No. 24-1184

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner finds itself in a "classic *Perlman* situation." Pet.15 (citation omitted). Just like Louis Perlman, Petitioner is "powerless to avert the mischief of the order" issued by the district court compelling third parties to produce Petitioner's privileged communications. *Perlman v. United States*, 247 U.S. 7, 13 (1918). As the petition established (at 8, 15-18), this appeal falls squarely within the *Perlman* rule. And the Eleventh Circuit's holding to the contrary conflicts with case law from at least four circuits.

Faced with this clear and deepening split, the government's only response is to deny any difference among the circuits and to distinguish the various cases on their facts. That attempt is unavailing. While of course cases exhibit factual differences, the government has no response to Petitioner's argument (at 10) that under longstanding case law in the First, Third, Fifth, and Tenth Circuits, Petitioner would be permitted to take an immediate appeal to protect its privileges under *Perlman*.

Unable to dismantle the acknowledged split, the government focuses instead on defending the merits of the decision below. That effort too falls short. The fact that Petitioner could have stood in contempt of the order compelling its own production of the privileged documents does not make *Perlman* any less applicable here. Rather, as in *Perlman*, Petitioner's assertion of privilege is "independent" of the underlying criminal proceeding and Petitioner is "powerless to avert the mischief of the order"—namely, the third

parties' production of privileged materials—absent an immediate appeal. *Perlman*, 247 U.S. at 12-13.

I. The Government Does Not Undermine The Existence Of A Circuit Split On The Question Presented.

As the petition established, the narrow interpretation of *Perlman* the Eighth and Eleventh Circuits apply is at odds with the rule in the First, Third, Fifth and Tenth Circuits. The government's efforts to downplay and reconcile this split are unavailing.

The government begins with the surprising claim that "none of the decisions on which petitioner relies demonstrates a conflict regarding the circumstances in this case." Opp.10. At minimum, the court that issued one of those decisions disagrees. In fashioning the rule that the Eleventh Circuit later adopted, the Eighth Circuit expressly diverged from the Tenth Circuit's interpretation of *Perlman*. *In re Grand Jury Subpoenas*, 974 F.3d 842, 844-45 (8th Cir. 2020) (distinguishing the "ill-advised" decision of the Tenth Circuit, which "concluded that the willingness of a third-party custodian to produce documents was sufficient reason to apply *Perlman*, even where the privilege holder was subject to the same order of production").

The Eleventh Circuit doubled down on this disagreement in the decision below. The court expressly "agree[d] with the reasoning of" the Eighth Circuit, which considered "a set of facts similar to these appeals." Pet.App.14a-15a. Like the Eighth Circuit, the Eleventh Circuit found dispositive the fact that "the privilege holder is subject to the district court's order."

Pet.App.14a (cleaned up) (citing and quoting *In re Grand Jury Subpoenas*, 974 F.3d at 844-45).

To avoid acknowledging this split, the government seizes on the narrow rule the Eighth and Eleventh Circuits adopted. Per the government, there is no split because *Perlman* applies to situations where "*only* the third party has custody of the allegedly privileged documents." Opp.6 (emphasis added). But that rule is not universal. Indeed, other courts have allowed *Perlman* appeals "even where the privilege holder was subject to the same order of production" and had custody over the same documents—the very rule the Eighth Circuit rejected as "ill-advised." *In re Grand Jury Subpoenas*, 974 F.3d at 844-45. In the First, Third, Fifth and Tenth Circuits, "the touchstone of the *Perlman* inquiry" is "the subpoenaed third party's lack of interest in protecting the confidentiality of the subpoenaed documents," *In re Grand Jury Subpoena*, 190 F.3d 375, 383 (5th Cir. 1999), *cert. denied*, 529 U.S. 1062 (2000), not whether the appellant also faces a subpoena for the same documents. Put differently, in most circuits "the essential fact" for appealability under *Perlman* is whether, "absent an immediate appeal, the allegedly privileged material will be disclosed." *In re Grand Jury Subpoena*, 274 F.3d 563, 570 (1st Cir. 2001).

