No. 18-1522

In the
Supreme Court of the United States

IN RE: GRAND JURY SUBPOENA, Dated March 21, 2018

DOE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REDACTED REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

OTHER AUTHORITY

INTRODUCTION

The decision below — that act-of-production testimony, inherent in every response to a subpoena *duces tecum*, is not protected by the spousal privilege — is unprecedented and dangerous. If it is to stand, clear guidance from this Court is first required. Otherwise, as the Petition explained, the government will now be permitted to issue subpoenas, in every grand jury investigation in which its target is married, to the target's spouse, with whom the target likely shares a home, tax filings, bank accounts, email addresses (and the list goes on), compelling the witness-spouse to identify, catalog, and produce documents relevant to the investigation.

The government attempts to minimize the holding and the parade of horribles it marshals by mischaracterizing it as "factbound." (BIO 5, 9.) Its efforts are illusory. The only "fact" on which the holding hinges is that, by responding to the subpoena *duces tecum*, Petitioner "does nothing more than establish the existence, authenticity, and custody" of the responsive records. (Pet. App. 3). This "fact" is true with *any* production in response to a subpoena *duces tecum*.

The actual import of the lower court's decision is that this universal "fact" — that act-of-production "only" establishes the existence, authenticity, and custody of the records — does not, as a matter of law, rise to the level of adversely affecting the target-spouse and thereby finding protection under the spousal privilege. Thus, as the government offers in its own example, it can steer clear of the spousal privilege by

compelling the witness-spouse to deliver to the grand jury a box of documents responsive to a subpoena, as long as the government will refrain from learning anything about the target until it "open[s] the box and read[s] the documents." (BIO 9.)

But, nearly two decades ago, this Court rejected such view as "anemic" and not accounting for reality. *United States v. Hubbell*, 530 U.S. 27, 43 (2000). This Court recognized that act-of-production testimony is a first and necessary step in an adverse chain of evidence. *Id.* at 41-42. A box of documents does not "magically appear in the prosecutor's office [or the grand jury room] like manna from heaven." *Id.* at 42. It is only *because* the witness took the mental and physical steps necessary to establish the existence, authenticity, and custody of the records demanded that the government received the box of "potentially incriminating evidence sought by the subpoena" from which it learned about the target. *Id.* The government makes no attempt to address this holding of *Hubbell* let alone reconcile it with the decision below.

ARGUMENT

I. THE GOVERNMENT'S ATTEMPTS TO CABIN THE NINTH CIRCUIT'S HOLDING FAIL

The Ninth Circuit held that "'the testimonial aspect of [Petitioner's] response to a subpoena *duces tecum* does nothing more than establish the existence, authenticity, and custody' of any responsive [redacted]" (Pet. App. 3, quoting *Hubbell*, 530 U.S. at 40–41.) The court stated its reasoning, in

full, as follows: "Because this bare testimonial aspect of [Petitioner's] act of production does not itself adversely affect her husband's case, [Petitioner] is not relieved of her obligation to produce [redacted] over which she has care, custody, or control." (Pet. App. 3.)

The Petition explained why that holding is dangerous as a practical matter. Indeed, it now gives the government the ability to compel a witness to identify and produce *anything* over which she has "care, custody, or control," in a criminal investigation of her husband.[1]

The government's attempt to limit the holding as "factbound" (BIO 5, 9) fails. Search the lower court's reasoning for a limiting fact. There is none. As set forth above, the only "fact" on which the it is based is that, by responding to the subpoena *duces tecum*, Petitioner "does nothing more than establish the existence, authenticity, and custody" of the responsive records. (Pet. App. 3.) But this "fact" is not limiting, as it is true with *any* production in response to a subpoena *duces tecum*.

Straining still to offer some limitation, the government asserts (falsely) that the decision also relied on the fact that the subpoena called for Petitioner's records only. (BIO 8.) As is plain from its language, it did not so rely. (Pet. App. 3.) But, even if it did, that a subpoena calls for the witness's records

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[1] As with the Petition, this Reply uses the gender pronouns and the husband and wife labels specific to this case, but the examples and arguments herein apply to all spousal combinations.

only is also a fact true with *any* production, as a subpoena can only require a witness to produce items in her possession or under her custody or control. Thus, there is no limit to the decision below. And, be there any doubt, the government now has the playbook to craft subpoenas to fall without question in the loophole created by the decision.

So, even reading the holding as limited by the government, consider the countless examples of evidence that the government can now force a witness to produce in an investigation of her husband:

- Copies of *your* income tax returns.
- Documents reflecting any direct or indirect sources of money in which *you* have an interest.
- Copies of statements of bank accounts in which *you* have any financial interest.
- Copies of emails from email addresses to which *you* have access.
- Copies of all internet / phone records associated with *your* residence.
- Any firearms, ammunition, scales, baggies, fill-in-the blank drug or gang indicia in *your* home.

