No. _____

In the Supreme Court of the United States

In re: SEARCH WARRANTS ISSUED FEBRUARY 18, 2022

JOHN DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When the Government seizes documents or hard drives that may contain attorney-client privileged and work-product protected material, it often utilizes a "Filter Team" to review the seized material to determine if the material is privileged before the material is turned over to a "Prosecution Team." Privilege holders can challenge the protocol to be used by the Filter Team. Generally, district court orders granting or refusing to enjoin certain privilege protocols are immediately appealable by both the Government and the privilege holder because such orders are either final orders or they are interlocutory orders granting or denying injunctions. The question is this:

Does the fact that the privilege holder is under criminal investigation deprive appellate courts of jurisdiction to review orders refusing to enjoin attorney-client privilege review protocols?

PARTIES TO THE PROCEEDING

Petitioner John Doe was the appellant below. Respondent United States of America was the appellee below.

RELATED PROCEEDINGS

United States District Court (W.D.N.C.)

In re: Search Warrants Issued February 18, 2022, No. 3:22-mj-78 (May 1, 2023)

United States Court of Appeals (4th Cir.):

In re: Search Warrants Issued February 18, 2022, No. 23-4330 (Aug. 2, 2024)

TABLE OF CONTENTS

Page:

Appendix

Sealed Supplemental Appendix

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Constitutional Provisions:

Rules:

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

John Doe, through counsel, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit that is in direct conflict with a decision of the Eleventh Circuit on an important question related to protection of the attorney-client privilege and work-product doctrine.

The Fourth Circuit held that, because John Doe is under criminal investigation, the court lacks jurisdiction to consider John Doe's appeal of an order refusing an injunction against an attorney-client privilege review protocol. App.18a. It so held even though, as Judge Quattlebaum in concurrence below noted, the protocol "run[s] the risk of hollowing out both the attorney-client privilege and the work-product doctrine." App.26a.

Judge Quattlebaum "respectfully encourage[d] the Supreme Court to consider" this issue, App.26a, and the Fourth Circuit stayed its mandate pending this Court's review of the instant petition. In light of Judge Quattlebaum's encouragement, the direct circuit split, and the national importance of protecting the attorney-client privilege and work-product doctrine, the Court should accept this petition.

OPINIONS BELOW

The opinion of the court of appeals, App.1a-26a, is reported at 111 F.4th 316. An order of the district court, Supp.App.1-12, is not published in the Federal

Supplement and was filed under seal. An additional order of the magistrate judge, Supp.App.13-22, is not published in the Federal Supplement and was filed under seal.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2024. A petition for rehearing was denied on August 30, 2024. App.29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]"

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

28 U.S.C. § 1292(a)(1) provides: "[T]he courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[.]"

STATEMENT OF THE CASE

1. In early 2022, federal agents sought and obtained search warrants for John Doe's home,

vehicle, and office. Agents then seized 27 computers and hard drives.

2. Before obtaining the search warrants, agents and/or prosecutors recognized the potential that the search would result in the seizure of attorney-client privileged and work-product protected documents. So when seeking the warrants, the Government also sought authority to utilize a filter protocol to review the seized material. The magistrate approved the Government's proposed protocol *ex parte*.

That *ex parte* protocol established a "Filter Team" comprised of government attorneys, staff and agents. This group of executive branch officials would review the seized material and decide, *unilaterally*, whether or not a certain document was potentially privileged (*i.e.*, covered by the attorney-client privilege or work-product doctrine). Documents deemed by the Filter Team to be not potentially privileged would be sent directly to the Prosecution Team without Doe having an opportunity to object and assert privilege. Materials that the Filter Team deemed potentially privileged would be held by the Filter Team pending either Doe's agreement that the materials were not privileged or a court order determining whether the documents were privileged.

3. After the seizure, Doe informed the Government that it had seized a large volume of privileged material, much of which pertained to the specific factual issues under investigation. He, therefore, objected to the Government utilizing the *ex parte* privilege protocol on the ground that executive branch officials cannot unilaterally deem a document non-privileged.

4. After negotiations between the parties reached an impasse, Doe moved for an injunction prohibiting the Government from utilizing the *ex parte* filter protocol and seeking a protocol under which Doe would have 45 days to lodge privilege objections before documents were provided by the Filter Team to the Prosecution Team. JA21-38.[1] Doe's motion was based on, *inter alia*, the Fifth Amendment, Federal Rule of Civil Procedure 65, and Federal Rule of Criminal Procedure 41(g).

