No. 21-1364

In the Supreme Court of the United States

MORDECHAI KORF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
JOSHUA K. HANDELL
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion by declining to enjoin the government's use of a filter team to review assertedly privileged materials obtained during a warranted search, where the filter-team procedures barred the filter team from providing any materials to the investigatory team without petitioners' consent or a court order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 11 F.4th 1235. The order of the district court (Pet. App. 32a-40a) is not published in the Federal Supplement but is available at 2020 WL 6689045. The order of the magistrate judge (Pet. App. 41a-65a) is not published in the Federal Supplement but is available at 2020 WL 5658721.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2021. A petition for rehearing was denied on January 19, 2022 (Pet. App. 66a-67a). The petition for a writ of certiorari was filed on April 18, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As part of a criminal investigation into suspected money laundering and wire fraud, the government executed a warranted search of petitioners' businesses and seized a substantial volume of documents, a small fraction of which petitioners have asserted to be privileged. Pet. App. 2a-3a. Petitioners moved to enjoin the government from using a filter team—consisting of government attorneys and staff who are not involved in the criminal investigation—to review the seized materials. *Id.* at 3a. The magistrate judge imposed a modified protocol that precluded the filter team from turning any materials over to the investigative team without a court order or petitioners' consent, but otherwise denied petitioners' motion. *Id.* at 41a-65a. The district court affirmed. *Id.* at 32a-40a. The court of appeals likewise affirmed. *Id.* at 1a-31a.

1. A federal criminal investigation is underway into whether certain of petitioners engaged in money-laundering transactions to conceal the proceeds of fraud and embezzlement from PrivatBank, a Ukrainian bank. See Gov't C.A. Br. 5-6; see also Pet. App. 8a n.2 (noting that a related "lawsuit alleges Racketeer Influenced and Corrupt Organization ('RICO') violations that arise out of 'a series of brazen fraudulent schemes orchestrated by Ukra[i]nian oligarchs * * * to acquire hundreds of millions of dollars-worth of U.S. assets through the laundering and misappropriation of corporate loan proceeds issued by PrivatBank.'"). In the summer of 2021, investigators determined that a group of corporate entities with variants of the name "Optima"—all of which are owned, managed, or controlled by petitioners Mordechai Korf, Uriel Laber, and Chaim Shochet—played a role in the suspected criminal activity. Gov't

C.A. Br. 5; see Pet. App. 4a. Based on these findings, the government applied for a warrant to search a suite of offices in Miami, Florida used by the Optima entities. Gov't C.A. Br. 5-6; see Pet. App. 3a-4a.

A magistrate judge in the United States District Court for the Southern District of Florida issued a warrant, identifying items to be seized that included records belonging or relating to two Ukrainian nationals and Korf, Laber, and Schochet. Pet. App. 4a. More specifically, the warrant authorized seizure of, *inter alia*, "[r]ecords of receipt of income, [r]ecords of all accounts and transactions at financial institutions, [r]ecords of loans and financing transactions, and all communications between [these persons] and any employee or agent of" the Optima entities. *Ibid.* (brackets in original). In addition to the seizure of paper records, the warrant authorized the seizure, imaging, or copying of electronic storage media that could contain evidence described in the warrant. *Id.* at 5a.

In issuing the warrant, the magistrate judge recognized the potential for privilege issues and imposed a filter protocol (the Initial Protocol) applicable to any communications that were to or from an attorney. Pet. App. 5a. In the event investigators seized such communications during their search, the Initial Protocol provided:

> Filter for Privileged Materials: If the government identifies seized communications to/from an attorney, the investigative team will discontinue review until a filter team of government attorneys and agents is established. The filter team will have no previous or future involvement in the investigation of this matter. The filter team will review all seized communications and segregate communications

> to/from attorneys, which may or may not be subject to attorney-client privilege. At no time will the filter team advise the investigative team of the substance of any of the communications to/from attorneys. The filter team then will provide all communications that do not involve an attorney to the investigative team and the investigative team may resume its review. If the filter team decides that any of the communications to/from attorneys are not actually privileged (e.g., the communication includes a third party or the crime-fraud exception applies), the filter team must obtain a court order before providing these attorney communications to the investigative team.

Id. at 5a-6a (emphases omitted).

Federal law-enforcement agents subsequently executed the search and seized various documents and equipment, including servers containing electronic documents and correspondence. Pet. App. 6a.

