[Public Copy—Sealed Materials Redacted]

No. 24-

IN THE

Supreme Court of the United States

IN RE: GRAND JURY INVESTIGATION

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An order enforcing a discovery request or compelling compliance with a subpoena ordinarily "is not a 'final order' subject to appellate review." *Church of Scientology of California v. United States*, 506 U.S. 9, 18 n.11 (1992). Typically, an objecting party "must refuse compliance, be held in contempt, and then appeal the contempt order." *Id.* However, in *Perlman v. United States*, 247 U.S. 7, 12-13 (1918), this Court recognized an exception to that general rule: a discovery order directed at a disinterested third party is an immediately appealable final order because the objecting party is otherwise "powerless to avert the mischief of the order." *Id.*

In this case, a grand jury subpoenaed a set of privileged documents from Petitioner, an investment company, which objected to protect its attorney-client privilege. The grand jury also subpoenaed similar documents from several third parties, which indicated a willingness to produce the documents despite Petitioner's privilege assertion.

The question presented is:

Whether *Perlman* permits an immediate appeal of orders compelling both the objecting privilege-holder and a disinterested third party to comply with a grand jury subpoena.

PARTIES TO THE PROCEEDING BELOW

Petitioner is [redacted].

Respondent is the United States of America.

CORPORATE DISCLOSURE STATEMENT

Petitioner [redacted] states that it has no parent companies or publicly-held companies with a 10% or greater ownership in them.

STATEMENT OF RELATED CASES

In re Grand Jury Investigation, Nos. 23-10155, 23-10901 (11th Cir. judgment entered Oct. 16, 2024).

In re Grand Jury Investigation, No. 1:22-CV-03031 (N.D. Ga. case closed Jan. 5, 2023).

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INTRODUCTION

This case presents what should be a straightforward application of this Court's decision in *Perlman v. United States*, 247 U.S. 7, 12-13 (1918), but instead has deepened an acknowledged and substantial split among the circuits.

For several years, a grand jury in the Northern District of Georgia has been investigating a tax-shelter scheme allegedly facilitated by an executive who worked for Petitioner, an investment company.[1] Pet. App. 1a. The grand jury issued two subpoenas relevant to this Petition. The first "requested documents from an accounting firm where several [alleged] conspirators worked during the scheme." Pet. App. 2a. The second requested documents from Petitioner, a non-party, non-target "investment company whose executive [allegedly] facilitated the scheme." Pet. App. 2a.

The district court ordered both entities—along with several additional third parties and a government filter team—to produce documents in their possession over Petitioner's privilege objections. Although the third parties acknowledge Petitioner's assertion of privilege, none has a sufficient stake or interest in Petitioner's privilege to refuse compliance

[1] The parties are anonymized due to grand jury secrecy. *See, e.g., Rehberg v. Paulk*, 566 U.S. 356, 374 (2012) ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.").

with the subpoena. The third parties have indicated a willingness to comply with the subpoenas.

Petitioner attempted to appeal the district court's orders to the Eleventh Circuit under *Perlman*. *Perlman* holds that "a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology of California v. United States*, 506 U.S. 9, 18 n.11 (1992).

As at least four circuits have recognized, the circumstances here present a "classic *Perlman* situation." *United States v. Gorski*, 807 F.3d 451, 459 (1st Cir. 2015). Those circuits follow the rule that a privilege-holder's appeal of a district court's order to comply with a subpoena is "independent" of the underlying criminal proceeding, even where the order is directed at multiple parties. *Perlman*, 247 U.S. at 12. As those courts recognize, without an immediate appeal, the privilege-holder is "powerless to avert the mischief of the order." *Id.* at 13.

Nonetheless, following the lead of the Eighth Circuit, the Eleventh Circuit parted ways with those circuits, holding that it lacked jurisdiction over this appeal. According to these two courts, where an order compels production of documents by both a privilege-holder and a third party, the privilege-holder may not take an immediate appeal, but must first stand in contempt of the order before seeking appellate review of the district court's decision even as to the third party. It makes no difference in these cir-

cuits that the third parties are likely to disclose the privileged documents in the interim.

