Nos. 19-13838, 19-14874

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILIP ESFORMES,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida
No. 1:16-cr-20549-RNS-1

BRIEF OF FORMER HIGH-RANKING DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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Nos. 19-13838, 19-14874

UNITED STATES OF AMERICA v. ESFORMES

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-2(c), the undersigned counsel of record certifies that the following persons or entities have an interest in the outcome of this case, as described in 11th Circuit Rule 26.1-2(a), and were omitted from the Certificate of Interested Persons included in previously filed briefs according to 11th Circuit Rule 26-1-2(b):

1. Ashcroft, John D. (*amicus curiae*)
2. Gonzales, Alberto R. (*amicus curiae*)
3. Freeh, Louis J. (*amicus curiae*)
4. Keller, Scott A. (counsel for *amici curiae*)
5. Meese III, Edwin (*amicus curiae*)
6. Mukasey, Michael B. (*amicus curiae*)
7. Ogden, David W. (*amicus curiae*)
8. Starr, Kenneth W. (*amicus curiae*)
9. Thompson, Larry D. (*amicus curiae*)
10. Waxman, Seth P. (*amicus curiae*)

The undersigned certifies that to his knowledge, no publicly held company has an interest in the outcome of this appeal.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

REGULATIONS AND RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former high-ranking Department of Justice officials:

- **John D. Ashcroft**, U.S. Attorney General, 2001-2005.
- **Louis J. Freeh**, Director, Federal Bureau of Investigation, 1993-2001.
- **Alberto R. Gonzales**, U.S. Attorney General, 2005-2007.
- **Edwin Meese III**, U.S. Attorney General, 1985-1988.
- **Michael B. Mukasey**, U.S. Attorney General, 2007-2009.
- **David W. Ogden**, U.S. Deputy Attorney General, 2009-2010.
- **Kenneth W. Starr**, U.S. Solicitor General, 1989-1993.
- **Larry D. Thompson**, U.S. Deputy Attorney General, 2001-2003.
- **Seth P. Waxman**, U.S. Solicitor General, 1997-2001.

Amici provide a significant perspective on the strong public interest in ensuring that the government satisfies its deservedly high standards for maintaining the fairness and integrity of criminal proceedings. The government's conduct in this case fell far short of those standards. *Amici* accordingly urge dismissal of this criminal proceeding.

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[1] Pursuant to Federal Rule of Appellate Procedure 29, all parties have consented to the filing of this brief. Under Federal Rule of Appellate Procedure 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE ISSUE

Whether dismissal of this criminal proceeding is necessary to remedy the government's repeated violations of attorney-client privilege and work-product protection—when the government's search of the defendant's offices, which included his attorney's office, used a patently defective privilege "taint" protocol, unjustifiably seized hundreds of privileged materials, allowed prosecutors and case agents to review and use privileged materials for months even after being warned of privilege problems, and the government never notified the defendant or the district court about these significant privilege infringements.

SUMMARY OF THE ARGUMENT

The government in this case eviscerated the defendant's attorney-client privilege and work-product protection. Dismissal is the only remedy that can fix these pervasive violations.

I. The government's search of the defendant's offices gave prosecutors and investigative agents access to *hundreds* of privileged materials. Then, the government reviewed privileged material *for months*, some of which it indisputably used against the defendant before trial. Nor was this the first time that the government violated the defendant's attorney-client privilege, as the government separately used informants to record conversations between the defendant and his attorney.

Because the search of the defendant's offices included his attorney's office, Department of Justice policy directed the government to use an adequate "taint" protocol—a procedure that uses search agents, who are unconnected to the underlying investigation, to segregate possibly privileged material so that prosecutors and investigative agents cannot view that material.

But here the government's taint protocol was glaringly deficient, giving prosecutors and agents access to hundreds of privileged documents. To make

matters worse, some taint agents later joined the team investigating and prosecuting the defendant.

It would be bad enough if prosecutors and investigative agents had merely seen the hundreds of sensitive privileged communications seized. But the government undeniably *used* at least some of these materials to (1) try to convince one of the defendant's attorneys to cooperate with the government's investigation of the defendant and (2) exhaustively question a legal assistant about a protected document. In both circumstances, the witnesses' attorneys alerted the lead prosecutor to these privilege issues.

