No. 21-1364

IN THE

Supreme Court of the United States

MORDECHAI KORF *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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May 20, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Amici are a number of retired federal judges: Hon. Mark W. Bennett (Ret.), Hon. Andre M. Davis (Ret.), Hon. Nancy Gertner (Ret.), Hon. John Gleeson (Ret.), Hon. Thelton E. Henderson (Ret.), Hon. A. Howard Matz (Ret.), Hon. Shira A. Scheindlin (Ret.), and Hon. Thomas I. Vanaskie (Ret.)

Individually and collectively, *Amici* have vast experience in presiding over federal litigations at the trial and appellate levels. They have grappled with issues relating to the attorney-client privilege and work product doctrine in all manner of disputes. This gives them a unique perspective on the importance of the privilege, how it applies in practice, and appropriate procedures to safeguard it especially in the criminal justice context.

As described herein, *Amici* are concerned that the practice of government "filter team" review of potentially privileged material risks serious damage to the privilege in this particular case and to the broader policy underlying the privilege. *Amici* respectfully submit that this practice should not be permitted. Instead, courts should make use of special masters to oversee the review of potentially privileged material and related disputes.

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amici Curiae* state that counsel for all parties received timely notice of and consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part, and that no person or entity aside from counsel for *Amici Curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The purpose of the attorney-client privilege is to encourage frank communications between attorney and client. For this policy to work, courts must ensure that the privilege is not violated. This is especially so in the criminal context, where fairness, and the appearance of fairness, are essential to public confidence in the justice system.

To that end, the general rule obviously is that the government may not view privileged material. This rule is relatively easier to enforce when the government requests documents by subpoena, in which case the target can withhold documents claimed to be privileged. The government can challenge such claims, and the court can decide the dispute by *in camera* review of the documents. But when the government seizes material pursuant to a warrant—especially material from a law office or in-house counsel office—the government may very well have such protected material already. Special care is needed to ensure that government review of that material does not undermine public confidence in the privacy of communications with counsel.

The government maintains that in this context it is permissible to use a "filter team"—*i.e.*, a team of government lawyers or agents ostensibly with no connection to the criminal investigation at issue—to review material for privilege. Here, the government argues for a protocol under which the filter team can review documents over which the defendant claims privilege in order to mount challenges thereto. The Court of Appeals for the Eleventh Circuit approved this process. *See In re Sealed Warrant ("Korf")*, 11 F.4th 1235, 1243, 1248-52 (11th Cir. 2021).

Because this would allow the government to review potentially privileged material—without any judicial determination that the privilege does not apply—there is a risk of serious harm to the privilege. Indeed, the public may perceive there to be something illegitimate about government lawyers reviewing privileged material. And there are numerous instances of errors in the filter team process that tend to bear out that concern. Such perceptions of conflict and unfairness could have the effect of chilling attorney-client communications and even undermine the Sixth Amendment right to counsel.

Amici suggest instead that, where the government possesses potentially privileged material, a special master be appointed to oversee the process—*e.g.*, conducting the initial privilege review and ruling on challenges to a privilege log. Special masters are well-suited for this exercise. *First*, as neutral arbiters of privilege determinations, they can make privilege calls based on information provided in confidence and without fear of leaks or inadvertent errors. *Second*, as experienced lawyers, there is good reason to expect that they will make the right calls. *Third*, they will alleviate docket congestion and help expedite the process. And *finally*, their impartial status would promote confidence in the process.

The petition for a writ of certiorari should be granted, and the Eleventh Circuit should be reversed.

ARGUMENT

I. THE ROLE OF PRIVILEGE IN OUR LEGAL SYSTEM

A. General Principles

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance . . . ." *Fisher v. United States*, 425 U.S. 391, 403 (1976). The "central" justification for the privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *United States v. Zolin*, 491 U.S. 554, 562 (1989) (internal citations and quotation marks omitted). Absent the protection of the privilege, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher*, 425 U.S. at 403.

Similarly, the work-product doctrine recognizes that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). This is especially true in the criminal context, where "[t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). The doctrine therefore gives qualified protection for

materials prepared by an attorney in anticipation of litigation. *See id.*

These policies inform any rule about privilege, *Zolin*, 491 U.S. at 562, and they are especially important in the criminal context, where they implicate a defendant's constitutional right to counsel. *See DeMassa v. Nunez*, 770 F.2d 1505, 1507 (9th Cir. 1985) (describing Sixth Amendment as source of expectation for privacy in attorney-client privilege); *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981) ("The essence of the Sixth Amendment right to effective assistance of counsel is, indeed, privacy of communication with counsel.").

