No. 20-1141

IN THE

Supreme Court of the United States

IN RE GRAND JURY INVESTIGATION,
USAO NO. 2018R01761
(GRAND JURY SUBPOENAS TO PAT ROE)

DOE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The Rule 29.6 statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Tellingly, the government says little about the certworthiness of the two questions presented.

The government tries to reframe the first question presented to obscure the clear circuit split, using reasoning that the court of appeals never adopted. Contrary to the government's argument, the Ninth Circuit did not dismiss petitioner's *Perlman* appeal because it involved a question of personal jurisdiction; instead, the court dismissed the appeal *because it did not present a question of privilege*. The Ninth Circuit's privilege-or-nothing approach to *Perlman* conflicts directly with that of seven circuits.

Rather than confront the split, the government argues that it will win if certiorari is granted, or that petitioner will lose on the merits of its appeal if this Court reverses. Neither argument is correct, or a reason not to resolve the split that this case implicates.

The government never addresses the most glaring flaw with its position: without *Perlman*, petitioner may never have the opportunity to seek appellate review of the underlying personal jurisdiction issues. The government says that petitioner should wait for a final judgment to appeal, but there may never *be* a final judgment from which petitioner can appeal.

If this Court resolves the split and sustains appellate jurisdiction, there is no reason to assume that petitioner would lose on the merits of personal jurisdiction. The Roe Subpoenas at issue are far more jurisdictionally intrusive than the Company Subpoena, which undermines the government's attempt to ar-

gue that the outcome on one foreordains the outcome on the other.

On the second question, the government seeks to obviate the relevant split by rewriting what the Ninth Circuit said about the question presented. Three circuits require a link between the relevant jurisdictional contacts used to justify the subpoenas and the evidence the subpoenas demand. The Ninth Circuit requires no nexus; it lets the suspicion of offense alone dictate the scope of personal jurisdiction, contravening this Court's precedents.

This Court should grant certiorari on both questions presented.

I. This case is an ideal vehicle for resolving the entrenched circuit split on the first question presented.

A. The court of appeals thought it lacked jurisdiction under *Perlman* not because it thought personal jurisdiction issues specifically were excluded, but because it believed *Perlman* allowed review of only claims of privilege *and nothing else.* Indeed, the government argued below that *Perlman* required some sort of privilege—not that personal jurisdiction issues were uniquely unsuited for *Perlman* review. C.A. Gov't Br. 8. The Ninth Circuit agreed, acknowledging the split. The government now argues (at 13) that "the decision below does not conflict with the decisions of any other courts of appeals" on whether personal jurisdiction, specifically, is suitable for a *Perlman* appeal. But that is not the question presented, because the Ninth Circuit adopted the broader privilege-or-nothing reasoning *as the government asked*.

On the question decided and presented, there plainly is a split. The majority of circuits reject privilege-or-nothing as the standard; the First, Third, Sixth, Seventh, Eighth, Tenth, and Federal Circuits understand *Perlman* as allowing appeals on privilege *and more.* Pet. 13-16.

The Third Circuit, for example, has held that *Perlman* review stretches beyond just property and privilege interests. *In re Grand Jury*, 111 F.3d 1066, 1074-75 (3d Cir. 1997) (noting that the court "need not characterize [appellants'] interests as [a privilege] in order to find standing," given "*Schmidt*'s reasoning, and particularly its rejection of restricting standing solely to property or privilege interests"). That includes constitutional interests, such as the associational rights at issue in *In re Faltico*, 561 F.2d 109 (8th Cir. 1977), and the due process interest here. The government says that the Third Circuit limits *Perlman* review to instances where "the subpoenas will unduly burden petitioner's business or employees," Opp. 14, but the Third Circuit has explicitly said otherwise. *In re Grand Jury (Schmidt)*, 619 F.2d 1022, 1026-27 (3d Cir. 1980) (noting that it is "not [] viable" to limit *Perlman* just to cases involving invasions of "property interests or privileges," and explaining that infringements of liberty interests may be covered as well); *In re Grand Jury*, 111 F.3d at 1074 (*Perlman* "applies beyond [the] narrow factual and legal circumstances" presented in *Schmidt*). And even if *Schmidt* said what the government says, it would still conflict with the Ninth Circuit's privilege-only bright-line rule.