The decision below subverts the entire purpose of *Perlman*: to prevent the "mischief" from a third-party production. And it deepens an intractable split among the courts of appeals, which are now even more sharply divided over whether *Perlman* applies in the circumstances presented here. This case is an ideal vehicle for this Court to resolve this split and to correct the Eighth and Eleventh Circuits' unduly narrow reading of *Perlman*.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit's decision dismissing the appeal for lack of jurisdiction is reported at 119 F.4th 929 and reproduced at Pet. App. 1a-15a. The relevant proceedings of the district court are unreported and were filed under seal. Sealed documents are reproduced in the Sealed Appendix at Pet. App. 16a-69a.

JURISDICTION

Petitioner filed a petition for rehearing en banc, which was denied on January 10, 2025. Pet. App. 27a-28a. This petition was filed within 90 days of the decision denying rehearing en banc. Pet. App. 28a. This Court has jurisdiction to review the Eleventh Circuit's decision under 28 U.S.C. § 1254(1). The dispute over the production of Petitioner's privileged documents is still live. As the Eleventh Circuit explained: "Several of the conspirators have been indicted and convicted or pleaded guilty during the

pendency of the contested subpoenas. But the government still seeks to enforce the subpoenas to gather additional evidence." Pet. App. 2a.

STATEMENT OF THE CASE

1. In the summer of 2021, the grand jury issued a subpoena to an accounting firm where several suspected conspirators worked during the alleged tax-shelter scheme. Pet. App. 3a. The accounting firm complied with the subpoena, but withheld some 2,700 documents on Petitioner's request, as Petitioner expressed concern that production of the documents would violate its attorney-client and work-product privileges. Pet. App. 3a-4a.

The government moved to compel the accounting firm to produce the documents it had withheld. Pet. App. 4a. The accounting firm and the government eventually stipulated that Petitioner, as the privilege-holder, could review the records and "provide a privilege log, and participate in this litigation if they desire to do so." Pet. App. 3a-4a. The government confirmed that Petitioner was not a target of the grand jury's investigation. Pet. App. 5a, 10a.

While Petitioner was compiling the privilege log, the grand jury subpoenaed Petitioner "for the same kinds of records that it had requested from the accounting firm." Pet. App. 5a. Petitioner moved to quash the subpoena on privilege grounds, among other reasons. The district court denied Petitioner's motion to quash the subpoena, an order not at issue here. Pet. App. 5a.

Petitioner then submitted the privilege log for the documents the accounting firm had withheld, and followed up with a motion to intervene to assert its attorney-client and work-product objections to the subpoena directed at the accounting firm. Pet. App. 4a. The government opposed the motion and the assertion of privilege, arguing that the withheld documents were not privileged because the accounting firm "was not in an attorney-client relationship with any of the lawyers on the e-mails." Pet. App. 4a.

The government also moved to compel Petitioner to produce its own privileged documents. The government argued that to the extent any privilege applied to the documents, production was required under the crime-fraud exception, "the generally recognized exception to th[e] [attorney-client] privilege for communications in furtherance of future illegal conduct." *United States v. Zolin*, 491 U.S. 554, 556 (1989); Pet. App. 5a. The government then filed an *ex parte* motion to compel the production of the privileged documents from Petitioner and several other third parties. Pet. App. 5a-6a.

The government's motion sought a broad ruling, asking the district court to compel access to: (1) records held by Petitioner, (2) the withheld documents from the accounting firm, (3) records from engineering firms owned by a conspirator, and (4) documents held by the government filter team responsible for holding recovered documents until a court ordered the documents to be turned over to prosecutors. Pet. App. 5a-6a. None of these third parties claimed privilege over the documents. Pet. App. 6a.

2. In two separate orders issued the same day, the district court granted the government's requests in full and directed all parties to produce the documents the grand jury had subpoenaed. Pet. App. 16a-24a.

First, the district court denied Petitioner's motion to intervene in the dispute over the subpoena to the accounting firm. Pet. App. 4a. The court then granted the government's motion to compel the accounting firm to produce the subpoenaed documents. *See* Pet. App. 4a ("With [Petitioner] excluded from the proceeding and the accounting firm not asserting privilege itself, the district court granted the motion to compel because it was 'unopposed.'"). The accounting firm indicated it would comply with a court order directing it to produce the documents. Pet. App. 30a.