B. Protecting the Privilege in the Ordinary Course

Given these considerations, the general rule is that the government cannot access privileged material. Indeed, "an adverse party's review of privileged materials seriously injures the privilege holder." *In re Search Warrant ("Baltimore Law Firm")*, 942 F.3d 159, 175 (4th Cir. 2019).

Thus, for example, when the government seeks documents in the context of a grand jury subpoena, the subject may withhold documents claimed to be privileged. The privilege holder would then produce a log to describe the withheld documents with "sufficient information about the privilege claims that the government could intelligently evaluate appellants' assertions by reviewing the log." *In re Grand Jury Subpoenas ("Winget")*, 454 F.3d 511, 516 (6th Cir. 2006); *see also* Fed. R. Civ. P. 26(b)(5) (providing that party making privilege claim must "describe the nature of the documents . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim"). The

government may then challenge claims of privilege and seek a judicial ruling on the issue.

On such a challenge, the court can review the document at issue *in camera*, but *only* upon a showing that the privilege likely does not apply:

> [B]efore a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the [privilege] exception's applicability.

Zolin, 491 U.S. at 574. This means "a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Id.* at 572 (internal citation and quotation marks omitted); *see also In re Grand Jury Investigation*, 974 F.2d 1068, 1074 (9th Cir. 1992) ("[T]he standard established in *Zolin* for crime-fraud *in camera* review applies equally well when a party seeks *in camera* review to contest assertions of the privilege."). Notably, to make the required showing, the government may rely only on "any *nonprivileged* evidence"—*i.e.*, it may not review the underlying material to make the argument. *See Zolin*, 491 U.S. at 574 (emphasis added).

II. GOVERNMENT FILTER TEAMS CREATE UNACCEPTABLE RISKS

These procedures in the ordinary course are upended in the "filter team" context, where government attorneys get access to privileged materials *before* the privilege can be asserted by the privilege-holder, and

privileged documents may be used to inform arguments that the privilege should not apply.

A. The Use of Filter Teams in the Context of Seized Documents

When the government seizes documents pursuant to a warrant, especially from a law firm or in-house counsel's office, difficult issues can arise about how to protect the privilege. In those circumstances, the government already possesses material that may well be privileged but without any judicial determination that the privilege does not apply. Courts have therefore recognized that "a law office search should be executed with special care to avoid unnecessary intrusion on attorney-client communications." *Nat'l City Trading Corp. v. United States*, 635 F.2d 1020, 1026 (2d Cir. 1980). For similar reasons, the ABA *Model Rules* also impose an obligation on prosecutors to avoid subpoenaing a lawyer absent special circumstances. *See* MODEL RULES OF PRO. CONDUCT R. 3.8(e) (AM. BAR ASS'N 1983).

One approach the government sometimes proposes in these circumstances is a review of the material by a "filter team." A filter team theoretically is "walled off" from the investigation team, and the idea is that they can therefore review the documents for privilege without tainting the prosecution team.

Filter team procedures can vary. In some cases, the filter team will provide documents it deems not privileged directly to the prosecution team, without any second-level review. *See, e.g., Baltimore Law Firm*, 942 F.3d at 166. In the instant proceedings, the privilege holder may conduct an initial review of the potentially privileged material and prepare a log to substantiate any privilege claims. But the filter team

may then view any documents claimed to be privileged for purposes of mounting privilege challenges. *See Korf*, 11 F.4th at 1243.

But in any case, filter team review necessarily involves prosecutors—and sometimes even non-lawyers—seeing potentially privileged material without any judicial determination of the privilege's applicability. The use of filter teams therefore runs headlong into *Zolin*, which barred *in camera* review even *by the court* absent a preliminary showing that the document is not privileged. 491 U.S. at 572, 574; *see also id.* at 571 ("There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions[.]").

As discussed below, there is good reason for the Court to make clear that filter team review of this sort is impermissible.