The government also wrongly claims (at 14) that the Seventh and Federal Circuit's approach to *Perl-*

man is in harmony with the Ninth's. In the Seventh and Federal Circuits, a contractual or similar interest in confidentiality is sufficiently important for immediate appellate review under *Perlman*. *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 665-66 (7th Cir. 2009) (*Perlman* appeal of disclosure that would breach confidentiality provision in arbitration agreement); *Montgomery Ward & Co. v. Zenith Radio Corp.*, 673 F.2d 1254, 1256, 1259 & n.1 (C.C.P.A. 1982) (*Perlman* appeal where a disclosure would breach "guarantees of confidentiality"). Such an interest would not satisfy the Ninth Circuit's *Perlman* standard, as contractual confidentiality is merely a "preference for secrecy" that "does not create a legal bar to disclosure." *Gotham*, 580 F.3d at 665.

Like the Ninth Circuit, the government mistakes the frequency with which privilege appears in *Perlman* cases as a privilege *requirement*. Opp. 15 (citing Pet. App. 12a-13a). As the First Circuit, citing a leading jurisdictional treatise, explains: Claims of privilege are sufficient and "are by far the most common," but not necessary, as *Perlman* "requires only that the appellant have '*a significant interest* in the matters involved.'" *Gill v. Gulfstream Park Racing Ass'n*, 399 F.3d 391, 399 (1st Cir. 2005) (quoting 15B Charles Alan Wright et al., *Federal Practice & Procedure* § 3914.23, at 156 (2d ed. 1991)).

B. The government's two vehicle arguments are unavailing. First, the government says (at 15-16) this case is not a suitable vehicle because the court of appeals has already determined that there is personal jurisdiction over petitioner, and that determination carries over to the merits of petitioner's appeal

of the Roe Subpoenas. Not only are the merits irrelevant to the split over whether courts of appeals should get to *review* the merits, the government's portrayal of the merits is wrong. The Ninth Circuit never signaled how it would rule on the Roe Subpoenas. Nor is the court's treatment of the narrower Company Subpoena a valid proxy. The Second Roe Subpoena asks for virtually everything that Roe has on petitioner, Pet. App. 29a. Such a sweeping demand would effectively require general jurisdiction—something the government has not argued, C.A. Gov't Br. 27, and cannot establish.

The government also argues that there is no need to consider whether the district court had personal jurisdiction over petitioner for the Roe Subpoenas. According to the government, because Roe brought her laptop and cell phone into the United States, it can assert "tag" jurisdiction over those devices by subpoenaing Roe in her personal capacity.[1] Opp. 17. But again, there is no reason to think that the Ninth Circuit would agree with the government's view on the merits, considering that the only court to consider a comparable attempt to evade limits on personal jurisdiction over a corporation has *rejected* the government's position. *In re Sealed Case*, 832 F.2d 1268, 1273 (D.C. Cir. 1987) (observing that "service

[1] Neither *Kiobel ex rel. Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238 (2d Cir. 2018), nor *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968), says otherwise. Opp. 18. *Kiobel* involved documents that had *already been produced* in U.S. litigation by a company with an extensive U.S. presence. *Id.* at 241. *First National* was a case involving "American banks with branches or offices in foreign jurisdictions," 396 F.2d at 898, not foreign corporations whose employees are served with process while visiting the United States.

of a subpoena *duces tecum* on a corporate officer vacationing in the United States would not allow the Independent Counsel access to corporate records absent proof that a United States court had jurisdiction over the corporation itself"), *abrogated on other grounds by Braswell v. United States*, 487 U.S. 99 (1988); *see also* Pet. 19 n.6.

Second, the government argues that *Perlman* review is not available here because Roe is a "high-ranking employee" and not a disinterested third party who might produce petitioner's documents for fear of contempt. Opp. 16. The government even falsely states that Roe "has not demonstrated a willingness to fully comply with the subpoenas." Opp. 16. That is a misrepresentation, pure and simple. Roe, through her separate counsel, has repeatedly informed the district court that she intends to follow its disclosure orders. C.A. ER 209. Indeed, after she was threatened with contempt, Roe agreed to a production schedule, which would have obligated her to produce all relevant, non-privileged documents in a month's time; she halted production only after petitioner obtained a stay of the district court's order. C.A. ER 11-12; C.A. ER 147-48.

