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 *Amici Curiae* Professors of Criminal Law and Legal Ethics in Support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice of *amici*'s intent to file this brief, and consented in writing to its filing.

[2] *See* Ellen S. Podgor & Wilma F. Metcalf, *The Fox Guarding the Henhouse: Government Review of Attorney-Client Privileged Material in White Collar Cases*, 103 B.U. L. Rev. (forthcoming 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4087032.

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SUMMARY OF ARGUMENT

The use of government "filter teams" to review assertedly privileged material seized by the government raises grave concerns about the protection of client confidences. As numerous courts have recognized, any such process fundamentally undermines the attorney-client privilege and the work product doctrine. Moreover, the practical reality is that government filter teams are inclined to take a relatively narrow view of privilege, suffer from a lack of information needed to reliably assess privilege, and are prone to errors—which, when they happen, can be difficult or impossible for anyone outside the government to detect. Such processes do not adequately protect the attorney-client privilege, and they undermine public confidence in the fundamental fairness of the judicial process. These concerns are particularly acute where, as here, the search includes the files and electronic devices of attorneys representing the subject of the investigation.

These serious problems are not merely theoretical, as numerous examples of filter-team failures show. In cases across the nation, government filter teams have failed to screen documents for privilege or failed to identify privileged material they did screen, with the result that prosecution teams have received, reviewed, and in some cases used privileged material in their investigations. Even worse, in many of these cases the government failed to recognize the problem or failed to report it to the court or to defense counsel—which raises the realistic prospect that the failures of which the public is aware may be merely the tip of the iceberg.

Recognizing these inherent flaws in filter teams, courts increasingly have adopted alternative approaches that better protect client confidences. The Eleventh Circuit's decision in this case erroneously rejected those approaches and failed to recognize the serious problems with filter teams. This Court should grant certiorari to provide crucial guidance to courts nationwide on this important issue.

ARGUMENT

I. The Use of Government "Filter Teams" Imperils Client Confidences and Weakens the Actual and Perceived Fairness of Judicial Proceedings.

As the Petition explains, the Courts of Appeals are divided over how to implement this Court's existing precedent regarding the attorney-client privilege and work product doctrine in the context of searches and seizures, and this Court's review is needed to resolve that disagreement. Numerous courts have recognized, correctly, that permitting government filter teams to review assertedly confidential attorney-client material undermines those essential protections, creates a significant risk that privileged documents will be disclosed to the investigation team, and jeopardizes public confidence in the fairness of judicial proceedings.

1. Any review of a criminal defendant's privileged material by government agents as part of a filter team undermines the fundamental purpose of the attorney-client privilege—"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."

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). "The whole point of privilege is privacy." *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 599 (5th Cir. 2021).

The same is true of the work product doctrine, which "most frequently is asserted as a bar to discovery in civil litigation," but which plays an "even more vital" role "in assuring the proper functioning of the criminal justice system." *United States v. Nobles*, 422 U.S. 225, 237-38 (1975). As this Court has long emphasized, if attorney work product were discoverable by the client's adversary, "much of what is now put down in writing would remain unwritten," and "the interests of the clients and the cause of justice would be poorly served." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

Together, these principles cordon off a "privileged area" in which lawyer and client may plan and present a defense. *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 174 (4th Cir. 2019) (citation omitted). As courts have increasingly come to recognize, the effect of using a government filter team is to invade that privileged area. *See, e.g.*, *id.* at 174-75. Clients will be less likely to share confidences with their attorneys, and attorneys will be less likely to create work product, if they know that government agents may review their materials. That the government agents reviewing privileged communications may be segregated from one particular investigation is cold comfort—especially because the government reserves the right, consistent with the plain-view doctrine, to use in other criminal inquiries any information that its agents learn as part of a filter team. *See id.* at 183 & n.21.

