No. 24-502

In the Supreme Court of the United States

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction over petitioner's appeal from the district court's order denying his motion to revise the protocol, which had been included in the warrants obtained before a search, for filtering materials recovered in the search to protect materials subject to attorney-client privilege and work-product protection.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 111 F.4th 316. The orders of the district court (Pet. Supp. App. SA1-SA12) and the magistrate judge (Pet. Supp. SA13-SA22) are sealed and unreported.

JURISDICTION

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

STATEMENT

As part of a criminal investigation, the government executed search warrants and seized electronic devices and paper documents from petitioner. See Pet. App. 3a. The warrants included provisions establishing a proto-

col for filtering items that were potentially subject to attorney-client privilege or work-product protection. See *ibid.* The magistrate judge denied petitioner's motion for an order revising the filter protocol. See *id.* at 5a. The district court affirmed. See *id.* at 6a. The court of appeals dismissed petitioner's appeal for lack of appellate jurisdiction. See *id.* at 1a-26a.

1. In 2022, the government began investigating whether petitioner committed wire fraud, tax fraud, and money laundering. See Pet. App. 2a. A magistrate judge issued three search warrants authorizing searches of petitioner's apartment, office, and car. See *ibid.*

The search warrants included a protocol, which was approved by the magistrate judge, for reviewing seized documents. See Pet. App. 2a-3a. Under that protocol, the prosecution team could immediately begin reviewing the seized materials. See *id.* at 3a. But if it encountered "materials that were potentially attorney-client privileged or subject to the work-product doctrine," it would halt its review. *Ibid.* (brackets and citation omitted). A filter team with "no future involvement in the investigation" would then "segregate" potentially protected materials from unprotected materials. *Ibid.* (citation omitted). Materials that the filter team identified as potentially protected could be sent to the prosecution team only with petitioner's consent or a court order finding that the materials were not protected. See *ibid.*

The government executed the search warrants and seized electronic devices and paper documents. See Pet. App. 3a. Although the search warrants allowed the prosecution team to begin its review immediately, that team decided to wait so that the filter team could "prophylactically segregate" potentially protected materials. *Ibid.* The government contacted petitioner's

counsel to request "search terms, such as attorneys' emails and domain names, to assist in segregating potentially privileged material." *Id.* at 4a (brackets and citation omitted). Counsel did not respond and, a few weeks later, withdrew from the case. *Ibid.* Petitioner retained new counsel, who objected to the government's review of the seized materials. See *ibid.* The government and petitioner's counsel then tried, but failed, to negotiate a revised protocol for reviewing the materials. See *ibid.*

2. Petitioner intervened in the search-warrant proceedings and filed a motion "to enjoin the government from reviewing the seized material utilizing the *ex parte* filter protocol set forth in the search warrant." Pet. App. 4a (citation omitted). He proposed a revised filter protocol, under which (1) he would have an opportunity to review the seized materials and lodge privilege objections to documents being provided to the prosecution team; (2) a judge or special master would rule on the objections before the materials would be provided to the prosecution team; and (3) the filter team would consist of individuals who are not employed by the same offices as members of the prosecution team. See *id.* at 4a-5a.

The magistrate judge denied petitioner's motion, finding that petitioner did not satisfy the four-factor test for a preliminary injunction. See Pet. App. 4a. The district court affirmed that decision. See *id.* at 4a-5a.

3. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. See Pet. App. 1a-26a.

The court of appeals first determined that it lacked jurisdiction under 28 U.S.C. 1291, which authorizes appeals from final decisions of district courts. See Pet. App. 6a-13a. It explained that, under this Court's decision in *DiBella* v. *United States*, 369 U.S. 121 (1962),

orders resolving preindictment motions concerning seized evidence ordinarily do not constitute final orders. See Pet. App. 8a-9a. It observed that, under a narrow exception recognized in *DiBella*, an order denying a pre-indictment motion is immediately appealable if the motion is (1) "solely for the return of property" and (2) "in no way tied to a criminal prosecution *in esse* [*i.e.*, in existence] against the movant." *Id.* at 9a (quoting *DiBella*, 369 U.S. at 131-132) (footnote omitted). The court found that petitioner's motion failed the first aspect of that test because it sought to stop the government from reviewing seized material and to establish a revised filter protocol—not to require the government to return property. See *id.* at 10a-11a. The court then found that the motion also failed the second aspect of the test because "the records at issue are tied to a criminal prosecution" against petitioner. *Id.* at 11a.