Neither Roe's employment nor her rank is dispositive as to whether she is sufficiently "disinterested" to allow the company to assert its important interests in a *Perlman* appeal. *Schmidt*, 619 F.2d at 1024-25 (*Perlman* review may apply for "even an employee"); *e.g.*, *In re Sealed Case*, 107 F.3d 46, 48 (D.C. Cir. 1997) (considering the merits of a *Perlman* appeal brought by a company challenging a subpoena directed at the company's vice president). Thus, despite full briefing on "disinterestedness," the Ninth

Circuit did not adopt the government's position. Instead, it deliberately chose to dismiss petitioner's *Perlman* appeal on a ground on which the circuits are divided. Pet. App. 12a-13a.

C. Much of the government's brief is devoted to the merits of the first question presented. The government argues that pre-disclosure appellate review under *Perlman* is appropriate only when "disclosure to the grand jury would irretrievably destroy [a] privilege or protection." Opp. 12. The government says that petitioner, by contrast, faces no irretrievable loss and thus should await final judgment before appealing. *Id.*

But as this Court pointed out in *Perlman* more than a century ago, there may never *be* a final judgment, and the order of disclosure may prove to be effectively final. *Perlman v. United States*, 247 U.S. 7, 13 (1918) (rejecting the government's position that the appeal is interlocutory to a proceeding "not yet brought and depending upon [the government] to be brought"). The government says that petitioner's opportunity to appeal will surely come, but it never says *when* petitioner can appeal. Nor does it posit that the grand jury can "unsee" evidence that was improperly obtained from a foreign citizen.

The government claims that, because the grand jury has "historically broad investigative power," ordering disclosure that skirts the usual rules of personal jurisdiction "works no . . . 'mischief.'" Opp. 11. But the government does not explain its conclusory assertion, which is wrong in any event. The mischief in cases like this one is two-fold. First, the grand jury can claim extraterritorial reach that violates the Due Process Clause, compelling evidence about an

entirely foreign corporation from a foreign citizen who happens to visit the United States while working for the corporation. Second, if the Ninth Circuit is correct, the grand jury's extraterritorial arrogation is entirely insulated from any sort of meaningful appellate review. That insulation is exactly what *Perlman* rejected. 247 U.S. at 13 (rejecting the argument that "Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way"). The power to seek "every man's evidence" does not override the "basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)). "Every man's evidence" does not encompass everyone in the world.

II. This case also presents an important question of personal jurisdiction on which the circuits are divided.

A. The government does not deny that, in the Second, Seventh, and Tenth Circuits, the relevant inquiry for personal jurisdiction to enforce subpoenas is whether there is "a nexus between (1) the contacts giving rise to jurisdiction, (2) the claim or offensive involved, and (3) the documents or testimony sought in the subpoena." Opp. 24. But the government incorrectly states that the Ninth Circuit followed the same approach. To the contrary, the Ninth Circuit's position is that "the occurrence of the offense itself" is enough to "support a claim of jurisdiction," Pet. App. 15a (quoting *In re Marc Rich & Co., A.G.*, 707 F.2d 663, 667-68 (2d Cir. 1983)), and, because the

suspected offense, if proven, will link petitioner to the United States, that suspicion allows the grand jury's investigative powers to go beyond the sparse jurisdictional contacts.

There can be no dispute that the Company Subpoena does not ask about the contacts giving rise to jurisdiction. The purported contacts on which the Ninth Circuit relied concerned petitioner's investment in a foreign corporation with U.S. activity, and the sharing of office space with that foreign corporation. Pet. App. 16a. The Company Subpoena does not seek any information about that relationship. In the Second, Seventh, and Tenth Circuits, therefore, the Company Subpoena would have been unenforceable for lack of *relevant* jurisdictional contacts. *Leibovitch v. Islamic Republic of Iran*, 852 F.3d 687, 689 (7th Cir. 2017); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014); *Application to Enforce Admin. Subpoena Duces Tecum of SEC v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996). Even *Marc Rich* did not allow the suspicion of an offense alone to justify the exercise of personal jurisdiction; the subpoena in that case related to the foreign corporation's relationship with its U.S. subsidiary. 707 F.2d at 665. Not so here. There is therefore a split on this important jurisdictional issue.

