No.

IN THE

# Supreme Court of the United States

IN RE GRAND JURY INVESTIGATION,
USAO No. 2018R01761
(GRAND JURY SUBPOENAS TO PAT ROE)

DOE COMPANY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI (REDACTED)


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## QUESTIONS PRESENTED

1. Whether an appealing party's substantial interest in a disclosure order directing a disinterested third party to produce documents provides appellate jurisdiction under *Perlman v. United States*, 247 U.S. 7 (1918), where that interest will be lost absent immediate appellate review.

2. Whether a federal court lacks specific personal jurisdiction to enforce a subpoena that is directed to a foreign recipient and demands the production of documents that are unrelated to the recipient's contacts with the United States.

## PARTIES TO THE PROCEEDING

Petitioner, who was appellant below, is [redacted].

Respondent, who was appellee below, is the United States of America.

[redacted] were parties to the proceedings in the district court, but they were not parties to the relevant motions at issue in this case, and they did not participate in the appeal before the Ninth Circuit.

## RULE 29.6 STATEMENT

[redacted] is a direct, wholly owned subsidiary of [redacted]. No publicly held company owns 10% or more of either [redacted] or [redacted].

## RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States District Court (N.D. Cal.):

*In re Grand Jury Investigation USAO No. 2018R01761 (Grand Jury Subpoenas to* [redacted]*)*, No. 19-xr-90017-CRB (July 26, 2019) (order holding petitioner in contempt)

*In re Grand Jury Investigation USAO No. 2018R01761 (Grand Jury Subpoenas to* [redacted]*)*, No. 19-xr-90017-CRB (May 14, 2019) (order denying petitioner's motion to quash)

*In re Grand Jury Investigation USAO No. 2018R01761 (Grand Jury Subpoenas to* [redacted]

[redacted]), No. 19-xr-90017-CRB (April 14, 2019) (order granting government's motion to compel compliance)

United States Court of Appeals (9th Cir.):

*In re Grand Jury Investigation USAO No. 2018R01761 (Grand Jury Subpoenas to Pat Roe)*, Nos. 19-10187, 19-10261 (July 27, 2020), *en banc & panel reh'g denied* (Sept. 2, 2020)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner [redacted] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

## INTRODUCTION

This petition presents two questions about courts' ability to enforce constitutional limits on the government's subpoena power. Both questions involve a circuit split, a sharp departure from this Court's precedents, and sweeping implications for both civil and criminal subpoenas.

The first question concerns the ability to appeal an order to comply with an unlawful subpoena. The target of a subpoena can bring such an appeal (albeit only by being held in contempt). But subpoenas are often directed to third parties, who often yield to a district court's order to produce whatever documents they hold rather than risk contempt to appeal. This Court has therefore recognized for more than 100 years, since its landmark decision in *Perlman v. United States*, 247 U.S. 7 (1918), that a person with an interest in challenging a disclosure order to a third party can obtain immediate appellate review. This Court has required only that the third party be unwilling to enter contempt to provide an opportunity for judicial review and that the appealing party be

[1] This petition concerns grand jury subpoenas subject to secrecy rules. Any identifying information has been redacted for the public filing. The petition uses the generic references that the Ninth Circuit used in its opinion below, except that the Ninth Circuit called petitioner "the Company."

otherwise "powerless to avert the mischief of the order." *Id.* at 13.

The Ninth Circuit, joining the Second, has added a new requirement that this Court has never endorsed: only "a claim of privilege" opens the door to the appellate courts. Pet. App. 14a. In these circuits, important constitutional and jurisdictional objections to subpoenas (such as grand jury abuse or the supervising court's lack of jurisdiction) can never be heard by an appellate court. Six other circuits reject that needlessly restrictive approach and allow appeals under *Perlman* to raise other important challenges to a disclosure order. The Second and Ninth Circuit's foreclosure of appellate review invites abuse and forum-shopping. This Court should grant certiorari to resolve the circuit split deepened by the Ninth Circuit's decision.

The second question concerns whether subpoenas, like any other court-issued process, must comply with the Due Process Clause's limits on personal jurisdiction. A court must have either general jurisdiction over the target or specific jurisdiction over the subject matter. The Ninth Circuit effectively created a third form of personal jurisdiction for subpoenas: *any* connection with the United States creates personal jurisdiction to enforce *any* subpoena, even one that has *nothing* to do with the subpoena recipient's contacts with this country. That camel's-nose theory conflicts directly with two decades' worth of personal jurisdiction decisions from this Court, as well as the decisions of three other circuits, all of which enforce a subpoena only to the extent that the subpoena relates to the contacts giving rise to jurisdiction. Subpoenas—even grand jury subpoenas—must follow

the Due Process Clause's ordinary rules of personal jurisdiction.

This Court should grant certiorari to resolve both circuit conflicts and reject the Ninth Circuit's view of subpoena power free of appellate review or jurisdictional limitations.

## OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-18a) is reported at 966 F.3d 991. The decisions of the district court holding petitioner in contempt (Pet. App. 19a-20a), denying petitioner's motion to quash (Pet. App. 21a-23a), and granting the government's motion to compel compliance (Pet. App. 24a-67a), are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on July 27, 2020. Pet. App. 2a. A petition for rehearing was denied on September 2, 2020. Pet. App. 68a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

## STATEMENT

### A. A federal grand jury subpoenas the records of a [redacted]-based company with no presence in the United States.

1. Petitioner is a [redacted] venture capital firm that invests in other companies. It is registered as a company limited by shares in [redacted]. Its only offices are in [redacted]. C.A. ER241, ER444. It has no presence in the United States.

One of the companies in which petitioner has invested is [redacted] ("Firm"). [redacted] C.A. ER236, ER359, ER361. Petitioner initially funded the Firm, but at the time of the issuance of the subpoenas in this case, petitioner owned only a minority interest in the Firm; outside investors currently own a majority of the Firm. C.A. ER236. Unlike petitioner, the Firm has offices in the United States, including in [redacted]. C.A. ER361; C.A. SER51.

