No. 12-1239

In the Supreme Court of the United States

JOHN DOE 1, JOHN DOE 2, AND ABC CORPORATION,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner ABC Corporation's attorney-client privilege was vitiated in grand-jury proceedings where the district court found a reasonable basis to suspect that petitioner had used the privilege to commit a crime or fraud.

2. Whether the court of appeals had jurisdiction over petitioner ABC Corporation's interlocutory appeal of the district court's order requiring petitioner and two law firms to produce documents in response to a grand-jury subpoena, where petitioner, to whom the documents could be transferred, did not first refuse to comply with the order and go into contempt of court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-76) is reported at 705 F.3d 133. The relevant orders of the district court are unreported and sealed.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2012. A petition for rehearing was denied on January 17, 2013 (Pet. App. 77-78). The petition for a writ of certiorari was filed on April 11, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner ABC Corporation (petitioner), a now-dissolved corporation, invoked the attorney-client privilege to withhold documents demanded by grand-jury subpoenas issued to petitioner, its outside counsel, and

three individuals who were previously employed as petitioner's in-house counsel.[1] The government moved to enforce the subpoenas with respect to some of the withheld documents on the grounds that the documents were not privileged or that any privilege was vitiated by the crime-fraud exception. The district court granted the motions in part and ordered petitioner, its outside counsel, and its former in-house counsel to produce certain documents demanded by the subpoenas. The court of appeals dismissed petitioner's interlocutory appeal with respect to the subpoenas issued to petitioner and its outside counsel for lack of jurisdiction, and the court affirmed the district court's decision with respect to the subpoenas issued to petitioner's former in-house counsel. Pet. App. 1-76.

1. Petitioner is the subject of a federal grand-jury investigation in the Eastern District of Pennsylvania that seeks to determine whether petitioner and individuals affiliated with petitioner participated in a tax-evasion scheme. According to evidence submitted to the grand jury, petitioner acquired companies "with large

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[1] Petitioner John Doe 1 was ABC Corporation's president and sole shareholder. Petitioner John Doe 2 is John Doe 1's son and is also affiliated with ABC Corporation. Pet. App. 7. The court of appeals dismissed their appeal, holding that they lacked standing to assert ABC Corporation's attorney-client privilege. *Id.* at 13-14; *id.* at 61 (Vanaskie, J., concurring in part and dissenting in part). The petition contends in a footnote (Pet. 9-10 n.8) that the court of appeals should not have rejected the claims of John Doe 1 and John Doe 2 without first requesting briefing from the parties on standing or remanding to the district court. The petition does not, however, ask this Court to review the standing issue. For that reason, and because any privilege claims that John Doe 1 and John Doe 2 may have would be derivative of ABC Corporation's privilege, this brief refers to petitioner ABC Corporation as "petitioner."

cash accounts, few or no tangible assets, and considerable tax liabilities," transferred the assets of those companies into two limited liability companies, and then "engage[d] in various transactions that had the effect of fraudulently eliminating the target companies' tax liabilities." Pet. App. 7-8. John Doe 1 and John Doe 2 "would then divert the target companies' cash assets to themselves and their family members." *Id.* at 8, 47.

2. a. In December 2010, the grand jury issued a subpoena to petitioner's custodian of records. Pet. App. 8. The subpoena demanded all records relating to transactions between petitioner and the two limited liability companies implicated in the alleged criminal scheme. *Ibid.* After petitioner asserted that the grand jury had not properly served its custodian of records, and to avoid any problems arising from the alleged service error, the grand jury later issued subpoenas for those documents to two law firms that had physical custody of the documents. *Id.* at 8-9. Petitioner and the law firms responded to the subpoena but withheld 303 documents as privileged. *Id.* at 9. The government moved to enforce the subpoenas with respect to 171 of the withheld documents, arguing that the documents were either not privileged or that any privilege was vitiated by the crime-fraud exception. *Ibid.*

