Nos. 10-1147 and 10-1176

In the Supreme Court of the United States

WHITE & CASE LLP, PETITIONER

v.

UNITED STATES OF AMERICA

NOSSAMAN LLP, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS 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 a civil protective order that permits disclosure of discovery materials at trial, in support of motions, and to state attorneys general provides a basis for quashing federal grand jury subpoenas seeking non-privileged, pre-existing corporate documents provided in civil discovery to class action plaintiffs (Nos. 10-1147, 10-1176).

2. Whether a grand jury subpoena may be quashed because it seeks documents of foreign corporations that were brought to the United States for civil discovery. (No. 10-1176).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a)[1] is reported at 627 F.3d 1143. The sealed opinion of the district court quashing the grand jury subpoenas (Pet. Sealed App. 2-7) is unreported.[2]

[1] Citations to the petition and petition appendix are to petitioner White & Case's filings unless otherwise noted.

[2] Petitioners erroneously include as an opinion below the "Statement of Reasoning Involved in Court's Order of February 11, 2010," which

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2010. The petition for a writ of certiorari in No. 10-1147 was filed on February 25, 2011, and the petition for a writ of certiorari in No. 10-1176 was filed on March 4, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners White & Case LLP and Nossaman LLP represent certain defendants in antitrust class actions pending in the Northern District of California, including petitioners AU Optronics Corporation and AU Optronics Corporation of America (collectively AUO). A federal grand jury served subpoenas duces tecum on the law firms seeking non-privileged, pre-existing corporate records of petitioners' clients relevant to "an antitrust investigation into alleged criminal conduct." Pet. App. 2a. The district court granted petitioners' motions to quash the subpoenas, and the court of appeals reversed. *Id.* at 2a-3a.

1. In 2006, a Northern District of California grand jury investigation into an alleged price-fixing conspiracy in the Thin-Film Transistor-Liquid Crystal Display (TFT-LCD) industry became public. Pet. App. 2a; Gov't C.A. Br. 4. Subsequently, numerous "civil suits were filed by private plaintiffs against the companies under investiga-

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the district court entered in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827, 2010 WL 1264601 (N.D. Cal. Mar. 29, 2010). Pet. App. 4a-8a. The court issued that statement in the separate civil action and did so after the United States appealed the order quashing the subpoenas in this case. The statement's reasoning differs somewhat from the order reversed by the court of appeals. See Pet. Sealed App. 2-7.

tion." Pet. App. 2a. After these lawsuits were transferred to the Northern District of California for coordinated proceedings, the United States moved to intervene in the civil case for the limited purpose of obtaining a partial stay of discovery to minimize the possibility that the civil litigants might discover sensitive information about the grand jury investigation. Gov't C.A. E.R. 35-43. The district court granted this motion, stayed most discovery for several months, and authorized the United States to review, but not copy, all discovery produced by any party. *Id.* at 44-47.[3]

Months later, the court entered a stipulated protective order protecting material produced in discovery containing trade secrets and other confidential, private, or competitively sensitive information from disclosure and limiting the stipulating parties' use of this material to prosecuting, defending, or attempting to settle the civil action. Gov't C.A. E.R. 48-61.[4] By its express terms, the protective order did not provide "blanket protections" for all discovery or any "entitlement to file confidential information under seal," and it specifically excepted from its protections any "presentations of evidence and argument at hearings on dispositive motions and at trial." *Id*. at 48,

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[3] In January 2010, government attorneys reviewed a small number of documents from AUO and another defendant (but not any from White & Case's clients). Gov't C.A. E.R. 178. They "uncovered, almost immediately, extensive evidence of a worldwide conspiracy to fix the prices of TFT-LCD panels." *Ibid.* Among the documents were minutes documenting hotel room meetings of major producers to agree on prices. *Ibid.* There were also "documents reflecting efforts to hide or destroy incriminating emails." *Ibid.* These documents were not provided to the grand jury at that time, however, because the district court prohibited the government from making copies. Gov't C.A. Br. 10.

[4] The United States did not sign or stipulate to this order.

60. In the event of a discovery request, subpoena, or order in other litigation compelling disclosure of protected material, the protective order required notice to the party designating the material confidential to afford it the opportunity to protect its confidentiality in the other litigation, but the order specified that it did not authorize any party to disobey a lawful directive from another court. *Id.* at 58.[5]

Pursuant to discovery orders in the civil case, foreign-located corporate civil defendants brought pre-existing corporate documents into the United States from abroad and produced them to the law firms representing the plaintiffs and numerous corporate defendants. Gov't C.A. E.R. 197, 199.

2. In late 2006, the federal grand jury issued subpoenas duces tecum to several companies in the United States seeking, among other things, the documents currently at issue. At that time, the government deferred enforcement of the subpoenas with respect to documents outside the United States, but requested their production on a voluntary basis. Gov't C.A. E.R. 143. Over the next several years, many companies, but not petitioners or their clients, voluntarily produced their foreign-located documents.

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[5] Subsequently, at the request of the States of Washington and Illinois, the district court clarified that the protective order "does not and was not intended to interfere with any lawfully issued State subpoena or civil investigative demand," but "direct[ed] that any party who receives documents marked 'confidential' or 'highly confidential' pursuant to a discovery request, subpoena or CID shall not provide those documents to the U.S. Department of Justice absent further order of this Court." Order Clarifying Stipulated Protective Order 1-2, *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827 (N.D. Cal. May 4, 2010).