2. According to the government, a grand jury has been investigating [redacted]. C.A. ER17-18. Two of petitioner's employees have been implicated in the grand jury's investigation. [redacted] ("Former CFO"), [redacted]'s former Chief Financial Officer, was convicted of [redacted] At the time of his conviction, the Former CFO was one of peti-

tioner's employees. The grand jury has also indicted [redacted] ("John Doe"), one of petitioner's founding members, on several charges relating to the [redacted] Petitioner was not founded until after [redacted] had been completed.

As part of its investigation, the grand jury issued two subpoenas to [redacted] ("Pat Roe"), a [redacted] who is employed by petitioner as a public relations professional. While Pat Roe was temporarily in the United States attending the Former CFO's trial, the government served Roe with a subpoena demanding that she produce, among other things, "[a]ll documents relating in any way to the former [redacted]," as well as all documents concerning John Doe, the Former CFO, and other [redacted] ("First Roe Subpoena"). C.A. ER294. The First Roe Subpoena was not limited in time to the time of the [redacted]; as a result, the records responsive to the First Roe Subpoena include 140,000 emails in Roe's corporate email account that were saved on a work laptop that Roe brought along during a trip to the United States. C.A. ER148.

The government served a second, even broader, subpoena on Roe, asking for "[a]ll documents relating to [redacted], including all documents on any media in the possession of your counsel in the United States" ("Second Roe Subpoena").[2] C.A. ER322.

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[2] There is no separate entity called "[redacted]"—it is a shorthand reference to either [redacted]. [redacted] stands for [redacted]

The grand jury also issued a subpoena directed to "Custodian of Records - [redacted]" ("Company Subpoena"). C.A. ER331. The government purported to serve the Company Subpoena by handing it to an in-house attorney at the [redacted] office of the Firm, in which (as noted) petitioner was a minority investor. C.A. ER362. According to the government, the attorney who accepted the subpoena represented that he was in a position to accept service on petitioner's behalf, *id.*, even though petitioner had never actually authorized either the attorney or the Firm to accept service in lieu of petitioner, its minority investor. C.A. ER220. The Company Subpoena sought the production of "any and all documents relating to" [redacted] the Former CFO's "trial and prosecution"; the "hiring, or possible hiring, or retention, or possible retention, of any persons formerly employed by [redacted]"; and the "transfer, or possible transfer, or payment, or possible payment, of money . . . or any other benefit, including employment, of any persons formerly employed by [redacted]." C.A. ER336.

### B. The district court determines that it has personal jurisdiction to enforce the Roe and Company Subpoenas.

1. The Company moved to quash the two Roe Subpoenas, while the government moved to compel petitioner's compliance with the Company Subpoena. For all three subpoenas, petitioner argued that the district court lacked the personal jurisdiction over petitioner necessary to enforce each subpoena.[3] For the two Roe Subpoenas, petitioner contended that

[3] Petitioner also argued that the Company Subpoena was not properly served.

the government could obtain petitioner's corporate documents through Roe only by first establishing personal jurisdiction over petitioner itself. C.A. ER282.

In an order dated April 18, 2019 ("April Order"), the district court denied petitioner's motion to quash the Roe Subpoenas and granted the government's motion to compel compliance with the Company Subpoena. The court began its jurisdictional analysis by remarking that "*International Shoe* is an ill fit for questions about specific personal jurisdiction in the grand jury context." Pet. App. 35a. It went on to opine that its jurisdictional analysis could "begin[], and end[] . . . with [the] argument that the . . . possible violation of criminal law which the Grand Jury is investigating is enough to support a finding of specific personal jurisdiction." Pet. App. 36a. The district court found this potential violation of criminal law by looking to a draft, incomplete memorandum proposing that the Former CFO and John Doe would provide some initial funding to petitioner, which would be structured as a partnership. (That structure was never implemented; petitioner is not organized as a partnership, but a company limited by shares.) Pet. App. 43a. The court determined, based solely on this draft memorandum, that it was "plausible that former [redacted] employees had invested money in [petitioner], and thus there [wa]s a 'reasonable possibility' that [petitioner] may have violated federal money laundering laws." Pet. App. 44a.

The district court addressed petitioner's personal jurisdiction arguments with respect to the Roe Subpoenas in cursory fashion. It determined that "there

is jurisdiction over [petitioner], and so there is no danger that serving subpoenas on [Roe] in [Roe's] personal capacity could circumvent the rule that a court cannot obtain jurisdiction over a corporation by serving process on a corporate officer while that officer is in the jurisdiction." Pet. App. 54a n.6. Because other motions regarding the Roe Subpoenas filed by other parties were still pending before the district court at the time it ruled on petitioner's jurisdictional arguments, the court did not formally deny petitioner's motion to quash the Roe Subpoenas until May 14, 2019 ("May Order"). Pet. App. 22a.

2. Petitioner appealed the April and May Orders. C.A. ER151. While that appeal was pending, the district court held petitioner in contempt for failing to comply with the Company Subpoena. Pet. App. 20a. Petitioner appealed the contempt order. C.A. ER140.

### C. The Ninth Circuit declines to hear petitioner's appeal regarding the Roe Subpoenas, and affirms the district court's determination on the Company Subpoena by focusing on petitioner's relationship with the Firm.