The lead prosecutor never notified the defendant or the court of these significant privilege problems, later saying that she saw no problem with this "because the prosecution team was not planning to use those documents in the case against" the defendant—apparently referring only to *use as trial evidence*. Magistrate Judge R. & R., Dkt. 899 ("Mag."), at 53. The defense did not learn that the government had hundreds of attorney-defendant communications until months after the search, when the defendant's counsel physically inspected the documents the government had seized.

Faced with these facts, the district court and magistrate judge rightly recognized the government's pervasive violations. The magistrate judge explained:

- "[T]he 'taint' protocol utilized by the government" during the search "was both inadequate and ineffective." Mag.107-08.
- "[T]he government's disregard for the attorney client and work product privileges has not been limited to a single instance or event." Mag.114.
- "The undersigned assigns no credibility to the prosecution team's 'new' narrative . . . and deplores the prosecution team's attempts to obfuscate the record." Mag.110.

The district court reached the following conclusions:

- "[T]he prosecutors and agents in this case failed to uphold the high standards expected from federal agents and prosecutors from the United States Attorney's Office and Department of Justice during this investigation and prosecution." District Court's Remedial Order, Dkt. 975 ("Dist."), at 48.
- The prosecution team's "execution of their duties was often sloppy, careless, clumsy, ineffective, and clouded by their stubborn refusal to be sufficiently sensitive to issues impacting the attorney client privilege." Dist.49.
- The prosecution team "conducted multiple errors over the course of its investigation and infringed on [the defendant]'s attorney-client and/or work product privileges." Dist.49.
- "[T]he government continued to act with disregard for potential privilege issues" even after the search. Dist.35.

II. Dismissal is the only remedy that can fix the government's wholesale disregard of the defendant's attorney-client privilege and work-product protections.

These pervasive privilege violations have irreparably tainted the government's case against the defendant. The government's open access to hundreds of privileged communications—sensitive thoughts between a

defendant and his attorney—provided the government a massive strategic advantage. For example, seeing attorney-defendant communications allows the government to better plan its investigation, hone its theory of the case, and buttress strategic decisions leading up to and during trial. The lead prosecutor here even used privileged and protected materials to try to convince one of the defendant's own attorneys to cooperate with the government—and exhaustively question a legal assistant about a protected document.

Just because the government did not attempt to use privileged materials *as evidence at trial*—or *add additional charges*—does not erase the significant advantage it gained pre-trial from its unfettered access to hundreds of privileged materials.

There is no way for the government to unlearn this crucial privileged information. Even if a retrial occurred with new prosecutors, those prosecutors would still examine the first trial's record containing the original prosecutors and agents' strategic decisions—which were tainted by the government's widespread privilege violations.

The district court manifestly erred in denying the defendant's motion for an adequate remedy. The district court relied not on the severity of the privilege breaches and the impact on the defendant's trial rights, but on

concerns about impacting "the careers of the prosecutors." Dist.45. The government invited this error, allowing the prosecutors to appear at the district court's remedial hearing in their *individual* capacities—represented by *personal outside, non-governmental counsel*, who argued that the district court should consider these career concerns. It is doubtful that the Department of Justice can constitutionally delegate prosecutorial authority by allowing non-governmental counsel to argue against a remedy urged by and benefitting a criminal defendant in his criminal proceeding. Regardless, the prosecutors injected their own personal interests into the defendant's criminal proceeding, and that is *per se* structural error.

Dismissal is therefore the only remedy that restores the defendant to the circumstances that existed before the government's pervasive privilege violations. The attorney-client privilege is vital to our adversarial legal system, and the government has a special obligation to protect the integrity of criminal proceedings. Dismissal is required here to remedy the government's institutional failure to honor that obligation.

ARGUMENT

I. The government repeatedly violated the defendant's attorney-client privilege and work-product protections.

The government in this case repeatedly disregarded the defendant's attorney-client privilege and work-product protection throughout its years-long investigation and prosecution of the defendant.

The defendant has raised compelling threshold problems with the district court's failure to conduct its own hearing while not adopting some of the magistrate judge's credibility findings—which the magistrate judge made after thorough proceedings. *See* Appellant's Br. 25-27. In all events, this brief will cite to findings by both the magistrate judge and district court to provide this Court a complete view of the case.

A. Even before the government's botched search gave prosecutors and investigative agents access to hundreds of privileged materials, the government had informants record conversations between the defendant and his attorney.