The government next seeks to minimize this acknowledged split by picking apart the various facts and procedural postures of each of the cases the petition cites. Its attempt fails, as the distinctions it tries to draw are inapposite.

Because the Eighth Circuit expressly departed from the Tenth Circuit's approach in *In re Grand Jury Proceedings*, 857 F.2d 710 (10th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989) (*Company X*), the government argues that the Tenth Circuit has since disavowed that case in a later decision, *In re Motor Fuel Temperature Sales Practices Litigation*, 641 F.3d 470 (10th Cir. 2011). Opp.10-12. But *Motor Fuel* involved appeals filed by defendants, joined by third parties, in *civil litigation*. As the Tenth Circuit pointed out, *Perlman* was always foreclosed in that context. *See* 641 F.3d at 485 ("We are aware of no case … that extends *Perlman* beyond criminal grand jury proceedings. We decline to do so here."). The government's reliance on *Motor Fuel* is therefore unhelpful.

The government next suggests that *Company X* is not analogous to this case because it was unclear in that case whether the discovery orders—which were directed at both the appellant and a third party—concerned the same set of documents. But the court explicitly acknowledged that the case involved documents in the custody of "both the Company and Law Firm Y." *Company X*, 857 F.2d at 711; *see also* Petition for Writ of Certiorari at 2, *Company X*, (No. 88-1243), 1989 WL 1174625 (describing the universe of documents subject to both discovery orders). The government then implies that *Company X* is somehow not precedential on the key question here because the government there "had 'not argue[d]' against jurisdiction." Opp.11 (citation omitted). That is irrelevant. Because appellate jurisdiction "cannot be forfeited or waived," *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009), the Tenth Circuit did—as it must—address the

jurisdiction question and resolved it under *Perlman*. *See Company X*, 857 F.2d at 712 ("The fact that [the disinterested third party] is now willing to produce brings the instant case within the *Perlman* exception.").

The government correctly observes that the Tenth Circuit in *Company X* "did not appear to consider that the privilege holder had also been subject to an order to produce documents." Opp.11. But this does not undermine the split between the Circuits. Rather, that *is* the split: The Eleventh and Eighth Circuits consider whether the privilege holder is also subject to an order as to the same records and deny *Perlman* review if that is the case; the Tenth Circuit, as the government concedes, does not.

The government also misunderstands the relevant inquiry in *United States v. Gorski*, 807 F.3d 451 (1st Cir. 2015), and *FDIC v. Ogden Corp.*, 202 F.3d 454 (1st Cir. 2000). In *Gorski*, the court's analysis centered on the relationship between the appellant and *the disinterested third party*, not the relationship between the appellant and the court. *See* 807 F.3d at 459 (explaining that "[u]nder *Perlman*, 'a discovery order addressed to a non-party sometimes may be treated as an immediately appealable final order vis-à-vis a party who claims to hold an applicable privilege.'" (citation omitted)); *see also In re Grand Jury Subpoena*, 274 F.3d at 570 (asking primarily whether "absent an immediate appeal, the allegedly privileged material will be disclosed" by a third party without the appellant's control).

Moreover, the fact that the portion of the discovery order directed at the appellant in *Gorski* had been stayed made no difference, because the only reason it was stayed was to allow appeal of the portion of the order directed at the third party. *Gorski*, 807 F.3d at 459 n.2. If the *Perlman* exception did not apply, there would be no reason to stay the order at all. Contrary to the government's contention, the First Circuit does not require the order to have been directed "solely" at a disinterested third party. *Compare* Opp.14 *with Ogden*, 202 F.3d at 459 ("Courts frequently have invoked *Perlman* when a[n appellant] … seeks to appeal an order compelling [a third party] … to produce allegedly privileged materials."). Only the Eighth and Eleventh Circuits do.

The government next tries to distinguish *In re Grand Jury*, 705 F.3d 133 (3d Cir. 2012), *cert. denied*, 571 U.S. 818 (2013) (*ABC Corp.*), because there, the court allowed an appeal of the discovery order directed at the third party while denying jurisdiction over an appeal from the order directed at the appellant. *See* Opp.12-13. But no one contends that an appellant could immediately appeal a discovery order directed solely *at itself* without first standing in contempt. That would indeed contravene this Court's construction of *Perlman*. *See United States v. Ryan*, 402 U.S. 530, 532 (1971) ("one to whom a subpoena is directed may not appeal the denial of a motion to quash *that* subpoena" (emphasis added)).

