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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government does not come to grips with the friction between the decision below and *United States v. Zolin*, 491 U.S. 554 (1989), nor does the government resolve the incompatibility between its filter-team protocol and the principles underlying the attorney-client privilege and work-product doctrine. *Zolin* bars *judges* from reviewing potentially privileged materials absent a threshold showing by the government based on nonprivileged evidence. Yet the Eleventh Circuit licensed *prosecutors* to review potentially privileged materials absent any showing at all. *Zolin*'s logic precludes that result. And the government cites no other context in which it may review assertedly privileged materials *before* a court adjudicates privilege. Nor does the government dispute that its filter-team approach has failed in many cases, leading to improper disclosures of confidential materials to investigating prosecutors.

In contrast, petitioners' proposal to use privilege logs and *in camera* review to resolve disputes reflects routine practice in countless civil and criminal cases. The government never contends that petitioners' approach would be burdensome, unworkable, or incompatible with its legitimate interests. Nothing therefore justifies the government's desire to peruse assertedly privileged materials before a court has ruled.

The decision below also stands in tension with decisions from three other circuits. The government observes that those decisions involved different facts and filter-team protocols. But that observation overlooks that those circuits took fundamentally different

approaches to filter teams than did the Eleventh Circuit. Those circuits recognize the *inherent* risk of filter teams and prefer privilege logs and *in camera* review over such teams—exactly what petitioners seek here.

This Court should clarify the legal principles applicable to filter teams now. The Department of Justice has recently centralized its filter-team process. Absent this Court's intervention, DOJ will proceed with its privilege-disregarding protocols for investigations across the country—compromising privilege in case after case. And contrary to the government's suggestion, no threshold issue will complicate this Court's review, since the Eleventh Circuit correctly exercised jurisdiction over petitioners' appeal.

Accordingly, this is the ideal case to resolve a recurring issue, and the petition for a writ of certiorari should be granted.

A. The Decision Below Is Incorrect

The government's defense of the decision below cannot obscure its incompatibility with *Zolin* or its threat to the attorney-client privilege and work-product doctrine.

1. *United States v. Zolin*, 491 U.S. 554 (1989), holds that even *judicial in camera* review of attorney-client communications so imperils the privilege that the government must justify the need for review based on nonprivileged evidence. *Id.* at 574. Yet the court of appeals here allowed *federal prosecutors* to review attorney-client communications and work product without requiring the government to make any showing at all. *See In re Grand Jury Subpoenas*,

454 F.3d 511, 520 (6th Cir. 2006) (enjoining use of filter team and noting that under *Zolin* "even inspections by the district judge … require a prior showing" and "a government taint team's review of documents is far riskier to the non-moving party's privilege").

The government draws three distinctions between this case and *Zolin*, but none holds up. First, the government observes that "no use of a filter team was at issue in *Zolin*." Opp. 14. But that does not matter: the salient point is that *Zolin*'s logic precludes the filter-team procedure here because filter teams composed of prosecutors—often from the same office as the investigative team—cannot have greater access to assertedly privileged documents than impartial judges.

Second, the government notes that here it has "obtained lawful custody of all of the assertedly privileged materials" via search warrant, while in *Zolin* the government had not. Opp. 15. But custody over the relevant materials has nothing to do with the intrusive potential of review of assertedly privileged documents and the need for protective screens. *See, e.g.*, *United States v. Christensen*, 828 F.3d 763, 799 (9th Cir. 2015) (applying *Zolin* procedures to recordings seized by government pursuant to a warrant); *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) ("even if the office already has the putatively privileged material, the prosecutor still must go through the two-step procedure of *Zolin*"). The attorney-client privilege and the Fourth Amendment's warrant requirement provide *independent* shields. That the government may seize materials consistent

with the Fourth Amendment does not justify its invasion of the privilege by reviewing seized materials before a court has ruled on privilege assertions. And contrary to the government's suggestion, Opp. 20, government custody over materials does not automatically create "exigency" that would justify a privilege violation.