In March 2012, the district court granted the government's motion in part. Pet. App. 10; Pet. 5. In the March order, the district court concluded that the crime-fraud exception vitiated petitioner's claims of attorney-client and work-product privilege with respect to 167 of the withheld documents and ordered petitioner and the law firms to produce those documents to the grand jury. Pet. App. 10. Petitioner filed an interlocutory appeal, and the court of appeals dismissed the ap-

peal for lack of jurisdiction. *Ibid.* The court explained that petitioner "could receive immediate appellate review [only] by taking possession of the documents, refusing to produce them, and then appealing any contempt sanctions imposed by the [d]istrict [c]ourt." *Ibid.*

b. In December 2011, while the first set of subpoenas was being litigated in the district court, the grand jury issued subpoenas for documents and testimony to three lawyers who were formerly employed by petitioner as in-house counsel. Pet. App. 12. Those individuals refused to comply fully with the subpoenas, invoking petitioner's attorney-client privilege and their own work-product privileges to withhold 45 documents. *Id.* at 12-13. The government moved to enforce the subpoenas, and petitioner intervened in the district court to oppose the government's motion. *Id.* at 13.

In June 2012, the district court granted the government's motion in part and ordered the individuals to produce 11 of the subpoenaed documents and to testify before the grand jury. Pet. App. 4, 13; Pet. 7. In the June order, the district court concluded, after reviewing the records *in camera*, that the crime-fraud exception vitiated petitioner's attorney-client privilege with respect to communications about certain transactions that the district court determined were part of a tax-evasion scheme. Pet. App. 13, 47-48 n.23. Petitioner filed an interlocutory appeal. The court of appeals granted a petition for rehearing of its decision on petitioner's first interlocutory appeal and consolidated the two cases. *Id.* at 12-13.

3. The court of appeals held that it lacked jurisdiction over petitioner's interlocutory appeal with respect to the subpoenas issued to petitioner and its outside counsel, and it affirmed the district court's decision with

respect to the subpoenas issued to petitioner's former in-house counsel. Pet. App. 1-76.

a. The court of appeals explained that an order requiring a witness to produce documents or to testify is generally not considered an appealable final order and that "[i]t is well settled that a witness who '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.'" Pet. App. 15-16 (quoting *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992)). The court further explained that in *Perlman* v. *United States*, 247 U.S. 7 (1918), this Court created an exception to that general rule where "a disclosure order * * * is directed at a disinterested third party lacking a sufficient stake in the proceeding to risk contempt by refusing compliance." Pet. App. 19 (citing *Church of Scientology*, 506 U.S. at 18 n.11). Under those circumstances, the contempt route is not an option because "the privilege holder cannot itself disobey the disclosure order and the third party to whom the disclosure order is directed is unlikely to do so on [the privilege holder's] behalf." *Id.* at 19.

Applying those precedents, the court of appeals concluded that it lacked jurisdiction over petitioner's appeal from the district court's March order "because the contempt route remains open to [petitioner]" with respect to the subpoenas issued to petitioner and the law firms. Pet. App. 25. The court explained that although the documents demanded by those subpoenas were in a law firm's possession, "they are [petitioner's] documents and are under its legal control," and "[petitioner] is responsible for deciding whether to produce or withhold the documents, and could properly be held in contempt for directing the law firms to withhold them." *Id.* at 25-26.

The court acknowledged that "[t]he situation is complicated" because the district court's order "is also directed at [petitioner's] outside counsel, exposing them to potential contempt sanctions." *Id.* at 26. But the court explained that because the documents could be transferred to petitioner's possession and the law firms would not be targeted for contempt for making such a transfer under court order, "there is no need for us to allow a *Perlman* appeal." *Id.* at 27, 31.

The court of appeals further concluded that the *Perlman* exception did apply to petitioner's appeal of the district court's June order because that order was "directed solely at the three former * * * in-house attorneys" and "the contempt route [was] [therefore] not open to [petitioner]." Pet. App. 31. The court found "no basis to believe that these former employees are anything but disinterested third parties who are unlikely to stand in contempt to vindicate [petitioner's] alleged privilege." *Ibid.* The court rejected the government's argument that this Court's decision in *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009), which held that disclosure orders adverse to the attorney-client privilege in civil litigation are not immediately appealable under the collateral order doctrine, *id.* at 108-109, narrowed the scope of the *Perlman* doctrine to exclude interlocutory appeals by subjects of grand-jury investigations. Pet. App. 20-25, 32.

b. On the merits of the district court's June order requiring petitioner's former in-house counsel to produce documents and to testify, the court of appeals agreed that the crime-fraud exception vitiated petitioner's attorney-client privilege. Pet. App. 34-52.[2] The court

[2] The court of appeals rejected petitioner's arguments based on the work-product privilege because that privilege belonged to petitioner's

explained that a party seeking to overcome the attorney-client privilege must make a *prima facie* showing that (1) the client was committing or intending to commit a crime or fraud, and (2) the attorney-client communications were in furtherance of the alleged crime or fraud. *Id.* at 36.