1. The court of appeals dismissed petitioner's appeal regarding the Roe Subpoenas for lack of appellate jurisdiction, and it affirmed the district court's decision to grant the government's motion to compel compliance with the Company Subpoena.[4]

Petitioner had appealed the district court's decision regarding the Roe Subpoenas under *Perlman v. United States*, 247 U.S. 7 (1918), which allows for

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[4] Petitioner also argued that the Company Subpoena was improperly served on an attorney of the Firm, as it did in the district court. That issue is not raised in this petition.

parties to immediately appeal disclosure orders directed at a disinterested third-party custodian. But the panel rejected petitioner's reliance on *Perlman* as the basis for appellate jurisdiction, because the appeal did not present a claim of privilege. The panel held for the first time that such "a claim of privilege is essential to a *Perlman* appeal." Pet. App. 14a. The court of appeals acknowledged that it was rejecting the Third Circuit's approach to *Perlman* jurisdiction, which "require[s] only a disinterested third party, irrespective of privilege." Pet. App. 13a. The panel expressly disagreed with the Third Circuit and held that such a non-privilege-based claim "can later be addressed at trial or on appeal." Pet. App. 14a.

As for the Company Subpoena, the panel determined that the district court had personal jurisdiction over petitioner based on: (1) the government's allegations "that money from the [redacted] acquisition may have been laundered through [petitioner], and later laundered again through what was initially a wholly owned subsidiary of [petitioner]," *i.e.*, the Firm; (2) "evidence in the record that [petitioner] and the Firm at one time shared the same office in the United States"; and (3) "substantial overlap between employees of [petitioner] and the Firm." Pet. App. 16a.

The Ninth Circuit denied rehearing but stayed its mandate pending disposition of this petition. The subpoenaed documents have not yet been produced.

## REASONS FOR GRANTING THE WRIT

In two different respects, the Ninth Circuit has departed from the seminal decisions of this Court and the decisions of its sister circuits outlining the

ground rules for jurisdiction. Both departures warrant this Court's review.

On appellate jurisdiction, the Ninth Circuit acknowledged that it was siding with the Second Circuit opposite the Third Circuit on whether a claim of privilege is necessary for jurisdiction under *Perlman*. But the split runs much deeper than that; *six* circuits—the First, Third, Sixth, Seventh, Eighth, and Tenth—have construed *Perlman* more broadly than the Ninth Circuit here. In those circuits, a substantial interest against disclosure is all that is necessary for *Perlman* jurisdiction—privilege is sufficient, but not necessary. And the Ninth Circuit's privilege requirement is nowhere to be found in *Perlman* itself, where this Court resolved both a Fourth Amendment search-and-seizure argument and a Fifth Amendment privilege argument on the merits.

As for personal jurisdiction, the Ninth Circuit applied a standard completely unmoored from this Court's precedents. The court did not find general jurisdiction, and its analysis bears no resemblance to specific jurisdiction: the Firm is not even mentioned on the face of the subpoena, yet petitioner's limited connection to the Firm was the sole asserted link to the United States. In the Ninth Circuit, *any* contact with the United States now allows a subpoena to be enforced, whether or not that contact is related to the subpoena. That extraordinarily permissive approach conflicts with the decisions of this Court and those of the Second, Seventh, and Tenth Circuits, all of which hold that a subpoena may seek only those documents that are related to the subpoena recipient's contacts with the United States. A court's exercise of coercive

power must be consistent with the basic due process guarantee of personal jurisdiction. The power to enforce a grand jury subpoena is no exception.

This Court should grant certiorari to resolve both conflicts. Both of the Ninth Circuit's holdings weaken important constraints on the subpoena power and should be reviewed before they encourage further abuse.

## I. This Court should grant certiorari to resolve the circuit split regarding whether a substantial interest against a disclosure order directed at a third party suffices for appellate jurisdiction under *Perlman*.

As most circuits agree, *Perlman* is not limited to privilege. For over a century, a disclosure order "directed at a disinterested third party [has been] 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." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992). This Court concluded in *Perlman* that denying immediate appellate review in such circumstances would leave a person looking to appeal the order "powerless to avert the mischief of the order" and forced to "accept its incidence and seek a remedy at some other time and in some other way" through a "proceeding not yet brought and depending upon [the government] to be brought." 247 U.S. at 13. That reasoning is not limited to privilege cases, and *Perlman* did not say that it was.

*Perlman* started with a patent dispute and ended with a grand jury investigation. Louis Perlman introduced certain exhibits at a patent trial, which

were later "impounded" and "kept under seal" by the clerk of court. 247 U.S. at 9. A grand jury began investigating Perlman, and the district court ordered that the exhibits in the clerk of court's possession be released to the grand jury. *Id.* Perlman petitioned the district court to restrain the clerk of court from releasing the exhibits, which the court rejected.

Perlman appealed to this Court, arguing that "the proposed use by the United States before the grand jury of the exhibits as a basis for an indictment against him constitutes an unreasonable seizure and makes of him a compulsory witness against himself, in violation of the Fourth and Fifth Amendments." *Id.* at 13. The government moved to dismiss the appeal for lack of jurisdiction, arguing that the disclosure order was "not final, but merely interlocutory, and therefore not reviewable." *Id.* at 12.

This Court overruled the government's motion. It found the government's argument "strange": the government controlled whether to bring any criminal proceeding and might never do so, yet was effectively contending Perlman's appeal was "interlocutory in a proceeding not yet brought." *Id.* at 12-13. To accept the government's argument, this Court reasoned, would mean "that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way." *Id.* at 13. The *Perlman* Court was "unable to concur" in that result. *Id.* It went on to reject Perlman's appeal on the merits, reasoning that there was no "invasion of . . . privacy" and no "taking from [Perlman's] immediate and personal possession," but rather "a voluntary exposition of the articles." *Id.* at 13-14.

Since *Perlman*, this Court has reaffirmed that a disclosure order "directed at a third party" is an "immediately appealable final order because the third party presumably lacks sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology*, 506 U.S. at 18 n.11; *United States v. Ryan*, 402 U.S. 530, 533-34 (1971). But the circuits are now split over what an appealing party must claim in order to properly invoke appellate jurisdiction.