Filter-team processes therefore are likely to have a chilling effect on attorney-client communications and

on attorney-led factual investigations, including internal investigations into alleged corporate wrongdoing. Such investigations generate privileged materials that would be especially useful to government investigators, if they were allowed access to them. *See Upjohn*, 449 U.S. at 396. Notably, in one criminal case that involved a raid on the defendant's congressional office, the D.C. Circuit Court of Appeals rejected use of a filter team to review documents potentially protected by the Speech or Debate Clause out of concern that the process could "chill the exchange of views with respect to legislative activity." *United States v. Rayburn House Office Building, Room 2113*, 497 F.3d 654, 661 (D.C. Cir. 2007). So too, the use of filter teams to review potentially privileged documents threatens to chill the exchange of information and views between attorney and client.

The availability of filter-team processes only in the context of a search and seizure may also provide a perverse incentive to proceed in that manner. Respect for the principles underlying the attorney-client privilege dictates that, where prosecutors must obtain evidence from lawyers or represented parties, they should use the least intrusive practicable means—a proposition that in some instances is codified by statute and in the Department of Justice Manual. *See* 42 U.S.C. § 2000aa-11(a); U.S. Dep't of Just., Just. Manual § 9-13.420 (2021), *available at* https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.420. But when the government does proceed under a means less intrusive than search and seizure, such as by subpoena, courts have been unwilling to approve filter-team processes. *See In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (rejecting such a process because "the government does not actually possess the potentially-

privileged materials here, so the exigency typically underlying the use of taint teams is not present"); *United States v. Taylor*, 764 F. Supp. 2d 230, 234 (D. Me. 2011) (noting that courts have generally required preliminary review by defense counsel "where the government has not yet obtained the records"); *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006) (similar). Insofar as the government views filter-team procedures as advantageous—which it evidently does in many cases—this incentive structure is troubling.

2. In addition, the use of government filter-team agents to screen potentially privileged material is beset with numerous practical problems.

For one thing, "[i]t is reasonable to presume that the government's taint team might have a more restrictive view of privilege than [the defendant's] attorneys. *In re Grand Jury Subpoenas*, 454 F.3d at 523. That more restrictive view, understandable "given their prosecutorial interests in pursuing the underlying investigations," may "cause privileged documents to be misclassified and erroneously provided to an investigation or prosecution team." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 177.

This problem is exacerbated by the fact that the filter team frequently lacks information necessary to assess privilege. "The inquiry into whether documents are subject to a privilege is a highly fact-specific one" that requires taking context into account. *In re Grand Jury Proc.*, 220 F.3d 568, 571 (7th Cir. 2000). For example, a document not sent to or from a lawyer could be privileged, depending on the nature of the document, the purpose(s) for which it was created, and other factual circumstances, information that a filter team is unlikely to possess. *See,*

e.g., *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014). As one treatise explains:

> The privileged status of many communications is not apparent on their face. This, of course, is why privilege proponents generally have to supply supporting materials to opposing parties and the reviewing judicial officers when their claims are made. None of this often essential information can even be made available to the members of the taint team because they cannot reveal the contents of any of the seized communications to those who could supply it. As a consequence, this taint team process will necessarily result in a large number of false negatives—privileged documents that are not recognized as such.

Paul R. Rice, *Attorney-Client Privilege in the U.S.* § 11:19 (2d ed. 2021). A related problem, which occurred in one case discussed below, arises when filter-team members also make determinations about which documents are relevant or exculpatory.

For these and other reasons, when government filter teams review assertedly privileged material, mistakes—and sometimes misconduct—are too often the result. Filter teams in numerous cases "have been implicated in the past in leaks of confidential information to prosecutors. . . . [H]uman nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations." *In re Grand Jury Subpoenas*, 454 F.3d at 523; *see infra* Part II. Reliance on such procedures, "especially in the context of a criminal prosecution, is highly questionable, and should be discouraged," as leaks may indeed be "inevitable." *In re Search Warrant for*

Law Offices Executed on March 19, 1992, 153 F.R.D. 55, 59 (S.D.N.Y. 1994).

The practical problems with filter teams are not limited to the investigation at issue. Members of the filter team may become involved in another investigation or prosecution in which information they learned on the filter team becomes relevant, whether or not they realize it. In light of its fact-specific nature, this issue cannot be addressed through government screening procedures, and the defendant may never learn sufficient information about the two investigations to detect or raise the issue. Even the former filter-team member might not recall when or how she learned the information. But once information protected by the attorney-client privilege or work product doctrine "is revealed to the police, the privileges are lost, and the information cannot be erased from the minds of the police." *O'Connor v. Johnson,* 287 N.W.2d 400, 405 (Minn. 1979).

