be adverse to petitioner's husband. *Ibid.*

Nor does any conflict exist between the decision below and the Third Circuit's decision in *In re Grand Jury*, which likewise rejected a claim of spousal-testimonial privilege. In that case, the Third Circuit held that a witness could not invoke that privilege after the government had granted immunity to the spouse that "eliminate[d] the possibility that the testimony w[ould] be used to prosecute the witness's spouse." 111 F.3d at 1087. Petitioner contends (Pet. 13) that the

Third Circuit "recognized that the witness properly invoked the privilege in response to the subpoena seeking production of tapes," which involved "conversations between the witness's husband and others which [the witness] illegally recorded," *In re Grand Jury*, 111 F.3d at 1084. But the Third Circuit had no occasion to consider whether the production of those tapes, standing alone, would qualify for protection under the spousal-testimonial privilege because the government also sought the witness's in-court testimony and voluntarily elected to offer immunity to prevent any invocation of privilege. See *ibid.* In any event, no conflict exists because, contrary to petitioner's assertion (Pet. 13), the court of appeals in this case did not find "the privilege inapplicable as a matter of law to a subpoena duces tecum," but instead found as a factual matter that the testimonial aspects of the act of production were not adverse to petitioner's husband. In that respect, the decision accords with *In re Grand Jury*, which itself emphasized that "the privilege only applies to testimony that is 'adverse' to the other spouse." 111 F.3d at 1087.[3]

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[3] The court of appeals had no occasion to determine whether the spousal-testimonial privilege in fact applies to a spouse's act of producing documents in response to a subpoena, because it found that such an act would not be adverse to petitioner's husband on the facts of this case. Pet. App. 3. Notably, however, the courts to have considered the issue have all held that the spousal-testimonial privilege is limited to a spouse's in-court testimony. See, *e.g.*, *United States* v. *Chapman*, 866 F.2d 1326, 1332-1333 (11th Cir.), cert. denied, 493 U.S. 932 (1989); *United States* v. *Archer*, 733 F.2d 354, 358 (5th Cir.), cert. denied, 469 U.S. 861, and 469 U.S. 862 (1984); *United States* v. *Lefkowitz*, 618 F.2d 1313, 1318 (9th Cir.), cert. denied, 449 U.S. 824 (1980); *United States* v. *Mendoza*, 574 F.2d 1373, 1379 (5th Cir.), cert. denied, 439 U.S. 988 (1978). Those decisions accord with this Court's recognition in *Trammel* that "[i]t is only the

3. In any event, the unusual procedural posture of this case further renders it unsuitable for review.

As noted, see p. 5, *supra*, after the court of appeals issued its mandate in this case [redacted] and petitioner's husband was tried and convicted [redacted] No issue was raised at petitioner's husband's trial regarding any use by the government of any act of production by petitioner. In addition, the term of the grand jury that issued the subpoena to petitioner expired in January 2019. When a grand jury's term expires, so does any obligation to comply with a subpoena issued by that grand jury, as well as any contempt order based on a witness's failure to do so. See *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966).

Petitioner has not attempted to explain what future harm might occur to her without this Court's review or even what relief she seeks in the district court now that she is no longer subject to the contempt order, [redacted] Even if the case were not formally moot, any potential practical effect of a decision by this Court would be so remote as to render review unwarranted for that reason alone.

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spouse's testimony in the courtroom that is prohibited." 445 U.S. at 52 n.12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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