After surveying a variety of verbal formulations used by the courts of appeals, the court stated that its prior decisions describing a *prima facie* showing as "evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met" were "not particularly helpful" because that formulation "does not quantify what evidence is sufficient." Pet. App. 39 (internal quotation marks and citations omitted). The court explained, however, that its precedents were consistent with the "reasonable basis standard" applied by other courts of appeals and that the standard "is intended to be reasonably demanding; neither speculation nor evidence that shows only a distant likelihood of corruption is enough." *Id.* at 39-41 (internal quotation marks and citation omitted).

Under the reasonable-basis standard, the attorney-client privilege is vitiated "[w]here there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud." Pet. App. 41. The court of appeals stated that the reasonable-basis standard was consistent with this Court's statement in *Clark* v. *United States,* 289 U.S. 1, 15 (1933), that "there must be something to give colour

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former in-house counsel, not to petitioner, and the former in-house counsel did not appeal. Pet. App. 53-54.

to the charge" that a communication was used in furtherance of a crime or fraud. Pet. App. 41 (internal quotation marks omitted). The court noted that although the district court used the court of appeals' "sufficient to support" language from prior cases, the district court "also concluded that the Government had met its burden by establishing that there was a 'reasonable basis to suspect' that [petitioner] had committed a crime or fraud." *Id.* at 39.

The court of appeals rejected petitioner's argument that the court should "modify the standard to establish crime-fraud by requiring the government to demonstrate by a preponderance of the evidence that the privilege has been employed to commit a crime or fraud." Pet. App. 42 (citation omitted). The court explained that, "particularly * * * in the grand jury context, where the need for speed, simplicity, and secrecy weighs against imposing a crime-fraud standard that would require adversarial hearings or the careful balancing of conflicting evidence," the policy concerns served by the attorney-client privilege are appropriately protected by the reasonable-basis standard. *Id.* at 43-44.

The court of appeals further concluded that, in the particular circumstances presented here, the crime-fraud exception applied. Pet. App. 45-52. The court stated that, having reviewed unredacted versions of the district court's orders and *ex parte* submissions from the government, "we cannot say that the [d]istrict [c]ourt's detailed factual findings constituted clear error or that it abused its discretion in determining that there was a reasonable basis to suspect that [petitioner] was engaged in a criminal scheme" and that petitioner "used the legal advice it obtained in connection with these

transactions to further its criminal scheme." *Id.* at 47, 50.

c. Judge Vanaskie concurred in part and dissented in part. Pet. App. 61-76. He agreed that the court of appeals had jurisdiction over the district court's June order, but in his view, the court of appeals also had jurisdiction over petitioner's appeal from the March order to the extent that it required production of documents by the law firms. *Id.* at 62-75. Judge Vanaskie would have therefore reached the merits of both orders. He would nevertheless have affirmed on the grounds that the crime-fraud exception vitiated petitioner's attorney-client privilege. *Id.* at 75-76.

4. After the court of appeals issued its decision, the law firms produced the previously withheld documents, as required by the March order. Pet. 10. Petitioner's former in-house counsel also produced the documents they had previously withheld, as required by the June order. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-30) that the courts below used the wrong standard in holding that the crime-fraud exception vitiated its attorney-client privilege with respect to specific materials demanded by grand-jury subpoenas issued to petitioner, two outside law firms, and three individuals who were formerly employed as petitioner's in-house counsel. Petitioner further contends (Pet. 31-39) that the court of appeals had jurisdiction over petitioner's interlocutory appeal of the district court's order requiring petitioner and the two law firms to produce documents in response to subpoenas pursuant to *Perlman* v. *United States*, 247 U.S. 7 (1918). The court of appeals applied a correct standard to assess the crime-fraud exception and correctly found *Perlman*

inapplicable on the specific facts presented. Its decision does not conflict with any decision of this Court or another court of appeals and further review is unwarranted.