Third, the government notes that *Zolin* involved "materials that the district court had already classified as attorney-client communications over which any privilege had not been waived." *Id.* at 15. But "in *Zolin* there is no indication that any court had *specifically* adjudicated the documents to be privileged." *In re Gen. Motors Corp.*, 153 F.3d 714, 716 n.3 (8th Cir. 1998). And courts have regularly applied *Zolin*'s protections absent such a prior classification. *See Christensen*, 828 F.3d at 799; *In re Gen. Motors*, 153 F.3d at 716. That makes sense: the *claim of privilege* triggers procedural protections, not the *adjudication* of privilege.

The government also contends (Opp. 15) that *Zolin* "supports" its position by allowing judges to consider evidence "directly but incompletely reflecting the content of the contested communications" when "determining whether *in camera* review is appropriate." 491 U.S. at 573-74. But that contention obscures that *Zolin* allows district courts to review only "*nonprivileged* evidence in support of [a] request for *in camera* review." *Id.* at 574 (emphasis added). The decision below, in contrast, licenses filter-team prosecutors to review assertedly *privileged* evidence before any court does. The government offers no sound justification for this incongruity.

2. Adopting the government's position would erode the attorney-client privilege and work-product doctrine—core protections in our criminal justice system. The "whole point" of these protections is "privacy," *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 599 (5th Cir. 2021), so that clients and their attorneys can have the "full and frank communication" necessary to prepare an effective defense, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Allowing filter-team review of attorney-client communications and work product will chill these important exchanges.

The government, echoing the Eleventh Circuit, asserts that the filter-team protocol here is "respectful" of these interests. Opp. 12 (quoting Pet. App. 28a). But nowhere else may the government review assertedly privileged communications *before* any court has ruled on a privilege claim. Filter-team review might be considered "respectful" of the privilege if the only alternative were *investigative*-team review. But as *Amici* Retired Federal Judges (Br. 5-6, 13-17) explain, privilege logs and *in camera* review by special masters or judges allow resolution of privilege claims while protecting the privilege. Multiple courts have employed such procedures instead of filter teams. *See* Pet. 22-23 & n.5. The government never contends that these procedures are unduly burdensome or unworkable—nor could it, since such procedures are routinely used in other contexts. So while petitioners propose an administrable approach that fully respects the attorney-client privilege and work-product doctrine, the government proposes an approach that destroys a privilege holder's privacy interests and at

best "mitigate[s]" (Opp. 12)—but does not prevent—the risk of improper use.

Finally, petitioners do not make a "broad request to categorically invalidate all government filter teams." *Id.* at 10. The Court need only rule that filter-team access to assertedly privileged materials is barred when privilege-log and *Zolin*-based *in camera* procedures are workable. The government has never identified any government interest that those procedures would impair—for instance, it does not claim that classified information is at issue or that it cannot disclose seized materials to petitioners without jeopardizing its investigation. The Court can leave open those exceptional claims for filter-team access to privileged materials, while holding that for ordinary cases—like this one—such access unjustifiably undermines the privilege.

B. Other Circuits Have Reined In Filter Teams

The disarray in the lower courts on filter-team protocols is manifest and merits this Court's review.

1. While the Eleventh Circuit saw "no possibility here that privileged documents will mistakenly be provided to the investigative team," Pet. App. 28a, the Fourth and Sixth Circuits concluded that filter teams create an "*inevitable*" risk of unauthorized disclosure, *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (emphasis added); *see In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 177, 179, 182 (4th Cir. 2019). And while the Eleventh Circuit approved *ex ante* filter-team review before a court had adjudicated privilege assertions, Pet. App. 31a, the Fourth and Sixth Circuits barred the use of filter teams and

required privilege logs and *in camera* review instead, *see In re Search Warrant*, 942 F.3d at 181; *In re Grand Jury Subpoenas*, 454 F.3d at 524.

Those cases did involve different filter-team procedures than those here. But contrary to the government's position, those courts' "frameworks of analysis" are not consistent with the Eleventh Circuit's. Opp. 16 (quoting Pet. App. 31a n.10). Rather, the Fourth and Sixth Circuit decisions "indicate that [those courts] would disapprove of the Modified Protocol adopted here." *Id.* at 18. If those courts thought that procedures like the Modified Protocol adequately protected privilege, they would have required them on remand. Instead, they required the procedures—privilege logs and *in camera* review—that petitioners propose. Pet. 28.