### A. The circuits are deeply split over whether appellate jurisdiction under *Perlman* requires more than a substantial interest in an order of disclosure directed at a third party.

1. Six circuits have understood *Perlman* to require only a substantial interest in a disclosure order directed at a third party. The Third Circuit was the first to opine on the kind of interest and claim necessary to bring a *Perlman* appeal. The owner of a Philadelphia brewery challenged federal grand jury subpoenas directed to his employees, contending that "the grand jury was not investigating any federal crimes," and that the grand jury's investigation "was being conducted in bad faith." *In re Grand Jury (Schmidt)*, 619 F.2d 1022, 1024 (3d Cir. 1980). The district court denied the brewery owner's motion to quash, and he appealed. The government moved to dismiss, arguing that prior *Perlman* cases involved "some property interest in, or claim of privilege respecting, the information sought or the information about to be disclosed," whereas the brewery owner's appeal did not. *Id.* at 1026.

The Third Circuit disagreed, concluding that *Perlman* review was available for more than just claims involving privileges or property interests. The court opined: "We can imagine cases where neither property interests, nor privileges, have been affected, but other valued rights have." *Id.* It gave the example of "a political candidate's liberty interest [being] infringed by serving grand jury subpoenas upon his workers to discourage them from soliciting nominating petitions or election support." *Id.*

The First Circuit has reached the same conclusion about *Perlman* jurisdiction. In *Gill v. Gulfstream Park Racing Ass'n*, 399 F.3d 391 (1st Cir. 2005), a non-profit association filed under seal confidential information about a report that it prepared with the help of tipsters as part of a civil defamation lawsuit between a thoroughbred owner and a racetrack. *Id.* at 394-95. When the district court ordered the information to be unsealed, the association appealed, arguing that Federal Rule of Civil Procedure 26's balancing test weighed in favor of withholding disclosure to protect the public interests underlying the government informant's privilege. *Id.* at 402-03. The party seeking disclosure argued that the court of appeals lacked jurisdiction over the appeal because the association failed to raise "a substantial privilege claim." *Id.* at 399.

The First Circuit rejected that argument, holding that "[t]he *Perlman* doctrine requires only that the appellant have 'a significant interest in the matters involved in the discovery order.'" *Id.* (quoting 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.23, at 156 (2d ed. 1991)). Acknowledging that "[c]laims of privilege are by far the most

common," the court of appeals emphasized that "[i]t is *not a requirement* for interlocutory appeal of discovery orders conclusively determining third-party rights that the appellant assert a substantial, well-recognized claim of privilege," and that a "proprietary interest also may suffice." *Id.* (emphasis added; citation and internal quotation marks omitted). The court went on to consider the Rule 26 argument on the merits, and remanded the case for the district court to conduct the appropriate balancing analysis.

The Sixth, Seventh, Eighth, and Tenth Circuits have also all taken the view that *Perlman* does not require a claim of privilege, and that a substantial interest may suffice. *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 474 n.8 (6th Cir. 2006) ("The *Perlman* doctrine allows for immediate appeal from a discovery order when the order is directed to a disinterested nonparty who will not risk contempt merely to protect *privacy interests* that are more important to someone else." (emphasis added)); *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 665 (7th Cir. 2009) (invoking *Perlman* to consider whether a disclosure made in response to a subpoena was prohibited by a contract requiring confidentiality in arbitration); *In re Berkley & Co.*, 629 F.2d 548, 551 (8th Cir. 1980) ("A well-established exception to this rule, however, permits an individual claiming a privilege *or other interest* in subpoenaed documents to appeal from an order to produce directed to a third party custodian of the documents." (emphasis added)); *In re Faltico*, 561 F.2d 109, 110-11 (8th Cir. 1977) (considering in a *Perlman* appeal whether the order of disclosure violates the First Amendment's prohibition against compelled speech); *In re Grand Jury Proceedings*,

616 F.3d 1172, 1179 (10th Cir. 2010) ("We have consistently held that we have appellate jurisdiction under the *Perlman* rule when an interlocutory appeal is sought by an intervenor who claims *a justiciable interest* in preventing a third party's disclosure of documents or testimony, and the party subject to the subpoena indicates that he or she will produce the records or testify rather than risk contempt." (emphasis added)). The law in the Federal Circuit is the same: just before being merged into the new Federal Circuit, the Court of Customs and Patent Appeals, also took the view that *Perlman* does not require a privilege. *Montgomery Ward & Co. v. Zenith Radio Corp.*, 673 F.2d 1254, 1259 (C.C.P.A. 1982) ("[T]he courts have not limited interlocutory appeals of discovery orders to those involving assertions of absolute or constitutional privileges. Indeed, appeals have been permitted when based on an interest in continued confidentiality of business records.").[5]

2. Only two circuits have taken the opposite position and held that a claim of privilege is necessary to seek appellate review under *Perlman*. Shortly after the Third Circuit's decision in *Schmidt*, the Second Circuit issued a decision repudiating the Third Circuit's approach and deeming immediate appellate review appropriate only when a disclosure order endangers "a constitutional, statutory, or common law privilege." *In re Subpoenas to Local 478, Int'l Union of Operating Eng'rs and Benefit Funds*, 708 F.2d 65, 72-73 (2d Cir. 1983). To the extent that *Schmidt* supported the position that a party could appeal un-

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[5] Decisions of the Court of Customs and Patent Appeals are binding on the Federal Circuit. *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc).

der *Perlman* when it sought to vindicate "a property right to prevent disruption of its business affairs," the Second Circuit viewed such a holding as "error." *Id.* at 73. By the Second Circuit's reasoning, allowing a *Perlman* appeal for anything other than a claim of privilege could allow a party to "impede a grand jury investigation, whether or not the [appealing party comes] forward with concrete assertions that the legal and practical value of fundamental rights would be destroyed if collateral review were withheld." *Id.*

The panel here opted to join the Second Circuit in holding that "a claim of privilege is essential to a *Perlman* appeal." Pet. App. 14a. According to the Ninth Circuit, "a claim of privilege is one of the only non-procedural grounds on which a subpoenaed individual may resist a grand jury subpoena," and thus, "*Perlman* exists to protect that limited right." Pet. App. 10a. Agreeing with the Second Circuit's reasoning in *Local 478*, the Ninth Circuit observed—without explaining how—that other harms, such as "harms resulting from improper purpose," can be "addressed at trial or on appeal." Pet. App. 13a.