The court of appeals further determined that it lacked appellate jurisdiction under 28 U.S.C. 1292(a)(1), which authorizes appeals from orders denying injunctions. See Pet. App. 14a-17a. It expressed "skeptic[ism]" that petitioner's filter-protocol motion was "really a motion for an injunction," noting that "traditional courts of equity did not typically issue equitable relief, including injunctions, in ongoing criminal cases." *Id.* at 14a & n.14. But the court explained that regardless, the test set forth in *DiBella* "would still apply" to the type of motion at issue here. *Id.* at 15a.

Judge Quattlebaum filed a concurring opinion. See Pet. App. 18a-26a. He acknowledged that "binding precedent" established that the court of appeals lacked jurisdiction over petitioner's appeal. *Id.* at 26a. But he "encourage[d]" this Court to "consider loosening" its

precedents to permit "interlocutory review of privilege-based challenges to screening." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-21) that the court of appeals had jurisdiction over his appeal from the district court's order denying his motion for a revised filter protocol. 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. No further review is warranted.

1. In the court of appeals, petitioner relied on both 28 U.S.C. 1291 and 28 U.S.C. 1292(a)(1) to establish appellate jurisdiction. See Pet. App. 6a, 14a. It is unclear what, specifically, he relies on in his petition, whose "statutory and constitutional provisions involved" section quotes only Section 1292(a)(1), see Pet. 2, but whose body discusses cases interpreting Section 1291, see Pet. 17-19. Regardless, neither provision grants appellate jurisdiction here.

a. Section 1291 grants courts of appeals jurisdiction over appeals from "final decisions of the district courts." 28 U.S.C. 1291. In general, a decision is "final" only if it "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citation omitted). In a criminal case, the finality requirement generally "prohibits appellate review until conviction and imposition of sentence." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984).

In *DiBella* v. *United States*, 369 U.S. 121 (1962), this Court considered the application of Section 1291 to pre-indictment orders concerning evidence seized pursuant to search warrants. The Court emphasized that, as a

general matter, such orders are "truly interlocutory" because they are merely "'step[s] in the criminal case preliminary to the trial thereof.'" *Id.* at 131 (citation omitted). It recognized a narrow exception, however, for cases in which "the motion is solely for the return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *Id.* at 131-132. In such circumstances, the proceedings concerning the motion are properly regarded as an "independent" case rather than as a "'step in the criminal case,'" and the order terminating those proceedings is properly regarded as final. *Id.* at 131 (citation omitted).

The court of appeals correctly determined that petitioner's motion independently fails each of *DiBella*'s requirements. First, petitioner's motion was "not 'solely for the return of property.'" Pet. App. 10a. The motion sought "to stop 'the government from reviewing the seized material'" until the establishment of a revised filter protocol and "to identify at this stage any privileged documents that may be inadmissible at trial." *Id.* at 10a-11a (citation omitted). Second, petitioner's motion is "tied to a criminal prosecution *in esse* against him." *Id.* at 11a. Petitioner acknowledged below that he is "the target of a grand jury investigation," and the court found that the seized materials "are tied to [that] investigation." *Id.* at 12a. Petitioner's motion thus constituted a "'step in the criminal case'" rather than an "independent" case in its own right. *DiBella*, 369 U.S. at 131-132 (citation omitted). The district court's order resolving that motion was interlocutory rather than final —and so not appealable under Section 1291.

b. Section 1292(a)(1) grants the courts of appeals jurisdiction over appeals from "[i]nterlocutory orders of the district courts * * * granting, continuing, modify-

ing, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. 1292(a)(1). The court of appeals correctly determined that it lacked jurisdiction under that provision as well. See Pet. App. 14a-17a.