Second, the district court granted the government's motion to compel the production of documents under the crime-fraud exception. The court ordered Petitioner, the accounting firm, the engineering firms, and the government filter team to produce all subpoenaed documents. Pet. App. 6a-7a. The court offered one sentence of reasoning:

> It appearing that sufficient grounds and good cause exist to support the granting thereof, the United States' motion for crime-fraud finding and to compel production of documents is hereby GRANTED.

Pet. App. 6a. Just as it had ordered the accounting firm to produce everything the government had requested notwithstanding Petitioner's assertion of

privilege, the district court "compelled production of nearly every document that the government requested" from Petitioner and the other third parties. Pet. App. 6a. Petitioner moved the district court for a stay of the order compelling production pending appeal, which the court granted. Pet. App. 25a. The stay has since been lifted, over Petitioner's objection. *See* Pet. App. 25a-26a.

3. Petitioner immediately appealed both orders to the Eleventh Circuit under *Perlman v. United States*, 247 U.S. 7 (1918).

As a general rule, "[w]hen a witness seeks to challenge a subpoena on appeal, he ordinarily must first stand in contempt." Pet. App. 9a. The reason for this rule is that, as this Court explained in *Cobbledick*, "only when the witness fears the threat of 'languishing in jail' does his 'situation become so severed from the main proceeding as to permit an appeal.'" Pet. App. 9a (quoting *Cobbledick v. United States*, 309 U.S. 323, 328 (1940)); *see also United States v. Ryan*, 402 U.S. 530, 532-33 (1971) (reaffirming *Cobbledick*'s rule as consistent with 28 U.S.C. § 1291).

There is an important exception to this general principle, however, recognized in *Perlman*. "*Perlman* allowed immediate appellate review of an order enforcing a subpoena when the objector was not the party subject to the subpoena." Pet. App. 12a (citing 247 U.S. at 12-13). Under *Perlman*, "a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake

in the proceeding to risk contempt by refusing compliance." *Church of Scientology of California*, 506 U.S. at 18 n.11.

The *Perlman* doctrine rests on two critical premises. First *Perlman* explained that a privilege-holder's attempt to "intervene to oppose and urge in opposition property and constitutional rights and their sanctions ... was in effect independent" of the underlying criminal proceeding, to which the privilege-holder is not a party. 247 U.S. at 12; *see also, e.g.*, *Cogen v. United States*, 278 U.S. 221, 225 (1929) ("The independent character of the summary proceedings is clear, even where the motion is filed in a criminal case, whenever the application for the papers or other property is made by a stranger to the litigation.").

Second, the *Perlman* exception recognizes that precluding an immediate appeal would leave the privilege-holder "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13; *see also, e.g.*, *Cobbledick*, 309 U.S. at 328-29 ("To have denied [Perlman] opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim.").

As Petitioner explained to the Eleventh Circuit, both of *Perlman*'s key premises apply in the circumstances here. Most importantly, absent an immediate appeal, Petitioner would have no chance to prevent the release of its privileged materials by a third party. Pet. App. 12a-13a.

The Eleventh Circuit rejected Petitioner's arguments and found that "no exception to the final-judgment rule provides jurisdiction over these appeals." Pet. App. 8a.

First, the court held it lacked jurisdiction over Petitioner's appeal of the order compelling production of Petitioner's own documents. Pet. App. 9a-11a. The panel applied the rule that "[w]hen a witness seeks to challenge a subpoena on appeal, he ordinarily must first stand in contempt." Pet. App. 9a (citing *Cobbledick*, 309 U.S. at 326-28). Because Petitioner did not stand in contempt, the court found there was no appealable, final district court decision for it to review. Pet. App. 11a.

Second, the court held it also lacked jurisdiction over Petitioner's appeal of the order compelling production of documents in the possession of the third parties (i.e., the accounting and engineering firms and the government filter team) under *Perlman*. Pet. App. 11a-15a. The court recognized that the Eleventh Circuit had previously "adopted the *Perlman* exception to prevent 'intervenor[s] from losing all rights to appeal if the subpoenaed party does not choose to assume the risk of contempt.'" Pet. App. 12a (quoting *In re Fed. Grand Jury Proc. (FGJ 91-9)*, 975 F.2d 1488, 1492 (11th Cir. 1992)). But the court refused to apply *Perlman* here. Pet. App. 13a-15a. According to the Eleventh Circuit, *Perlman* would apply only if Petitioner "would have no other means of appellate review." Pet. App. 13a (citation omitted). But because Petitioner could have stood in contempt of its *own* production of documents and then appealed, the court concluded that Petitioner "could

raise all its privilege arguments on appeal if it stood in contempt." Pet. App. 14a.