After discovering that the clients of the law-firm petitioners had sent documents responsive to the original grand jury subpoenas to petitioner-law firms and that the documents had subsequently been produced to plaintiffs' counsel, the grand jury issued new subpoenas duces tecum to petitioner-law firms, one other law firm defending a class action defendant, and the lead counsel for the direct purchaser plaintiffs in the civil case. Gov't C.A. E.R. 68-140, 197, 199. The subpoenas served on petitioner-law firms and the other defense firm sought various categories of their clients' "non-privileged" corporate documents in the United States and in the possession of the firms[6]; the subpoena served on plaintiff's counsel sought the documents produced to it by the defense firms' clients. *Id.* at 68-140.

3. Petitioners moved to quash the subpoenas arguing, among other things, prosecutorial misconduct. The district court rejected this argument, finding "that the government had not engaged in any bad faith tactics." Pet. App. 3a; see Pet. Sealed App. 6 n.1. Nevertheless, it quashed the subpoenas. The court acknowledged the holding in *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-1227 (9th Cir. 1995), that a grand jury subpoena can be used to obtain civil discovery notwithstanding the existence of a

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[6] Specifically, the subpoenas at issue, with one exception, sought only relevant corporate documents for a period that predated the private lawsuits. See, *e.g.*, Gov't C.A. E.R. 99-100 (seeking relevant corporate documents for "the period of January 1, 1998 through December 7, 2006") (emphasis omitted). The exception is a demand, without any time limitation, for documents relating to any actual, possible, or proposed cartel agreement. *Id*. at 111. An admission of such an agreement contained in a response to a deposition question or interrogatory answer would be responsive to this subpoena provision.

protective order in a civil case. The district court declined to follow *Meserve*, however, on the ground that the decision did not address foreign evidence. Pet. Sealed App. 5-6.

The court of appeals reversed. Pet. App. 1a-3a. The court noted that petitioners had made no claim of privilege. *Id.* at 3a. Nor had they established, or even suggested, "collusion between the civil suitors and the government." *Ibid.* "Indeed, the district court determined that the government had not engaged in any bad faith tactics." *Ibid.* Under these circumstances, the court applied *Meserve*'s "per se rule that a grand jury subpoena takes precedence over a civil protective order." *Ibid.* The court observed that as a result of the civil action, "documents have been moved from outside the grasp of the grand jury to within its grasp." *Ibid.* The court found no authority that precluded "the government from closing its grip on what lies within the jurisdiction of the grand jury." *Ibid.*[7]

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[7] After the court of appeals issued its mandate, the grand jury obtained copies of all of the documents at issue in this appeal that were in the possession of plaintiffs' counsel. The United States has committed to return the documents if a petition for certiorari were granted and the court of appeals decision reversed.

To date, 21 individuals and eight companies have been charged with price fixing. Of these, ten individuals and seven companies have pleaded guilty for their role in the price-fixing conspiracy. These convictions have resulted in criminal fines totaling more than $890 million. Press Release, U.S. Dep't of Justice, *Former HannStar Executive Agrees to Plead Guilty and Serve Jail Time for Participating in Global LCD Price-Fixing Conspiracy* (Oct. 27, 2010), http://www.justice.gov/atr/public/press releases/2010 /263532. pdf.

Petitioner Nossaman's clients—fellow petitioners AU Optronics Corporation and AU Optronics Corporation America—have been indicted by the grand jury and charged with price fixing. Their case is

ARGUMENT

Petitioners contend that grand jury subpoenas cannot be used to obtain pre-existing, non-privileged corporate documents in the United States that might contain evidence of a crime and that have already been produced to private plaintiffs. They rely on a civil protective order that was limited by its terms to only the pretrial stages of the civil litigation and that permitted disclosure to state attorneys general. The court of appeals correctly rejected this claim, and, although the circuits have adopted somewhat different positions on when grand jury subpoenas may be used to obtain materials covered by a civil protective order, no other court of appeals would have decided this case differently. Further review is not warranted.

1. Petitioners contend that the circuits are split three ways on the standard to apply when deciding whether a protective order in a civil case precludes enforcement of a grand jury subpoena seeking information subject to that order. Pet. 16-23; Nossaman Pet. 14-22. Specifically, petitioners claim that the Fourth, Ninth, and Eleventh Circuits apply a per se rule that always enforces grand jury subpoenas notwithstanding a civil protective order,[8] the First and Third Circuits apply a rebuttable presumption that a grand jury subpoena should be enforced not-

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scheduled for trial later this year. Petitioner White & Case's clients have not been indicted.

[8] *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir.), cert. denied, 487 U.S. 1240 (1988); *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-1227 (9th Cir. 1995); *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1020 (11th Cir. 1993).

withstanding a protective order,[9] and the Second Circuit applies a rebuttable presumption that a protective order precludes a subpoena's enforcement.[10] To the extent there is disagreement in the courts of appeals on the relationship between grand jury subpoenas and civil protective orders, this case does not implicate it. The subpoenas at issue here would have been enforced in any circuit.

a. Petitioners significantly overstate the difference between the rule applied in the Fourth, Ninth, and Eleventh Circuits (which petitioners characterize as a "per se" approach) and the rule applied by the First and Third Circuits, which apply a rebuttable presumption that a grand jury subpoena should be enforced even when there is a civil protective order. As a practical matter, little if any difference has emerged in the application of those rules.[11]

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[9] *In re Grand Jury Subpoena*, 138 F.3d 442, 445 (1st Cir.) (*Roach*), cert. denied, 524 U.S. 939 (1998); *In re: Grand Jury*, 286 F.3d 153, 157-158 (3d Cir. 2002).