1. a. Attorney-client communications that facilitate a present or future crime or fraud are not protected by the attorney-client privilege. *Clark* v. *United States*, 289 U.S. 1, 15 (1933). The crime-fraud exception ensures that the "'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States* v. *Zolin*, 491 U.S. 554, 563 (1989) (citations omitted). The exception applies regardless of whether the attorney was a knowing participant in the client's misconduct. See *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982); *United States* v. *Calvert*, 523 F.2d 895, 909 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

In *Clark*, this Court stated that "a mere charge of illegality, not supported by any evidence," is insufficient to vitiate the privilege. 289 U.S. at 15. Rather, "there must be 'something to give colour to the charge'; there must be '*prima facie* evidence that it has some foundation in fact.'" *Ibid.* (citation omitted). Although the Court has not further defined what quantum of proof would satisfy the *prima facie* standard, the courts of appeals have concluded that the privilege is vitiated where "there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud." *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005), cert. denied, 546 U.S. 1088 (2006).

As the First Circuit has explained, "[t]he circuits * * * all effectively allow piercing of the privilege on

something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud." *In re Grand Jury Proceedings*, 417 F.3d at 23; see also *United States* v. *Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997) (privilege is vitiated where "a prudent person would have a reasonable basis to suspect the perpetration of a crime or fraud and that defendant's communications to his attorney were in furtherance thereof") (citation omitted); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir.) (district court must find "reasonable cause to believe" that the attorney's services were used "in furtherance of [an] ongoing unlawful scheme") (internal quotation marks and citation omitted), cert. denied, 519 U.S. 945 (1996); *In re Antitrust Grand Jury*, 805 F.2d 155, 165-166 (6th Cir. 1986) (government must present evidence that raises "more than a strong suspicion that a crime was committed," but not necessarily strong enough "to effect an arrest or secure an indictment"); *In re Sealed Case*, 754 F.2d 395, 399 n.3 (D.C. Cir. 1985) (requiring a showing "that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof") (internal quotation marks and citation omitted).

The court of appeals applied that general standard and concluded, based on its review of unredacted versions of the district court's orders and *ex parte* submissions from the government, that it "[could] not say that the [d]istrict [c]ourt's detailed factual findings constituted clear error or that it abused its discretion in determining that there was a reasonable basis to suspect that [petitioner] was engaged in a criminal scheme" and that petitioner "used the legal advice it obtained in con-

nection with these transactions to further its criminal scheme." Pet. App. 47, 50. The court of appeals applied a correct standard and its fact-bound conclusion on that issue does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

The court of appeals correctly rejected petitioner's argument (Pet. 28) that the government must prove a criminal or fraudulent purpose by a preponderance of the evidence to vitiate the attorney-client privilege in the context of a grand-jury investigation. Pet. App. 44. Federal Rule of Evidence 104(a), upon which petitioner relies, does not expressly set forth any standard of proof. Nor does this Court's decision in *Bourjaily* v. *United States*, 483 U.S. 171 (1987), require a preponderance standard in grand-jury investigations. In *Bourjaily*, the Court applied a preponderance standard to admissibility determinations for hearsay evidence at trial because the Court had "traditionally required" that such trial determinations "be established by a preponderance of proof." *Id.* at 175. By contrast, "in the grand jury context," the Court has declined to impose rules "that would saddle a grand jury with minitrials and preliminary showings," which "would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). The court of appeals correctly adhered to those precedents.

b. Petitioner contends (Pet. 12-24) that the decisions of the courts of appeals "are in disarray" on the standard required for a *prima facie* showing that the crime-

fraud exception vitiates the attorney-client privilege. That is incorrect.

