No. 24-1184

In the Supreme Court of the United States

IN RE GRAND JURY INVESTIGATION, PETITIONER

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

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction over petitioner's interlocutory appeals of orders requiring petitioner and third parties to produce the same records in response to grand jury subpoenas, where petitioner did not first stand in contempt of court.

ADDITIONAL RELATED PROCEEDING

United States Supreme Court:

In Re Grand Jury Investigation, No. 24A527 (stay denied Dec. 2, 2024)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 119 F.4th 929.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2024. A petition for rehearing en banc was denied on January 10, 2025 (Pet. Supp. App. 27a-28a). The petition for a writ of certiorari was filed on April 10, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a grand jury in the United States District Court for the Northern District of Georgia issued subpoenas for overlapping sets of documents from petitioner and third parties, the district court granted the government's motion to enforce those subpoenas. Pet. App. 6a-7a. The court of appeals dismissed petitioner's interlocutory appeals for lack of appellate jurisdiction. *Id.* at 1a-15a.

1. One of the targets of an investigation into a tax-shelter scheme by a federal grand jury in Georgia is an executive of petitioner, an investment company. Pet. App. 2a. In June and July 2021, the grand jury issued subpoenas seeking "the same kinds of records" from petitioner and an accounting firm. *Id.* at 5a; see *id.* at 3a. Petitioner asserted privilege over certain documents; the accounting firm did not assert privileges of its own, but did not turn over documents as to which petitioner asserted privilege. *Id.* at 3a-6a.

The government thereafter moved to compel production of documents that the accounting firm had withheld based on petitioner's privilege claims. Pet. App. 3a. To assess the privilege claims, the district court entered a stipulated order permitting the privilege claimants to review relevant documents and submit privilege logs. *Id.* at 3a-4a. Petitioner filed a privilege log and moved under Federal Rule of Civil Procedure 24 to intervene in the proceedings concerning the accounting firm for the purpose of asserting attorney-client privilege and work-product protection. Pet. App. 4a.

The government subsequently filed an ex parte motion seeking "a broad crime-fraud or waiver ruling that would defeat" petitioner's privilege claims. Pet. App. 5a-6a. The motion sought production of several categories of documents held by petitioner, the accounting firm, a government filter team, and other third parties. *Ibid.* The government explained that various records "were not privileged because some communications did not involve legal advice," that records of other communications "included third parties that destroyed confidentiality," and that the remainder "implicated the crime-fraud exception" to the attorney-client privilege and work-product protection. *Id.* at 5a.

The district court granted the government's motion to compel the accounting firm to produce documents, and denied petitioner's motion to intervene, on the ground that petitioner had failed to establish privilege over the relevant documents. Pet. App. 4a; Pet. Supp. App. 23a-24a. The same day, the district court granted in part the government's ex parte motion for a crime-fraud or waiver ruling and to compel production of documents by petitioner, the accounting firm, and other third parties. Pet. App. 6a. The court's crime-fraud order required petitioner and third parties to produce almost all the documents that the government sought, with a few exceptions as to which the court concluded that the privilege issues were unclear. *Ibid.* Because the government had submitted the motion ex parte, the court also ordered the government to provide a redacted copy of the motion to petitioner and third parties. *Ibid.*

Rather than electing to stand in contempt of the district court's order requiring it to turn over the disputed records, which would have provided a way to generate an order indisputably subject to immediate appeal, petitioner instead filed interlocutory appeals from the denial of intervention and the orders requiring production of documents by petitioner and the third parties. Pet. App. 4a, 7a-8a. At petitioner's request, the district court granted a stay pending appeal of its orders compelling production. *Id.* at 7a.

2. The court of appeals dismissed petitioner's appeals for lack of jurisdiction. Pet. App. 1a-15a.

The court of appeals first observed that it lacked jurisdiction to review petitioner's appeal of the part of the crime-fraud order that required petitioner to produce documents. Pet. App. 11a; see *id.* at 9a-11a. The court explained that, under "longstanding precedent," "'orders

denying motions to quash grand jury subpoenas are ordinarily not appealable final orders under'" 28 U.S.C. 1291. Pet. App. 11a (quoting *In re Grand Jury Proceedings*, 832 F.2d 554, 558 (11th Cir. 1987) and *In re Fed. Grand Jury Proceedings (FGS 91-9)*, 975 F.2d 1488, 1491 (11th Cir. 1992) (per curiam)). The court explained that instead, "[w]hen a witness seeks to challenge a subpoena on appeal, he ordinarily must first stand in contempt," as only then does his "'situation become so severed from the main proceeding as to permit an appeal.'" *Id.* at 9a (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940)) (brackets omitted). And because petitioner here "did not stand in contempt before it filed these appeals," the court found that it "lack[ed] jurisdiction to review [petitioner's] objections about documents it must produce." *Id.* at 11a.