As an initial matter, petitioner's motion is not properly regarded as a motion for an injunction. Courts of equity traditionally have not issued injunctions "in ongoing criminal cases." Pet. App. 14a n.14; see, *e.g.*, *In re Sawyer*, 124 U.S. 200, 210 (1888) ("[A] court of equity * * * has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors."). Although petitioner labeled his motion as one "to enjoin the government from reviewing the seized material," Pet. App. 4a (citation omitted), "the label attached to an order"—let alone a motion seeking an order—"is not dispositive." *Abbott* v. *Perez*, 585 U.S. 579, 594 (2018). And regardless of the label he affixed to his motion, petitioner has "agree[d] that the district court properly treated it as one under" Federal Rule of Criminal Procedure 41(g), Pet. App. 7a, whereby a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return," Fed. R. Crim. P. 41(a); see Pet. App. 8a n.6 (noting open question about whether "it was in fact proper to treat [petitioner's] motion as a Rule 41(g) motion").

In addition, it is well established that "[t]he interlocutory injunction appeal statute cannot be used to circumvent the policies that deny final judgment appeal." 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3918.4 (2d ed. 2024). In particular, efforts to sidestep *DiBella* by relabeling motions as requests for injunctions "have uniformly been rejected." *Ibid.*; see *id.* at n.12 (collecting cases). Accordingly, "[s]ince

[petitioner's] motion fails *DiBella*'s test," the court of appeals lacked "both § 1291 and § 1292(a)(1) jurisdiction over his appeal." Pet. App. 16a.

c. Petitioner does not meaningfully address the court of appeals' application of Section 1291, Section 1292(a)(1), and *DiBella*. Petitioner instead appears to argue (Pet. 13-18) that this Court should carve out a special exception to the normal jurisdictional rules for motions concerning attorney-client privilege and work-product protection.

As the court of appeals and Judge Quattlebaum both recognized, this Court's decision in *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009), forecloses that argument. See Pet. App. 17a n.16; *id.* at 25a-26a (Quattlebaum, J., concurring). This Court held in *Mohawk* that "disclosure orders adverse to the attorney-client privilege" do not "qualify for immediate appeal" under Section 1291. 558 U.S. 103. The Court explained that "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." *Id.* at 109. "Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded." *Ibid.*

Petitioner notes (Pet. 17) that *Mohawk* was a "civil" case, while this is a "criminal" case. But that distinction cuts against petitioner, for this Court has recognized that the policies underlying the finality requirement are "especially compelling in the administration of criminal justice." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); see *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) ("[T]his policy is at its strongest

in the field of criminal law.") (per curiam). Petitioner also asserts that *Mohawk* concerns "'factual'" disputes, while this case raises a "legal question of whether a privilege protocol sufficiently protects the privilege." Pet. 17-18 (citation and emphasis omitted). But *Mohawk* emphasized that a court applying the finality requirement must focus on "the entire category to which a claim belongs" and must not engage in an "individualized jurisdictional inquiry." 558 U.S. at 107 (citations omitted). Applying that approach, the Court held that the entire category of "disclosure orders adverse to the attorney-client privilege" does not "qualify for immediate appeal"; it left no room for an individualized inquiry into whether a particular case presents a legal or a factual dispute. *Id.* at 103.

Petitioner notes (Pet. 13) the important interests served by attorney-client privilege and work-product protection. But the finality requirement likewise serves important interests. It promotes the "efficient administration of justice" by preventing "'piecemeal appellate review of trial court decisions,'" and it "helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation." *Flanagan*, 465 U.S. at 263-264 (citation omitted). This Court already found in *Mohawk*, moreover, that the importance of attorney-client privilege does not "justify the cost of allowing immediate appeal," 558 U.S. at 108—all the more so in a criminal case, see, *e.g.*, *Hollywood Motor Car*, 458 U.S. at 265.