Petitioner states (Pet. 17-19) that the Second, Sixth, and Eighth Circuits have required a showing of "probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime." Pet. 17 (quoting *Jacobs*, 117 F.3d at 87); see also *In re Grand Jury Proceedings*, 609 F.3d 909, 912 (8th Cir. 2010); *United States* v. *Clem*, 210 F.3d 373 (6th Cir. 2000) (Table), cert. denied, 531 U.S. 1154 (2001).[3] As the Sixth Circuit has explained, however, "there are not practical differences between the probable cause standard and the *prima facie* standards formulated in the [other] circuits." *In re Antitrust Grand Jury*, 805 F.2d at 165-166. Courts applying a probable-cause standard have defined "probable cause" as "*a reasonable basis to suspect* the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof." *Jacobs*, 117 F.3d at 87 (emphasis added); see *In re Antitrust Grand Jury*, 805 F.2d at 165-167 (probable-cause standard "require[s] that a prudent person have a *reasonable basis to suspect* the perpetration of a crime or fraud") (emphasis added; citation omitted); *In re Sealed Case*, 754 F.2d at 399 n.3 (noting that its *prima facie* standard "require[s] that a prudent person have a

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[3] Petitioner contends (Pet. 20) that the First and Ninth Circuits apply a "reasonable cause" standard, but petitioner acknowledges that the standard is "analogous to 'probable cause.'" Petitioner also acknowledges (Pet. 22) that the D.C. Circuit has described the standard of proof it applies to vitiate the attorney-client privilege as of "little practical difference" from the probable-cause standard applied by other courts. *In re Sealed Case*, 754 F.2d at 399 n.3; see also *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997).

reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof") (emphasis added).

The court of appeals thus did not, as petitioner suggests (Pet. 24-28), create a new "reasonable suspicion" standard for vitiating the attorney-client privilege that entails a less stringent showing than probable cause. Moreover, petitioner does not even advocate for the adoption of a probable-cause standard, and it identifies no authority in support of its position (Pet. 28) that the government should be required to establish the applicability of the crime-fraud exception by a preponderance of the evidence in a grand-jury investigation. Petitioner has failed to identify any conflict among the courts of appeals warranting this Court's review.

c. Petitioner perceives (Pet. 29-30) "disagreement in the circuits" as to whether a district court is categorically barred from considering evidence from the alleged privilege holder rebutting a crime-fraud claim. Any such disagreement is not implicated in petitioner's case. The district court explicitly considered and rejected the declarations that petitioner submitted as rebuttal evidence. See Pet. App. 51-52 (stating that the district court was not "required to credit [a] bald statement * * * from a grand jury subject" that petitioner did not seek legal advice that was used to commit a crime or fraud). To the extent that petitioner contends (Pet. 30 & n.18) that it was entitled to "oral argument or a hearing" on its rebuttal evidence, it identifies no authority in support of that position.

d. Petitioner further contends (Pet. 11-12, 24-28) that application of a reasonable-basis standard to vitiate the attorney-client privilege conflicts with this Court's

statement in *Zolin*, *supra*, that the showing required to vitiate the privilege is more stringent than the showing required to justify *in camera* review of allegedly privileged materials. The quantum of proof required by the court of appeals to vitiate the attorney-client privilege is more stringent than the standard adopted in *Zolin*, and the decisions therefore do not conflict.

The issue in *Zolin* was "whether the applicability of the crime-fraud exception must be established by 'independent evidence' (*i.e.*, without reference to the content of the contested communications themselves), or, alternatively, whether the applicability of that exception can be resolved by an *in camera* inspection of the allegedly privileged material." 491 U.S. at 556. The Court held that the applicability of the crime-fraud exception could be established through *in camera* review if the party opposing the privilege makes "a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the [disputed] materials *may reveal evidence* to establish the claim that the crime-fraud exception applies." *Id.* at 572 (emphasis added; citation omitted). The Court stated that this showing is "not * * * a stringent one" and that "a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege." *Ibid.*

The object of the *Zolin* inquiry is thus not to determine whether the privilege has been vitiated but whether *in camera* review of the disputed materials would be useful in making that determination. Once that minimal threshold is satisfied, the district court will review the materials and make a further determination whether the evidence is sufficient to vitiate the privilege, *i.e.*, whether "there is a reasonable basis to suspect that the privi-

lege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud." Pet. App. 41. Although both inquiries employ a reasonableness test, the object of the *Zolin* inquiry is whether *in camera* review would be useful to determine whether the crime-fraud exception applies, which is different—and less stringent—than the further inquiry into whether the exception in fact applies and vitiates the privilege.