2. a. Following the search, petitioners moved to intervene in the search-warrant proceedings in the Southern District of Florida. D. Ct. Doc. 3 (Aug. 17, 2020). Contending that the materials the government had seized pursuant to the warrant included some privileged communications, petitioners sought "intervention to ensure that the protocol used to assess privilege accords with fundamental constitutional rights, including those afforded by the Sixth Amendment." *Id.* at 2; see Pet. App. 6a (stating that in-house attorneys and paralegals worked, or had previously worked, in the targeted business suite on behalf of the Optima entities and petitioners Korf, Laber, and Shochet).

Alongside their intervention motion, petitioners filed a "motion * * * to prohibit law enforcement review of seized materials until an appropriate procedure for

review of privileged items is established." D. Ct. Doc. 4, at 1 (Aug. 17, 2020) (capitalization and emphasis omitted). Petitioners contended, among other things, that the Initial Protocol set out in the warrant was "inadequate" because it "only allows for judicial review if a communication is clearly sent 'to/from attorneys,'" *id.* at 3, and that, more broadly, only "the Court itself or a special master"—not the members of the filter team—should be empowered "to adjudicate the existence of legal privileges," *id.* at 13-14. Petitioners asked the court to enjoin the filter team from undertaking its review of the seized materials until a more protective protocol was implemented. *Id.* at 18.

b. The magistrate judge allowed petitioners to intervene, see Pet. App. 45a; construed their substantive motion as a request for a preliminary injunction, *id.* at 47a; and granted it in part, *id.* at 62a-65a.

At the outset, the magistrate judge rejected petitioners' contention "that the use of government filter teams to conduct privilege reviews is *per se* legally flawed," observing that such "teams have been employed to conduct privilege reviews in numerous cases." Pet. App. 50a (collecting cases). However, the magistrate judge expressed "reservations about the initial filter team protocol set forth in the search warrant * * * because the segregation process only requires the filter team to review for possible privilege those items which are 'to/from attorneys,'" and "the initial filter team protocol * * * does not in all instances provide [petitioners] with a mechanism for challenging the filter team's privilege determinations." *Id.* at 52a-53a (citation omitted). Proceeding with the traditional injunctive-relief analysis, the magistrate judge concluded that petitioners had "shown irreparable harm with respect to the initial

privilege review of the seized documents," *id.* at 57a; that the prospect of "disclosure of items protected by the attorney-client privilege or work product doctrine" tipped the balance of harms in petitioners' favor, *id.* at 59a-60a; and that the "important and competing public interests" identified by petitioners and the government—respectively, avoiding "'appearances of unfairness as to the intrusion into privileged documents and communications'" and "'minimizing the delay of criminal investigations and the efficient administration of justice'"—ultimately "favor[ed] the issuance of an injunction as to the initial privilege review of the seized items," *id.* at 60a-61a (citations omitted).

The magistrate judge then imposed new requirements (the Modified Protocol) to address the concerns raised by petitioners. First, the magistrate judge "permit[ted] [petitioners] to conduct the initial privilege review of all seized items." Pet. App. 62a. The Modified Protocol directed that, once petitioners had completed their review, they would "provide a privilege log to the government's filter team," which would then "have the opportunity to challenge any privilege designation on [petitioners'] privilege log" after having "review[ed] any item on the privilege log in order to formulate [such] a challenge." *Ibid.* Second, the magistrate judge reiterated that the filter team must be "walled off from the underlying investigation"; accordingly, the Modified Protocol both required that "[t]he government's filter team shall be comprised of attorneys and staff from outside the * * * Cleveland branch office" of the U.S. Attorney's Office for the Northern District of Ohio, which was then primarily responsible for the investigation, and prohibited the filter team from "shar[ing] a first level supervisor with anyone on the

investigative/prosecution team." *Id.* at 62a n.13.[1] Third, the Modified Protocol specified that "[t]he investigative/prosecution team will be prohibited from receiving any items listed on the privilege log unless agreed to by the parties or the Court/special master has overruled the privilege." *Id.* at 63a; see *id.* at 63a-64a (reproducing Modified Protocol in full).

The magistrate judge temporarily stayed "[t]he portion of th[e] Order that allows for the government filter team review of potentially privileged documents * * * to provide [petitioners] with an opportunity to appeal th[e] ruling." Pet. App. 64a-65a.

c. The district court overruled petitioners' objections and affirmed the magistrate judge's order. Pet. App. 32a-40a. The court found that the magistrate judge had "carefully crafted a review protocol that affords proper deference to any attorney-client or work-product privileges that [petitioners] may be entitled to." *Id.* at 39a.