In June 2015, the government directed two informants, the "Delgado Brothers"—who were parties to a joint-defense agreement with the defendant—to record meetings with the defendant, despite the government knowing that the defendant was represented by counsel. Dist.10-12; Mag.93, 97-100, 105, 112-13. The Delgado Brothers had signed a confidential plea

agreement, so they continued to communicate with the defendant "like normal" and "did not want him to think that they were adverse to him." Mag.105; *see* Dist.8-9.

Fully aware of the danger of invading privilege due to the joint-defense agreement, the government nevertheless sent the informants to meetings without any clear instruction not to record attorneys. Dist.10-11; Mag.93, 95, 100, 102, 113. So the informants did not believe there were any restrictions on what or whom to discuss. Mag.107. Unsurprisingly, the informants engaged in conversations with the defendant and his attorneys, which they dutifully recorded and revealed to their government handlers. Dist.11; Mag.113-14. Although the government sought a post-taping review with the court *ex parte* before releasing the recordings to the prosecution team, it did not provide the reviewing court a complete record of the defendant's conversations with his attorney. *See* Dist.12-13; Mag.95, 113-14.

B. But the worst privilege violations in this case occurred the following year. On July 22, 2016, the government arrested the defendant and executed a search warrant of the Eden Gardens Assisted Living Facility ("Eden Gardens"), which the defendant operated. Mag.2; *see* Dist.29. The government seized hundreds of privileged documents and commingled those documents with non-privileged materials in 69 boxes of evidence. Soon after

the search, members of the prosecution team proceeded to scour these boxes for evidence, yet the defense team did not discover the government's unfettered access to this privileged material until months later.

1. Before the search, the government knew that Eden Gardens included the offices of Norman Ginsparg, the defendant's civil attorney. Dist.29; Mag.7, 9, 16, 44. The Department of Justice's Justice Manual ("JM") requires that prosecutors take special precautions to avoid viewing privileged material when searching attorney premises. JM § 9-13.420 (2020) – Searches of Premises of Subject Attorneys, https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.420.

These precautions, typically called a "taint" protocol, involve multiple features. Typically, a "privilege team," consisting of agents and lawyers who are not involved in the underlying investigation reviews seized materials and segregates possibly privileged documents. *Id.* A taint protocol should also provide "special instructions to the searching agents regarding search procedures and procedures to be followed to ensure that the prosecution team is not 'tainted' by any privileged material inadvertently seized." *Id.* Instructions should include "procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team" until

otherwise instructed. *Id.* Prosecutors, too, "must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized." *Id.*

The government here nominally attempted to implement a taint protocol. This taint protocol called for the use of non-case search agents as part of the privilege team conducting the search. Dist.29; Mag.7, 107. These "taint agents" were supposed to separate any materials seized during the search that they believed to be potentially privileged into a "taint" box to be reviewed by a filter attorney. Dist.29; Mag.7, 45-46.

But the district court found the taint protocol in this case was "sloppy," "inadequate," "ineffective," and "border-line incompetent"—and those are charitable characterizations. Dist.32-33; *see* Mag.108. No filter attorney was actually assigned, so no lawyer did a filter review during the search. Dist.29; Mag.66-67. Nor did any lawyer instruct agents on how to execute the filter process themselves. Mag.46. Taint agents were not given the names of defendant's counsel or law firm. Dist.30; Mag.46. Nor were agents instructed how to handle materials seized from Ginsparg's office. Dist.29. Instead, taint agents conducted only a "cursory review" of documents seized, and there was no review at all of seized electronic storage media. Dist.35; Mag.8, 12, 108.

As a result, only a handful of documents were placed into the single "taint" box—while hundreds of documents clearly prepared by law firms or marked privileged, confidential, work product, or attorney/client were placed in the other 69 boxes of purportedly non-taint materials. Dist.30, 33; Mag.107. For example, documents that were seized but not segregated for "taint" review included: a letter labeled "privileged and confidential" showing the name of the defendant's counsel; a document entitled "Medicare Medicaid future liability discussions"; a document including "[a]nswers to your questions related to [the defendant]'s deposition"; witness interviews prepared by law firms marked "privileged and confidential"; a document prominently featuring defendant's counsel's law firm name, "Carlton Fields"; and six-years' worth of bills and descriptions of legal work. *See* Mag.8-11. Similarly, the government's own labels on some non-taint boxes—"Carlton Fields," "legal," "court documents"—screamed privilege, yet no steps were taken to screen privileged materials in these boxes. Dist.30; Mag.7-8, 12-13.