In *ABC Corp.*, it did not matter that the two separate orders concerned the same or overlapping set of documents. What mattered was that one party could not stand in contempt for an order directed at another

party. *See ABC Corp.*, 705 F.3d at 144. *ABC Corp.* allowed an appeal for the order concerning the third parties despite a separate order directed at the appellant, which is the opposite of what the Eleventh Circuit did here.

Finally, the government emphasizes the wrong factor in the Fifth Circuit's holding in *United States v. Fluitt*, 99 F.4th 753 (2024). True, as the government notes, the original request directed at the third parties in *Fluitt* was reformed by the magistrate judge and redirected at the government instead. *See id.* at 759-60. But that was not the relevant issue in the court's *Perlman* analysis. Instead, what ultimately matters in the Fifth Circuit—and the First, Third, and Tenth—is that "the documents at issue are in the hands of a third party who has no independent interest in preserving their confidentiality." *Id.* at 761 (cleaned up). Because there a "party [held] the disputed materials" and was "different from the individuals or entities asserting privilege," that party was not expected to stand contempt to protect the privilege in question. *Id.* In effect, what was enough for the Fifth Circuit in *Fluitt* was not enough for the Eleventh Circuit here.

The split between the First, Third, Fifth and Tenth Circuits on the one hand and the Eighth and Eleventh Circuits on the other is so undeniable that the government's best option is to misinterpret how the circuits on the opposite side of the split from the decision below apply *Perlman*. As demonstrated, the government cannot persuasively reconcile the circuit split raised here.

II. The Approach Of The Eighth And Eleventh Circuits Is Wrong.

The Eleventh Circuit's decision distorts the purpose of the *Perlman* exception. As the government concedes (Opp.6), *Perlman* is an exception to the norm where the privilege holder is "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13. The Eleventh Circuit's application of *Perlman* disregards that it is the "mischief"—the disclosure—that this Court sought to allow the appellant to prevent. Instead, the approach it has borrowed from the Eighth Circuit denies review even if a third party will comply with a discovery order, and even if the appellant is "powerless to avert" that disclosure. *Id.* In ignoring the outcome *Perlman* expressly intended to prevent, the Eleventh Circuit's approach turns the exception completely on its head.

The government contends that Petitioner could have stood in contempt of its discovery order and obtained appellate review through that alternative path. Opp.7. That misses the point: Even if Petitioner had stood in contempt, it would have made no difference, because the third parties would divulge the privileged documents. Although a stay of that order temporarily allowed Petitioner to pursue a *Perlman* appeal, that stay was lifted after the Eleventh Circuit erroneously ruled that the appeal could not proceed. *See* Pet.App.25a-26a. In other words, Petitioner is still "powerless to avert the mischief" of the discovery order directed at the third parties here. *Perlman*, 247 U.S. at 13. That is precisely why this Court devised the *Perlman* exception. *Perlman*'s objective is not to force litigants to stand in contempt pointlessly, but

only to require contempt where that would protect the privilege while review is sought.

Contrary to the government's contention, this Court has never required that the documents be *only* in the custody of third parties (Opp.6), or that the order at issue be directed solely at those third parties (Opp.7). *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992) ("[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."). To read *Perlman* to include the circumstances here would not be to "expand" the *Perlman* exception (Opp.9), but to apply it faithfully, as the First, Third, Fifth, and Tenth Circuits do.

As those circuits recognize, what matters for the *Perlman* inquiry is not that an order is directed at the appellant, but that an order is directed at the *third party*. Because a disinterested third party alone could cause the disclosure that the privilege holder would be "powerless to avert," *Perlman*, 247 U.S. at 13, it is enough for the appellant privilege holder to "be able to prove that the [disinterested third party] will produce the records rather than risk contempt." *Company X*, 857 F.2d at 712 (citation omitted). Put differently, the privilege holder "ha[s] no control over the documents" because the third party here also holds them. *Gill v. Gulfstream Park Racing Ass'n*, 399 F.3d 391, 398 (1st Cir. 2005). The third party can "let the cat out of the bag, thus rendering an end-of-case appeal nugatory," and the privilege holder is

powerless to stop it. *Ogden*, 202 F.3d at 459. That is why *Perlman* applies.