[10] *In re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d 1221, 1224 (2d Cir. 1991).

[11] Although the Ninth Circuit in this case "appl[ied] [its] per se rule that a grand jury subpoena takes precedence over a civil protective order," it first noted that "[n]o collusion between the civil suitors and the government has been established or even suggested by [petitioners]." Pet. App. 3a. Reflecting the general rule that grand juries cannot subpoena information protected by the attorney-client privilege, *Swidler & Berlin* v. *United States*, 524 U.S. 399, 401-409 (1998), the court of appeals also noted that petitioners "d[id] not claim that the documents are privileged." The Fourth Circuit, another court of appeals that purportedly follows the "per se" rule, has cautioned that "Fifth [A]mendment and ethical concerns obviously would be raised * * * if the government directly or indirectly sponsored a civil lawsuit or discovery requests in a civil lawsuit for the purpose of aiding a criminal investigation." *In re Grand Jury Subpoena*, 836 F.2d 1468, 1472 n.6, cert. denied, 487 U.S. 1240 (1988). In finding a grand jury

While the First and Third Circuits describe the rule they follow in this context differently from the Fourth, Ninth, and Eleventh Circuits, little if any functional difference distinguishes their approaches. In the First and Third Circuits, a grand jury subpoena overrides a protective order unless the party seeking to quash the subpoena shows "exceptional circumstances that clearly favor subordinating the subpoena to the protective order." *In re Grand Jury Subpoena*, 138 F.3d 442, 445 (1st Cir.) (*Roach*), cert. denied, 524 U.S. 939 (1998); *In re: Grand Jury*, 286 F.3d 153, 157-158 (3d Cir. 2002). "In the vast majority of cases, a protective order should yield to a grand jury subpoena." *In re: Grand Jury*, 286 F.3d at 162; see *id.* at 163 ("We cannot overemphasize that the presumption we announce today in favor of a grand jury subpoena may only be rebutted in the rarest and most important of cases."); accord *Roach*, 138 F.3d at 445 ("In the end, society's interest in the assiduous prosecution of criminal wrongdoing almost always will outweigh its interest in the resolution of a civil matter between private parties, * * * and thus, a civil protective order ordinarily cannot be permitted to sidetrack a grand jury's investigation.") (internal citations omitted).

In fact, the government is aware of no case in those circuits where the presumption was rebutted and the grand jury subpoena was not enforced. Thus, the First and Third Circuits' rule that grand jury subpoenas "almost always" overcome protective orders, *In re: Grand Jury*, 286 F.3d at 160, has been indistinguishable in practice from the nominally more categorical approach taken by the Fourth, Ninth, and Eleventh Circuits.

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subpoena enforceable in the case before it, that court said that "[t]here is no allegation in this case of such an improper purpose." *Ibid.*

In any event, petitioners marshal no support from decisions of the First or Third Circuits for the proposition that those courts would find any "exceptional circumstances" in this case that would justify non-enforcement of the subpoenas. The "exceptional circumstances" test would permit enforcement of a civil protective order against a grand jury subpoena only "in the exceptional case in which the public interest demands that the civil litigation take priority over any criminal investigation." *In re: Grand Jury*, 286 F.3d at 162; see *id.* at 163 ("[O]nly in cases in which the public interest in resolving the civil litigation is overwhelming should courts consider overriding a grand jury subpoena."). While petitioners make various policy arguments based on the foreign origin of the subpoenaed documents, see pp. 22-26, *infra*, petitioners make no attempt to explain how the public interest in facilitating civil antitrust litigation takes precedence over the grand jury's criminal antitrust investigation, and it does not, see pp. 16-19, *infra*.

b. In some circumstances, the Second Circuit takes a different approach to analyzing the enforceability of a grand jury subpoena for materials covered by a protective order, but that difference is not implicated here.[12] The

[12] Contrary to petitioners' claims, Pet. 20, Nossaman Pet. 19-20, *SEC* v. *Merrill Scott & Associates, Ltd.*, 600 F.3d 1262 (2010), does not indicate that the Tenth Circuit will adopt the Second Circuit's position on the issue presented. In *Merrill Scott & Associates*, a plaintiff, the SEC, violated protective orders by sharing a person's confidential information, through the United States Attorney's Office, with the IRS. *Id.* at 1272. After that violation, the district court essentially modified the orders to permit retroactively this sharing despite the person's "justified reliance" on the orders' plain language to prevent that sharing. Citing *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), the court of appeals concluded that the district court could not so easily modify the protective order. *Id.* at 1272-1273. The

Second Circuit would have enforced the grand jury subpoenas in this case for two independent reasons: petitioners do not claim that they or their clients provided deposition testimony in reliance on the protective order, and any such reliance would have been unreasonable because, among other reasons, the protective order was limited to the pretrial stages of litigation and did not prevent disclosure to state attorney generals for their own antitrust enforcement efforts.