The district court observed that it is "well-established that filter teams—also called 'taint teams'—are routinely employed to conduct privilege reviews." Pet. App. 35a (collecting authorities). The court also observed that "[t]he Modified Review Protocol incorporates several layers of safeguards that prevent anyone other than the filter team and [petitioners] from reviewing the potentially privileged documents," emphasizing that "[n]ot only do [petitioners] have the opportunity to review the documents *before* the filter team, but any documents identified by [petitioners] in their privilege

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[1] The investigation has since been taken over by the Criminal Division of the Department of Justice. The filter team, which is still subject to the Modified Protocol, remains located in the Northern District of Ohio.

log may not be released to the prosecution team until the parties agree to do so, or the Court or special master has ruled on the privilege objections." *Id.* at 37a-38a. Turning to petitioners' objection to the participation of government attorneys on the filter team, the district court declined to "presume the Government's purported lack of integrity in abiding by the Court's Order and the law." *Id.* at 38a.

3. The court of appeals affirmed in a per curiam decision. Pet. App. 1a-31a.

The court of appeals first concluded that it had jurisdiction over petitioners' interlocutory appeal pursuant to the test this Court set out in *DiBella* v. *United States*, 369 U.S. 121 (1962). See Pet. App. 15a-22a. The court of appeals stated that under *DiBella*, the denial of petitioners' motion here could be treated as immediately appealable "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse [(in actual existence)] against the movant." *Id.* at 16a (quoting *DiBella*, 369 U.S. at 131-132) (second set of brackets in original). And in the court's view, the motion satisfied those requirements, on the theory that petitioners had "primarily asked for the court to order the return of the seized documents to prevent law enforcement from reviewing the materials"; had suggested only "in the alternative[] that an independent party could act as the filter"; and had sought review when "[t]here is currently no complaint, arrest, detention, or indictment in this case." *Id.* at 18a.

Turning to the propriety of the requested relief, the court of appeals recognized the "vital" role of the attorney-client and work-product privileges, and determined that petitioners had failed to make the necessary showing for a preliminary injunction against the

government's use of a filter team in the circumstances here. Pet. App. 23a-31a. While recognizing that "a showing of irreparable injury [is] 'the sine qua non of injunctive relief,'" the court "proceed[ed] no further than consideration of [petitioners'] likelihood of success on the merits," which it found dispositive in this case. *Id.* at 24a (citation omitted). The court of appeals found that "the great weight of authority that supports the district court's conclusions" made its "holding on this front * * * not even close." *Id.* at 25a. The court of appeals emphasized the "[s]ignifican[ce]" of the Modified Protocol "allow[ing] [petitioners] to conduct the initial privilege review" and "requir[ing] [their] permission or court order for any purportedly privileged documents to be released to the investigation team." *Ibid.* The court of appeals found that those aspects of the Modified Protocol, coupled with the consensus view of courts that have reviewed similar protocols, supported the district court's denial of injunctive relief for three reasons.

First, the court of appeals recited authority from eight other circuits "approv[ing] of the use of a walled-off government filter team to review documents for privilege." Pet. App. 26a (collecting cases). Second, the court observed that petitioners had "cite[d] no cases for the broad remedy they seek: a holding that government agents 'should never . . . review documents that are designated by their possessors as attorney-client or work product privileged' until after a court has ruled on the privilege assertion," nor had the court's own "research unearthed any." *Ibid.* Third, the court explained that the Modified Protocol "suffers from none of the defects" that other circuits had "found disqualifying" when "disapprov[ing] of particular filter-team

protocols." *Id.* at 27a; see *id.* at 27a-31a (discussing *In re Grand Jury Subpoenas 04-124-03 & 04-124-05*, 454 F.3d 511 (6th Cir. 2006), and *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019)).

The court of appeals accordingly determined that the Modified Protocol "appears * * * to comply with even the most exacting requirements other courts that have considered such protocols have deemed appropriate." Pet. App. 31a. Petitioners thus had "not clearly established a substantial likelihood of success on the merits" warranting an injunction against the government's use of a filter team in this case. *Ibid.* The court made clear that it was not "prejudg[ing] other filter protocols that are not before us." *Id.* at 31a n.10.

The court of appeals denied a petition for rehearing. Pet. App. 66a-67a.