REASONS FOR GRANTING THE WRIT

I. There Is An Acknowledged And Deepening Split Over Whether *Perlman* Applies In The Circumstances Here.

The question presented is the subject of an acknowledged and deepening 4-2 circuit split. Under longstanding case law in the First, Second, Fifth, and Tenth Circuits, Petitioner would be permitted to take an immediate appeal to protect its privileges under this Court's decision in *Perlman*. However, in recent years, the Eighth and Eleventh Circuits have diverged from that rule. This stark and intractable split among the circuits requires this Court's intervention.

1. Before the Eighth and Eleventh Circuits parted ways, several courts of appeals applied *Perlman* to the circumstances here. As those courts recognize, both aspects of *Perlman* apply to a party in Petitioner's position. Petitioner is a third party to the grand jury's investigation, and Petitioner's claim of privilege is "independent" of those proceedings. *Perlman*, 247 U.S. at 12. And Petitioner is "powerless to avert the mischief of the order" because it risks losing its privileges altogether if one of the other disinterested entities produces the documents over which Petitioner claims a privilege. *Id.* at 12-13.

The Tenth Circuit articulated this view most clearly in *In re Grand Jury Proceedings (Company*

X), 857 F.2d 710 (10th Cir. 1988). In that case, a privilege-holder, Company X, and a law firm, Law Firm Y, possessed the same privileged documents. A grand jury served both the company and the law firm with subpoenas requiring production of the privileged documents. *See id.* at 711. Law Firm Y initially objected to the production, but, after a court order compelling production, the law firm decided it would "not run the risk of contempt and [would] now produce the subpoenaed documents." *Id.* Company X, as the privilege-holder, appealed. *See id.*

The Tenth Circuit held it had jurisdiction under *Perlman*, even though—as here—the privilege-holder was ordered to disclose similar documents as a third-party. *Id.* at 711-12. The Tenth Circuit reasoned that because the law firm was willing to produce the privileged documents, "the Company must have the opportunity for appellate review at this time or the opportunity for appellate review of the district court's order to compel prior to actual production of the documents for grand jury use will be lost forever." *Id.* Unlike the decision below, the Tenth Circuit imposed no requirement that a privilege-holder stand in contempt just because it holds the same documents as a third party who is willing to produce those documents.

The First, Third, and Fifth Circuits have similarly applied *Perlman* in the circumstances presented here.

The First Circuit, for instance, considered these very circumstances to present "a classic *Perlman* situation." *United States v. Gorksi*, 807 F.3d 451, 459

(1st Cir. 2015). In *Gorski*, a non-party law firm and privilege-holder company were subpoenaed for, and compelled to produce, the same documents. The privilege-holder company appealed the district court's order compelling the law firm's production of documents under the crime-fraud exception. *See id.* at 457. The First Circuit had no trouble applying *Perlman* to those circumstances, as the privilege-holder, like Petitioner, was "a non-party" so "it cannot ensure there would be any traditional final judgment from which to appeal, either." *Id.* at 459.

The Third Circuit has likewise held it has jurisdiction over a privilege-holder's appeal of an order compelling production from three former employees of the privilege-holder. *In re Grand Jury*, 705 F.3d 133, 149 (3d Cir. 2012). The Third Circuit recognized that there was "no basis to believe that these former employees [were] anything but disinterested third parties who are unlikely to stand in contempt to vindicate [the privilege-holder's] alleged privilege," and applied *Perlman* to permit the privilege-holder to bring an immediate appeal. *Id.*

The Fifth Circuit recently applied this same rule to an appeal of a district court order directed at a government filter team. In *United States v. Fluitt*, 99 F.4th 753, 761 (5th Cir. 2024), the Fifth Circuit held it had jurisdiction over an immediate appeal of a district court's order to compel production of materials in the government filter team's possession. The Fifth Circuit reasoned "the party holding the disputed materials is different from the individuals or entities asserting privilege and, importantly, does not share the privilege-holders' interest in defying a court or-

der." *Id.* "[T]hat lack of interest is the 'touchstone of the *Perlman* inquiry,'" so the Fifth Circuit held the *Perlman* doctrine applied. *Id.* (citation omitted).