The magistrate judge denied the injunction in part but modified the filter protocol to allow Doe to provide search terms to the Government to assist the Government in its privilege review. Supp.App.22.

Doe then appealed the magistrate's order to the district court. JA85-104. Doe again objected to the privilege protocol delegating to the executive branch the non-delegable judicial function of making a privilege determination. *Id.* He also raised a Fifth Amendment concern with the magistrate judge's modified filter protocol. *Id.* As Judge Quattlebaum explained below, for the modified filter protocol to be effective "the Filter Team would need Doe to provide it with certain identifying information," such as the names of potential witnesses. App.20a. However, that information "might be self-incriminating or might reveal some or all of the privileged information." App.20a, 25a. As a result, he argued (and Judge Quattlebaum later found) that the modified privilege protocol leaves Doe "caught between the proverbial rock and a hard place. Either give up potentially self-incriminating work product or

[1] References to the JA are to the joint appendix filed in the court of appeals.

risk the government reviewing work product and using it to the government's advantage." App.25a.

The district court upheld the modified privilege protocol on the ground that the Filter Team designating a document as not potentially privileged was not a privilege determination. Supp.App.7. It also rejected Doe's Fifth Amendment concern because Doe's participation was "not require[d]" but merely allowed. Supp.App.10.

5. Doe timely appealed. He argued that the district court erred in its legal conclusion that the Filter Team's determination that a document is not potentially privileged is not a privilege determination.

Initially, the Government did not contest appellate jurisdiction. Gov.Br.9. However, shortly before oral argument, the Fourth Circuit directed the parties to be prepared to discuss appellate jurisdiction, and it specifically referenced, *inter alia*, this Court's opinion *DiBella v. United States*, 369 U.S. 121 (1962), which held that appellate courts lack jurisdiction to conduct interlocutory review of denials of motions to suppress. App.27a-28a. Thereafter, the Government changed its position and argued that the court of appeals lacks jurisdiction to review Doe's appeal, but the Government argued that the court of appeals would have jurisdiction to review the order if the Government appealed. App.26a.

6. In response to the court's order, Doe noted that the Eleventh Circuit had recently considered the exact question at issue—that is, whether appellate jurisdiction exists to review a district court's privilege protocol order when the appeal is filed by an uncharged target of an ongoing criminal

investigation—and it held that appellate jurisdiction existed. Specifically, in *In re Sealed Search Warrant & Application for a Warrant by Telephone or Other Reliable Electronic Means ("United States v. Korf")*, 11 F.4th 1235, 1247 (11th Cir. 2021), the Eleventh Circuit held that appellate jurisdiction exists to review orders denying injunctions sought by parties under investigation to government privilege protocol orders. The Eleventh Circuit rejected the Government's argument that, under *DiBella,* the court lacked appellate jurisdiction because the movants were under investigation. *Id.*

The Eleventh Circuit noted that *DiBella* addressed a different situation—that is, where a party appeals a pretrial denial of a motion to suppress. Specifically, "[i]n *DiBella*, the Supreme Court considered whether orders on two preindictment motions to suppress the use of evidence in a forthcoming criminal trial (evidence that was allegedly procured through an unreasonable search and seizure) were exceptions to the final-judgment rule and immediately appealable as a final order." *Id.* at 1244. Because motions to suppress are not "'independent' from the [criminal] judgment" or "'fairly severable from the context of a larger litigious process'" of the criminal case, the *DiBella* Court held that the motions were not appealable before the final criminal judgment. *Id*. (quoting *DiBella*, 369 U.S. at 126-27).

The Eleventh Circuit held that pre-trial motions seeking privilege protocols, on the other hand, do not "attack the validity of the search and seizure under the Fourth Amendment," but instead seek to protect a citizen's privacy of their privileged communications. *Id*. at 1246. "The damage [to that interest] from any

error in the district court would be 'definitive and complete' if interlocutory review is not available." *Id.* at 1247 (quoting *DiBella*, 369 U.S. at 124). "[T]he remedy of returning to the [privilege holder] any improperly seized documents protected by privilege *before* the government has reviewed them . . . redress[es] any potential injury by ensuring it does not occur in the first place." *Id.* "And if a district court incorrectly denies relief when it is required, immediate review is necessary to preserve that same remedy." *Id.* (cleaned up). Finally, a motion that "seeks only to address the review protocol is a discrete action, not tied to any other civil or criminal proceedings, so granting review would not frustrate the policy against piecemeal review in federal cases." *Id.* (cleaned up). Accordingly, the Eleventh Circuit held that it had jurisdiction to consider the appeal of the district court's order denying the injunction—and Doe argued that the Fourth Circuit should reach the same result.