2. Similarly, *United States v. Christensen*, 828 F.3d 763 (9th Cir. 2015), reasoned that where the government seizes potentially privileged materials, *Zolin* requires it to make "a preliminary showing based on evidence other than the potentially privileged materials themselves" to justify district court *in camera* review. *Id.* at 799. It therefore faulted the district court for allowing *ex ante* filter-team review of the relevant materials instead of "follow[ing] the correct process under *Zolin*." *Id.* While the court "did not directly address the intersection of *Zolin* with the filter team," Opp. 22, the decision is clear that if *Zolin* prevents a *judge* from conducting *in camera* review absent a threshold government showing "based on evidence other than the potentially privileged materials themselves," *Christensen*, 828 F.3d at 799, then a *prosecutor* cannot review "potentially privileged materials"

without any showing at all. Yet the Eleventh Circuit here approved precisely that result.[1]

C. Filter-Team Protocols Should Be Clarified Now

The Department of Justice has recently centralized filter-team practice through its Special Matters Unit (SMU). This Court should correct the legal flaw inherent in standard DOJ procedures *before* the SMU spreads unjustifiable and intrusive practices nationwide.

1. The general use of filter teams needlessly exposes privileged material to the government's eyes without any threshold showing. This intrusion undermines the trust and confidence of clients in a wide range of investigations. Search warrants will often, as here, sweep up a range of privileged communication between clients and counsel. DOJ itself recognizes that risk by proposing filter teams. Yet the incidental seizure of privileged materials provides no justification for the government to review those materials and irreparably damage client trust. And nothing prevents filter-team prosecutors and agents from returning to their regular jobs, armed with knowledge gleaned from reading privileged files. They cannot purge that knowledge, and nothing prevents its misuse.

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[1] *United States v. Scarfo*, __ F.4th __, 2022 WL 2763761 (3d. Cir. July 15, 2022), did not "reach[]" whether the filter-team procedure there caused a constitutional violation or "comment[] on the advisability of" that procedure, *id.* at *17; *see* Opp. 22 n.2. *Scarfo* therefore does not support the government's position.

Beyond that, as the *Amici* Criminal Law and Legal Ethics Professors (Br. 11-21) show, filter teams frequently break down, leading to improper disclosures to investigators. *See also* Pet. 30-32. This is no surprise. It is impossible for filter teams to perfectly manage voluminous electronic documents with fail-safe barriers from investigators. The two teams cannot be hermetically sealed. They will inevitably need to talk to each another to understand what has been seized by the investigative team and why it might or might not be privileged.[2] Filter-team prosecutors are not all-knowing; they need investigators to make arguments about whether the crime-fraud exception applies. "[L]eaks of confidential information to prosecutors" are therefore both "logical" and "inevitable." *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

The government describes documented filter-team failures as "hand-picked examples." Opp. 23. But the government does not deny that filter teams have failed or predict perfection in the future. Reality refutes any such claim. And petitioners' and *amici*'s citations come from reported decisions, which are likely the tip of the iceberg. Filter teams operate "behind

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[2] Here, filter-team and investigative-team prosecutors both worked in the U.S. Attorney's Office for the Northern District of Ohio (albeit different branches). Pet. 11-12. The government states that the investigation "has since been taken over by the Criminal Division of the Department of Justice," Opp. 7 n.1, but that does not necessarily mean that the original prosecutors are no longer involved, or that the filter team has no communication with the investigating prosecutors.

closed doors under the government's own supervision." Professors *Amici* Br. 10. No one knows how often breakdowns occur. But common sense and experience suggest that they occur regularly, without any target's or court's knowledge. And failures can only rise with filter teams' expanded use.

The government (Opp. 24) cites the "presumption of regularity," but that presumption applies only "in the absence of clear evidence to the contrary." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). The numerous reported examples of filter-team mistakes and malfeasance provide "clear evidence" to overcome the presumption.