In short, at least four circuits have applied a rule directly contrary to the rule the Eleventh Circuit adopted in the decision below. Had Petitioner attempted to take this appeal in any of those circuits, *Perlman* would have applied to permit the immediate appeal.

2. In the decision below, the Eleventh Circuit departed from this consensus among the circuits. Relying on a decision from the Eighth Circuit, which itself acknowledged the split in authority, the decision below stakes out a much narrower—and unwarranted—reading of *Perlman*.

The Eleventh Circuit recognized that it had previously "adopted the *Perlman* exception to prevent 'intervenor[s] from losing all rights to appeal if the subpoenaed party does not choose to assume the risk of contempt.'" Pet. App. 12a (quoting *In re Fed. Grand Jury Proc. (FGJ 91-9)*, 975 F.2d 1488, 1492 (11th Cir. 1992)). But the court refused to apply *Perlman* here. Pet. App. 13a-15a. According to the Eleventh Circuit, *Perlman* would apply only if Petitioner "would have no other means of appellate review." Pet. App. 13a (citation omitted). But because Petitioner could have stood in contempt of its *own* production of documents and then appealed, the court concluded that Petitioner "could raise all its privilege arguments on appeal if it stood in contempt." Pet. App. 14a. Thus, the Eleventh Circuit found the existence of a second district court order

directed at Petitioner directly sufficient to make *Perlman* inapplicable altogether, notwithstanding the fact that Petitioner had no control over the other entities directed to produce its privileged documents.

In reaching this conclusion, the Eleventh Circuit "agree[d] with the reasoning of" the Eighth Circuit's decision in *In re Grand Jury Subpoenas*, 974 F.3d 842, 844-45 (8th Cir. 2020). Pet. App. 14a-15a. In that case, the Eighth Circuit held that *Perlman* did not permit a privilege-holder to take an immediate appeal of an order compelling production of privileged documents "because [the privilege-holder] is subject to the district court's order." *In re Grand Jury Subpoenas*, 974 F.3d at 844. The Eighth Circuit rejected the privilege-holder's argument that it should be allowed to take an immediate appeal because a third party also subject to the order "is likely to produce the documents in conjunction with a plea agreement or otherwise." *Id.* According to the Eighth Circuit, this risk was "not sufficient by itself to invoke *Perlman*." *Id.* Rather, according to the Eighth Circuit, the privilege-holder must "resist compliance, submit to contempt sanctions, and secure appellate review" of its own order, and at the same time—as Petitioner attempted to do here—"obtain a stay of the production order [directed at the third party] or rely on forbearance of the government pending appeal." *Id.*; *see* Pet. App. 43a-69a.

The Eighth Circuit's decision acknowledged its divergence from the case law in the First and Tenth Circuits discussed above. The court disagreed with the Tenth Circuit's decision in *In re Grand Jury Proceedings (Company X)*, 857 F.2d 710 (10th Cir. 1988).

In re Grand Jury Subpoenas, 974 F.3d at 844-45. According to the Eighth Circuit, the Tenth Circuit was wrong to "appl[y] *Perlman* solely because the third-party custodian was likely to produce documents." *Id.* at 845. The Eighth Circuit likewise distinguished the First Circuit's decision in *United States v. Gorski*, 807 F.3d 451 (1st Cir. 2015), as presenting "a classic *Perlman* situation" unlike the one before the Eighth Circuit, because the order against the privilege-holder in that case had been stayed. *In re Grand Jury Subpoenas*, 974 F.3d at 845 n.2. The Eleventh Circuit in the decision below did not discuss or attempt to reconcile its decision with *Gorski*, which presented the exact circumstances as here, including a temporary stay.

The Eighth and Eleventh Circuits have parted ways from the rest of the circuits in stripping privilege-holders like Petitioner of their right to immediate appellate review to protect that privilege. This intractable split among the circuits requires this Court's intervention.

II. The Decision Below Is Wrong.

The Eleventh Circuit's jurisdictional holding was an incorrect interpretation of *Perlman*. As the First Circuit recognized in identical circumstances, this case presents a "classic *Perlman* situation." *Gorski*, 807 F.3d at 459.