B. Risks of Filter Team Review

The risks of filter teams are well-documented. As the Sixth Circuit has noted, they "present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors." *Winget*, 454 F.3d at 523; *see also United States v. Gallego*, No. CR-18-01537-001-TUC-RM (BPV), 2018 WL 4257967, at *2 (D. Ariz. Sept. 6, 2018) ("[F]ederal courts have generally taken a skeptical view of the Government's use of 'taint teams' as an appropriate method for determining whether seized or subpoenaed records are protected by the attorney-client privilege." (internal quotation marks omitted)).

The chief risk comes from the inevitable conflict of interest involved. Prosecutors are of course bound to

respect the privilege.[2] And *Amici* do not mean to suggest that government attorneys do not act with integrity. Yet prosecutors obviously have an interest in furthering government investigations and prosecutions—after all, that is what they do for a living. As the Sixth Circuit has explained:

> [T]he government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations.

Winget, 454 F.3d at 523.

This apparent conflict is easily recognized by the public. "For those [affected] clients — and to the public at large — it surely appears . . . that 'the government's fox has been left in charge of the Law Firm's henhouse.'" *Baltimore Law Firm*, 942 F.3d at 182 (alterations omitted; quoting *Winget*, 454 F.3d at 523); *see also In re Search Warrant for Law Offices*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) ("It is a great leap of faith to expect that members of the general public would believe any such [ethical] wall would be

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[2] For example, the Justice Department Manual provides that when dealing with a law office search, "close control" should be exercised "[b]ecause of the potential effects of this type of search on legitimate attorney-client relationships . . . ." Section 9-13.420. More generally, the ABA Criminal Justice Standards for the Prosecution Function 3-1.2(b) provide that "[t]he prosecutor should seek to . . . respect the constitutional and legal rights of all persons, including suspects and defendants." *See Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

impenetrable; this notwithstanding our own trust in the honor of an AUSA."). Such a perception tends to undermine the policy objective of the privilege—*i.e.*, to encourage frank communication with counsel.

And this is not just an issue of perception. Errors (intentional or otherwise) do happen. For example, "[i]t is reasonable to presume that the government's taint team might have a more restrictive view of privilege" than a defendant. *See Winget*, 454 F.3d at 523. In the case below, for instance, the filter team initially proposed to review only communications that were to or from attorneys. *Korf*, 11 F.4th at 1242-43. However, a document of course could be privileged without the presence of a lawyer if it *reflects* legal advice. And a filter team lawyer likely would not be familiar enough with the relationship or document at issue to appreciate when that might be the case. Thus, a filter team might erroneously pass along to the prosecution team such a document. *See, e.g., Winget*, 454 F.3d at 523.

In addition, it is difficult to effectively "wall off" government lawyers. This is especially so where the filter team comes from the same district (or even same office) as the prosecuting team. In other contexts, ethical rules recognize the inherent risk of such a situation. For example, where an individual attorney has a conflict of interest, professional conduct rules often impute that conflict to everyone at that individual's firm—*i.e.*, an ethical wall is generally not sufficient. *See* MODEL RULES OF PRO. CONDUCT R. 1.10 (AM. BAR ASS'N 1983).[3] This rule was put in place in

[3] The imputed conflict rule has been adopted by most states. *See* CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N (Jan. 2,

part because of the practical reality that confidential information is shared freely among lawyers at a law firm. *See* Paul R. Taskier & Alan H. Casper, *Vicarious Disqualification of Co-Counsel Because of "Taint*," 1 GEO. J. OF LEGAL ETHICS 155, 155-157 (1987). It is reasonable to assume that the same risks are present in a prosecutor's office.[4]

The risk of sharing potentially privileged information among prosecutors is heightened when the material relates to more than one investigation. Increasingly, these materials are comingled on electronic storage mediums such as laptops or email accounts. Thus, a filter team that might be "walled off" from one investigation might be involved in another that *does* concern the material under review. The Fourth Circuit, noting this tension, observed, "[i]t would be difficult for reasonable members of the public to believe" that a filter team would disregard information "relevant to other criminal inquiries in [the district]." *Baltimore Law Firm*, 942 F.3d at 182; *see also United States v. Stewart*, No. 02 Cr. 396 JGK, 2002 WL 1300059, at *7 (S.D.N.Y. June 11, 2002) (where multiple files are involved, "it is impossible to know" whether the government's search terms "might nevertheless inadvertently pick up some non-responsive and privileged materials").[5]

2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_10.pdf.

