No. 24-502

In the Supreme Court of the United States

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Court Should Review the Fourth Circuit's Decision.

1. This petition raises the question of whether appellate jurisdiction exists to review an order that "run[s] the risk of hollowing out both the attorney-client privilege and the work-product doctrine." App.26a. In direct conflict with the Eleventh Circuit, the Fourth Circuit held it lacked jurisdiction because Petitioner is under criminal investigation—while noting that it would otherwise have jurisdiction. App.10a–13a. Judge Quattlebaum explained that the majority's holding may render the order unappealable because any violation of Petitioner's privilege may never be known. App.21a, 23a–24a. And he encouraged this Court to consider the issue and find that appellate jurisdiction exists. App.26a. That encouragement, the presence of a direct circuit split, and the importance of the issue each establish that review is warranted.

2. The Government first argues that the decision below was correct because the appellate court did not have jurisdiction to hear Petitioner's appeal under 28 U.S.C. § 1291 or § 1292. Gov.Br.5.

a. Regarding Section 1291, the Government argues that the decision appealed was not a "final decision of the district court," *id.* (cleaned up) (quoting § 1291), because Petitioner is under criminal investigation, so the order denying Petitioner's requested injunctive relief should be treated the same as denial of a motion to suppress in a criminal case. *See* Gov.Br.6.

i. Under *DiBella v. United States*, 369 U.S. 121, 129–31 (1962), denial of a motion to suppress is unappealable until the final criminal judgment

because the order is merely a step toward the final criminal judgment. But in reaching that holding, the Court carved out an exception under which immediate review is available if a motion is (1) "solely for the return of property," and (2) "in no way tied to a criminal prosecution *in esse* against the movant." *Id.* at 131–32. Rulings on such motions are sufficiently "independent" to impart finality for purposes of review, *id.* at 132, thus establishing appellate jurisdiction under Section 1291. *Id.*

The Fourth Circuit held that *DiBella* bars appellate jurisdiction. App.13a. However, as Judge Quattlebaum explained, this Court should be "skeptical" of the majority's conclusion. *See* App.25a. As Judge Quattlebaum noted, there are key differences between Petitioner's motion and a motion to suppress. For one thing, suppression motions seek relief for past constitutional violations, whereas Petitioner's motion seeks to prevent a future violation. For another, suppression motions merely affect the evidentiary presentation at trial, but denial of Petitioner's motion may give the Government the "playbook" that Petitioner plans to use to defend himself, thus allowing the Government to "devise its offensive and defensive schemes much more effectively with the benefit of [Petitioner]'s strategies." App.24a. Accordingly, whereas suppression orders may create evidentiary error, the order here "may affect the fundamental fairness of the entire [proceeding]." App.23a. "More insidious still, [the Government's] improper access to [Petitioner]'s playbook could go undetected," App.24a, thus preventing any review. Because of these differences between suppression motions at issue in *DiBella*

and privilege protocol motions at issue here, *DiBella* should not bar appellate review.

Even if *DiBella* applies to motions like Petitioner's, the Eleventh Circuit correctly held—directly contrary to the Fourth Circuit—that orders on privilege protocol motions *are* immediately appealable under *DiBella*. *See United States v. Korf*, 11 F.4th 1235, 1245–47 (11th Cir. 2021). The Court should, at the least, review these directly contradictory holdings and determine which circuit reached the correct result. Petitioner submits that the Eleventh Circuit's holding is correct and should be adopted by this Court—and that the Fourth Circuit's holding must be reversed.

ii. The Government incorrectly claims that the Eleventh Circuit's decision does not conflict with the decision below. *See* Gov.Br.10. The Government attempts to distinguish the cases because in this case the Government has "only retained copies" of Petitioner's material, whereas in *Korf*, the Government did not provide the privilege-holder with copies. *Id.* at 11. That distinction is immaterial. Both Petitioner and the movant in *Korf* sought appellate review of orders that determined the privilege protocol following Government seizures. The Eleventh Circuit held that appellate jurisdiction exists to review such an order; the Fourth Circuit held the opposite. That circuit split, in light of Judge Quattlebaum's encouragement and the importance of the issue presented, establishes that review is warranted.

b. Second, the Government argues the Fourth Circuit correctly determined it did not have jurisdiction under Section 1292 because Petitioner's

motion at the district court was not truly a motion for injunctive relief. *See* Gov.Br.7. That argument ignores Petitioner's requested relief—that is, an injunction preventing the Government from reviewing the seized material under any protocol that does not afford Petitioner, as the privilege-holder, the opportunity to make document-specific privilege assertions and obtain a judicial determination of privilege as to any contested assertion. *See* App.4a–5a. The district court denied that requested injunctive relief, and with Section 1292, Congress established that such denials are immediately appealable.

The Government then argues that even if Petitioner moved for injunctive relief, "[c]ourts of equity traditionally have not issued injunctions 'in ongoing criminal cases.'" Gov.Br.7 (quoting App.14a n.14). But this is not an "ongoing criminal case"; Petitioner is not charged with a crime. Nor was Petitioner's request for injunctive relief a motion to suppress under a different label. As discussed above, a motion to suppress seeks relief from a constitutional violation that has already occurred. Petitioner's motion sought to avoid a violation occurring in the first place.

As the Eleventh Circuit determined in *Korf*, unlike a suppression motion, requests for privilege-review protocols are "not tied to any criminal prosecution." *Korf*, 11 F.4th at 1246. Anyone whose privileged material has been seized would be entitled to the relief sought in such a motion. Yet, under the Fourth Circuit's holding, everyone *except those under criminal investigation* would be entitled to appeal denial of such a motion. Because the motion for a legally sufficient privilege-review protocol does not

relate to "the prosecution, the punishment, or the pardon of crimes or misdemeanors," *In re Sawyer*, 124 U.S. 200, 210 (1888), the Government's argument that a court in equity lacks jurisdiction to consider the request is without merit.