The government also emphasizes the "procedural protections adopted" in the Modified Protocol here, which the government believes "effectively mitigate the risk" of improper disclosures. Opp. 24. But "mitigation" is cold comfort when those efforts fail—and the structural features discussed above mean that failures will occur as long as filter teams review potentially privileged materials before a court adjudicates privilege. That is why protective procedures *ex ante* are needed.

2. The SMU, a new institutionalized filter team composed of DOJ attorneys, highlights the need for this Court's review. The SMU demonstrates DOJ's commitment to filter teams in major federal investigations. Absent this Court's intervention, DOJ is prepared to have the "filter team conduct an initial review of … potentially privileged content." *Id.* at 11. Far from "rendering any review at this point substan-

tively premature," *id.* at 23, the SMU's creation renders the need for this Court's intervention all the more pressing.

D. The Government's Vehicle Argument Lacks Merit

This case is an excellent vehicle in which to provide guidance on these filter-team issues. Pet. 34. The government contends that "the procedural posture of the case complicates review" because "[t]he government argued below that the court of appeals lacked appellate jurisdiction." Opp. 25. But the Eleventh Circuit rejected the government's argument, Pet. App. 22a, and the government's brief in opposition does not assert that the Eleventh Circuit erred. Rather, it simply notes what "[t]he government argued below" and that this Court would need to address jurisdiction before reaching the merits. Opp. 25.

The appellate-jurisdiction issue here is straightforward. The courts of appeals have jurisdiction to review denials of injunctions like the one in this case under 28 U.S.C. § 1291(a)(1). *See In re Search Warrant Issued June 13,* 2019, 942 F.3d 159, 169 (4th Cir. 2019). And regardless, the Eleventh Circuit correctly found jurisdiction under *DiBella v. United States*, 369 U.S. 121 (1962), which allows collateral-order review of denials of pre-indictment motions "solely for return of property and … in no way tied to a criminal prosecution in [existence]," *id.* at 131-32; *see Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 597-98 (5th Cir. 2021) (finding jurisdiction under *DiBella* in similar case). Here, petitioners "clearly seek only the return of their property" to prevent "the government from reviewing seized materials until a pro-

tocol protective of the attorney-client privilege [is] ordered." Pet. App. 17a-18a. Petitioners "do not seek to invalidate the [government's] seizure" or "to suppress the seized materials." *Id.* at 18a. Nor are petitioners' arguments "in any way tied to an ongoing criminal prosecution" because "[t]here is currently no complaint, arrest, detention, or indictment in this case." *Id.* And because petitioners' "interests in preventing the government's wrongful review of their privileged materials lie in safeguarding their privacy," damage to those interests would be "definitive and complete" if an immediate appeal were unavailable. *Id.* at 20a (quoting *DiBella*, 369 U.S. at 124).

If anything, this case is a better vehicle for resolving the question presented than a case arising after a criminal conviction. Petitioners sought an immediate return of their materials and injunction of filter-team review, Dist. Ct. Dkt. 4, at 7—remedies that "can redress any potential injury by ensuring it does not occur in the first place." Pet. App. 21a; *see In re Search Warrant* 942 F.3d at 175 (holding that the "harm is plainly irreparable, in that the Filter Team's review of th[e] privileged materials cannot be undone"). In contrast, if a privilege holder were forced to wait until after indictment and trial (which may never occur) to object to filter-team review of privileged materials, the harms inflicted by that review could no longer be fully remedied. And in a post-conviction appeal, the privilege holder would also need to satisfy "harmless-error review" by identifying "evidence that was privileged but improperly provided to the prosecution" and caused prejudice. *United States v. Scarfo*, __ F.4th __, 2022 WL 2763761, at *17 (3d Cir. July 15, 2022); *see*

United States v. DeLuca, 663 F. App'x 875, 878-79 (11th Cir. 2016) (similar with denial of motion to dismiss indictment).

Accordingly, the only sensible way to challenge filter-team review of documents—and thus cleanly raise the question presented—is to move for a return of seized documents and an injunction of the filter team's operation before it starts. Petitioners' use of that approach here counsels not against certiorari, but in favor of it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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