ARGUMENT

Petitioners renew their claim (Pet. 13-14) that the magistrate judge abused his discretion by adopting a filter-team protocol, asserting that such a protocol "threatens valued confidentiality interests" and requesting "this Court" to "set nationwide standards" for whether and how filter teams review lawfully seized materials. See Pet. 13-34. But as the court of appeals correctly recognized, petitioners' broad request to categorically invalidate all government filter teams lacks meaningful support, and the specific filter-team protocol at issue here ensured that "the filter team cannot inadvertently provide the investigation team with any privileged materials," thus "comply[ing] with even the most exacting requirements" imposed by other federal courts across the nation. Pet. App. 25a-26a, 31a. Because that assessment does not conflict with any decision of this Court or of another court of appeals, the lower courts'

denial of injunctive relief that would preclude a government filter team from any role in reviewing the materials in the circumstances of this case does not warrant this Court's review.

1. Evidentiary privileges are governed by "[t]he common law[,] as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. As the court of appeals noted, two such privileges—"the attorney-client and work-product privileges"—"play a vital 'role in assuring the proper functioning of the criminal justice system'" by "provid[ing] a means for a lawyer to prepare her client's case." Pet. App. 25a (quoting *United States* v. *Nobles*, 422 U.S. 225, 238 (1975)).

In certain criminal investigations, particular groups of lawfully obtained materials may be viewed as likely to contain information that could be subject to an assertion of the attorney-client or work-product privileges. To ensure that the persons responsible for investigating and prosecuting the criminal case are not exposed to such material, the government sometimes relies on filter teams composed of attorneys and agents "who have not and will not be involved in the investigation or prosecution of the" individuals or entities under suspicion. 2 Wayne R. LaFave et al., *Search and Seizure: A Treatise on the Fourth Amendment* § 4.1(h), at 594 (6th ed. 2020). The walled-off filter team conducts an initial review of seized materials to separate those that have potentially privileged content from those that do not. *Ibid.* Once that review is complete, the putative privilege-holders may challenge the filter team's classifications and obtain judicial resolution of any lingering disputes. See *id.* at 594-595; see also Paul F. Rothstein & Sydney A. Beckman, *Federal Testimonial Privileges* § 2:40, at 337-339 & n.9 (2021).

The Modified Protocol adopted here is especially "'respectful of * * * the protection of privilege.'" Pet. App. 28a (citation omitted). The Modified Protocol assigns the initial privilege review not to the filter team but instead to petitioners, who have been afforded the time and opportunity to review the materials and "provide a privilege log to the government's filter team." *Id.* at 62a. The government then has "the opportunity to challenge any privilege designation on [petitioners'] privilege log." *Ibid.* During the pendency of such a challenge, the investigative team remains "prohibited from receiving any items listed on the privilege log unless agreed to by the parties or the Court/special master has overruled the [claim of] privilege." *Id.* at 63a.

2. The court of appeals correctly found that, taken together, those procedures mitigate the "possibility * * * that privileged documents will mistakenly be provided to the investigative team." Pet. App. 28a. But notwithstanding the protections embodied in the Modified Protocol, petitioners appear to contend (Pet. 14-24), as the lower courts understood them to be contending below (see Pet. App. 23a, 34a-35a, 48a), that any review by a filter team of potentially or assertedly privileged material is categorically unlawful without a prior adjudication of the privilege claim by a court or judicially appointed special master. They cite no decision of this Court or of any court of appeals adopting such a per se rule. Instead, they suggest only (Pet. 15) that "[t]he decision below runs counter to the principles animating" this Court's decision in *United States* v. *Zolin*, 491 U.S. 554 (1989). But the decision in that case—which did not feature (much less foreclose) the use of a filter team—does not cast doubt on the careful procedures adopted

by the district court in this case, let alone justify the injunctive relief that petitioners seek.