Importantly, as the government recognized below, it can only issue subpoenas where it shows "a reasonable probability" that doing so will further the grand jury's investigation. (ER 61.) Thus, that it can word a subpoena without referencing the target of the investigation is, in reality, irrelevant. By issuing the subpoena (whether it references the target or not), the government is asserting (lest the subpoena be quashed) that there is "a reasonable probability" the subpoena

will further the investigation against the target. In other words, to state the obvious, by issuing the subpoena, the government is asserting that the documents are relevant to the investigation against the target, and, therefore, necessarily adverse to him. Thus, for example, the government can now force a wife to produce documents reflecting sources of money in which *she* has an interest, even though such sources, in fact, reflect her husband's activities, and even though the sought-after documents are necessarily relevant to the grand jury's investigation against her husband.

Alarmingly, and undisputed by the government, this is true even where the government could not otherwise lawfully obtain the evidence. For example, in a non-tax criminal investigation, prosecutors cannot obtain from the IRS tax returns or return information related to its target without a court order upon the government's application establishing reasonable cause to be believe that a criminal act has been committed and that the return is relevant to the investigation of the act. *See* 26 U.S.C. § 6103(i); *see also* DOJ Criminal Resource Manual § 515, Requests for Disclosure of Tax Returns and Return Information from the IRS not Relating to Tax Administration, *available at* https://www.justice.gov/jm/criminal-resource-manual-515-requests-disclosure-tax-returns-and-return-information-irs-not (last visited September 23, 2019). Under the lower court's holding, the government can now avoid such requirements by issuing a subpoena to the target's spouse for "her" (joint) tax filings.

Or, similarly, the government could, without having to satisfy the probable cause standard required by a

warrant, compel a spouse to search "her" (shared) email account or "her" (shared) residence and produce requested items in the grand jury investigation against her husband.

The practical implications of the decision below, on their own, warrant certiorari. This Court must intervene.

II. THE GOVERNMENT IGNORES THE CONFLICTS OF AUTHORITY

The government does not dispute, nor did the lower courts otherwise find, that the documents sought by the at-issue subpoena are adverse to Petitioner's husband.[2] Instead, the decision below reasoned that the act-of-production testimony inherent in the documents'

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[2] Indeed, even though the subpoena to Petitioner makes no reference her husband, the government's theory has *always* been that the "records sought clearly relate to the federal crimes under investigation" against her husband. *See, e.g.*, ER 57 ([redacted]).

production — as distinguished from the documents themselves — is not adverse because such testimony "does nothing more than establish the existence, authenticity, and custody" of the responsive records. (BIO 7; Pet. App. 3.)

As explained in the Petition, this rationale was rejected by this Court in *Hubbell*. There, this Court explained that act-of-production testimony is not meaningless simply because it is limited to "establish[ing] the existence, authenticity, and custody of the items that are produced." *Hubbell*, 530 U.S. at 40-41. To the contrary, *Hubbell* held, this testimony is protected *because* it establishes the items' "existence, authenticity and custody," which assists the prosecutor in both identifying "potential sources of information" and obtaining that information. *Id.* at 41. To be sure, such testimony is the first and necessary step to the prosecution's receipt of the items, which do not, as the government would have it, otherwise "magically appear," untethered from the witness's act, for its use in the investigation. *Id.* at 41-42.

In sum, this Court explained, where a witness is protected "from being compelled to answer questions designed to elicit information about the sources of potentially incriminating evidence," such protection also applies "to the testimonial aspect of a response to a subpoena seeking discovery of those sources." *Id.* at 43. In other words, if a witness cannot be compelled to answer questions about evidence that is incriminating to the target of the investigation, she cannot be compelled to comply with a subpoena seeking the same information.

The government makes no attempt to explain, as it cannot do so, the decision below in light of the clear instruction in *Hubbell* (the applicability of which neither the Ninth Circuit nor the government dispute). Instead, the government makes a circular and conclusory argument that the decision below could not conflict with *Hubbell*, as it cites to it in recognizing that "the testimonial aspect of [Petitioner's] response... does nothing more than establish the existence, authenticity, and custody" of the produced records. (BIO 10, citing Pet. App. 3, quoting *Hubbell*, 530 U.S. at 40–41). Of course, the fact that the lower court quoted one phrase of *Hubbell* while ignoring fully its doctrine does not mean that they are in harmony.

The government's own example, offered in support of the lower court's decision, illustrates the conflict with *Hubbell*. The government asserts that had Petitioner, in responding to the subpoena, delivered a box of documents to the grand jury, the government, upon seeing the delivery, would have only learned that Petitioner had responsive records (and nothing about her husband). (BIO 9.) While the government may "have learned nothing at all about [Petitioner's husband] without opening the box," it concedes that it would do so once it lifted the lid. (*Id.*) And, as *Hubbell* recognized, but the lower court ignored, the box did not "magically appear... like manna from heaven." *Hubbell*, 530 U.S. at 40-41. It is only because Petitioner provided the box, that the government had a lid to lift and documents to read.