The court of appeals also found that it lacked jurisdiction over petitioner's objections to production of the same documents by third parties. See Pet. App. 11a-15a. The court recognized that *Perlman* v. *United States*, 247 U.S. 7 (1918), established a "narrow exception" to the contempt requirement by allowing "immediate appellate review of an order enforcing a subpoena when the objector was not the party subject to the subpoena." Pet. App. 12a. But the court explained that *Perlman* "applies 'only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims.'" *Id.* at 13a (quoting *United States* v. *Ryan*, 402 U.S. 530, 533 (1971)) (brackets and emphasis omitted). And the court observed that here, "[r]eview of the investment company's claims over these documents is not impossible—as needed to trigger *Perlman*—because the crime-fraud order compelled the investment company to produce a

set of documents that included the same documents that the third parties were required to produce." *Ibid.* Thus, petitioner "could raise all its privilege arguments on appeal if it stood in contempt." *Id.* at 14a.

3. After the court of appeals issued its decision, the district court lifted its stay. Pet. Supp. App. 25a-26a. The court of appeals denied petitioner's subsequent motion to stay the district court's order lifting the stay. See C.A. Order (Nov. 25, 2024). On December 2, 2024, this Court (Thomas, J.) denied petitioner's emergency motion for a stay. See No. 24A527. This Office is informed that, following this Court's denial of a stay, petitioner declined to stand in contempt of the district court's order and produced the records as required.

ARGUMENT

Petitioner contends (Pet. 10-19) that the court of appeals had jurisdiction over its interlocutory appeals of the district court's orders to compel production of documents even though petitioner did not stand in contempt. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. This Court has previously denied a petition for a writ of certiorari in a case presenting a similar question. See *John Doe 1* v. *United States*, 571 U.S. 818 (2013). It should follow the same course here.

1. An order to testify or to produce documents to a grand jury is generally not a "final decision[] of the district court" subject to immediate appellate review under 28 U.S.C. 1291. See *Cobbledick* v. *United States*, 309 U.S. 323, 327-328 (1940). The usual route for appellate review of a district court order compelling document production or testimony demanded by a subpoena is thus for the subpoena recipient to go into contempt of

court and appeal the contempt citation. See *ibid.*; see also *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992); *United States* v. *Ryan*, 402 U.S. 530, 534 (1971); *Alexander* v. *United States*, 201 U.S. 117, 121 (1906). Under *Perlman* v. *United States*, 247 U.S. 7 (1918), an exception to that general rule applies when a disclosure order is directed at a disinterested third party who lacks a sufficient stake in the proceeding to risk contempt by refusing compliance, and therefore the privilege holder is "powerless to avert the mischief of the order." *Id.* at 13.

Petitioner argues (Pet. 17-18) that the *Perlman* exception applies here because the district court compelled third parties to disclose the same documents as petitioner, and those third parties were unlikely to risk contempt. The court of appeals correctly recognized that *Perlman*'s exception does not apply under the particular circumstances here. Pet. App. 11a-15a. *Perlman* concerned a situation in which only the third party had custody of allegedly privileged documents and would likely choose to produce them rather than face contempt to allow an appeal. 247 U.S. at 13. In that circumstance, the privilege holder did not have the option of standing in contempt and therefore was "powerless to avert" the order. *Ibid.*

Thus, as this Court has made clear, the *Perlman* exception applies "[o]nly in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *Ryan*, 402 U.S. at 533; see *Cobbledick*, 309 U.S. at 328-329 (explaining that *Perlman* ensured that the objecting party was not "den[ied] * * * any appellate review of his constitutional claim"). Here, however, the court of appeals correctly recognized that the contempt option

was fully available to petitioner as a means of obtaining appellate review of its privilege claims.

The district court's crime-fraud order was not solely directed at third parties, but instead "compelled [petitioner] to produce a set of documents that included the same documents that the third parties were required to produce." Pet. App. 13a. Petitioner therefore "could raise all its privilege arguments on appeal if it stood in contempt." *Id.* at 14a. Petitioner simply chose not to do that. But when a claimant is "free to refuse compliance" and thus obtain "full review of his claims" before complying, *Perlman* "has no application." *Ryan*, 402 U.S. at 533-534.