2. Compounding these significant logistical failures, some taint agents were connected to the defendant's case, having previously participated in health care fraud cases related to the investigation against the defendant. Dist.29; Mag.18. And after the search, some agents became actively involved in the investigation. Dist.29; Mag.15-17, 19-20. For

example, taint agents were encouraged to contact witnesses without limitation, and one agent interviewed approximately fifteen witnesses (five of which occurred after the search). Mag.15-16. Taint agents also attended meetings discussing the investigation with prosecution team members and conducted post-search interviews alongside prosecution team members. Mag.16-19. Taint agents were not removed from the investigation until months later (in December 2016). Mag.20.

3. Once the 69 "non-taint" boxes of documents were transferred to an FBI storage facility, prosecutors and case agents could access these boxes at their discretion without signing a log. Mag.15. Both before and during the lead prosecutor's review, the government knew the "non-taint" boxes could contain privileged materials. On the search date in July 2016, defendant's counsel asserted privilege in person and by emailing the lead prosecutor. Dist.29-30; Mag.44-45. Defendant's counsel stated:

> I have informed agents that they are seizing attorney-client privileged materials. Ginsparg identified his files for agents. Ginsparg is an attorney. He provided counsel for companies, [the defendant], and others. These are privileged files. We are not waiving any privilege.

Dist.30; Mag.45. The lead prosecutor forwarded that email to her supervisor, but no action was taken. Dist. 29-30; Mag.45.

The government's lead prosecutor began reviewing the 69 "non-taint" boxes of seized materials within days of the search. Dist. 30; Mag.46. The lead prosecutor therefore had access to the hundreds of privilege documents commingled in these boxes. And we know for certain that at least on three pre-trial occasions, the lead prosecutor *used* privileged materials obtained from this search—namely, the "Descalzo Documents," which were protected documents prepared by a legal assistant, Jacob Bengio, for one of the defendant's criminal counsel, Marissel Descalzo. Mag.46; *see* Dist.34.

Two months after the search, in September 2016, the government arranged for a reverse proffer[2] of Ginsparg, the defendant's attorney whose office had been searched. Dist.37. During that session while trying to convince Ginsparg to "flip" on the defendant and cooperate, the lead prosecutor used the protected Descalzo Documents—prepared at the direction of the defendant's separate criminal attorney—as well as privileged text messages between the defendant and Ginsparg. Dist.37; Mag.24-27, 38-39, 64, 109. In connection with the reverse proffer, Ginsparg's own counsel alerted the government to these privilege issues on November 2, 2016. Dist.37, 40; Mag.53, 63. Nevertheless, the government's lead prosecutor

[2] In a reverse proffer, the government presents its evidence to a witness to convince the witness that it has a strong case against him and to secure his cooperation with the government.

pressed on with her review of the Eden Gardens search materials. Dist.34; Mag.54.

Separately, the lead prosecutor exhaustively questioned Bengio, the legal assistant, about the details of the protected Descalzo Documents, which Bengio had prepared. Mag.111, 115; *see* Dist.36, 38-39. From these protected documents, the lead prosecutor sought—but was unable—to establish that the defendant's financial records had been altered. Mag.111, 115. Bengio's attorney also raised privilege issues, and Bengio identified a lawyer's handwritten notes on the document. Dist.38-39, 41; Mag.74-76, 78. Even after Bengio said that the document had been prepared for the defendant's counsel, the lead prosecutor continued the interrogation about the Descalzo Documents. Mag.34, 85-86, 110. The government again used these documents during a second debriefing of Bengio in October 2016. Dist.34, 39; Mag.111 n.53.

Several members of the prosecution team were present during Ginsparg's reverse proffer and Bengio's debriefings—and therefore witnessed these uses of, and warnings about, privileged and protected materials. Dist.37-38; Mag.31, 39-40.

4. Yet even after all those repeated warnings, the government's lead prosecutor *continued to review the Eden Gardens search materials* until she

viewed an item on December 7, 2016 that appeared to include attorney names. Dist.34; Mag.54. The government did not assign a filter attorney to review the materials seized from Eden Gardens until late January 2017. Dist.31.[3] Even then, the government did not notify the court or the defendant about its possession of privileged material. Dist.34; Mag.54.