7. Following argument, both parties submitted supplemental briefing on the jurisdictional issue. Thereafter, the divided panel issued a decision in which the majority opinion held that the court lacked jurisdiction to consider Doe's appeal because "the record as a whole indicates that Doe is the target of a grand jury investigation." App.12a. Specifically, the panel majority first "treat[ed] the district court's order as a [Federal Rule of Criminal Procedure] 41(g) order." App.7a-8a. It then concluded that the question of appellate jurisdiction was controlled by *DiBella* (even though *DiBella* only addressed the appealability of denial of a motion to suppress—not a Rule 41(g) motion for return of seized property or a motion seeking to enjoin a privilege protocol). The

court then construed *DiBella* as creating a test for appellate jurisdiction over any order on "all motions and suits . . . that resemble Rule 41(g) motions." App.16a. Under that test, as the court construed it, an order on a Rule 41(g) motion is appealable before a final judgment in a future potential criminal case only if the motion (1) is "solely for return of seized property" and (2) is "in no way tied to a criminal prosecution *in esse* against the movant." App.9a (quoting *DiBella*, 369 U.S. at 131-32).

The panel majority held that Doe failed both prongs of the test. As to the first prong, it held that Doe's motion seeking an injunction to challenge a privilege protocol was not "solely for the return of property" because it sought the additional relief of establishing a privilege protocol. App.10a. Secondly, because Doe is under criminal investigation, and because Doe's motion might delay the Government's access to evidence for its investigation and give Doe advance notice of "privileged documents that may be inadmissible at trial," it was "tied to a criminal prosecution." App.11a. Accordingly, the Fourth Circuit reached the opposite holding from the Eleventh Circuit—that is, that it lacks appellate jurisdiction because Doe is under criminal investigation.

8. Judge Quattlebaum issued a concurring opinion in which he "[r]egrettably" concurred but "respectfully encourage[d] the Supreme Court to consider . . . permit[ting] interlocutory review of privileged-based challenges to screening protocols," because "protocols like this one run the risk of hollowing out both the attorney-client privilege and the work-product doctrine." App.26a. "Mitigating that risk, in [his] view, would be worth the costs of a

possible delay in Doe's criminal investigation or any inconvenience of piecemeal litigation." *Id.* Specifically, first, Judge Quattlebaum was "skeptical" that "*DiBella* applies to the denial of a Rule 41(g) motion challenging a protocol for handling material potentially containing privileged information just as *DiBella* applies to the denial of a motion to suppress under former Rule 41(e)." App.23a, 25a. He noted significant differences between denying a motion to suppress and denying a challenge to a privilege protocol. For one, "[d]enying a motion to suppress [merely] affect[s] what evidence can be introduced at trial against a defendant[,]" whereas "[d]enying a challenge to a protocol allegedly insufficient to protect a criminal defendant's potentially privileged information may affect the fundamental fairness of the entire trial." App.23a.

He continued,

> Notably, without ever having to introduce privileged information at trial, the government could review and use that information to shape a litigation strategy with no one else the wiser. . . . Imagine one team in the Super Bowl has the other's playbook. The team with the playbook could devise its offensive and defensive schemes much more effectively with the benefit of the other team's strategies. More insidious still, improper access to the other team's playbook could go undetected.

App.23a-24a. He also noted that the protocol suffers from the "obvious flaw" that it leaves "the government's fox . . . in charge of the appellants'

henhouse," and that the government "may err by neglect or malice, as well as by honest differences of opinion." App.24a (quoting in parenthetical *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006)).

He noted other differences between the instant appeal and the appeal at issue in *DiBella* as well:

> With the denial of a motion to suppress, at least a judge has had the opportunity to consider and decide the issue, and most importantly, to develop a record for us to potentially review later. But in Doe's challenge to the protocol, the issue may not be as neatly teed up. To be sure, a record might be proper for review if the government identified the potentially privileged documents and the parties disputed whether they were in fact privileged. In that situation, we'd have a judicial decision, as we would on a motion to suppress. But my concern is when that process does not play out. And the protocol approved here makes that a real possibility.