2. Petitioner does not appear to dispute that it could have obtained immediate review of its privilege objections by standing in contempt. Instead, petitioner asserts (Pet. 16) that "[t]he existence of [an] order compelling Petitioner to produce the same or similar documents does not change *Perlman*'s application." That assertion is incorrect.

As petitioner recognizes, *Perlman* "has no application" where the privilege holder "may obtain full review of his claims." Pet. 17 (quoting *Ryan*, 402 U.S. at 533-534). See *In re Grand Jury Subpoenas*, 974 F.3d 842, 844 (8th Cir. 2020) (*Y Corp.*) (per curiam) ("The *sine qua non* of the *Perlman* exception is the inability of the privilege holder to obtain appellate review at the juncture when documents otherwise would be produced."); *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 485 (10th Cir. 2011) (The "underpinnings of the *Perlman* rule" stem from "the impossibility of an appeal later on."), cert. denied, 565 U.S. 1147 (2012); *Wilson* v. *O'Brien*, 621 F.3d 641, 643 (7th Cir. 2010) (Easterbrook, C.J.) (contrasting *Perlman* with a

situation in which a "person *has* a means to obtain appellate review" through the contempt route); *In re Sealed Case*, 737 F.2d 94, 98 (D.C. Cir. 1984) (explaining that *Perlman* is "confined * * * to situations in which the contempt route * * * is unavailable"); 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.23.2 (2d ed. 2025) (explaining that to invoke *Perlman*, an appellant "must not have had any other opportunity to secure review").

Petitioner argues (Pet. 17-18) that even though it has a route to appellate review of its privilege claims, the *Perlman* exception should nonetheless be extended to this situation. In petitioner's view (*ibid.*), the purpose of the exception would be served by doing so because "the third parties are free to comply with the order" even if petitioner stood in contempt and subsequently appealed. "Likelihood of production by a third-party custodian, however, is not sufficient by itself to invoke *Perlman*." *Y Corp.*, 974 F.3d at 844. "Even where *Perlman* applies, the third-party custodian could produce the requested documents; the privilege holder must obtain a stay of the production order or rely on forbearance of the government pending appeal." *Ibid.*

"The *sine qua non* of the *Perlman* exception is the inability of the privilege holder to obtain appellate review"—in *any* form—"at the juncture when documents otherwise would be produced." *Y Corp.*, 974 F.3d at 844. So long as the privilege holder has such a route, it does not need a special interlocutory appeal. Given a third-party custodian's discretionary ability to disclose the disputed records no matter what, the only difference between petitioner exercising the option it has (standing in contempt of the production order directed at petitioner itself) and the one it wants to add (a special

interlocutory appeal) is the requirement to stand in contempt as a prerequisite to an appeal. But that is no reason to expand the *Perlman* exception.

To the contrary, this Court has "consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance * * * and resistance to that order with the concomitant possibility of an adjudication of contempt." *Ryan*, 402 U.S. at 533. *Perlman* provides a path to "full review" where none exists, *ibid.*, not a means to avoid production pending such review.

Moreover, even if third parties produced documents during a privilege holder's appeal from a contempt order, a court could still remedy improper third-party disclosures after a successful appeal by, for example, ordering the government to destroy or return any documents it received or taking other corrective measures. See *Church of Scientology*, 506 U.S. at 13 (describing remedies available even after production); cf. *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 109 (2009) (holding that disclosure of allegedly privileged communications is by itself insufficient to justify interlocutory appeal under the collateral order doctrine in part because other remedies are available). And, again, any problem of third-party disclosures would be the same even if *Perlman* were to provide an unnecessary second route to asserting petitioner's privilege claims to the court of appeals.

Petitioner errs in relying (Pet. 17) on *United States* v. *Nixon*, 418 U.S. 683 (1974), for the proposition that the contempt rule is "not without exception and in some instances the purposes underlying the finality rule require a different result." *Id.* at 691. Petitioner never

explains how its departure from the longstanding contempt rule would serve, rather than undermine, the finality requirement—which is "especially compelling" in criminal cases because of the need to "safeguard against undue interruption" of grand jury proceedings. *Cobbledick*, 309 U.S. at 327. "Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims ha[s] [this Court] allowed exceptions to th[e] principle" that standing in contempt is an appropriate prerequisite to generating a final appealable order. *Ryan*, 402 U.S. at 533.