In February 2017, defense counsel discovered the treasure trove of privileged materials in the government's possession—when the defense exercised its right to physically inspect the documents seized. Dist.31, 34; Mag.64; *see* Fed. R. Crim. P. 16(a)(1)(E). Defense counsel identified 1,244 legal documents seized and asserted privilege over approximately 800. Dist.33; Mag.22.

C. The magistrate judge correctly identified a pattern of misconduct, finding "the government's disregard for the attorney client and work product privileges has not been limited to a single instance or event." Mag.114. The government's misconduct resulted in the recording of defendant's attorneys and the extensive seizure of hundreds of privileged materials. Mag.109, 112.

[3] The district court mistakenly stated January 2016 rather than January 2017. Dist.31.

The magistrate judge also found that the government presented a "facially inconsistent" narrative when confronted about its use of the privileged Descalzo Documents. Mag.110. In pre-hearing affidavits, members of the prosecution team swore that "Mr. Bengio's counsel asserted that *the notes* related to a project for Descalzo"—as in, work-product protection encompassed this legal assistant's notes as a whole. Mag.40 (emphasis added) (Agent Mitchell); *see* Mag.69-70 (Attorney Bradylyons); Mag.50 (Attorney Young); Mag.110. And government attorneys admitted that they continued to interrogate Bengio about the documents after privilege was raised. *See* Mag.34 (Agent Ostroman); Mag.51-52 (Attorney Young). But at the hearing, members of the prosecution team testified that they believed Bengio's counsel's privilege warning related to *only one line item* of the legal assistant's notes—not the notes in their entirety. Mag.43 (Agent Mitchell); Mag.60 (Attorney Young); Mag.69 (Attorney Bradylyons).

The magistrate judge rejected this explanation, assigned "no credibility to the prosecution team's 'new' narrative," Mag.110, and "found the government's attempt to obfuscate the evidentiary record to be deplorable," Mag.114. And the magistrate judge found that the lead prosecutor "wholly disregarded all privilege concerns in conducting" the Bengio debriefings. Mag.110.

The district court echoed the magistrate judge's frustration, finding that "the Government continued to act with disregard for potential privilege issues after" the search, Dist.35, committed "multiple errors" during its investigation, and "infringed on [the defendant]'s attorney-client and/or work product privileges," Dist.49. The district court concluded that "the prosecutors and agents in this case failed to uphold the high standards expected from federal agents and prosecutors from the United States Attorney's Office and Department of Justice during this investigation and prosecution." Dist.48.

II. Dismissal is necessary to remedy the institutional failure caused by the government's intrusion into the defendant's attorney-client relationship.

The government's pervasive privilege violations prejudiced the defendant. The government had unfettered access to hundreds of privileged documents, reviewed privileged material for months, and taint agents participated in the investigation alongside members of the prosecution team. The government's access to these reams of privileged material undoubtedly influenced the course of these proceedings. Dismissal is necessary to remedy these widespread violations of the defendant's attorney-client privilege and work-product protection.

A. Federal prosecutors are no ordinary litigants. Protections for attorney-client communications are vital in the criminal context, where government prosecutors bear a "heavy responsibility . . . to conduct criminal trials with an acute sense of fairness and justice." *United States v. Dawson*, 486 F.2d 1326, 1330 (5th Cir. 1973).[4] As the Supreme Court explained, the prosecution's interest "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, the prosecutor

> is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id.

Department of Justice policies reinforce this "duty to refrain from improper methods," *id.*, requiring prosecutors to conduct themselves in a manner above and beyond what is expected of ordinary litigants. The privilege context is no exception. As explained above (at pp.10-11), Department policy requires prosecutors to adopt special precautions, such

[4] Fifth Circuit decisions issued before October 1, 1981 are binding precedent in this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

as implementing a "taint protocol," to avoid viewing privileged material. This preserves the fairness of a criminal trial.

After all, the attorney-client privilege is critical for protecting a defendant's constitutional rights, especially the "right to counsel and a fair trial," *United States v. Ofshe*, 817 F.2d 1508, 1515 (11th Cir. 1987)—and sometimes the right against self-incrimination, *see Swidler & Berlin v. United States*, 524 U.S. 399, 407-08 (1998) (attorney-client privilege shields "admission[s] of criminal wrongdoing" in addition to "matters which the client would not wish divulged").