This appeal falls squarely within the *Perlman* rule. The district court ordered third parties—two engineering firms, an accounting firm, and a government filter team—to produce documents in their

possession. Petitioner—a non-party to the investigation and a non-target of the investigation—asserted privilege over those documents. Had there been a single order directed *only* at the third parties, there would be no question that *Perlman* applies here. The existence of a second order compelling Petitioner to produce the same or similar documents does not change *Perlman*'s application.

There is little difference between the position Petitioner finds itself in and the situation Louis Perlman faced when he turned to this Court to protect his rights in 1918. *Perlman*, 247 U.S. at 7-8. In *Perlman*, a grand jury sought production of exhibits that a court clerk held in its custody, but which were "Perlman's[] personal property." *Id.* at 10. Perlman was not a party to the grand jury investigation, "but a witness." *Id.* He asserted that "the use of [the exhibits] by the grand jury and the United States attorney as contemplated would be in violation of his rights and unwarranted in law." *Id.* The district court issued an order "directing the clerk to produce the exhibits before the grand jury." *Id.* Perlman sought appellate review of the order.

The government argued—as it has here—that "the order of the District Court if considered as a part of the criminal proceeding is not final, but merely interlocutory, and therefore not reviewable by this court." *Perlman*, 247 U.S. at 12. This Court disagreed, regarding the government's argument as "somewhat strange." *Id.* at 12-13. This Court rejected the government's position "that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other

time and in some other way." *Id.* at 13. Indeed, although this Court ultimately ruled against Perlman on the merits of his privilege claim, it had no trouble finding jurisdiction over the appeal.

This Court has consistently distinguished the circumstances of *Perlman* from situations in which a privilege-holder must stand in contempt to obtain appellate review of an objection. As this Court has explained, *Perlman* "has no application" in situations in which a privilege-holder "is free to refuse compliance and ... in such event he may obtain full review of his claims before undertaking any burden of compliance with the subpoena." *Ryan*, 402 U.S. at 533-34. "The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result." *United States v. Nixon*, 418 U.S. 683, 691 (1974). *Perlman* is one such exception. *Id.* (discussing *Perlman*).

The purpose of *Perlman* is plainly served by an immediate appeal here. As in *Perlman*, the court's order left Petitioner "'powerless to avert the mischief of the order,'" because "the [third parties] could hardly have been expected to risk a citation for contempt in order to secure [Petitioner] an opportunity for judicial review." *Ryan*, 402 U.S. at 533 (quoting *Perlman*). Indeed, the government filter team, in particular, cannot be expected to risk contempt to protect Petitioner's privilege—it was the government itself who sought to pierce that privilege. It thus does not matter whether Petitioner complies with the order or refuses and stands in contempt. Either way, the third parties are free to comply with the or-

der and "lack[] a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology of California*, 506 U.S. at 18 n.11.

In *Cobbledick* itself, this Court cited *Perlman* in warning the lower courts that "[d]ue regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." 309 U.S. at 328-29. As the Court explained, "[t]o have denied [Perlman] opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim." *Id.* So too here.

The decision below adopted an unduly narrow reading of *Perlman*. By contrast, the rule applied in the First, Second, Fifth, and Tenth Circuits aligns with *Perlman* and subsequent authority applying it. The point of *Perlman*, as this Court has noted, is that a third party "lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology of California*, 506 U.S. at 18 n.11. That reasoning remains, whether or not the privilege-holder also possesses the documents.

III. This Case Is An Excellent Vehicle To Decide This Important Question of Appellate Jurisdiction.

This case is an ideal vehicle for this Court to review the question presented. It squarely presents a key jurisdictional question that the Eleventh Circuit got wrong.

The Eleventh Circuit's opinion below turns solely on jurisdiction. *See* Pet. App. 2a. There are no alternative grounds that may preclude this Court's review of the question presented. This case presents the perfect opportunity to address this purely legal question.

Further, there is an urgent need for the Court to clarify whether the courts of appeals have jurisdiction over such appeals. If the Eleventh Circuit's rule is allowed to stay in place, litigants like Petitioner will be denied *any* appellate review to vindicate their right to assert attorney-client privilege, "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This subverts the entire purpose of *Perlman*—to provide an avenue for appellate review to parties who are otherwise "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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