App.24a-25a.

Finally, he recognized a Fifth Amendment problem with the filter protocol.

> [T]o challenge the introduction of evidence, a criminal defendant need not give up any rights on their way to file a motion to suppress. That might not be

> the case when challenging a protocol like this one. Consider work product doctrine—materials prepared in anticipation of litigation that need not go to or from an attorney. Under the protocol, Doe is asked to provide relevant search terms so that the filter team can flag such documents. But to properly flag them, a defendant may have to identify terms that might be self-incriminating or might themselves reveal some or all of the privileged information. As a result, Doe is caught between the proverbial rock and a hard place. Either give up potentially self-incriminating work product or risk the government reviewing work product and using it to the government's advantage.

App.25a.

Thus, he concluded, "Maybe *DiBella* applies here despite these differences[,] [b]ut to repeat, I am skeptical. The risks and inability to later remedy them seem much greater" here. App.25a.

Despite finding that *DiBella* likely does not apply, Judge Quattlebaum was "not sure" that appellate jurisdiction exists considering a separate opinion of the Court, *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009). App.25a (cleaned up). Specifically, under *Mohawk*, "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." *Mohawk*, 558 U.S. at 109. But Judge Quattlebaum found this result problematic. He wrote: "make no mistake, protocols like this one run the risk of hollowing out both the

attorney-client privilege and the work-product doctrine." App.26a. He further noted that "ironically, . . . in this procedural posture, a criminal target like Doe—whose liberty is at risk—has fewer rights than a civil litigant fighting over money." *Id.* "And tilting the scales further, the government submits that if the district court had adopted Doe's protocol, it could have appealed." *Id.*

Accordingly, Judge Quattlebaum "respectfully encouraged the Supreme Court to consider loosening the reins of *Mohawk* to permit interlocutory review of privilege-based challenges to screening protocols." *Id.* (cleaned up).

9. John Doe now petitions the Court to consider the important question of whether courts of appeals have appellate jurisdiction under these circumstances.

REASONS FOR GRANTING THE PETITION

This case presents an important question of whether courts of appeals are prohibited from reviewing orders that "run the risk of hollowing out both the attorney-client privilege and the work-product doctrine" before that harm materializes simply because the movant appears to be under criminal investigation. *See* App.26a. The Court should consider this petition (1) because of the importance of the issue, the resolution of which will determine whether protections for the attorney-client privilege are subject to "widely varying applications by the courts," *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)); (2) because there is a direct circuit split on the question; (3) because Judge Quattlebaum "respectfully encouraged the Supreme Court to

consider" this issue; and (4) because this case presents an ideal vehicle for resolving this urgent question of appellate jurisdiction.

A. The issue is of national importance.

The attorney-client privilege and work-product doctrine are vital to the proper administration of justice. *See, e.g., Upjohn*, 449 U.S. at 389; *United States v. Nobles*, 422 U.S. 225, 238 (1975). "[F]or the attorney-client privilege to be effective, it must be predictable." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011). "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Jaffee*, 518 U.S. at 18 (quoting *Upjohn,* 449 U.S. at 393).

As relevant here, the privilege will be subject to "widely varying applications by the courts," *Jaffee*, 518 U.S. at 18 (cleaned up), if, as the Fourth Circuit held, courts of appeals lack jurisdiction to review orders that determine—not the factual question of whether a document is privileged—but the legal question of what process is required to sufficiently protect the privilege following a law enforcement seizure. Under the Fourth Circuit's holding, district courts are free to fashion essentially unreviewable protocols, so long as the privilege holder is under criminal investigation.

Regarding unreviewability, as Judge Quattlebaum noted, violations of a privilege-holder's privilege "could go undetected." App.23a-24a ("Notably, without ever having to introduce privileged information at trial, the government could review and use that information to shape a litigation strategy *with no one else the wiser*." (emphasis added)). That

is because privilege protocols may not require the Government to disclose privilege violations. Indeed, the instant privilege protocol does not require such disclosure, JA60-61—but the Fourth Circuit nonetheless held it could not review the protocol to correct that or any other defect.