B. The government tries to distinguish the conflicting decisions on which petitioner relies as decisions involving civil subpoenas. Opp. 23. But the personal jurisdiction inquiry is the same whether the subpoena is issued by a civil litigant or a grand jury; only the burden of proof is different. Indeed, the Second Circuit in *Marc Rich* borrowed from civil cases (including *International Shoe*) to assess the pro-

priety of a grand jury subpoena. And civil decisions are likewise informed by criminal personal jurisdiction rulings; at least one court has cited a grand jury subpoena case in deciding whether to enforce a civil subpoena. *Estate of Ungar v. Palestinian Auth.*, 412 F. Supp. 2d 328, 331 (S.D.N.Y. 2006) (citing *Sealed Case*, 832 F.2d at 1272-73), *aff'd*, 332 F. App'x 643 (2d Cir. 2009).

C. In a transparent attempt to cloud the split with case-specific issues, the government introduces facts that are irrelevant to the jurisdictional inquiry and, in any event, are not the facts on which the courts of appeals relied. Opp. 22-23. The relevant inquiry here is whether contacts relating to petitioner's work with the Firm, a foreign corporation that was formerly a subsidiary, are sufficient to establish personal jurisdiction to enforce a subpoena that asks nothing about that relationship, merely on the government's suspicion that there may be some link between those contacts and offenses against the United States. Pet. 26-31.

Most of the facts that the government offers are not jurisdictionally relevant because (1) they are not petitioner's contacts,[2] (2) there is no evidence that those contacts occurred in the United States, or (3)

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[2] Opp. 20, 21 (discussing individuals who allegedly "used their personal funds" "to help found [petitioner]" or "invest[ed] substantial amounts of their own money in [petitioner]"). *But see Walden v. Fiore*, 571 U.S. 277, 284 (2014) (personal jurisdiction "must arise out of contacts that the 'defendant *himself*' creates with the forum State").

they are not contacts at all, just the government's musings about whether a crime has occurred.[3]

The remaining contacts—all of which relate to the activities of petitioner's purported subsidiaries, and on which the government principally relies—demonstrate just how far the Ninth Circuit departed from the fundamental personal jurisdiction principles applied by this Court and other circuits. The government proposes to use a parent corporation's contacts with purported U.S.-affiliated subsidiaries as a reason to pry into *other* aspects of the parent corporation's affairs that are not related to the contacts with subsidiaries.[4] That prying cannot be done under general jurisdiction, because this Court squarely rejected the proposition that foreign corporations are subject to general jurisdiction "whenever they have an in-state subsidiary or affiliate," *Daimler AG v. Bauman*, 571 U.S. 117, 136 (2014), and the government never argued alter ego or any other theory allowing for the imputation of contacts. And the Ninth Circuit's sister circuits would rule out specific jurisdiction, as the Company Subpoena asks for

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[3] *E.g.*, Opp. 21 (arguing "[t]he financial structure of the entities at issue was enough to create a likelihood of criminal conduct").

[4] The government raises allegations about a different subsidiary of petitioner—not the Firm—that stopped operating in 2015, and went out of existence in 2017. *See* C.A. ER 235. The alleged "five employees 'in the US,'" "business card with a United States address and phone number," and "United States bank account" all relate to that subsidiary. Opp. 23. Critically, the court of appeals makes no mention of that subsidiary in its jurisdictional analysis, likely because the government did not offer any coherent theory to link that subsidiary to the offenses being investigated by the grand jury.

nothing related to the potential jurisdictional contacts.

This Court should grant certiorari to ensure that the Ninth Circuit's anomalous approach to personal jurisdiction does not persist, and to confirm, as the majority of circuits have done, that the same due process rules apply to subpoenas (grand jury or otherwise) and every other form of process. The government's inchoate suspicion is no basis to require a foreign corporation to answer for matters that are entirely unrelated to its presence in the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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