In *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), "deponents [had] testified in reliance upon [a] Rule 26(c) protective order, absent which they may have refused to testify." *Id.* at 296. In that situation, the Second Circuit held that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, * * * a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government." *Ibid.*[13] At the same time, the court noted that "[t]he reliance of a private party upon protection of pre-existing documents from disclosure to the Government would normally be more difficult to justify than that of a witness who would, ab-

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decision does not suggest a protective order would preclude enforcement of a compulsory process, let alone a grand jury subpoena. And it does not indicate that the Tenth Circuit will follow the Second Circuit's decision in *In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d at 1223, and apply the *Martindell* presumption in the grand jury subpoena context. The Tenth Circuit did not cite that 1991 decision nor any other circuit's decision addressing whether a grand jury subpoena overcomes a protective order.

[13] *Martindell* did not involve a grand jury subpoena, see 594 F.2d at 296 n.6, but the Second Circuit subsequently applied the *Martindell* presumption to a grand jury subpoena in *In re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, *supra*.

sent the protective order, have invoked his privilege and given no testimony at all." *Id.* at 297 n.8.

In subsequent cases, the Second Circuit has clarified that the *Martindell* presumption comes into play only when a party reasonably relies on a protective order in providing deposition testimony. Thus, in *United States* v. *Davis*, 702 F.2d 418, cert. denied, 463 U.S. 1215 (1983), the court found *Martindell* inapplicable (and affirmed enforcement of a grand jury subpoena) where "there [was] no indication that [a witness] agreed to testify only in reliance on [an] 'understanding'" of confidentiality and where many records sought "existed prior to the advent of the litigation." *Id.* at 422, 423. And in *SEC* v. *TheStreet.com*, 273 F.3d 222 (2d Cir. 2001), the court held that "the rule of *Martindell* * * * was not applicable" where the party seeking to block access to evidence covered by a protective order "did not at any time contend that [deponents] had reasonably relied on the [protective order] in giving their [c]onfidential [t]estimony." *Id.* at 234-235.[14]

Moreover, the Second Circuit has made clear that reasonable reliance is not established—and the *Martindell* presumption is thus inapplicable—when a protective order is "on [its] face temporary or limited." *TheStreet.Com*, 273 F.3d at 231. In *In re Agent Orange Product Liability Litigation*, for example, the court held that the presumption did not apply because the appellants "could not have relied on the permanence of the protec-

[14] In *Minpeco S.A.* v. *CFTC*, 832 F.2d 739 (2d Cir. 1987), the court applied the *Martindell* presumption in a case apparently involving pre-existing documents, but that decision involved an administrative subpoena from an agency, not a grand jury, and in any event, it came before the Second Circuit clarified in *TheStreet.com* that the presumption rested on a reliance rationale. 273 F.3d at 234-235.

tive order" since the order "by its very terms was applicable solely to the pretrial stages." 821 F.2d 139, 147 (2d Cir.), cert. denied, 484 U.S. 953 (1987); see also *Gambale* v. *Deutsche Bank AG*, 377 F.3d 133, 142 n.7 (2d Cir. 2004) (concluding "there [was] no presumption against access" because "the Bank could not have reasonably relied on the [protective order] because it was explicitly temporary").

In light of these significant limitations on the *Martindell* rule, petitioners' attempt to quash the grand jury subpoena in this case would have failed in the Second Circuit for a number of independent reasons. As noted previously (note 6, *supra*), the subpoenas in this case sought principally pre-existing corporate documents not created in reliance on a protective order, which do not trigger the *Martindell* presumption even in the Second Circuit, see *TheStreet.com*, 273 F.3d at 234-235; *Davis*, 702 F.2d at 422. It is thus not surprising that, unlike those parties that have successfully resisted grand jury subpoenas in the Second Circuit, petitioners have failed to point to any deposition testimony responsive to the subpoenas that "would not even have existed but for [the civil protective order], upon which the [petitioners] apparently relied" in providing the testimony. *Palmieri* v. *New York*, 779 F.2d 861, 865 (2d Cir. 1985).

Deposition testimony (about illegal cartel agreements) would be responsive to only one narrow category of material covered by the subpoenas in this case. See note 6, *supra*. Petitioners, however, do not claim that any of their clients or employees provided any deposition testimony responsive to that request in reliance on the protective order in this case. In fact, all of the "merits" witnesses from AUO and White & Case's clients invoked their Fifth Amendment privilege against compelled self-

incrimination in their merits depositions in the civil case.[15] The witnesses' invocation of the privilege is not surprising, given that those merits depositions took place when petitioners were fully aware that the United States was seeking civil discovery material for use in its criminal investigation.[16] In sum, there was no reasonable reliance on the protective order to provide potentially incriminating testimony in this case, nor could there have been.[17]

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[15] Petitioners express concern that reliance on the Fifth Amendment, rather than a protective order, is not a good option for deponents because of "the potentially ruinous adverse inferences that can follow from an assertion of the Fifth Amendment." Pet. 26. Petitioners here, however, secured an order from the district court allowing witnesses "to revoke the assertion of privilege" before trial and testify at a new deposition. Gov't C.A. E.R. 203. The order preserved the right of plaintiffs to request an adverse inference instruction, *id.* at 204, but the right to a do-over deposition without invocation of the privilege would seem to make such an instruction less likely. In any event, as discussed below, a civil protective order does not allow witnesses to avoid this dilemma. See pp. 18-19, *infra*.