This longstanding split over the type of interest necessary to bring a *Perlman* appeal leaves the availability of appellate review for third-party disclosure orders on grounds other than privilege entirely at the mercy of geography. This Court should grant review to ensure that access to the federal appellate courts is uniformly available so long as the appealing party has a substantial interest in the documents to be disclosed, as the majority of circuits to speak on the question have held.

### B. This case presents an ideal vehicle to resolve this important question.

The Ninth Circuit's decision eliminates *all* appellate review of most third-party subpoenas—criminal *and* civil—with privilege claims the sole exception. Even weighty constitutional claims and challenges to the basic authority of the court or grand jury will go unreviewed. Subpoenas are already an extraordinarily broad tool backed by powerful penalties. This unjustified insulation of the subpoena power raises an important issue that warrants this Court's immediate review.

This case is an ideal vehicle to vindicate the ability to appeal claims other than privilege. The interest asserted in this case is a significant one—the constitutional right "to be subject only to lawful power." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion). Here, the government seeks an extraordinarily broad swath of company documents, far broader than it could get from petitioner without general jurisdiction. So instead the government chose to evade personal jurisdiction requirements by "tagging" petitioner's employee—a foreign citizen temporarily visiting the United States—with a limitless demand for corporate documents. In fact, the Second Roe Subpoena makes no attempt at making a specific request, instead simply asking for "[a]ll documents relating to [redacted] [i.e., petitioner and its parent company], including all documents on any media in the possession of your counsel in the United States." C.A. ER 322. Petitioner seeks to appeal to vindicate its own due process entitlement to the protections of personal juris-

diction, which cannot be evaded by tagging an employee.[6]

Currently the Ninth Circuit cannot hear a constitutional or jurisdictional argument like that, and neither can the Second. These courts also refuse to consider claims that the grand jury is being used for abusive purposes, *e.g.*, *Schmidt*, 619 F.2d at 1024. Closing the door to these claims, while allowing appeals on matters of evidentiary privilege, makes no sense and has no basis in *Perlman*. The touchstone of *Perlman* has always been the loss of a substantial interest absent an immediate appeal, not the type of interest being asserted. *Church of Scientology*, 506 U.S. at 18 n.11 (under *Perlman*, "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

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[6] *E.g.*, *In re Sealed Case*, 832 F.2d 1268, 1273 (D.C. Cir. 1987) (observing that "service of a subpoena *duces tecum* on a corporate officer vacationing in the United States would not allow the Independent Counsel access to corporate records absent proof that a United States court had jurisdiction over the corporation itself"), *abrogated on other grounds by Braswell v. United States*, 487 U.S. 99 (1988); *NML Capital, Ltd. v. Republic of Argentina*, Nos. 03-cv-8845 et al., 2011 WL 3897828, at *3 (S.D.N.Y. Sept. 2, 2011) (holding that a subpoena directed at an organization's general manager was "in effect directed to the [organization], because all of the information sought [was] about the [organization], not about [the general manager] personally"), *aff'd sub nom. EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012); *Estate of Ungar v. Palestinian Auth.*, 412 F. Supp. 2d 328, 335 (S.D.N.Y. 2005) (declining to compel the production of "corporate documents only in [the subpoena recipient's] possession by virtue of his position as Chairman," in response to a personal capacity subpoena demanding such documents).

proceeding to risk contempt by refusing compliance").

2. This case also presents exactly the sort of irreparable loss that *Perlman* was meant to avoid—without an appeal *now*, petitioner risks losing its ability to pursue its personal jurisdiction arguments on appeal *ever*. *Cobbledick v. United States*, 309 U.S. 323, 328-29 (1940) ("To have denied [Perlman] opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim."). Once Roe provides documents responsive to the Roe Subpoenas to the grand jury, petitioner's appeal will be moot. The Ninth Circuit suggested that the harms here "can later be addressed at trial or on appeal," Pet. App. 14a, but that is hardly true. Not all grand jury proceedings result in indictments, and not all indictments lead to trial, verdict, and appeal. The need for immediate appellate review to protect important interests other than privilege is all the more pressing in the case of someone who is not a target of the grand jury's investigation. That person will have no future opportunity to appeal. *Perlman*, 247 U.S. at 13 (rejecting the notion that an appeal is interlocutory to a proceeding "not yet brought and depending upon [the government] to be brought").

But even assuming that the interested appellant seeking *Perlman* review *is* a target of the grand jury's investigation, and an indictment eventually issues, that still leaves no viable path to appellate review for a claim like the one petitioner presents here. There is no mechanism for a grand jury to "unsee" evidence that has been unlawfully obtained. *United*

*States v. Calandra*, 414 U.S. 338, 349 (1974) (holding that the exclusionary rule does not apply in grand jury proceedings). A grand jury's indictment cannot be challenged on the ground that the evidence used to issue the indictment was unconstitutionally obtained. *Id.* at 344-45 (holding that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence"). And the exclusionary rule has never been applied to evidence obtained from a subpoena which the issuing court lacked personal jurisdiction to enforce. Thus, despite the Ninth Circuit's baseless conclusion to the contrary, this case presents a prime example of a disclosure order for which the only meaningful avenue to appellate review is an immediate appeal under *Perlman*.