Ultimately, Petitioner attempted to prevent a future violation of his rights by seeking a court order prohibiting such a violation. That request is a quintessential request for an injunction. The district court denied that motion, and Congress has established that denials of injunctions are immediately appealable under Section 1292.

The Fourth Circuit's contrary decision will not only subject Petitioner to a legally insufficient privilege-review protocol; it may also prevent any appeal of resulting violations of Petitioner's privilege, because the protocol approved by the district court does not require the Government to inform Petitioner if the prosecution obtains privileged material. *See* App.24a. The Government's argument that Section 1292 does not provide appellate jurisdiction thus fails.

3. The Government next argues that this Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), bars appellate review. *See* Gov.Br.8–10. In *Mohawk*, this Court held that an order finding material non-privileged and thus requiring its disclosure was not immediately appealable. 558 U.S. at 103. But the order appealed in this case was not an order determining whether material is privileged; it was an order refusing to prevent the Government from exercising sole discretion to determine whether material is privileged. Only judges can make contested privilege determinations. *See NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 498, 500 (4th Cir.

2011); *see also In re The City of New York*, 607 F.3d 923, 947 (2d Cir. 2010); *NLRB v. Detroit Newspapers*, 185 F.3d 602, 606 (6th Cir. 1999). *Cf. Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (recognizing the Constitution vests "[t]he judicial Power" solely in the federal courts, which includes "the duty of interpreting and applying the law"). So the order refused an injunction to prevent a future violation of separation of powers and Article III.

The *Mohawk* court's analysis establishes that this distinction requires a different result here than in *Mohawk*. In *Mohawk*, the district court properly exercised its power and reached a document-specific privilege determination that "information concerning [the plaintiff's] meeting with retained counsel and the company's termination decision" was not privileged and ordered that information to be disclosed to the defendant. 558 U.S. at 104. That ruling "involve[d] the routine application of settled legal principles," which was "unlikely to be reversed on appeal" because the ruling "rest[ed] on factual determinations for which appellate deference is the norm." *Id.* at 110. And it was reviewable on appeal because the plaintiff knew a privilege determination had been made by the court and the court provided a basis for that ruling. *See id.* at 107–08.

Here, on the other hand, the district court determined as a matter of law that the Government may unilaterally make privilege determinations. That legal conclusion did not "rest on factual determinations." *Id.* at 110. And, as flagged by Judge Quattlebaum, Petitioner will not know if and how the Government uses information erroneously turned over to the prosecution team. *See* 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)). It is well established that making privilege determinations is a non-delegable Article III duty. *See, e.g.*, *Interbake Foods*, 637 F.3d at 498. So the district court's order refused to prevent a violation of separation of powers—and Petitioner's appeal sought review of that purely legal constitutional error, not a factual determination leading to a disclosure order.

Mohawk recognized that there is "a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final'." 558 U.S. at 106 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–46 (1949)). Those are "decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.* (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)).

The order appealed from meets that test. And Judge Quattlebaum encouraged this Court to hold that appellate jurisdiction exists under *Mohawk* to review these types of orders. *See* App.26a ("I would respectfully encourage the Supreme Court to consider loosening the reins of *Mohawk* to permit interlocutory review of privilege-based challenges to screening protocols . . . ."). The Court should do so.

4. As for the importance of the issue, Judge Quattlebaum noted that "[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 (emphasis added). That is particularly true

where the violation may never be disclosed. *See* App.23a–24a. So the issue is of tremendous importance to the "fundamental fairness" of proceedings. App.23a.

Privilege review protocol questions are also recurring issues. Digital communication has become ubiquitous, and seizures of large volumes of digital material have become increasingly common. The result is recurring seizures of large volumes of privileged material.[1] Waiting until a final criminal judgment to review a privilege protocol order will lead to more privilege violations and undermine "the fundamental fairness of entire [proceedings]," App.23a (cleaned up). On the other hand, as the Eleventh Circuit explained in *Korf*, "a motion seeking only injunctive relief in the form of a preferred protocol for the government's review of allegedly privileged materials and the return of those items that the protocol determines are protected" is "not complex," so there is minimal concern that any criminal proceeding will be delayed, especially when review of motions of this type can be expedited. 11 F.4th at 1247. The importance of safeguarding the "fundamental fairness" of entire proceedings and

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[1] *See, e.g.*, *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019); *Korf*, 11 F.4th 1235; *In re Search Warrants*, 1:21-cv-04968-SDG, 1:21-cv-04969-SDG, 2021 WL 5917983 (N.D. Ga. Dec. 15, 2021); *United States v. Ritchey*, 605 F. Supp. 3d 891 (S.D. Miss. 2022); *Matter of O'Donovan*, No. 22-mj-1000-DLC, 2022 WL 10483922 (D. Mass. Oct. 17, 2022); *United States v. Reifler*, 1:20-CR-512-1, 2021 WL 2253134 (M.D.N.C. June 2, 2021); *In re Search Warrants Executed on Apr. 28, 2021*, 21-MC-425 (JPO), 2021 WL 2188150 (S.D.N.Y. May 28, 2021); *Trump v. United States*, 43 F.4th 689, 696 (11th Cir. 2022); *Cohen v. United States*, No. 1:18-mj-03161, 2018 WL 1772209 (S.D.N.Y. Apr. 13, 2018).

protecting the attorney-client privilege and work-product doctrine from orders that "run the risk of hollowing out both" support granting this petition. App.23a, 26a.

CONCLUSION

In light of the direct circuit split, Judge Quattlebaum's encouragement, and the importance of the issue, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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