[4] By analogy, courts deem a prosecutor to know of exculpatory *Brady* material when anyone on the "prosecution team" has such knowledge. *See United States v. Hunter*, 32 F.4th 22, 36 (2d Cir. 2022); *United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019).

[5] The plain view doctrine compounds this concern. In other words, during a filter team review, a government agent might seek to seize additional materials about other clients in the

In light of the above, it is unfortunately not surprising that there have been many leaks from filter teams. To take just a few examples:

- In *United States v. Noriega*, the government recorded Manuel Noriega's phone calls from prison, some of which were with his attorney. 764 F. Supp. 1480 (S.D. Fla. 1991). A DEA agent was assigned to review the recordings for privilege, but ultimately, privileged material was provided to the prosecuting attorney and some material even made its way to CNN.[6]
- In *United States v. Elbaz*, a filter team made numerous errors, including uploading unfiltered material to the prosecution team's database, thus giving prosecutors access to many privileged communications. 396 F. Supp. 3d 583, 589 (D. Md. 2019).
- In other instances, prosecutorial teams have simply overlooked materials that should have been recognized as protected. *See, e.g., United States v. Milk*, No. CR. 16-50149-03-JLV, 2020 WL 6255653 at *2, *6 (S.D. Oct. 23, 2020) (taint team attorney overlooked work product to aid

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course of reviewing a lawyer's files. *See Baltimore Law Firm*, 942 F.3d at 182 (criticizing filter team protocol where "government has never disclaimed an intention to use the plain-view doctrine").

[6] As evident from *Noriega*, the risks of error are compounded when filter teams rely on non-attorneys to make privilege determinations "[b]ecause of the legal nature of the privilege issues involved." *In re Search of Electronic Commc'ns*, 802 F.3d 516, 530 & n.54 (3d Cir. 2015). Even when not directly reviewing for privilege, non-lawyers still pose risks because they are not "bound by the ethical considerations which affect a lawyer." *In re Search Warrant for Law Offices*, 153 F.R.D. at 59.

attorney's cross examination of government witnesses).

* * *

For the foregoing reasons, filter teams pose serious risks to the criminal justice process. Indeed, individual defendants and the public at large reasonably could believe that, when a filter team is involved, their private communications with counsel could end up in prosecutors' hands.

III. SPECIAL MASTERS ARE WELL-SUITED TO OVERSEE PRIVILEGE REVIEW

Amici believe that a different approach is needed. Because determining issues of privilege is, fundamentally, a judicial function, the matter should be overseen by the court, not the executive branch. *See Baltimore Law Firm*, 942 F.3d at 181 (holding that court "erred in assigning judicial functions to the Filter Team"). In other words, there should be a judicial process to determine whether a document is privileged before the government is allowed to review it. *Amici* respectfully submit that the best way to address this is to appoint a special master. This would both lend legitimacy to the process and allow for the efficient resolution of questions of privilege.

Special masters have become an increasingly useful resource for federal courts, including in this context.[7] It is well-settled that courts may appoint "persons unconnected with the court to aid judges in the

[7] *See generally* Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479 (2009). The Justice Department Manual expressly acknowledges the possibility for special master review of potentially privileged material. § 9-13.420.

performance of specific judicial duties[.]" *In re Peterson*, 253 U.S. 300, 313 (1920); *see also* Fed. R. Civ. P. 53(1)(C) (allowing appointment of special masters to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district"). Special masters also must not have a "relationship to the parties, attorneys, action, or court" that would require disqualification of a judge. Fed. R. Civ. P. 53(a)(2); *see also* 28 U.S.C. § 455.

Special masters are especially well-suited to oversee the privilege review process required in criminal cases like this one. For example, a special master could conduct the initial review of privileged material directly, as was ordered in connection with the seizure of material from former President Donald J. Trump's ex-lawyer Michael Cohen. *See* Order of Appointment, *In re Search Warrants*, No. 18-MJ-3161(KMW), (S.D.N.Y. Apr. 27, 2018), ECF. No. 30. Alternatively, the defendant could prepare a privilege log, and the special master could hear any government challenges thereto. *See, e.g., Winget*, 454 F.3d at 523-24 (providing that special master would segregate materials with search terms, and then privilege holder could review and produce a log). Whatever the format, special master involvement is superior to the use of a filter team. This is so for a number of reasons:

First, special masters can make privilege calls based on information provided in confidence and without the fear of leaks or inadvertent errors that comes with use of a filter team. As the Fourth Circuit explained:

> Unlike the Filter Team, [] a magistrate judge and a special master are judicial officers and *neutral* arbiters that have no stake in the outcome of the privilege decisions.