3. Finally, as courts have noted repeatedly, the use of filter teams undermines public confidence in the fundamental fairness of judicial proceedings. As one court observed, "The appearance of Justice must be served, as well as the interests of Justice. It is a great leap of faith to expect that members of the general public would believe any such [ethical] wall would be impenetrable; this notwithstanding our own trust in the honor of an AUSA." *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. at 59; *see also United States v. Gallego*, No. 4:18-cr-1537, 2018 WL 4257967, at *2 (D. Ariz. Sept. 6, 2018) ([E]ven if no leaks occur, the use of walled-off taint teams undermines the *appearance* of fairness and justice."); *Preventive Med. Assocs., Inc. v. Massachusetts*, 992 N.E.2d 257, 272 (Mass. 2013) ("[U]se of an independent special master offers a far greater

appearance of impartiality and protection against unwarranted disclosure and use of an indicted defendant's privileged communications.").

This problem is significantly compounded by the fact that the filter-team process is conducted behind closed doors under the government's own supervision, making it difficult if not impossible for anyone outside the government to know whether an unauthorized disclosure of privileged information has occurred. "[T]he secretive nature of cases in which taint teams are often employed leave many accounts of botched procedures that result in privilege leaks relegated to rumor or sealed judicial memoranda." Roland Behm et. al., *"Trust Us:" Taint Teams and the Government's Peek at Your Company's Privileged Documents*, ACC Docket, June 2010, at 74, 82-83. In short, the use of filter teams calls into question the fairness of judicial proceedings where privilege is at issue.

II. Filter Teams in Numerous Cases Have Failed to Protect Defendants' Rights in Privileged Material.

Despite the lack of transparency that makes filter-team failures so difficult to identify, some severe failures to protect defendants' privileged material have come to light over the years, along with at least one recent case in which a filter team failed to protect the defendant's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Disturbingly, these failures typically were revealed by accident rather than through any forthright admission by the government—and in some cases, the government refused to acknowledge any error even as it faced sanctions for misconduct.

Examples of the failures of filter teams include:

1. *Harbor Healthcare System v. United States*:

After Harbor Healthcare System ("Harbor") became the subject of two *qui tam* lawsuits alleging False Claims Act violations, the company received investigative demands from the U.S. Department of Health and Human Services and the Department of Justice ("DOJ") Civil Division. The company responded to the demands, led by its compliance director and outside counsel. *See Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 595 (5th Cir. 2021). The local U.S. Attorney's Office ("USAO") subsequently executed a search warrant on Harbor offices, seizing huge swaths of data, including recent privileged communications with outside counsel regarding the investigative demands. *See id.* at 596.

As in the case now before this Court, in *Harbor* the government assembled a filter team from a different division of the USAO handling the investigation, received from the company a list of lawyers and law firms, and set up a process by which the company should be able to challenge the filter team's privilege determinations. Yet when the company did so, the government refused to respond, and failed to return or delete privileged material. Eventually, Harbor received a list of documents the government had already transferred to civil and criminal investigators, which included "a significant number of privileged documents." *Id.* at 597.

The Fifth Circuit found that the government "show[ed] a 'callous disregard' for Harbor's rights" and "made no attempt to respect Harbor's right to attorney-client privilege in the initial search." *Id.* at 599. Moreover, "by its treatment of Harbor's privileged materials after the search," the government "further disregarded Harbor's rights" when it refused

to destroy or return copies of documents that it agreed were privileged. *Id.*

2. *United States v. Sullivan*:

Because defendant Leihinahina Sullivan was represented by counsel when the government executed a search warrant at her residence, the government established a filter team to review all seized materials. That team failed to identify as privileged, and therefore sent to the prosecution team, four photographs of defense "strategy boards" related to the pending case. *United States v. Sullivan*, No. 17-cr-104, 2020 WL 1815220, at *6 (D. Haw. Apr. 9, 2020). The court found that a filter-team agent was unable to open the relevant computer files and so, rather than taking even "minimal" extra steps to protect the defendant's rights, simply "*presumed* the documents were not privileged and thus provided them to the prosecution team." *Id.* at *8-9. The defendant, who represented herself *pro se*, identified the privileged documents while reviewing discovery in pretrial detention and brought them to the court's attention. *Id.* at *4 & n.11.