2. Petitioner contends (Pet. 31-39) that the court of appeals had jurisdiction over petitioner's interlocutory appeal from the district court's March order requiring petitioner and its outside counsel to produce documents in response to subpoenas. Further review of that question is not warranted.

a. An order to testify or to produce documents to a grand jury is generally not a "final decision of the district court" subject to immediate appellate review under 28 U.S.C. 1291. The usual route for appellate review of a district court order compelling document production or testimony demanded by a subpoena is thus for the subpoena recipient to go into contempt of court and appeal the contempt citation. See *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992); *United States* v. *Ryan*, 402 U.S. 530, 534 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 327-328 (1940); *Alexander* v. *United States*, 201 U.S. 117, 121 (1906). An exception to that general rule applies when a disclosure order is directed at a disinterested third party who lacks a sufficient stake in the proceeding to risk contempt by refusing compliance. See *Perlman*, 247 U.S. at 13-15.

Those legal principles are not in dispute. Rather, petitioner disputes whether the *Perlman* exception applies

on the facts of this case, where the grand jury issued subpoenas to both petitioner's custodian of records and its outside counsel who had physical custody of the documents. The court of appeals held that, in those particular circumstances, a *Perlman* appeal was not warranted. The court explained that "[a]lthough the documents [we]re in the physical possession" of a law firm, "they are [petitioner's] documents and are under its legal control," that petitioner "is responsible for deciding whether to produce or withhold the documents," and that petitioner "could properly be held in contempt for directing the law firms to withhold them." Pet. App. 25-26. The court addressed the concern that the law firms may feel compelled to produce the documents to avoid contempt sanctions by explaining that the law firms should instead transfer custody of the documents to petitioner and would in those circumstances not face contempt sanctions for good-faith actions. *Id.* at 26-30.

The court of appeals' application of *Perlman* was sound. *Perlman* applies when a third party who has custody of allegedly privileged documents would likely choose to produce them rather than face contempt in order to allow an appeal. In that situation, the privilege holder has no power to protect the privilege by going into contempt. But petitioner was not "powerless to prevent" (Pet. 32) the law firms from producing the documents. As the court of appeals explained, the documents belonged to petitioner, and petitioner could prevent disclosure by taking custody of the documents and refusing to produce them, thereby allowing the normal contempt route of appeal to operate. Pet. App. 10, 25, 29.

Petitioner contends (Pet. 34) that the court of appeals' decision gives the government a path to avoiding

Perlman appeals by subpoenaing the privilege holder in addition to whatever third party has physical custody of the documents demanded by the subpoena. That concern is unfounded. As the court of appeals explained, its decision "would only prevent an appeal where a privilege holder subject to a disclosure order retains legal control of the documents that are in the physical possession of another and the Government has agreed that the documents can be transferred to the privilege holder without the transferor risking contempt." Pet. App. 30-31. The court of appeals' conclusion that a *Perlman* appeal *was* warranted to review the district court's order requiring petitioner's former in-house counsel to produce documents and to testify illustrates the narrow scope of its jurisdictional holding.

b. Petitioner further contends (Pet. 37-39) that the Court "should grant the writ and decide whether *Perlman* survives" the Court's decision in *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009), in which the Court held that disclosure orders adverse to the attorney-client privilege in civil proceedings are not immediately appealable under the collateral order doctrine because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." *Id.* at 109. But the court of appeals *agreed* with petitioner that the *Perlman* exception survives the Court's decision in *Mohawk* with respect to alleged privilege holders who are the subjects of grand-jury investigations (Pet. App. 20-25), and there is thus no reason for the Court to grant certiorari in petitioner's case to review that question.

3. Finally, petitioner has not received a final judgment of conviction, making its current claim of harm extremely abstract. Assuming petitioner is indicted and

convicted, petitioner can present its attorney-client privilege claim (together with any other legal claims) in a petition for review from any direct appeal. See *Ryan*, 402 U.S. at 532 n.3.

This Court has often noted that "encouragement of delay is fatal to the vindication of the criminal law" and that intermediate appeals in criminal investigations and trials are for that reason particularly disfavored. *Cobbledick*, 309 U.S. at 325; see also *Di Bella* v. *United States*, 369 U.S. 121, 126 (1962) ("[T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law."). That policy fully applies in this case, and further review here is therefore especially unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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