Zolin arose out of an investigation by the Internal Revenue Service (IRS) into the tax returns of L. Ron Hubbard, founder of the Church of Scientology. 491 U.S. at 556. In furtherance of that investigation, the IRS served a summons upon a state court, which sought documents that had been filed—some under seal—in earlier litigation involving the Church. *Id.* at 557. The Church and Hubbard's wife sought an order barring disclosure of certain materials to the IRS on the basis of the attorney-client privilege. *Id.* at 557-558. The IRS responded by requesting that the district court review the contested materials *in camera* to determine whether they fell within the crime-fraud exception to the privilege. *Id.* at 559. In support of that approach, the IRS submitted, *inter alia*, partial transcripts it had obtained from a confidential source purportedly demonstrating that certain of the attorney-client communications withheld on privilege grounds were in fact ancillary to ongoing fraud. *Id.* at 558-559. "The specific question presented" to this Court was whether, when the government is attempting to obtain assertedly privileged materials, "the applicability of the crime-fraud exception"—a "recognized exception" to attorney-client privilege "for communications in furtherance of future *illegal* conduct"—"must be established by 'independent evidence' (i. e., without reference to the content of the contested communications themselves), or, alternatively, whether the applicability of that exception can be resolved by an *in camera* inspection of the allegedly privileged material." *Id.* at 556 (emphasis omitted).

Resolving that question in favor of the government, this Court determined "that a rigid independent

evidence requirement does not comport with 'reason and experience,'" and "decline[d] to adopt it as part of the developing federal common law of evidentiary privileges." *Zolin*, 491 U.S. at 574 (quoting Fed. R. Evid. 501). The Court thus approved use of "*in camera* review * * * to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception," conditioned on the production of "evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability." *Id.* at 574-575. And the Court held that this "threshold showing * * * may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged," *id.* at 575, including evidence "reflecting the content of the contested communications" themselves, *id.* at 573.

Zolin does not support petitioners' maximalist position. Petitioners' assertion (Pet. 15) that "[t]he decision below runs counter to the principles animating *Zolin*" fails properly to account for the numerous and significant distinctions between the privilege-review process evaluated in that case and the one presented here. Most pertinently, no use of a filter team was at issue in *Zolin*. This Court thus had no reason to, and did not, consider the lawfulness of filter teams in general or the appropriateness of any specific filter-team protocol. Nor did the Court address what procedures might circumscribe the government's review when—as in this case, but not in *Zolin*—it has already obtained lawful custody of all of the assertedly privileged materials through the execution of a warranted search. Cf. *In re Grand Jury Subpoenas 04-124-03 & 04-124-05*, 454 F.3d 511, 522-523 (6th Cir. 2006) (*Winget*) (noting that, when "the potentially-privileged documents are already in the

government's possession, * * * the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege"). *Zolin* also involved the assertion of an exception with respect to materials that the district court had already classified as attorney-client communications over which any privilege had not been waived, 491 U.S. at 563, not the procedures for the initial adjudication of a privilege claim. And—aside from noting "the burdens *in camera* review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties," *id.* at 571—the Court did not consider whether an alternative process that permitted adversarial presentation might better facilitate the adjudication of privilege claims, because no party had requested such a process in that case.

Moreover, to the extent that *Zolin* does bear on the circumstances here, it supports the balanced approach reflected in the Modified Protocol. Petitioners principally object (Pet. 17) that, under those procedures, "the government is permitted to review assertedly privileged documents in order to develop arguments contesting the privilege assertion." But *Zolin*, while only addressing the judicial review at issue there, rejected the contention that "the content of the contested communications themselves" could not inform the privilege determination. 491 U.S. at 556. The Court observed that "partial transcripts, or other evidence directly but incompletely reflecting the content of the contested communications, generally will be *strong* evidence of the subject matter of the communications themselves," and it concluded that "[p]ermitting district courts to consider this type of evidence would aid them substantially

in rapidly and reliably determining whether *in camera* review is appropriate." *Id.* at 573. Indeed, the only restriction that this Court placed on the evidence relevant to a court's undertaking *in camera* review was that the material "has not been adjudicated to be privileged." *Id.* at 575. By definition, the privilege status of materials contested under the Modified Protocol has not yet been adjudicated. And the Court's objective of "strik[ing] the correct balance" between the need for judicial resolution of privilege disputes and the burdens on judicial economy occasioned by such proceedings, *id.* at 572, is advanced by the Modified Protocol's permitting the filter team to review materials identified on petitioners' privilege log, which will allow the government to refine or withdraw its objections.