The court observed that the filter-team agent "demonstrat[ed] a total disinterest in both the rights of Defendant and the court's expectation that the taint team would fulfill its obligation to the court," even after learning that he had violated both. *Id.* at *8. The government's filings similarly reflected an "astonishing" and "disappointing lack of recognition of this wrongdoing." *Id.* at *9. Indeed, the government, while recognizing that the filter team had disclosed privileged documents to the prosecution team, argued that "there was no improper disclosure" because technically "there was no failure to follow taint review protocols," an argument the court rightly characterized as "shocking." *Id.* at *9 & n.20.

The court sanctioned the government for the "reckless and grossly negligent conduct" of the filter team and found that "the United States' conduct cannot be described as a mistake or honest disagreement of opinion; instead, it demonstrated a clear lack of concern for Defendant's rights and its obligations to this court." *Id.* at *10.

3. *United States v. Avenatti*:

Invasion of the attorney-client privilege is not the only harm that can result from the use of a filter team, as the recent mistrial in the *Avenatti* case illustrates.

In declaring a mistrial, the district court found that the filter team had failed to provide to the prosecution team—and consequently, the government failed to provide to Avenatti—material the government was required to disclose under *Brady*. The court found that "the government was fully on notice of the significance of" the material, but that through "inadvertence and a failure to appreciate what was there," it failed to make the required disclosure, thus depriving Avenatti of information he could have used in his opening statement and in cross-examining government witnesses. Trial Transcript at 57, 62-63, *United States v. Avenatti*, No. 8:19-cr-061 (C.D. Cal. Aug. 28, 2021), ECF No. 792.

Notably, although in *Avenatti* the defendant knew that the relevant documents were missing, in many cases defendants may be unaware of the existence of particular *Brady* material that falls through the cracks of the government's faulty filter-team process.

4. *United States v. Elbaz:*

In *Elbaz*, the government, struggling to meet discovery deadlines, took a series of shortcuts that led to

privileged material being disclosed by the filter team to the prosecution team. First, the prosecution team requested the full original contents of one seized hard drive before the filter team had completed its review—and then failed to notice the filter team's warning that it could contain privileged materials. *See United States v. Elbaz*, 396 F. Supp. 3d 583, 588-89 (D. Md. 2019). Additionally, the prosecution team inferred, incorrectly, that the contents of one seized device would not contain privileged material, and so did not run it through the filter process. *See id.* at 589. Upon further review, the government discovered that the prosecution team also had access to WhatsApp chats and Hebrew-language documents that had not been reviewed by the filter team. *See id.* at 589-90. Cumulatively, these errors gave the prosecution team access to thousands of potentially privileged documents for approximately five months, more than 100 of which members of that team viewed or were presumed to have viewed. *See id.* at 590.

5. *United States v. Esformes*:

This health care fraud case involved a remarkable variety of filter-team problems, all of which the district court found had occurred despite the government acting in good faith.

First, although the government's filter-team protocol required it to use "non-case agents" to execute an office search, the government "relied on several agents for the search who had participated in other health care fraud cases that bear some relationship to the Esformes case or who were later used in the underlying Esformes investigation." *United States v. Esformes*, No. 16-cr-20549, 2018 WL 5919517, at *23 (S.D. Fla. Nov. 13, 2018). The district court noted that the use of these agents "raises questions about

their independence and effectiveness as members of the filter team." *Id.*

The government's selection of these agents was only the beginning of its noncompliance with the filter-team protocol, as "agents were either provided inadequate instructions or ignored those instructions" throughout a search that was "clumsy" and "borderline incompetent." *Id.* "Hundreds of documents, clearly prepared by law firms and/or marked 'privileged and confidential' or 'attorney/client privilege' or 'work product privileged' or 'legal' were not segregated and placed in the 'taint box' and were, thus, within the boxes provided to the prosecution team." *Id.* at 21. And like the government's "preparation for and the methods used during" the search, those it used "after the search were sloppy and ineffective." *Id.* at 23.