[16] All but one of the AUO merits depositions took place in November 2009, four months after the United States asked the district court to modify its civil protective order to permit it to copy material for the grand jury. (The other AUO merits deposition took place almost a year later, in September 2010.) The merits depositions of White & Case's clients took place in November 2010, nearly a year after the grand jury subpoenas had been served and while the United States' appeal of the district court decision to quash was pending. Petitioners do not suggest that there was any testimony responsive to the subpoena in the non-merits depositions, *i.e.*, those concerning class certification, and, in any event, White & Case's clients agreed to provide those transcripts to the Antitrust Division voluntarily, Gov't C.A. E.R. 20.

[17] Petitioners do not make any Fifth Amendment claim with respect to the pre-existing corporate documents sought by the subpoenas, nor could they. Corporations have no right against compelled self-incrimination under the Fifth Amendment, *Doe* v. *United States*, 487 U.S. 201, 206 (1988), and, in any event, pre-existing, voluntarily prepared bus-

Petitioners' claim would have failed in the Second Circuit for a second reason: the civil protective order in this case "on [its] face" was both "temporary" and "limited." *TheStreet.com*, 273 F.3d at 231. The protective order excluded from its terms "presentations of evidence and argument at hearings on dispositive motions and at trial." Gov't C.A. E.R. 48, 60. The Second Circuit has held that "reliance" on a protective order "applicable solely to the pretrial stages of the litigation" is "misplaced." *TheStreet.com*, 273 F.3d at 231 (quoting *Agent Orange*, 821 F.2d at 147). The protective order here thus would have been categorically ineligible for the *Martindell* presumption.

Moreover, the protective order was "limited" (*TheStreet.com*, 273 F.3d at 231) in that it "does not and was not intended to interfere with any lawfully issued *State* subpoena or civil investigative demand."[18] Accordingly, state attorneys general could subpoena the documents and use them to enforce their own antitrust statutes. Petitioners thus could have had no reasonable expectation that the material covered by the protective order would be used only in the private civil litigation.

The protective order was additionally "limited" (*TheStreet.com*, 273 F.3d at 231) because it did not keep any information confidential from the United States. The district court had earlier granted the United States the right to review (but not copy) everything produced in discovery in the civil case. Gov't C.A. E.R. 47. It is difficult to understand why a witness with self-incrimination con-

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iness records are not covered by the privilege, *United States* v. *Doe*, 465 U.S. 605, 611-612 (1984).

[18] Order Clarifying Stipulated Protective Order 1-2, *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827 (N.D. Cal. May 4, 2010) (emphasis added).

cerns would reasonably choose to provide testimony he knew that federal prosecutors could read.

Finally, while petitioners, their clients, and other foreign companies may have reasonably relied on the protective order to limit voluntary disclosures by the civil plaintiffs and defendants (who were parties to those orders), they could not have reasonably relied on that order, whatever its terms, to protect those documents from grand jury subpoenas in the Northern District of California. Since 1995, the Ninth Circuit rule has been that grand jury subpoenas, "as a matter of course, prevail over a protective order." *Meserve*, 62 F.3d at 1226. As a result, the reliance rationale of *Martindell* and its presumption are inapplicable here for that reason as well.

2. The court of appeals' decision is correct and is consistent with decisions of this Court recognizing the broad scope of the grand jury's authority to obtain relevant evidence. "[R]ooted in long centuries of Anglo-American history," the grand jury "is a constitutional fixture in its own right." *United States* v. *Williams*, 504 U.S. 36, 47 (1992) (brackets in original; internal quotation marks and citations omitted). It "occupies a unique role in our criminal justice system," as "an investigatory body charged with the responsibility of determining whether or not a crime has been committed." *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 297 (1991).

As this Court has noted, "the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen." *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972). The broad "scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). The grand jury's "task is to inquire into the exis-

tence of possible criminal conduct and to return only well-founded indictments." *Branzburg*, 408 U.S. at 688. Its "investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Id.* at 701 (citation omitted). As a result, its "investigative powers are necessarily broad." *Id.* at 688; see also *Calandra*, 414 U.S. at 344 ("The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.").

Thus, "[a]lthough the powers of the grand jury are not unlimited and are subject to the supervision of a judge, 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*, 408 U.S. at 688 (citations omitted). Accordingly, while "[o]ver the years" this Court has "received many requests to exercise supervision over the grand jury's evidence-taking process," it has "refused them all." *Williams*, 504 U.S. at 50; see *Calandra*, 414 U.S. at 343.

The Ninth Circuit's conclusion that grand jury subpoenas are enforceable notwithstanding the existence of a civil protective order (even in situations, unlike this case, where potentially incriminating deposition testimony is involved) is consistent with this Court's understanding of the broad scope of the grand jury's investigative function. The contrary position—that materials can be provided to private class action antitrust plaintiffs but withheld from a federal grand jury—turns on its head the settled principle that "it is the Attorney General * * * who [is] primarily charged by Congress with the duty of protecting the public interest under the[] [antitrust] laws" and that pri-

vate actions merely "supplement[] government enforcement of the antitrust laws." *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954).