Review will also be rare because few criminal defendants preserve the right to review their convictions. Almost all criminal defendants plead guilty pursuant to plea agreements, and almost all plea agreements contain appeal waivers. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87, 122-126 (2015) (eighty percent of plea agreements include appeal waivers). It would be highly risky for a criminal defendant to take a case to trial to preserve appellate review of the privilege protocol. Therefore, under the Fourth Circuit's holding, most privilege protocol orders will never be subject to meaningful review, even where, as here, those orders violate separation of powers and "le[ave] the government's fox in charge of guarding the [privilege-holder]'s henhouse," and thus create a substantial risk of the privilege being violated. *In re: Search Warrant Issued June 13, 2019 ("Balt. Law Firm")*, 942 F.3d 159, 178 (4th Cir. 2019) (quoting *In re Grand Jury Subpoenas*, 454 F.3d at 523).

Even if review is available, the question will likely not be whether the protocol itself was illegal, but will instead be whether the protocol led to breaches of Doe's privilege and whether those breaches were prejudicial. *Cf. Greer v. United States*, 593 U.S. 503,

513 (2021) (suggesting that structural errors are a limited class of errors and that most errors are subject to harmless error review). Now, on the other hand, the question for the appellate court is the legality of the protocol in the first instance. Specifically, here, the district court delegated the non-delegable duty of making privilege determinations to the executive branch. *See Balt. Law Firm*, 942 F.3d at 176-77 ("[W]hen a dispute arises as to whether a lawyer's communications or a lawyer's documents are protected by the attorney-client privilege or work-product doctrine, the resolution of that dispute is a judicial function.") ("[A] court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute.") (citing cases). And the protocol will likely be ineffective at protecting Doe's privilege unless he agrees to waive his Fifth Amendment right against self-incrimination and provide information to the Government. *See* App.25a (Quattlebaum, J., concurring) (noting that "Doe is caught between the proverbial rock and a hard place").

This privilege review process "widely varies," *Jaffee*, 518 U.S. at 18 (cleaned up), from what the Fourth Circuit previously held was required in privilege protocols. *See Balt. Law Firm*, 942 F.3d at 176 (holding that the executive branch cannot make privilege determinations, and that a privilege determination becomes final when documents are provided to the prosecution team). The instant protocol would also likely be reversed in the Eleventh Circuit, which held that such protocols are subject to immediate appellate review, and further held that the protocol at issue sufficiently protected the privilege

because it "did not assign judicial functions to the executive branch," but instead afforded the privilege holders "the first opportunity to identify potentially privileged materials" and required that "before any of those items may be provided to the investigative team, either the [privilege holders] or the court must approve." *Korf*, 11 F.4th at 1247, 1251. And the instant protocol likely would be reversed if the privilege holder were not under criminal investigation, because the Fourth Circuit's holding that it lacks appellate jurisdiction turns on whether or not the appellant is under criminal investigation. App.12a.

Thus, the Fourth Circuit's holding that it lacks jurisdiction to review a privilege protocol when the appellant is under criminal investigation creates the prospect of "widely varying" protections for the attorney-client privilege. *Jaffee*, 518 U.S. at 18. Variations will exist by jurisdiction, by district judge, and based on the Government's label of the privilege holder as a witness, subject, or target. Such an uncertain privilege is "little better than no privilege at all." *Id.* (cleaned up).

If lawyers and citizen are aware that the only protection for their privileges if they find themselves under criminal investigation will be law enforcement officers and prosecutors unilaterally acting in the target's interest to fully protect their privileges, clients and their lawyers ought not create written documentation of their communications with each other. For, as circuit courts have routinely recognized, protocols that leave the government in charge of guarding the privilege-holder's privilege create substantial foreseeable risks of breaches. *See,*

e.g., Balt. Law Firm, 942 F.3d at 178; *In re Grand Jury Subpoenas*, 454 F.3d at 523.

Thus, the Fourth Circuit's holding would disincentivize the sharing of information between clients and their counsel that the attorney-client privilege and the work-product doctrine are designed to protect. Such a chilling effect would undermine the administration of justice, *see, e.g., Balt. Law Firm*, 942 F.3d at 176, and supports this Court heeding Judge Quattlebaum's encouragement to clarify that appellate jurisdiction exists.