Consequently, the prosecution team not only reviewed privileged documents but also used them in a reverse proffer with one witness and debriefings of another. *See id.* The prosecution team continued to review and use these documents even after being alerted to the privilege issue by one of the witnesses—and when that team later came across a document that was potentially privileged on its face, it did not inform the court or the defense. *See id.* at 24.

These issues came to light only after the defense reviewed the seized materials, identified privileged documents, and alerted the government—at which point the prosecution team represented inaccurately to defense counsel that the seized materials were "being reviewed by a *filter team* and *not* by the prosecution team." *Id.*

The district court declined to adopt the magistrate judge's finding that the prosecutors acted in bad

faith, determining instead that "their execution of their duties was often sloppy, careless, clumsy, ineffective, and clouded by their stubborn refusal to be sufficiently sensitive to issues impacting the attorney client privilege." *Id.* at 34. In particular, the prosecution team's "myopic view of [the defendant's lawyer] as a criminal and not an attorney skewed their reaction to, and blurred their ability to see, the potential for privilege." *Id.* at 32.

The district court suppressed some evidence but denied other remedies, finding that the defense failed to meet its burden to establish prejudice. The court acknowledged that the government "attempted to use the information contained in [the defendant's privileged] documents to gather more information from" the defendant's confidant and his assistant, but nevertheless the court was "unconvinced" that the government gained a "real advantage" from their use. *Id.* at 31.

6. *SEC v. Lek Securities Corporation*:

To support the SEC's investigation of a securities company for manipulative trading, the New Jersey USAO established a filter-team process to cull potentially privileged documents using a defined set of privilege terms. Yet supposedly "filtered" materials provided to the SEC repeatedly included documents that hit on the privilege terms, and an SEC attorney determined that dozens of those documents were potentially privileged. *See SEC v. Lek Securities Corp.*, No.17-cv-1789, 2018 WL 417596, at *1 (S.D.N.Y. Jan. 16, 2018). Moreover, when the SEC asked the USAO filter team for documents in native format, the filter team failed to screen the attachments to documents that hit on privilege terms. *See id.* at *2. These failures to implement a relatively straightforward filter-team process resulted in the SEC investigative team

receiving a 15-page draft timeline of events that the company's owner sent to his attorney (which the SEC acknowledged reviewing), as well as documents prepared by the attorney or his paralegal (which were clearly identified in a footer as privileged attorney work product) describing the "key" individuals and entities in the case. *See id.* at *3-4.

7. *United States v. Black*:

During an investigation into alleged drug smuggling in a federal detention facility, the government obtained audio recordings of prisoners' phone calls to their attorneys. The government created a filter team to review *other* materials but did not ask that team to review the audio recordings. Instead, the lead prosecuting attorney distributed the recordings "indiscriminately," even after learning that investigators had inadvertently listened to the beginning of at least one attorney-client call. *United States v. Black*, No. 16-cr-20032, 2017 WL 2151861, at *7 (D. Kan. May 17, 2017). The district court determined that she did so because—despite a contrary opinion from DOJ's Professional Responsibility Advisory Office—the government "unilaterally decided the telephone calls were not privileged, and did so without notice to the Court or the parties." *Id.* at *8.

Following an investigation by a special master, the court found that at least two prosecutors "had knowingly and intentionally listened to attorney-client phone calls in one or more of their cases." *United States v. Carter*, 429 F. Supp. 3d 788, 824 (D. Kan. 2019), *order vacated in part on other grounds*, No. 16-cr-20032-02, 2020 WL 430739 (D. Kan. Jan. 28, 2020). The extent and scope of the government's intrusion on the privilege remained unclear because the government defied the court's orders to preserve and produce relevant documents and generally refused to

cooperate with the investigation. *See id.* at 866-67. Ultimately, the court found that the government had committed "systemic prosecutorial misconduct" and then "responded by minimizing the seriousness of its conduct and delayed and obfuscated th[e] investigation" of that conduct. *Id.* at 903. Litigation over that misconduct continues today.