3. Petitioners do not contend that any court of appeals has adopted the position they advocate here, or that the decision below implicates any direct circuit conflict. Instead, they assert more generally (Pet. 13) that the decision below "sits uncomfortably alongside" decisions of other circuits. But as the court of appeals explained (Pet. App. 27a, 31a n.10), the Modified Protocol "suffers from none of the defects * * * courts [have] found disqualifying" in other filter-team procedures, and is consistent with "frameworks of analysis that other Circuits have used."

a. Petitioners first invoke a decision of the Fourth Circuit preliminarily enjoining a filter-team review of records seized from a Baltimore law firm. Pet. 24-26 (discussing *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019) (*Baltimore Law Firm*)). In that case, a magistrate judge permitted a government filter team to segregate privileged from nonprivileged materials in the first instance; forward materials that

the filter team had determined to be nonprivileged directly to the investigative team; and bear sole responsibility for bringing potentially privileged materials to the attention of other counsel so as to tee up any adjudication by the court. *Baltimore Law Firm*, 942 F.3d at 165-166. The court of appeals, stating that "the resolution of [a privilege] dispute is a judicial function," concluded that the protocol improperly "assign[ed] judicial functions to the executive branch" by empowering members of the filter team (including "*non-lawyer* members," such as paralegals and law-enforcement agents) "to designate seized documents as nonprivileged" and then have them "deliver[ed] * * * to the Prosecution Team without the approval of the Law Firm or a court order." *Id.* at 176-177. The court of appeals was also concerned that the magistrate judge authorized that protocol entirely "in *ex parte* proceedings," *id.* at 178, and "gave no indication that she had weighed any of the important legal principles that protect attorney-client relationships," *id.* at 179.

Baltimore Law Firm does not support the proposition that the use of filter teams is per se inappropriate. As Judge Rushing stressed in her concurring opinion there, the court's disapproval of the particular filter-team protocol at issue was grounded in the "unique facts and circumstances of [that] case." 942 F.3d at 183-184. Indeed, the decision did not even address the filter-team protocol that was actually in place by the time of the appellate proceedings; instead, it analyzed an initial protocol that the district court had since modified. *Id.* at 169-170 (majority opinion); see *id.* at 183-184 (Rushing, J., concurring) (suggesting that the court's opinion did not call into question the modified filter-team protocol); see also Pet. App. 29a n.9 ("A

concurring opinion in *Baltimore Law Firm* suggests that the majority decision did not address or otherwise call into question the modified filter protocol, which was more similar to the protocol at issue here."); Pet. 25 n.7 (conceding that "[t]he majority opinion [in *Baltimore Law Firm*] does not suggest that this modified protocol would impermissibly delegate a judicial function").

Nor does that decision indicate that the Fourth Circuit would disapprove of the Modified Protocol adopted here. As the court of appeals in this case recognized (Pet. App. 28a), "*Baltimore Law Firm* is * * * different from [petitioners'] case in important ways." There, the government obtained a "search warrant * * * for a lawyer's records as they concerned one specific client," but ended up seizing "*all* the lawyer's email correspondence, including his correspondence with clients other than the one whose materials were authorized to be seized." *Ibid.* (emphasis added). As a result, "[t]he vast majority" of the seized communications—more than 99%—were "from other attorneys and concerned other attorneys' clients who had no connection at all with the investigation that led to the search warrant." *Id.* at 28a-29a; see *Baltimore Law Firm*, 942 F.3d at 172. In this case, in contrast, the materials that the government obtained from the Optima entities consisted overwhelmingly of business records, see Gov't C.A. Br. 27; indeed, petitioners have now completed their review of the paper documents seized during the search and have asserted privilege over less than two percent of them, *id.* at 38.

In addition to the differences between the two litigations' respective populations of seized materials, the court of appeals in this case correctly recognized that the procedures adopted in the Modified Protocol are

substantially more protective than those deemed inadequate in *Baltimore Law Firm*. For example, although the Initial Protocol here was originally adopted *ex parte*, the magistrate judge permitted petitioners to intervene, held an adversarial hearing, and imposed the Modified Protocol in response to their concerns—all before the investigative team was given an opportunity to review any of the seized materials. Pet. App. 30a. Moreover, the court of appeals observed that the Modified Protocol "d[oes] not" implicate *Baltimore Law Firm*'s concern with "assign[ing] judicial functions to the executive branch," but instead provides petitioners with "the first opportunity to identify potentially privileged materials" and restricts any transfer of materials to "the investigative team[until] either [petitioners] or the court [have] approve[d]." *Id.* at 30a-31a.

b. Petitioners next cite (Pet. 26-27) the Sixth Circuit's decision in *Winget*, *supra*, but that decision likewise does not support their position. There, a federal grand jury issued documentary subpoenas to Venture Holdings LLC, a company owned by Larry Winget before its bankruptcy. *Winget*, 454 F.3d at 513. Winget intervened and sought to conduct his own privilege review of the Venture documents, but the district court assigned that function instead to a government "taint team," which was empowered to identify privilege in the first instance and transfer documents to the investigative team without either Winget's agreement or a judicial order. *Id.* at 513, 515, 518 n.5.