This Court's opinion in *Mohawk*, 558 U.S. at 109-10, is instructive. There, the Court held that a district court's order in a civil case requiring a privilege holder to disclose material over which the privilege holder claimed privilege did not qualify for immediate appeal because (1) "deferring review until final judgment [would] not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel"; and (2) privilege-holders have other means of obtaining immediate review, including an opportunity to unilaterally obtain review by refusing to produce the material, being held in contempt, and appealing. 558 U.S. at 109-11. Here, on the other hand, deferring review will chill the sharing of information protected by the attorney-client privilege and work-product doctrine, and privilege holders who are under criminal investigation lack a mechanism to unilaterally obtain immediate review. In *Mohawk*, the Court also noted that deferring review of a district court's privilege determination would not discernably chill the sharing of information between clients and their lawyers because such privilege determinations are "unlikely to be reversed on appeal [since] they rest on *factual*

determinations for which appellate deference is the norm." *Mohawk*, 558 U.S. at 110 (emphasis added). The same cannot be said for the *legal* question of whether a privilege protocol sufficiently protects the privilege, which is subject to *de novo* review. Accordingly, *Mohawk* supports granting this petition and reversing the Fourth Circuit's holding.

Because the Fourth Circuit's holding would lead to widely varying protections of the attorney-client privilege and of the work-product doctrine by jurisdiction, by district (or magistrate) judge, and by the status of the privilege holder, the holding will chill the information sharing that the attorney-client privilege and the work-product doctrine are designed to protect. Such a chill will undermine the administration of justice and infringe upon a criminal defendant's Sixth Amendment right to the assistance of counsel for his defense. Therefore, resolving the instant question is of national importance.

B. A member of the panel below "encouraged the Supreme Court to consider" this issue.

Judge Quattlebaum, who concurred in the panel's decision but not its opinion, "respectfully encourage[d]" this Court to "permit interlocutory review of privilege-based challenges to screening protocols." App.26a. He did so because the Fourth Circuit's holding prohibited review of a protocol that "run[s] the risk of hollowing out both the attorney-client privilege and the work-product doctrine," *id.,* by leaving "the government's fox . . . in charge of the [privilege-holder's] henhouse" in a manner that might give the Government Doe's "playbook" for responding to the Government's allegations, App.24a.

Judge Quattlebaum further noted that he was "skeptical" of the majority's legal conclusion that appellate review was barred by this Court's *DiBella* opinion. Specifically, he noted that while a motion to suppress and Doe's motion had similarities, there were also key differences. First, "[d]enying a motion to suppress may affect what evidence can be introduced at trial against a defendant[,] while [d]enying a challenge to a protocol allegedly insufficient to protect a criminal defendant's potentially privileged information may affect the fundamental fairness of the entire trial." App.23a. Additionally, unlike when a judge rules on a motion to suppress, in this situation the judge may not have a record that "neatly tee[s] up" the issue for appellate review. App.24a. And finally, while "a criminal defendant need not give up any rights on their way to file a motion to suppress[,] [t]hat might not be the case when challenging a protocol like this one." App.25a.

Judge Quattlebaum encouraged this Court "to permit interlocutory review of privilege-based challenges to screening protocols" because he did not see "under current law . . . [any] vehicle permitting interlocutory review of Doe's challenges to the district court's order." App.26a. This Court should grant Doe's petition for this reason as well.

C. There is a direct circuit split on the instant question.

Review is particularly appropriate here because the Fourth Circuit's decision is directly contrary to the Eleventh Circuit's opinion. *Compare Korf*, 11 F.4th 1235, *with* App.1a-26a. These two circuits appear to be the only circuits to have considered the

issue. Unlike with many other legal questions, waiting until additional circuits consider the issue will not meaningfully advance the Court's consideration of the question because the fundamental question is whether *DiBella* applies to motions seeking injunctions against privilege protocols, and this Court is well-positioned to decide the scope of coverage of its own opinion.

Because the question for the Court is how courts of appeals should interpret this Court's opinion in *DiBella*, waiting for other circuits to consider the question is unnecessary. And, given the importance of the issue, which is bolstered by Judge Quattlebaum's encouragement of this Court's review, the Court should address this issue now.

D. This case is an ideal vehicle for resolving the issue.

The question of appellate jurisdiction was briefed, argued, and ruled upon in a published opinion, and the only issue resolved in the opinion was the jurisdictional question presented for this Court's review. This case, therefore, presents an ideal vehicle for resolving the circuit split on this important question.

CONCLUSION

Because the question is of national importance, because Judge Quattlebaum encouraged this Court to resolve the question, because there is a direct circuit split, and because this case presents an ideal vehicle for resolving this question, the Court should grant this petition and determine that courts of appeals are not deprived of jurisdiction to review privilege

protocol orders when the party seeking review appears to be under criminal investigation.

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