As an initial matter, if a civil protective order is permitted to shield information from a grand jury, it "may seriously impede a criminal investigation." *In re Grand Jury Subpoena*, 836 F.2d at 1475; accord *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1017 (11th Cir. 1993). "Uncoerced testimony given in a civil action may provide important and relevant information to a grand jury investigation." *In re Grand Jury Subpoena*, 836 F.2d at 1475. Moreover, "protective orders may cause the absurd result of shielding deponents from prosecutions for perjury because * * * the protective order itself impedes an investigation that might lead to cause for believing that perjury has occurred." *Ibid.* Nothing in Federal Rule of Civil Procedure 26(c) or its advisory notes "support[s] the notion that Congress, in passing on and enacting the Rule, intended to circumscribe the grand jury's authority and subpoena power." *In re Grand Jury Proceedings (Williams)*, 995 F.2d at 1017.

Second, permitting a protective order to defeat a grand jury subpoena would, as a functional matter, constitute an attempt to create a "*de facto* grant of immunity." *In re Grand Jury Subpoena*, 836 F.2d at 1475. Yet grants of immunity are the exclusive prerogative of the Executive Branch. See *ibid.*; *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983) ("No court has authority to immunize a witness. That responsibility * * * is peculiarly an executive one.").

Third, while allowing a protective order to thwart a grand jury subpoena would have the definite effect of impeding the grand jury's investigation, the civil-litigation benefits of doing so are far from certain. While it has

been suggested that a protective order will make civil deponents less likely to invoke their Fifth Amendment privilege, "an individual may not totally rely on judicial protection against the use of incriminating information without a grant of immunity." *In re Grand Jury Subpoena*, 836 F.2d at 1476; see *Andover Data Servs.* v. *Statistical Tabulating Corp.*, 876 F.2d 1080, 1084 (2d Cir. 1989) ("a court in a civil action is simply without the means to fashion a sufficiently durable safeguard for the full protection of the [F]ifth [A]mendment rights of a reluctant non-party witness").

Material subject to a protective order can leak; the protective order can be modified to permit disclosure; and material protected pre-trial may be disclosed at trial. *In re Grand Jury Subpoena*, 836 F.2d at 1476; see *In re Grand Jury Proceedings (Williams)*, 995 F.2d at 1019 n.14. Even under the *Martindell* approach, testimony provided pursuant to a protective order can be divulged to a grand jury if the government establishes a "compelling need" or "extraordinary circumstances." *Ibid.* Finally, courts have "available other tools to ensure successful resolution of a civil action which is threatened by a deponent's privileged silence," such as delaying discovery until completion of the grand jury investigation, using "traditional rules of burden-shifting," *In re Grand Jury Subpoena*, 836 F.2d at 1476-1477, or, as in this case, permitting witnesses who have invoked their Fifth Amendment privilege at a deposition the opportunity to revoke that invocation later and testify, see note 15, *supra*.[19]

[19] As discussed in the text, a civil protective order is not an adequate substitute for a witness's invocation of his Fifth Amendment privilege against self-incrimination. Accordingly, the concern that the government expressed in its motion to stay discovery in the civil case about employees' being put in the "untenable position of having to choose be-

3. The question of how and when grand jury subpoenas can require production of material covered by civil protective orders rarely arises. After the Ninth Circuit decided *Meserve* 16 years ago, it did not have occasion to address the issue again until this case. Several other circuits that have addressed the question have done so only once, the most recent decision coming nine years ago.[20] The lengthy list of civil cases with parallel criminal investigations provided by petitioner White & Case, Pet. 24-26, underscores this point. Despite the frequency of such parallel litigation, the question presented here arises only rarely.

In most cases, the government serves grand jury subpoenas and obtains the evidence it needs long before discovery in any related civil case has advanced very far.

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tween asserting their Fifth Amendment right against self-incrimination, with the negative inference that comes with that decision, or testifying in the deposition and running the risk of self-incrimination in the criminal matter" (Gov't C.A. E.R. 40) does not support petitioners here. As argued in the motion in which that statement appeared, the way to avoid such concerns would be to stay discovery; absent such a stay, employees would encounter such a dilemma with or without a civil protective order.

[20] The Fourth Circuit has not issued another opinion addressing the issue since its first and only one in *In re Grand Jury Subpoena*, *supra*, in 1988. Likewise, the Eleventh Circuit has not had occasion to address the question again since its 1993 decision in *In re Grand Jury Proceedings (Williams)*, *supra*; the First Circuit since its 1998 decision in *In re Grand Jury Subpoena (Roach)*, *supra*; and the Third Circuit since its 2002 decision in *In re Grand Jury*, *supra*. Although the Second Circuit has had more recent occasion to discuss the *Martindell* presumption, see, *e.g.*, *SEC* v. *TheStreet.com*, *supra*, it has not had a case involving a federal grand jury subpoena and a protective order since 1991, see *In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, *supra*. The issue has not arisen in the Fifth, Sixth, Seventh, Tenth, and D.C. Circuits.

Indeed, the government occasionally seeks to delay civil discovery that might interfere with an ongoing criminal investigation, as it did in this case. See p. 3, *supra;* see also *In re Grand Jury Subpoena*, 836 F.2d at 1476 (courts "commonly * * * delay discovery until a pending grand jury investigation has been completed"). Thus, the government's need to serve a grand jury subpoena seeking the fruits of civil discovery arises infrequently.

Moreover, petitioner White & Case's claim, echoed by various amici curaie, that review is necessary because the per se rule encourages civil plaintiffs to make "overly broad discovery requests [that] will expose defendants to greater risks in a parallel criminal investigation" to gain leverage in the civil action, Pet. 27, lacks merit. White & Case's concern appears to be that plaintiffs' use of discovery to obtain evidence supporting their civil antitrust claims for price fixing threatens to uncover evidence of price fixing that might result in a criminal prosecution. Such a concern provides no reason to grant review, let alone to keep evidence out of the grand jurors' hands. *Branzburg*, 408 U.S. at 696.