The court of appeals viewed that protocol as inadequate in two respects. First, the court was skeptical that filter-team review was appropriate in the context of a grand-jury subpoena, observing instead that "government taint teams seem to be used primarily in

limited, exigent circumstances in which government officials have already obtained the physical control of potentially-privileged documents through the exercise of a search warrant." *Winget*, 454 F.3d at 522; see *id.* at 523 ("[T]he government does not actually possess the potentially-privileged materials here, so the exigency typically underlying the use of taint teams is not present."). Second, the court expressed concern that, "under the taint team procedure, appellants' attorneys would have an opportunity to assert privilege *only* over those documents which *the taint team has identified* as being clearly or possibly privileged." *Ibid.* In the court's view, the protocol adopted there thus failed to provide "any check in the proposed taint team review procedure against the possibility that the government's team might make some false negative conclusions, finding validly privileged documents to be otherwise." *Ibid.*

As the court of appeals in this case correctly observed, "neither of the[] problems [identified by the Sixth Circuit] exists here." Pet. App. 28a. The government's reliance on a filter team to review materials seized from the Optima entities follows what the *Winget* Court recognized to be the usual course of filter-team review; indeed, where records are already in the government's lawful custody, the Sixth Circuit opined that the government's use of a filter team to review them is "respectful of, rather than injurious to, the protection of privilege." 454 F.3d at 522-523. And, "unlike in *Winget*, under the Modified Filter-Team Protocol" here, petitioners themselves "identify all allegedly privileged materials in the first instance," thereby eliminating the "possibility * * * that privileged documents will mistakenly be provided to the investigative team" in the manner envisioned by the Sixth Circuit. Pet. App. 28a.

c. Petitioners assert (Pet. 28-30) that "[t]he decision below is also in tension with a decision from the Ninth Circuit holding that *Zolin* applies in similar circumstances." But the decision they cite—*United States* v. *Christensen*, 828 F.3d 763 (2016), cert. denied, 137 S. Ct. 628, and 137 S. Ct. 2109 (2017)—expressed no disapproval of the government's use of a filter team to review potentially privileged documents and adopted no limitations on such review that would indicate disapproval of the Modified Protocol used in the circumstances of this case.

Christensen arose from a federal investigation into the Pellicano Investigative Agency, "a widespread criminal enterprise offering illegal private investigation services in Southern California," and the agency's owner, Anthony Pellicano. 828 F.3d at 775. At one point in the investigation, the government seized, pursuant to a warrant, recordings that Pellicano secretly made of his phone calls with Terry Christensen, an attorney who had retained Pellicano's services to assist in a client's child-support litigation. *Id.* at 776, 798. "Recognizing that Pellicano regularly engaged in work relating to legal matters and at the behest of attorneys, the government established a separate group of attorneys and investigators—the 'filter team'—to screen items for privilege before the items were released to the team investigating the underlying case." *Id.* at 798–799. After reviewing the recordings and determining "that the conversations were not privileged and were in furtherance of a crime," the filter team filed an *ex parte* application for an order "allowing the team to release the recordings to those investigating the underlying case." *Id.* at 799. The district court initially granted that order without first reviewing the recordings *in camera* or

deciding whether the government had offered an evidentiary basis for the crime-fraud exception; but it later reconsidered that decision, applied the *Zolin* framework, identified an adequate evidentiary basis, reviewed the recordings *in camera*, and found them to be unprotected. *Ibid.*

In "affirm[ing] the result of the district court's reconsidered *Zolin* analysis," the Ninth Circuit commented that "the district court initially erred in not applying *Zolin*" but later "recognized its own error and reconsidered its decision under the correct framework." *Christensen*, 828 F.3d at 798. Although the court of appeals stated that "a preliminary showing based on evidence other than the potentially privileged materials themselves" is necessary to trigger *in camera* review by the district court, *id.* at 799, the Ninth Circuit did not directly address the intersection of *Zolin* with the filter team established to review the recordings the government had obtained in a warranted seizure. The court of appeals did not suggest that it was inappropriate for the filter team to review and consider the content of the recordings when formulating its ex parte request for permission to transfer the materials to the investigative team, and the court expressed approval of an "ex parte process to determine whether the crime-fraud exception applies to potentially privileged materials." *Ibid.*[2]