Of course, Petitioner has never argued that the documents would be protected by the spousal privilege

if the government obtained them through *another* source. Thus, if, for example, the government obtained the records from a lawful search of the Does' residence or from [redacted], Petitioner could not assert the spousal privilege. But, that is not what happened here. The government forced Petitioner herself to identify, collect, and produce the documents. She is the one who both "identif[ied] potential sources of information" relevant to the investigation against her husband and "produced those sources" to the investigators. *Hubbell*, 530 U.S. at 41. While the documents are what are, ultimately, incriminating, the government would not know of their existence without Petitioner. And, the government's repeated attempts to disclaim her authentication of them (BIO n.2) fall squarely within the manna-from-heaven argument rejected by *Hubbell*.[3]

The government's efforts to reconcile the Third Circuit's decision in *In re Grand Jury*, 111 F.3d 1083 (3d Cir. 1997) also fail. As explained in the Petition, the Third Circuit agreed that the grand jury witness

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[3] The government's citations to *Fisher v. United States*, 425 U.S. 391 (1976) are also misplaced. *Hubbell* distinguished *Fisher* in which the government knew of the documents' existence and authenticity *before* issuing the subpoena. *Hubbell*, 530 U.S. at 44. Because the documents' existence and authenticity were a "foregone conclusion," the act-of-production testimony gave the government no new information. *Id.* Here, the government "is not invoking the 'forgone conclusion' doctrine." (ER 65.) Indeed, the government admitted that, before Petitioner's production, it did "not know the... [redacted]." (*See* appellate court docket, 18-50321, at entry 31).

properly invoked her spousal privilege in response to a subpoena that demanded production of items and her testimony. *Id.* at 1084, 87-88.

The government asserts that the Third Circuit had no occasion to consider whether the witness's production *alone* qualified for the spousal privilege. But, the Circuit's decision was not based on the fact that the witness's oral testimony was also sought. Rather, it was based on the reality that she was being forced to provide testimony (whether in production or oral form, both of which take place before the grand jury) in a proceeding that was against her husband. *Id.*

Here, Petitioner's testimony likewise takes place before the grand jury in an investigation against her husband. But, the Ninth Circuit spit with the Third in not requiring the government to provide any assurance that her testimony will not be used against her husband. Had the investigation taken place in the Third Circuit, *In re Grand Jury* would have prevented the government's actions now approved of in the Ninth.

III. THE GOVERNMENT'S MOOTNESS-HARMLESSNESS ARGUMENT IS INACCURATE AND INAPPROPRIATE

Unable to explain away the dangerous loophole created by the decision below or its conflict with *Hubbell*, the government makes a last-ditch effort on a what appears to be quasi-mootness-harmlessness grounds. The government claims that Petitioner's husband was "tried and convicted without the introduction of any documents produced by" Petitioner to the grand jury; and that because the grand jury that

issued the subpoena is now expired, Petitioner is no longer subject to the contempt order that was stayed pending appeal. (BIO 12.)

This wink-wink, nothing-to-see-here argument is factually incorrect and altogether improper. First, as the government well knows, although the contempt sanctions were *initially* stayed pending appeal to the Ninth Circuit (Pet. App. 5-6), the government successfully opposed Petitioner's application for a stay pending further review, citing the grand jury's close-to-expiring term, which the government refused to extend (*see* district court docket below, 18-CM-0771-JAK, at entries 53-55). The stay ended while the grand jury was still in session. (*Id.*) At that time, Petitioner first sustained and paid a one-day contempt sanction, plus interest, and thereafter fully complied with the grand jury's subpoena by producing documents that (although had not previously been in her possession) she had identified and collected as responsive to the subpoena and within her custody or control. (*Id.* at entry 56, providing proof of production and contempt sanction payment). Thus, Petitioner seeks relief from the contempt finding and sanctions, both of which she suffered.

Second, the government's claims of what did or did not occur during Petitioner's husband's trial are inappropriate assertions of facts outside the record on appeal. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) ("It is a basic tenant of appellate jurisprudence that parties may not unilaterally supplement the record on appeal with evidence not

reviewed by the court below.") (alterations and citation omitted).

In any event, whether the documents Petitioner produced were introduced in her husband's trial is irrelevant to the harm Petitioner sustained when she was forced to produce them in the first place. "[T]he important public interest in marital harmony" the spousal privilege is intended to further, *see Trammel v. United States*, 445 U.S. 40, 53 (1980), was destroyed when the government, blessed by the decision below, forced Petitioner to identify, collect, and produce records in the criminal grand jury investigation against her husband.

Upon production, Petitioner was left with the pain of believing that she betrayed her husband of forty years; the fear that the information she produced gave the government a "lead to incriminating evidence" that doomed him, *Hubbell*, 530 U.S. at 42; and the sadness of living with her decision for the rest of her life. The relationship with her husband is irreparably altered. It is *this* harm that the privilege protects against. And the government's untested, late-in-the-day claim that it did not use her exact records (while, notably, remaining silent on whether it read or learned information from the records she produced) provides no relief. *See id.*, at 41-43 (rejecting the government's assertion that it would not introduce the compelled records against Hubbell as overcoming his privilege against producing them in the first place).

CONCLUSION

The Court should grand the petition and reverse the decision below.

Respectfully submitted,

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