3. The importance of the question presented is heightened because the effects of the Ninth Circuit's decision will be felt far beyond the grand jury context; after all, there are civil *Perlman* appeals, too. The Ninth Circuit opined that the grand jury deserves "wide latitude," Pet. App. 10a, but *Perlman* is not limited to grand jury subpoenas and cannot be limited on that basis.

Civil litigants have relied on *Perlman* appeals to challenge a variety of orders to disclose confidential but non-privileged information. A third party, for example, may want to keep out of the public eye information that it provided to a federal agency as part of the agency's investigation. *E.g.*, *CFTC v. Parnon Energy Inc.*, 593 F. App'x 32 (2d Cir. 2014). A business may want to keep its proprietary information confidential. *Montgomery Ward*, 673 F.2d at 1259. And a trade association that regulates the activities

of its members may want to maintain confidentiality to encourage its members to report unseemly or illegal activity. *Gill*, 399 F.3d at 403.

The Ninth Circuit's "claim of privilege" test for *Perlman* review would foreclose appellate jurisdiction where many other courts have recognized it. And its reasoning for doing so has no application in civil cases—yet *Perlman* applies equally to both civil and criminal subpoenas. Even if the grand jury may get "wide latitude," Pet. App. 10a, civil subpoenas can be issued by one party's lawyer. Fed. R. Civ. P. 45(a)(3). Deference to the *grand jury's* subpoena power is no basis for a rule that withholds most appellate review of *all* subpoenas. Most circuits recognize as much; this Court should not allow this over-deferential rule to persist in part of the country.

## II. This Court should grant certiorari to resolve a circuit conflict regarding whether subpoenas are subject to this Court's precedents on personal jurisdiction.

The Due Process Clause limits the personal jurisdiction of courts to those parties with a "relationship to the forum." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1779 (2017). Courts may exercise only two forms of personal jurisdiction: "'general' (sometimes called 'all-purpose') jurisdiction, and 'specific' (sometimes called 'case-linked') jurisdiction." *Id.* at 1780 (citation omitted). In this case, the court of appeals recognized a third form of personal jurisdiction, one that allows a court overseeing a grand jury to exercise personal jurisdiction over a corporation regarding any matter, so long as there is *something* to connect the corporation to the United States. That is not general jurisdiction, because a

corporation must be incorporated or have its principal place of business in the United States to be "essentially at home" here. And it is not specific jurisdiction, because the contacts supposedly giving rise to jurisdiction are unrelated to the act that the court is being asked to take.

Personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ir. Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). The restraint is no less effective just because the process being enforced by a court comes from a grand jury. A grand jury is "an arm of the court," and its proceedings "constitute a judicial inquiry." *Levine v. United States*, 362 U.S. 610, 617 (1960) (citation and internal quotation marks omitted). While a grand jury possesses broad discretion as to what it may investigate, "the grand jury's subpoena power is not unlimited," and relies on the "power of a federal court to compel persons to appear and testify before a grand jury." *Calandra*, 414 U.S. at 345, 346 & n.4 ("[T]he grand jury must rely on the court to compel production of books, papers, documents, and the testimony of witnesses . . . .").

Personal jurisdiction applies to *all* court-issued process—subpoenas just as much as complaints or indictments. "[T]he subpoena power of a court cannot be more extensive than its jurisdiction." *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988). After all, "a court that issues subpoenas is *enforcing* something rather than begging," just as in a civil or criminal action. *Leibovitch v. Islamic Republic of Iran*, 852 F.3d 687, 689 (7th Cir. 2017).

Until the panel's decision here, there had been little dispute that the rules of personal jurisdiction that apply to civil actions *also* apply to subpoenas (even grand jury subpoenas). The Ninth Circuit departed from that understanding, instead effectively crafting a "grand jury exception" to the Due Process Clause's personal jurisdiction requirement. It affirmed the enforcement of a subpoena seeking documents that have nothing to do with the alleged contacts giving rise to jurisdiction. That holding cannot be reconciled with this Court's personal jurisdiction precedents, nor can it be squared with decisions from other circuits faithfully applying those precedents to subpoenas.

### A. The Ninth Circuit's decision effectively creates a new, looser standard of general personal jurisdiction for grand jury subpoenas, which directly conflicts with this Court's decisions.

The court of appeals thought the district court could exercise personal jurisdiction to enforce the subpoena on a theory that had no connection with the subpoena. According to the government, it was plausible that petitioner may have engaged in money laundering through the Firm, and because there were facts demonstrating that petitioner at one point used the Firm's office in the United States. But the subpoena being enforced by the district court had nothing to do with petitioner's relationship with the Firm.

This Court has made clear that there is only *one* circumstance where a court may exercise personal jurisdiction over a person even if the person's contacts with the forum have nothing to do with the

matter being heard by the court: when the court has general jurisdiction because the person is "essentially at home" in the forum. *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citation and internal quotation marks omitted); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) ("[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."). "[O]nly a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). If there is no basis for general jurisdiction, then jurisdiction *must* be limited to "issues deriving from, or connected with, the very controversy that establishes jurisdiction," *i.e.*, from the "activity or [] occurrence that takes place in the forum." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (citation omitted).

For a corporation, general jurisdiction lies, at most, in only the two places where "the corporation is fairly regarded as at home": the place of incorporation, and the principal place of business. *Goodyear*, 564 U.S.at 924. General jurisdiction is meant to be "easily ascertainable" and "clear and certain." *Daimler*, 571 U.S. at 137. The simplicity of this test is intended to allow foreign parties "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable." *Id.* at 139 (citation omitted).