8. *United States v. DeLuca*:

After the FBI searched the offices of defendant Stephen DeLuca's company, the parties stipulated to a process under which a filter team would review DeLuca's communications to or from his attorneys and give DeLuca any documents deemed not privileged so that he could decide whether to challenge that determination before a magistrate. A member of the filter team, however, "unilaterally decided that the stipulation was not in effect" and so gave the prosecution team access to communications that he deemed not privileged, without notice to the defense or the court. *United States v. DeLuca*, 663 F. App'x 875, 877 (11th Cir. 2016). The defense discovered this violation only when, on the eve of trial, the government filed an amended exhibit list that included one of DeLuca's emails to his attorney. *See id.*

The district court found that the government had violated the attorney-client privilege by viewing that email and other attorney-client communications, but denied relief on the ground that DeLuca failed to meet his burden to show prejudice. *See id.* at 878. As the Eleventh Circuit noted in affirming, "showing how the government used certain information within its control as part of a criminal investigation has always been an uphill battle." *Id.* at 881.

9. *United States v. Pedersen*:

In this capital case, government violations of the attorney-client privilege, resulting from both intentional conduct and neglect, continued for years because the filter-team protocol was both deficient and not followed, "because nobody notified defense counsel regarding these problems, and because nobody raised these issues with the court despite many opportunities to do so." *United States v. Pedersen*, No. 12-cr-431, 2014 WL 3871197, at *26 (D. Or. Aug. 6, 2014).

The government's numerous violations of the filter-team protocol included failing to provide the filter team with intercepted legal mail despite explicit instructions to do so, *see id.* at *31, and failing to run through the filter-team process intercepted audio of attorney-client calls, some of which included "significant substantive content regarding a number of issues including the facts of the case, legal issues pertaining to the case, [and] defense strategy," *id.* at *21. The government also failed to maintain a clear separation between the filter team and the prosecution team—one AUSA's dual role was "anathema to the very purpose of a taint team." *Id.* at *17, 30.

The court noted that the "most troubling aspect" of the government's conduct was that, despite being aware of the problems, the government "did not alert the court . . . on its own." *Id.* at *32. Indeed, the court observed, "It is unclear when, if ever, the government would have raised these issues on its own. Rather, it was the accidental provision of privileged calls through discovery and the very hard work of defense counsel that ultimately resulted in the exposure of the conduct in this case." *Id.* Partly for that reason, the court expressed concern that the govern-

ment's transgressions in the case were "likely to recur absent corrective action." *Id.* at *2.

10. *United States v. Kaplan*:

The government, suspecting that defendant Solomon Kaplan was perpetrating fraud through his law practice, searched Kaplan's office and seized numerous files. The affidavit in support of the search warrant detailed procedures through which an "ethical wall" attorney would screen seized documents for privilege. *United States v. Kaplan*, No. 02-cr-883, 2003 WL 22880914, at *1 (S.D.N.Y. Dec. 5, 2003).

The court found it "apparent that the procedures used by the Government in this case were of little use in protecting any privileged materials seized by the Government." *Id.* at *11. Contrary to the procedures the government affirmed to the magistrate judge would be used, an FBI case agent—not a member of the "ethical Wall Team"—was given access to privileged materials and allowed to make his own determination whether the crime-fraud exception applied. *Id.* The court noted that the breakdown of the filter-team procedures in this case "raises serious concerns about the admissibility of information gained in the investigation of leads developed as a result of review of materials that ultimately are determined to be privileged, and eviscerates any claim that an 'ethical wall team' within the Government effectively screens the prosecution team from privileged materials." *Id.*

11. *United States v. Noriega*:

Perhaps the most famous example of filter-team failure occurred in the government's prosecution of former Panamanian dictator Manuel Noriega. After the government obtained audio recordings of Noriega's prison phone calls, it developed procedures pursuant to which the recordings would be screened

for privilege by a DEA agent not involved in the prosecution. *See United States v. Noriega*, 764 F. Supp. 1480, 1483 (S.D. Fla. 1991). This filter agent failed to screen many of the recordings, however, and agents assisting the prosecution received and reviewed numerous attorney-client conversations, including a conversation about two potential government witnesses that a government witness himself reviewed. After that witness conveyed the substance of the privileged conversation in a memo he prepared for the prosecution's use, the lead prosecutor asked the filter agent to check whether the relevant audiotape contained any attorney-client conversations—the filter agent erroneously reported back that it did not. *See id.* at 1483-84.