3. Petitioner asserts (Pet. 10) that "several courts of appeals applied *Perlman* to the circumstances here." But none of the decisions on which petitioner relies demonstrates a conflict regarding the circumstances in this case.

a. Contrary to petitioner's contention (Pet. 10-11), the Tenth Circuit has rejected petitioner's position. In *In re Motor Fuel Temperature Sales Practices Litigation*, *supra*, the district court had required privilege-holding trade associations and retailers to disclose communications that had taken place between them. See 641 F.3d at 477, 484. The Tenth Circuit "decline[d]" to apply the *Perlman* exception both because *Perlman* did not apply to "discovery in civil litigation," *id.* at 485, and "in any event," the privilege-holding trade associations had "not shown how they are precluded from any further review." *Ibid.* The court observed that the subpoenas against the privilege holders "'raise[d] the same * * * issues'" as the discovery order against the retailers, and therefore the privilege holders could obtain immediate review by "refus[ing] to comply with the subpoenas directed to themselves, incur[ring] contempt

citations, and appeal[ing] from the contempt orders." *Id.* at 486 (citation omitted); see *id.* at 485 (observing that the "underpinnings of the *Perlman* rule" rest on "the impossibility of an appeal later on").

Although petitioner does not address *In re Motor Fuel*, it asserts (Pet. 10-11) that the decision below conflicts with the Tenth Circuit's previous decision in *In re Grand Jury Proceedings*, 857 F.2d 710 (1988) (*Company X*), cert. denied, 492 U.S. 905 (1989). But *Company X* did not directly address the question presented, and it therefore cannot be taken to hold—contrary to the reasoning of *In re Motor Fuel*—that *Perlman* applies when the appellant is subject to an order to produce the same documents as the third party. In *Company X*, the government had "not argue[d]" against jurisdiction. *Id.* at 711. And the court's conclusion that *Perlman* applied because a third party was "willing to produce" documents, *id.* at 712, did not appear to consider that the privilege holder had also been subject to an order to produce documents. See *ibid.* Nor did the court's opinion detail whether the privilege holder and the third party were required to produce the same records. See *ibid.* *Company X* thus expressed no legal rule about situations like petitioner's and does not demonstrate any conflict with the decision below.

Petitioner notes (Pet. 14-15) that the Eighth Circuit has read the Tenth Circuit's *Company X* decision more broadly. See *Y Corp.*, 974 F.3d at 845 (reading *Company X* as "broadening * * * *Perlman*" and concluding that such "expansion would be ill-advised"). But the Tenth Circuit's subsequent decision in *In re Motor Fuel*, which cited *Company X*, suggests that the Tenth Circuit itself does not understand *Company X* to reach so far. See *In re Motor Fuel*, 641 F.3d at 485 (citing *Company X*,

857 F.2d at 711-712). And to the extent any uncertainty exists about Tenth Circuit precedent in light of *Company X* and *In re Motor Fuel*, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties," *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

b. Petitioner is also mistaken in asserting a conflict between the decision below and the Third Circuit's decision in *In re Grand Jury*, 705 F.3d 133 (2012) (*ABC Corp.*), cert. denied, 571 U.S. 818 (2013). That decision adopted the same approach as the court of appeals' decision in this case.

Among other issues, *ABC Corp.* considered an order that required both the privilege holder and a law firm to produce the same documents. 705 F.3d at 140-141. The documents had been transferred to the law firm's physical possession but remained in the privilege holder's legal control, and therefore the privilege holder had the ability to retrieve its documents and stand in contempt. *Id.* at 147-148. The Third Circuit found that *Perlman* did not apply because the "contempt route remain[ed] open" for the appellant to seek review. *Id.* at 149. And in doing so, the court "distinguished" cases in which "disclosure orders were not also directed at the privilege holder, making it effectively impossible for the holder to be held in contempt." *Id.* at 149 n.16.

Petitioner claims that *ABC Corp.* supports its position based on a different part of the Third Circuit's opinion that concerned "an order compelling production from three former employees." Pet. 12 (citing *ABC Corp.*, 705 F.3d at 149). But the court did not suggest that those third parties had been required to produce documents that the privilege holder had also been required to produce. See *ABC Corp.*, 705 F.3d at 149 (noting that

"the Government d[id] not argue that the contempt route remain[ed] open"). The Third Circuit instead applied *Perlman* to that order on the ground that "[t]he contempt route w[as] not open to ABC Corp. because the subpoena and subsequent Order were directed solely at the" third parties, "who [we]re unlikely to stand in contempt" themselves. *Ibid.* That application of *Perlman* is fully consistent with the court of appeals' decision here.