The Ninth Circuit's test strips foreign companies of that "minimum assurance." According to the court of appeals, a court has personal jurisdiction to enforce a

grand jury subpoena directed at a party so long as there is evidence of "substantial overlap between the employees" of the foreign corporation and another corporation with a more significant presence in the United States. Pet. App. 16a. It did not matter that the "overlap," which involved the "shar[ing of] the same office in the United States," had little to do with what the subpoena is seeking. *Id.* As far as a subpoena is concerned, that is functionally general jurisdiction, and the Ninth Circuit's standard comes nowhere close to meeting the bright-line rules that this Court affirmed in *Daimler*. The record here is undisputed that petitioner was not incorporated here, and it did not have its principal place of business here. The Ninth Circuit therefore should have looked to see if the subpoena derived from the "activity or [] occurrence that takes place in the forum." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (citation omitted).

### B. The Ninth Circuit's approach to personal jurisdiction for subpoenas irreconcilably conflicts with the approach taken by the Second, Seventh, and Tenth Circuits.

1. Every circuit to consider the question of when a court meets the Due Process Clause's personal jurisdiction requirements for enforcing a subpoena has held that there must be a nexus between (1) the contacts giving rise to jurisdiction, (2) the claim or offense involved, and (3) the documents or testimony sought in the subpoena. The courts applying this nexus requirement have recognized that a subpoena recipient's "United States . . . activity must relate to the matter over which the Court will exercise jurisdiction," for "[w]ithout that connection, jurisdiction is

missing." *In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705*, 381 F. Supp. 3d 37, 57 (D.D.C. 2019), *aff'd sub nom. In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019).

The Tenth Circuit was the first to recognize that the Due Process Clause requires a nexus between (1) the subpoena recipient's contacts with the United States, (2) the underlying offense or claim, and (3) the subject matter of the subpoena itself. In *In re Application to Enforce Administrative Subpoenas Duces Tecum of SEC v. Knowles*, 87 F.3d 413 (10th Cir. 1996), the U.S. Securities and Exchange Commission asked a district court to enforce two administrative subpoenas that it served on a Bahamian citizen in his personal capacity. The subpoenas sought bank records of two companies for whom the recipient was the company president; the SEC issued the subpoenas as part of an investigation of allegations that the companies allegedly bribed U.S.-based securities brokers. *Id.* at 414-15. The recipient challenged the subpoenas on the ground that the district court lacked personal jurisdiction to enforce them. The court of appeals affirmed the district court's decision to enforce the subpoenas. It noted that all of the recipient's contacts with the United States "concern[ed] his activities as the former president of [the two companies]," the contacts "involve[d] activities that [were] the very source of the SEC's interest in the two corporations," and the "underlying investigation and [the] subpoena enforcement action ar[o]se out of [the recipient's] contacts with the United States." *Id.* at 418.

The Second Circuit has followed the Tenth Circuit in holding that the enforceability of a subpoena "fo-

cus[es] on the connection between the nonparty's contacts with the forum and the discovery order at issue." *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014) (citing *Application to Enforce*, 87 F.3d at 418). In *Gucci*, a district court had held that a subpoena served on the Bank of China was enforceable because the bank had a "continuous and systematic" presence in the United States—particularly, in New York. *Id.* at 136 (citation omitted). That was clearly wrong under *Daimler*, so the Second Circuit remanded the case for the district court to determine whether it had specific jurisdiction over the bank. In remanding, the court of appeals instructed the district court that, because the process in question is a subpoena and not a full-blown civil action, the focus should be on "the nonparty's contacts with the forum and the discovery order at issue." *Id.* at 141.

The Seventh Circuit has adopted a similar approach to personal jurisdiction for subpoenas. In *Leibovitch*, a group of plaintiffs who had secured a default judgment against the Islamic Republic of Iran issued subpoenas to the U.S. branches of foreign banks that had, at one point, held Iranian assets. 852 F.3d at 689. The banks had provided documents with respect to their 17 branches in the United States (none of which had Iranian assets), but the plaintiffs were dissatisfied with the scope of that production, as they wanted documents from *any* of the banks' branches *anywhere* in the world. *Id.* The court of appeals held that the district court lacked personal jurisdiction to indulge the plaintiffs' demand. "It's not as if the foreign banks are incorporated or headquartered in the United States," the Seventh Circuit remarked, as that would put the

banks "within the court's personal jurisdiction" and make any discovery request fair game so long as it did not "present an undue burden." *Id.* at 689-90. Because the banks did not meet the requirements for general jurisdiction, the subpoenas had to be "tailored to the banks' presence or activities in the United States" to be enforceable. *Id.* at 690.

2. Even courts considering personal jurisdiction to enforce *grand jury* subpoenas have recognized that the documents being sought must be related to the contacts giving rise to jurisdiction. The Second Circuit was the first to take up this issue in *In re Marc Rich & Co., A.G.*, 707 F.2d 663 (2d Cir. 1983). *Marc Rich* concerned a grand jury subpoena directed at a Swiss company that did no business in the United States, but had a subsidiary that did business in New York. *Id.* at 665. The subpoena was issued as part of a federal grand jury's investigation of the two companies, particularly as to allegations that the Swiss parent entered into the transactions with the U.S. subsidiary that were designed to evade the subsidiary's taxes in the United States. *Id.*

The court determined that the district court had personal jurisdiction to compel compliance with the subpoena. In doing so, it recognized that the investigative function of the grand jury meant adjusting the bar on "*how much* of a jurisdictional showing the Government had to make in order to warrant the issuance of the subpoena." *Id.* at 669 (emphasis added). But the Second Circuit never doubted that the Due Process Clause's personal jurisdiction requirement also applied to grand jury subpoenas. *Id.* at 670 (citing *Int'l Shoe*, 326 U.S. at 320). Because a full showing of personal jurisdiction "by a prepon-

derance of evidence," *i.e.*, the same standard that would apply in civil suits, "might well invert the grand jury function, requiring that body to furnish answers to its questions before it could ask them," the court of appeals determined that the government need only show a "reasonable probability" of personal jurisdiction. *Id.* at 669-70 (citation omitted). It noted that the "reasonable probability" standard was the same that a civil plaintiff would need to meet to justify a temporary injunction challenged on the ground that the court lacked personal jurisdiction. *Id.* at 670 (citing *Visual Sciences, Inc. v. Integrated Commc'ns, Inc.*, 660 F.2d 56, 59 (2d Cir. 1981)). In *Marc Rich*, the court found the "reasonable probability" standard satisfied by an affidavit averring that a significant percentage of the domestic subsidiary's purchases were made from the foreign parent, which resulted in a significant gross loss to the subsidiary. *Id.* The grand jury's subpoena sought records of those transactions, and the court determined that it was "reasonable and just, according to our traditional conception of fair play and substantial justice," to require compliance by the foreign parent in responding to the subpoena. *Id.* (quoting *Int'l Shoe*, 326 U.S. at 320).