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[2] The Third Circuit's recent decision in *United States* v. *Scarfo*, No. 15-2811, 2022 WL 2763761 (July 15, 2022), which was issued after the petition was filed, likewise does not support petitioner's argument. In that decision, the Third Circuit recognized that the "use of filter teams is an acceptable method of protecting constitutional privileges" and, "[w]ithout reaching the question of whether a constitutional violation occurred (and without commenting on the advisability of the particular screening methods employed by the

4. Petitioners additionally assert (Pet. 30) that certiorari is warranted in light of the "surpassing significance" of the question presented and the "pressing" "need for this Court to resolve it now." They premise that assertion on the adoption by the Department of Justice of "a new Special Matters Unit" that will, *inter alia*, "'conduct[] filter reviews to ensure that prosecutors are not exposed to potentially privileged material,'" Pet. 33-34 (citation omitted), and a selection of cases in which filter-team errors purportedly resulted in the transfer of privileged material to investigative personnel, Pet. 30-33. Neither ground supports this Court's review at this time to announce categorical rules or attempt to prescribe nationwide standards.

Petitioners speculate (Pet. 33) that the Department of Justice's establishment of a general filter-team unit "may bring * * * centralized process to filter teams." But as discussed, see pp. 16-22, *supra*, petitioners have not identified any inter-circuit conflict implicated here that might interfere with such centralized procedures. If anything, further centralizing is likely to harmonize approaches nationwide, rendering any review at this point substantively premature.

Petitioners' hand-picked examples of instances in which they assert (Pet. 30) that filter teams have "br[o]k[en] down, leading to disclosure of privileged materials to the investigative team," see Pet. 30-33, likewise do not suggest any need for this Court's immediate intervention. Purported missteps by isolated filter-team members do not suggest that filter-team review is categorically impermissible or that the particular procedures adopted here are legally problematic. And

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government)," found that the filter-team procedures there had not prejudiced the defendant. *Id.* at *16-*17.

further refinement of procedures by the Department of Justice or courts imposing case-specific protocols may mitigate any issues that exist.

Moreover, as a general matter, petitioners identify no reason to dispense with the "presumption of regularity" that attaches to prosecutorial conduct in a criminal investigation. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (explaining that, "in the absence of clear evidence to the contrary, courts presume" that prosecutors, like other government officials, "have properly discharged their official duties") (citation omitted). And, as a specific matter, the procedural protections adopted by the district court in this case effectively mitigate the risk of malfeasance or mistake. As discussed above, the Modified Protocol enables petitioners to segregate potentially privileged materials in the first instance, rather than assigning that task to the filter team. Additionally, the investigative team does not have any access to potentially privileged materials as identified by petitioners. Even if the filter team reaches the conclusion that a document is not privileged, it must obtain the consent of petitioners or a court order before handing that material to the investigative team. Petitioners' ability to make privilege assertions and have those assertions resolved, if necessary, by a court before materials can be transmitted to the investigative team renders inapposite nearly all of petitioners' examples (Pet. 30-32), which concern cases in which privileged materials were turned over to an investigative team after being "overlooked" or incorrectly treated as nonprivileged by a filter team without any involvement by the asserted privilege-holder. And as the court of appeals determined, the Modified Protocol complies "with even the most exacting requirements other courts that have

considered such protocols have deemed appropriate." Pet. App. 31a.

5. Finally, even if the question presented otherwise merited this Court's consideration, the procedural posture of the case complicates review. The government argued below that the court of appeals lacked appellate jurisdiction under this Court's decision in *DiBella* v. *United States*, 369 U.S. 121 (1962), pointing out that, far from being a motion "solely for return of property," *id.* at 131-132, petitioners' motion had as its "primary purpose" the objective of placing "an additional layer of 'screen[ing]' between the government and the seized materials," Gov't C.A. Br. 19-20 (citation omitted; brackets in original). Petitioners requested only "return of a copy of the materials seized." D. Ct. Doc. 4, at 7. The jurisdictional nature of the issue means that this Court would need to independently satisfy itself of appellate jurisdiction, with the attendant possibility that the Court might not reach the question presented at all. If that question were ever to warrant review, a case where appellate jurisdiction is clearer would provide a more suitable vehicle.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
JOSHUA K. HANDELL
Attorney

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