As the Third Circuit has observed, allowing review regardless of whether the appellant has also been ordered to produce the same documents is consistent with *Perlman* because a party cannot stand in contempt for another party's failure to comply with a discovery order. *See ABC Corp.*, 705 F.3d at 149. Because Petitioner could not appeal the discovery order directed at the third party, much less stand in contempt for violating that order, "denial of immediate review would render impossible any review whatsoever" of its claims as to *that* specific order. *Ryan*, 402 U.S. at 533. It is irrelevant that there is a separate order directed at the appellant.

The government is also incorrect that improper disclosure could be remedied later, thus obviating the need for immediate appeal. *See* Opp.9 (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009)). In *Mohawk*, this Court narrowed the collateral order doctrine in the civil litigation context, observing that post-disclosure remedies can vindicate a defendant's privilege claims later. But the *Perlman* exception is distinct from the collateral order doctrine. *See United States v. Krane*, 625 F.3d 568, 572 (9th Cir. 2010). Because privilege claims are "one of the only non-procedural grounds on which a subpoenaed individual may resist a grand jury subpoena," *In re Grand Jury Investigation*, 966 F.3d 991, 996 (9th Cir. 2020), the *Perlman* exception protects against risks in that unique context. Unlike the defendant-appellant in *Mohawk*, a nonparty to a grand jury investigation has no means of curing privilege violations later: Once a

disinterested third party discloses privileged documents, those may be used by the government in additional investigations and form the basis of indictments to come.

The government warns against "undue interruption" to grand jury proceedings. Opp.10 (quoting *Cobbledick v. United States*, 309 U.S. 323, 327 (1940)). But the *Perlman* exception recognizes that "not to allow this interruption would forever preclude review of the witness' claim," which is why appellate review is justified. *Cobbledick*, 309 U.S. at 328. Moreover, the government's proposed solution—that Petitioner stand in contempt against its discovery order—would generate the same interruption. *See* Opp.7. Indeed, such interruption could be even more significant, because it would be pointless where the third party discloses the documents in the interim.

III. The Question Presented Is Important, And This Case Presents An Ideal Vehicle To Resolve It.

In *Perlman*, this Court understood the need to safeguard privilege documents from disclosure in grand jury proceedings. The Eighth and Eleventh Circuits currently apply *Perlman* in a way that incentivizes the government to "eviscerate" its protections by simply subpoenaing both a third-party custodian and the privilege holder to "artificially prevent the privilege holder from taking a *Perlman* appeal." *ABC Corp.*, 705 F.3d at 165-66 (Vanaskie, J., concurring). The government's rejoinder that this approach is consistent with *Mohawk* misunderstands how the *Perlman* exception and the collateral order doctrine

interact, and misapprehends the importance of the protections *Perlman* creates.

As the government emphasizes (Opp.5), in the years since this Court last addressed the *Perlman* exception, it has denied multiple petitions for certiorari on the exception's scope and application, including the precise question presented here in *Doe v. United States*, 571 U.S. 818 (2013). But as recent cases demonstrate, rather than dissipate over time, the split has only deepened. *See In re Grand Jury Subpoenas*, 974 F.3d 842; *In re Grand Jury 2021 Subpoenas*, 87 F.4th 229, 246 (4th Cir. 2023) (questioning *Perlman*'s "continued viability" after *Mohawk*); *In re Grand Jury Subpoenas Dated Sept. 13, 2023*, 128 F.4th 127, 140 (2d Cir. 2025) (concluding that *Perlman* is reconcilable with *Mohawk*). This case presents the perfect opportunity to resolve it, and only this Court can do so. The government does not dispute that the issue here turns solely on jurisdiction, nor that it presents purely legal questions. This case raises an issue of simple resolution, and this Court's input on this question is long overdue.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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