*Marc Rich* demonstrates that the way to balance the personal jurisdiction requirement against deference to the grand jury's "wide latitude" is to lessen the amount of proof necessary to establish jurisdiction, not to dispense with the jurisdictional rules altogether as the Ninth Circuit did here. Indeed, at least one court has applied *Marc Rich* in a way that limits a grand jury subpoena's reach to the contacts that give rise to jurisdiction, *i.e.*, subject to the same limitations that apply to civil subpoenas. *Violations*

*of 18 U.S.C. § 1956*, 381 F. Supp. 3d at 57 (noting that "United States . . . activity must relate to the matter over which the Court will exercise jurisdiction," as "[w]ithout that connection, jurisdiction is missing").

### C. The Ninth Circuit's personal jurisdiction ruling presents an important question, and this case is an ideal vehicle to answer it.

The Ninth Circuit refused to acknowledge what extraordinary power it was allowing federal courts. The Ninth Circuit claimed that it was faithfully applying *Marc Rich*, but it ignored the Second Circuit's caution that "[a] federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction." *Marc Rich*, 707 F.2d at 669. If the court of appeals were following *Marc Rich*, it would have determined whether there were sufficient facts to show a "reasonable probability" of personal jurisdiction to enforce the Company Subpoena, *i.e.*, that the jurisdictional contacts were connected to the documents being sought in the subpoena. But the Ninth Circuit refused to search for that nexus. Instead it found any connection to the United States, coupled with the grand jury's suspicion that the subpoena recipient is involved in an offense against the United States, adequate to establish broad personal jurisdiction to seek all manner of documents.[7]

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[7] *See, e.g.*, Pet. App. 16a (finding jurisdictionally significant the fact that "[t]he government alleges that money from the acquisition may have been laundered through [petitioner], and later laundered again through what was initially a wholly owned subsidiary of [petitioner]"). The grand jury's subpoena did not ask for any documents relating to petitioner and the Firm; ra-

The court of appeals did not decide to adopt an overly loose test for personal jurisdiction on its own. Throughout this litigation, the government has stressed that the grand jury may conduct an investigation based "merely on suspicion that the law is being violated, or even just that it wants assurance that it is not." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) (quoting *United States v. Morton Salt Co.*, 398 U.S. 632, 642-43 (1950)); *see also* Gov't C.A. Br. 26 (arguing that "[a] grand jury may investigate based on 'mere suspicion'"); C.A. ER262 (contending that "[t]he possible violation of the criminal laws of the United States is, *by itself*, sufficient to support specific jurisdiction"). That is the test the Ninth Circuit has effectively adopted: personal jurisdiction lies wherever the grand jury may suspect a crime, so long as there is something to tie the recipient of the grand jury's process to the United States, even if that connection shares no overlap with what is being sought in the subpoena.

However, "[t]he investigatory powers of the grand jury are [] not unlimited." *R. Enters.*, 498 U.S. at 727. While the grand jury may receive "wide latitude" in *what* it may investigate, *Calandra*, 414 U.S. at 343, its power to compel testimony and production is only concurrent with that of its supervising court. *Brown v. United States*, 359 U.S. 41, 49 (1959) ("A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid."), *overruled on other grounds*

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ther, it sought virtually any and all documents relating to the [redacted], and regarding a certain set of current and former employees of petitioner. C.A. ER 336.

*by Harris v. United States*, 382 U.S. 162 (1965); *Blair v. United States*, 250 U.S. 273, 280 (1919) ("At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States."). And here, a court cannot compel compliance with the grand jury's directives "when the compulsion the grand jury seeks would override rights accorded by the Constitution," *United States v. Williams*, 504 U.S. 36, 48 (1992), particularly those rights that "represent[] a restriction on judicial power," such as the Due Process Clause's personal jurisdiction requirement, *Ins. Corp. of Ir.*, 456 U.S. at 702.

If left to stand, the Ninth Circuit's decision would make the grand jury's reach limitless not only as to subject matter and scope, but as to territorial boundaries as well. Free from the restraints of the personal jurisdiction caselaw that would bind a court in any other scenario, under the Ninth Circuit's reasoning, a grand jury can compel a foreign party to answer its demands if it even *thinks* that the party is associated with offenses against the United States. A grand jury subpoena is not "some talisman that dissolves all constitutional protections." *United States v. Dionisio*, 410 U.S. 1, 11 (1973). If federal courts supervising grand juries must abide by the personal jurisdiction rules imposed by the Due Process Clause, grand juries, as arms of their supervising courts, must abide by those rules as well.

This case presents the ideal vehicle for addressing the Ninth Circuit's limitless standard for personal jurisdiction and grand jury subpoenas. Unlike *Marc Rich*, the facts giving rise to personal jurisdiction

here have nothing to do with what the grand jury is investigating. While solicitude to the grand jury's investigative function may justify diluting the quantum of proof required, as the Second Circuit did in *Marc Rich* by adopting the "reasonable probability" standard, that does not mean a court can abandon the nexus between the minimum contacts giving rise to jurisdiction and the subject matter of the grand jury subpoena.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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