Petitioner also objects (Pet. 13-15) to the adequacy of appellate review after final judgment. But this Court has already determined that "postjudgment appeals generally suffice" to "ensure the vitality of the attorney-

client privilege." *Mohawk*, 558 U.S. at 109. Further, "our litigation system has long accepted that certain burdensome rulings will be 'only imperfectly reparable' by the appellate process." *Bullard* v. *Blue Hills Bank*, 575 U.S. 496, 507 (2015). "This prospect is made tolerable by our confidence that * * * trial courts * * * rule correctly most of the time." *Ibid.* "And even when they slip, many of their errors * * * will not be of a sort that justifies the costs entailed by a system of universal immediate appeals." *Ibid.* Finally, "in extraordinary circumstances," "a party may petition the court of appeals for a writ of mandamus." *Mohawk*, 558 U.S. at 111. While mandamus "do[es] not provide relief in every case," it serves as a "useful 'safety valve' for promptly correcting serious errors." *Ibid.* (alteration and citation omitted).

2. Contrary to petitioner's suggestion (Pet. 19-20), the decision below does not conflict with the Eleventh Circuit's decision in *In re Sealed Search Warrant & Application for a Warrant by Telephone or Other Reliable Electronic Means*, 11 F.4th 1235 (2021) (*Korf*), cert. denied, 143 S. Ct. 88 (2022). In *Korf*, the Eleventh Circuit exercised jurisdiction over an appeal from a district court's order concerning materials that were potentially privileged and that had been seized pursuant to a search warrant. See *id.* at 1244-1248. Applying *DiBella*, the court first concluded that the litigants "clearly" sought "the return of their property"; their motion asked the court "to order the return of the seized documents" and suggested a filter protocol only "in the alternative." *Id.* at 1245. The court then concluded that the motion was "not tied to any criminal prosecution." *Id.* at 1246.

Although some tension may exist between some of the reasoning in *Korf* and some of the reasoning in the

decision below, both applied the same legal test—the two-part test set forth in *DiBella*—to determine whether a party may take an immediate appeal from a district-court order concerning seized materials. And the cases are not on all fours. In *Korf*, the government "remain[ed] in possession of the materials seized," so that "the motion was solely for the return of property," 11 F. 4th at 1246. Here, in contrast, the government "has already returned all the seized hardware to [petitioner] and has only retained copies," so that petitioner's "possession of the records refutes his contention that by his motion he sought solely the return of his property." Pet. App. 11a (citation, internal quotation marks, and brackets omitted). The court below accordingly did not perceive a direct conflict between the two decisions, see *id.* at 10a n.8, 11a n.9, and none exists.

3. Petitioner also errs in relying (Pet. 18-19) on Judge Quattlebaum's concurrence. Judge Quattlebaum recognized that "binding precedent"—specifically, this Court's decision in *Mohawk*—precluded the court of appeals from exercising jurisdiction over petitioner's appeal. Although Judge Quattlebaum "encourage[d]" this Court to "consider loosening" *Mohawk*, petitioner has not asked the Court to reconsider that precedent. Pet. App. 26a. Nor does petitioner "discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior [statutory] decision." *Randall* v. *Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment). "Such an incomplete presentation is reason enough to refuse [any] invitation to reexamine" existing precedent. *Ibid.*

In addition, the "preferred means for determining whether and when prejudgment orders should be imme-

diately appealable" is "rulemaking, 'not expansion by court decision.'" *Mohawk*, 558 U.S. at 113 (citation omitted). The Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, authorizes this Court to adopt rules defining "when a ruling of a district court is final for the purposes of appeal under section 1291." 28 U.S.C. 2072(c). Congress has also authorized this Court to adopt rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under [Section 1292]." 28 U.S.C. 1292(e). 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. "Any further avenue for immediate appeal" of the types of rulings at issue here "should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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