Equally unfounded is the claim that the different approaches among the circuits tempts "plaintiffs and prosecutors to forum shop." Pet. 27; Br. of Amici Curaie Chamber of Commerce of the United States of America and DRI—The Voice of the Defense Bar 9-10. In fact, the Department of Justice continues to investigate and prosecute international cartels in circuits that do not apply the per se rule. See, *e.g.*, *Stolt-Nielsen, S.A.* v. *United States*, 442 F.3d 177 (3d Cir.) (grand jury investigation of international conspiracy to fix prices of parcel tanker shipping services), cert. denied, 549 U.S. 1015 (2006); *United States* v. *Taubman*, 297 F.3d 161 (2d Cir. 2002) (per curiam) (criminal prosecution of international conspiracy

to fix prices of auction commission rates). And even though the difference in approach among the circuits has existed for at least 20 years, petitioners cite no examples of the United States' impaneling a grand jury in one of the "per se" circuits in order to make it easier to enforce grand jury subpoenas. Finally, the circuits' approaches to this question provide no incentive for private plaintiffs to forum shop because a motion to quash a grand jury subpoena is made where the grand jury is empaneled, regardless of where the civil protective order was entered. Fed. R. Crim. P. 17(c)(2); *United States* v. *(Under Seal)*, 714 F.2d 347, 350 (4th Cir.), cert. dismissed, 464 U.S. 978 (1983).

4. Petitioners' remaining arguments provide no basis for review by this Court.

Petitioners contend that the analysis of the relationship between the protective order and the grand jury subpoenas should have been different because the evidence in question originated abroad. Nossaman Pet. 23; see Pet. 29-34. Other than the court of appeals decision in this case, however, no other circuit has considered that novel question, accord Amicus Br. of NACDL, et al. 11, and further consideration by the courts of appeals would be warranted before this Court addressed it. In any event, the decision below does not conflict with or circumvent settled principles governing the geographic reach of grand jury subpoenas.

While search warrants have specific territorial limits—with some exceptions, they can authorize searches and seizures only of persons and property located within the district of the issuing judge, see Fed. R. Crim. P. 41(b)—grand jury subpoenas do not. The only "geographic limit" on the grand jury is that its subpoena cannot be *served* on non-resident aliens outside the United

States. Fed. R. Crim. P. 17(e); 28 U.S.C. 1783. But neither that limit nor petitioners' proposed principle limiting the subpoena power to documents within the United States was violated in this case. The subpoenas sought documents located within the United States and in the custody or control of the U.S. law firms who were served with subpoenas in the United States.

A grand jury subpoena is simply a command directed to a person to appear before the grand jury and testify or produce evidence under the person's control. Thus, the grand jury's subpoena power does not turn on where the evidence originated or even where it is currently located. Rather, "[t]he test for the production of documents is control, not location." *In re Grand Jury Subpoena Directed to Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); accord *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 828-829 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *In re Grand Jury Subpoena Addressed to First Nat'l City Bank*, 396 F.2d 897, 900-901 (2d Cir. 1968) ("a federal court has the power to require the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person in possession or control of the material.").[21]

[21] The decision below does not implicate *Commodity Futures Trading Commission* v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984), or Sections 274-278 of the *United States Department of Justice's Criminal Resource Manual* (1997), as petitioners claim, see Nossaman Pet. 23. *Nahas* involved service of an administrative subpoena on a foreign citizen in a foreign nation, 738 F.2d at 493, and the cited sections of the government manual describe methods, including subpoenas, to obtain evidence located abroad. Neither is relevant here because the holding below is that the grand jury, via subpoena, can command United States law firms served in the United States to produce evidence in the United States under their control. Pet. App. 2a-3a.

Nor does the rule applied by the Ninth Circuit in this case have "serious implications under the foreign-sovereignty and international-comity principles that dictate the limitations on the government's extraterritorial subpoena power," Pet. 31, or allow the government to "ignore * * * settled methods for seeking foreign-based discovery." Nossaman, Pet. 24.[22] The subpoenaed documents are in the United States and under the control of U.S. law firms served in the United States. Under these circumstances, considerations of foreign sovereignty and international comity are, at most, *de minimis*. The United States, as a sovereign, is entitled to obtain and use evidence within its own territory without the consent of foreign governments. The availability of letters rogatory or treaty requests to attempt to obtain foreign-located duplicates of the documents that are in the United States does not render those means mandatory or invalidate other valid means, like the subpoena power, to compel a "party subject to [the court's] jurisdiction to produce evidence." *Société Nat'l Indus. Aérospatiale* v. *United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987); cf. *id.* at 539-540 (holding that the Hague Convention for obtaining evidence abroad did not preempt court's authority to order a "party before it to produce evidence physically located within a signatory nation").

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[22] The Nossaman petitioners' claim that the district court quashed the subpoena, "in large part, out of concern over the impact of such a precedent on foreign sovereignty," Nossaman Pet. 24-25, is unsound. While the district court noted petitioners' contentions about the interests of foreign sovereigns, it did not quash the subpoena on that basis but rather found it "more prudent to quash the subpoenas and allow the DOJ to raise these issues on appeal to the Ninth Circuit," given what it perceived as an absence of authority on the scope of the grand jury's authority in this situation. Pet. App. 2a-3a; see Pet. Sealed App. 6.