c. Petitioner's reliance (Pet. 11-12) on the First Circuit's decision in *United States* v. *Gorski*, 807 F.3d 451 (2015), is likewise misplaced. In *Gorski*, a company and its law firm were both ordered to produce records regarding a contracting-fraud scheme, but the district court "stayed and held in abeyance" the order against the company. *Id.* at 457. The First Circuit concluded that *Perlman* applied to the company's appeal of the order against the law firm because the company could not "be held in contempt because it is not the target of the subpoena at issue." *Id.* at 459. In reaching that conclusion, the court explicitly noted that "[a]lthough there is also a subpoena against [the company], the district court's production order as to [the company] has been stayed and held in abeyance pending our resolution of the appeals of the order as to [the law firm]." *Id.* at 459 n.2. "Therefore," the court continued, "we have before us only the part of the district court's order compelling production from [the law firm]." *Ibid.*

Because the order against the privilege holder was not at issue, *Gorski* did not determine whether *Perlman* applies even when the privilege holder is itself under an active obligation to produce the same documents as the third party. See *Y Corp.*, 974 F.3d at 845 n.2 (explaining that *Gorski* "does not support * * * expansion of the

[*Perlman*] exception" for that reason). Indeed, if anything, *Gorski*'s reasoning—which turned on whether the appellant could have been "held in contempt"—suggests that the court would have agreed that *Perlman* does not apply when the appellant could have obtained full review of its objections by standing in contempt of an order that required it to produce the same documents as the third party. 807 F.3d at 459; see *FDIC* v. *Ogden Corp.*, 202 F.3d 454, 459 (1st Cir. 2000) (explaining that *Perlman* applied to an order that was directed solely to a third party because the privilege holder "ha[d] no way of testing the order by allowing itself to be held in contempt").

d. Finally, petitioner is also incorrect in claiming (Pet. 12-13) that the decision below conflicts with the Fifth Circuit's decision in *United States* v. *Fluitt*, 99 F.4th 753 (2024). There, the district court ordered a government filter team to provide discovery material to a criminal defendant over the objection of third-party privilege holders. See *id.* at 758-760. The Fifth Circuit noted that *Perlman* applied when privilege holders are "unable to put themselves in contempt," which was the case there because the government filter team did not "share the privilege holders' interest in defying a court order." *Id.* at 760-761. Unlike this case, *Fluitt* did not involve an order requiring the privilege holders themselves to produce the same records, which would allow them to appeal by standing in contempt.[*]

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[*] Petitioner mentions (Pet. 10) the Second Circuit at the outset of its argument, but does not discuss the Second Circuit thereafter. Regardless, the Second Circuit has likewise emphasized that *Perlman* requires the unavailability of contempt. See *In re Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001*, 490 F.3d 99, 105-106 (2007).

4. Petitioner asserts (Pet. 19) "an urgent need for the Court to clarify whether the courts of appeals have jurisdiction" in cases like petitioner's. That assertion is unsound. Not only is appeal available in cases like this through the normal route of standing in contempt, see pp. 6-7, *supra*, but this Court has emphasized that the "preferred means for determining whether and when prejudgment orders should be immediately appealable" is "rulemaking, 'not expansion by court decision.'" *Mohawk*, 558 U.S. at 113 (citation omitted). See 28 U.S.C. 2072(c) (authorizing the Court to adopt rules defining "when a ruling of a district court is final for the purposes of appeal under section 1291"). Unlike litigation, the rulemaking process "draws on the collective experience of bench and bar" and "facilitates the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 114.

At all events, this case would be a poor vehicle for reviewing the question presented. Further review is unlikely to change the outcome of the underlying privilege dispute even if petitioner prevailed on its jurisdictional arguments. Most privilege rulings "are unlikely to be reversed on appeal," *Mohawk*, 558 U.S. at 110, and that is especially true here. The government's evidentiary burden to establish the crime-fraud exception is "a low hurdle," *In re Grand Jury Subpoena*, 2 F.4th 1339, 1345, 1349 (11th Cir. 2021), and here multiple co-conspirators have been convicted of crimes relating to the tax-shelter scheme that is still under investigation. See Pet. App. 2a; see also Gov't C.A. Br. 6-18, 24-28, 34-36; Gov't C.A. 28(j) Ltr. (Sept. 23, 2024); Gov't C.A. 28(j) Ltr. (Nov. 3, 2023); Gov't C.A. Response to Stay Mtn. 2, 8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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