Baltimore Law Firm, 942 F.3d at 181 n.19; *see also* Gretchen C. F. Shappert & Christopher J. Costantini, *Recent Case Law Developments Involving the Crime-Fraud Exception: The Attorney-Client Privilege, Filter Team Protocols, and Other Privileges*, 69 DOJ J. FED. L. & PRAC. 289, 326 (2021) ("Appointment of a special master to conduct the initial document review removes any suggestion that the process is influenced by participation of USAO personnel in the initial evidence review.").

Second, a special master—often a retired judge or other experienced practitioner[8]—presumably would be well-versed in issues of privilege. When raising disputes with a special master, both sides could therefore be confident that their arguments would receive a fair and reasonable hearing. *See, e.g.*, Order of Appointment, *In re Search Warrants*, No. 18-MJ-3161(KMW), ECF. No. 30 (appointing former federal judge as special master to review Michael Cohen documents); *Stewart*, 2002 WL 1300059, at *9 (appointing respected criminal defense attorney as special master). Of course, any challenges to a special master's ruling could be brought to the district court.

Third, special masters can help to promote judicial efficiency. Docket congestion may make it difficult for a district court to manage all privilege disputes effectively. Special masters can help to alleviate that burden. *See, e.g., Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 601 n.4 (5th Cir. 2021) (noting the court need not "pars[e] through reams" of

[8] *See, e.g.*, George C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, Judicature (2015); Thomas E. Willging, et al., *Special Masters' Incidence and Activity*, FED. JUD. CTR. (2000), https://www.uscourts.gov/sites/default/files/specmast.pdf.

documents because it "could engage a magistrate judge or special master to review the potentially privileged documents"); *Winget*, 454 F.3d at 524 (noting that court has "authority to issue reasonable deadlines" to avoid delay in special master process).[9] And given their status as neutrals, special masters can work closely with the parties to develop workable procedures to resolve matters expeditiously. *See, e.g., Stewart*, 2002 WL 1300059, at *10 (authorizing special master to "meet with the parties and to employ any procedures for review that may help ensure an accurate, impartial and expeditious review").[10]

Finally, use of a special master would promote public confidence in the privacy of privileged communications with counsel. Indeed, public perception of fairness has motivated several prominent appointments of special masters. For example, in *United States v. Stewart*, the government seized files from the office of attorney Lynne Stewart, who was alleged to have provided material support to terrorist activity by Sheikh Abdel Rahman. 2002 WL 1300059. The court rejected the government's proposal for a filter team, noting the potential risks in the law office search

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[9] *See also* ABA House of Delegates, *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*, AM. BAR ASS'N, 1, 4 (Jan. 2019), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2019/100-midyear-2019.pdf ("Special masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.").

[10] *See, e.g.*, Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 411 (1986) (noting that special masters can "discourage[] posturing for some undeserved tactical advantage," and may be "well positioned to suggest cost-effective, cooperative methods for sharing or acquiring information.").

context. *Id.* at *6-7 (noting that "at least three courts that have allowed for review by a government privilege team have opined, in retrospect, that the use of other methods of review would have been better"). Instead, the court appointed a special master, explaining:

> [I]t is important that the procedure adopted in this case not only be fair but also appear to be fair. The appearance of fairness helps to protect the public's confidence in the administration of justice and the willingness of clients to consult with their attorneys.

Id. at *8 (collecting cases). Other courts have appointed special masters for similar reasons—*i.e.*, to "help protect the public's confidence in the administration of justice." *See, e.g., In re Search Warrant dated Nov. 5, 2021*, No. 21 Misc. 813 (AT), 2021 WL 5845146, at *2 (S.D.N.Y. Dec. 8, 2021) (internal alterations omitted); *Gallego*, 2018 WL 4257967, at *3-4 (appointing special master to review privileged material from law office search).

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should grant the petition for certiorari and reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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May 20, 2022