The government's review of Noriega's privileged conversations with his attorney came to light only when CNN somehow obtained copies of the recordings. The district court observed that it was "unclear why" Noriega's privileged conversations with his defense team "were not recognized as such by the outside screeners and DEA agents reviewing the tapes, or by the agents briefed by" the government's witness. *Id.* at 1489.

III. Alternative Approaches That Would Avoid These Problems are Available and Should Be Adopted.

Alternative approaches for reviewing assertedly privileged material after a search and seizure are available, have been adopted in numerous cases, and are more protective of client confidences than filter-team procedures.

The most common alternative approach to a government filter team is for the district court to appoint

a special master or magistrate judge to make privilege determinations. Importantly, under this approach—unlike that adopted below—the government has no opportunity to review the content of documents that the adjudicator later determines are privileged. Consequently, there is no risk that filter-team agents will—inadvertently or otherwise—disclose privileged documents to the prosecution team, or share information they have learned in those documents, or use that information in another investigation. This approach, with its neutral arbiter and other attendant safeguards, is more protective of privilege and more likely to engender (and be worthy of) public confidence in the administration of justice.

That alternative is the approach adopted, for example, in the recent cases involving Michael Cohen and Rudy Giuliani. *See* Order of Appointment, *In re Search Warrants Executed on April 9, 2018*, No. 18-MJ-3161 (S.D.N.Y. April 27, 2018), ECF No. 30; Transcript of Hearing at 88, *In re Search Warrants Executed on April 9, 2018*, No. 18-MJ-3161 (S.D.N.Y. Sept. 18, 2018), ECF No. 104. Circuit courts have recommended this approach, and district courts have adopted it, for decades in other cases. *See In re Search Warrant Issued June 13, 2019*, 942 F.3d at 181; *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984); *Gallego*, 2018 WL 4257967, at *3; *United States v. Stewart*, No. 02-cr-3, 2002 WL 1300059, at *10 (S.D.N.Y. June 11, 2002). The particular approach proposed below by Petitioners—preparation of a privilege log by the defendant, followed by judicial resolution of any disputes that may arise—is common to civil litigation, and in the criminal context would simply require the government to make the initial showing required by *United*

States v. Zolin, 491 U.S. 554 (1989), before the district court could review documents *in camera*.

As the various cases adopting alternatives to filter-team procedures illustrate, these alternatives are well-established and eminently workable. Indeed, the government itself has proposed engaging a special master in some cases, including the Giuliani case. And of course, the government regularly invokes the process prescribed by *Zolin* in civil cases, where more than three decades of experience have amply demonstrated its viability.

Concerns about administrability and cost provide no sound justification for adopting the repeatedly failed filter-team procedures. Filter-team alternatives are not only widely used but also easily adaptable. Insofar as timeliness is a concern, for example, a special master's review can be conducted, and productions made, on a rolling basis. *See, e.g.*, *In re Grand Jury Subpoenas*, 454 F.3d at 524. Moreover, costs—for which the government will ultimately be responsible regardless of whether government agents or a special master reviews the documents—can be minimized by allowing for some assistance from the parties, without permitting government agents to review the content of privileged documents. Moreover, this Court has emphasized that "considerations of convenience do not overcome the policies served by the attorney-client privilege," *Upjohn*, 449 U.S. at 396, and has repeatedly declined to justify intrusions on the privilege based on prosecutorial interests such as these. *See, e.g.*, *id.*; *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998).

* * *

The use of filter teams fundamentally and unnecessarily intrudes on criminal defendants' attorney-

client privilege and work product doctrine, and has led to severe violations of those protections in numerous cases. The time has come for this Court to take a close look at those procedures and provide needed guidance.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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