In any event, any comity questions should be deemed resolved when the Executive Branch, through the Department of Justice, proceeds with a subpoena for foreign business records that have been brought to the United States. *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005) ("In our system of government, the Executive is the 'sole organ of the federal government in the field of international relations,' * * * and [it] has ample authority and competence to manage 'the relations between the foreign state and its own citizens' and to avoid 'embarass-[ing] its neighbor[s].'") (brackets in original and citations omitted). There is no basis for a district court to second-guess that judgment.[23]

Petitioner White & Case suggests that the decision will disturb relations between the United States and the European Union (EU) or Japan by "giv[ing] U.S. prosecutors *carte blanche* to pierce protective orders to obtain [European Commission (EC) or Japanese] leniency materials produced in civil discovery that the prosecutors would not be able to obtain directly from foreign regulators (absent the consent of the self-reporting company)." Pet. 36; see Br. of Amicus Curaie Japan Competition Law Forum 3, 13-14. But the United States has long emphasized the importance of confidentiality to a successful anti-cartel leniency program.[24] Indeed, the United States

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[23] To date, no foreign government has voiced any concerns about the subpoenas at issue in this case.

[24] See, *e.g.*, Letter from Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, to James C. Owens 3 (Oct. 6, 2009) (Attachment No. 5 to Mot. for Recons. re 185 Order on Mot. to Compel by European Commission, *In re: Flat Glass Antitrust Litigation (II)*, No. 08-mc-180, MDL No. 1942 (W.D. Penn. Oct. 8, 2009) (ECF No. 200) ("Confidentiality is one of the hallmarks of leniency programs, and a lack of confidentiality is a

has supported EU efforts to protect its confidential leniency materials from disclosure in civil discovery because "harm to the EC leniency program could result in harm to the Division's ability to detect and successfully prosecute international cartels that target U.S. businesses and consumers" because "[i]f companies that have dual exposure in the United States and the European Union are dissuaded from applying for leniency with the European Commission, then they may also choose not to apply for leniency in the United States, especially if they have greater exposure in the European Union."[25]

Accordingly, petitioner's suggestion that the United States would suddenly change its views on confidentiality, impair the EC or Japanese leniency program to the detriment of its own program, and jeopardize its close working relationship with the EU and Japan is without merit. In any event, companies involved in international price fixing that seek leniency typically do so in every country in which they can, including the United States. Such concurrent leniency applications result in the disclosure of all relevant information to the United States without any need to examine what those companies may have told other antitrust authorities.

The decision below does not improperly limit the court's discretion under Rule 17(c)(2), which allows the court to "quash or modify the subpoena if compliance would be unreasonable or oppressive," Fed. R. Crim. P. 17(c)(2). Nossaman Pet. 25-28. Nothing in the court of appeals decision limits the district court's traditional discretion under Rule 17. Rather, the court of appeals merely applied its prior decision in *Meserve* holding that

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major disincentive for leniency applications.")).

[25] *Id*. at 4.

the existence of a protective order alone does not make compliance unreasonable or oppressive. See *Meserve*, 62 F.3d at 1226.[26]

The Nossaman petitioners erroneously suggest that the subpoenas are unreasonable or oppressive because they were directed to lawyers. Nossaman Pet. 27-28. The grand jury appropriately directed its subpoenas to the law firms that had custody and control of the non-privileged documents produced to the multitude of parties in the civil action. The cited provision of the United States Attorney's Manual (USAM) applies only to attorney subpoenas seeking "information relating to the attorney's representation of a client." USAM § 9-13.410(B) (2009). The subpoenas here seek information that was produced in discovery, not information bearing on the representation of a client. *United States* v. *Perry*, 857 F.2d 1346 (9th Cir. 1988), and *United States* v. *Bergeson*, 425 F.3d 1221 (9th Cir. 2005), involved subpoenas served post-indictment on the criminal defendants' trial counsel seeking information about the attorney's representation of that client, specifically who was paying the fees and what trial date the attorney told the client. 857 F.2d at 1347-1348; 425 F.3d at 1222-1223. In *Perry*, the subpoena was issued under circumstances that "strongly suggest-[ed] an improper motive," 857 F.2d at 1348, and in *Bergeson*, the "attorney-client relationship * * * would be

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[26] Nor is there any rule barring a grand jury or criminal investigation's use of evidence that was produced in civil discovery. Cf. Nossaman Pet. 29. As this Court recognized in *United States* v. *Kordel*, 397 U.S. 1, 11-12 (1970), where civil discovery mechanisms are used in good faith and not "solely to obtain evidence for [a] criminal prosecution," there is nothing inappropriate, let alone unlawful, about the government's use of information produced by those mechanisms in a criminal investigation and prosecution.

destroyed" if the subpoena forced counsel to testify, 425 F.3d at 1223.

Here, the government acted in good faith, Pet. App. 3a, and no risk is posed to the attorney-client relationship. Similarly, the concern expressed by Amicus Curiae American Bar Association about "compel[ling] a lawyer to produce client information" and the need "to maintain a client's confidences" (Br. for The Am. Bar Ass'n at 3) is misplaced in this case. All of the documents at issue have already been disclosed (or will be disclosed) to the civil plaintiffs who seek millions of dollars in damages from the attorneys' clients.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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