The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). By shielding attorney-client communications from discovery, attorney and client are able to devise legal strategy; test legal theories; consider the relative importance of particular facts, witnesses, and evidence; and conduct a thorough investigation into the case. The need for such "full and frank communication," *id.*, is even more critical for a criminal defendant, where the defendant's liberty is at stake and the right to effective counsel is

a constitutional imperative. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

Defendants are prejudiced when these full and frank attorney-client conversations are "provided to the prosecuting attorney" and investigative agents. *Ofshe*, 817 F.2d at 1515. This exposes vital strategic information related to a case—from overarching trial strategy to discussion of specific facts. The government's knowledge of privileged information could be used to gather additional evidence, determine what facts to emphasize, extract additional information from witnesses, prove or disprove legal theories, and reveal aspects of a defense strategy.

The degree of prejudice to the defendant rises significantly in cases, like this one, involving government access to hundreds of documents in the middle of an ongoing investigation. Perhaps there could be little to no prejudice in a case with only incidental, minimal disclosures of privileged materials that are never seen by prosecutors or case agents. *See, e.g.*, *id.* ("[N]o information was provided to the prosecuting attorney."); *United States v. DeLuca*, 663 F. App'x 875, 878 (11th Cir. 2016) (per curiam) (prosecutor saw just a "single email" given to him by a case agent, who received only "a small percentage of privileged material" from the filter team). But here, the government used completely "inadequate and

ineffective" protocols for controlling access to materials it knew were privileged. Dist.33. The government's patently defective search protocol for the defendant's attorney's office gave prosecutors and case agents unrestricted access to hundreds of privileged documents, taint agents became case agents, and the lead prosecutor used privileged materials on at least three pre-trial occasions to bolster the case against the defendant. These events occurred only after the government previously allowed informants—who had a joint-defense agreement with the defendant—to record the defendant's conversations with his attorney.

On these facts, the defendant was undoubtedly prejudiced by the prosecutors' and agents' unfettered access to hundreds of privileged, "full and frank" attorney-client communications. *Upjohn*, 449 U.S. at 389. At best, the prosecution team repeatedly and consciously disregarded the risk that it would view privileged materials, even after warnings raised about the government's own defective search. To establish prejudice, a criminal defendant need not (and indeed cannot) reconstruct precisely what went through government lawyers' and agents' minds while they repeatedly viewed and used privileged documents during their ongoing investigation and trial preparation.

B. Dismissal of this case is the only remedy that accounts for the government's pervasive failure to assure the effective assistance of counsel and a fair trial.

To remedy privilege violations, courts must "identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *United States v. Morrison*, 449 U.S. 361, 365 (1981). Dismissal is an appropriate remedy to cure systemic harm caused by government misconduct. *E.g.*, *Ballard v. United States*, 329 U.S. 187, 195-96 (1946); *United States v. Bundy*, 968 F.3d 1019, 1042 (9th Cir. 2020); *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008); *United States v. Sabri*, 973 F. Supp. 134, 147 (W.D.N.Y. 1996); *United States v Omni Int'l Corp.*, 634 F. Supp. 1414, 1440 (D. Md. 1986). Even in civil cases with ordinary private litigants, privilege violations may warrant dismissal. *E.g.*, *Eagle Hosp. Phys., LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1302-03 (11th Cir. 2009); *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1306 (11th Cir. 2006); *Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987).

Under this Court's caselaw, dismissal for the government's intrusion into the attorney-client relationship is appropriate upon a showing of "demonstrable prejudice, or substantial threat thereof." *DeLuca*, 663

F. App'x at 878; *see Ofshe*, 817 F.2d at 1515. And as explained above (at pp.10-16, 21-22), the widespread attorney-client privilege violations here—caused by the government's own egregiously flawed search—gave prosecutors and case agents unfettered access to hundreds of privileged materials, vastly increasing the risk that the government benefitted from its intrusion. In fact, the prosecution team here indisputably reviewed and used privilege materials during its investigation, and it alerted no one about it for months.

A lawyer who reviews privileged information "cannot unlearn the information in the documents." *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1325 (D. Utah 2016), *aff'd*, 890 F.3d 868 (10th Cir. 2018); *accord Eagle Hosp.*, 561 F.3d at 1302-03 (opposing attorney acquiring attorney-client information is "privy to privileged information which he could not unlearn"); *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 432 (W.D. Wash. 2002) (strong remedy needed where review of privileged information "cannot be erased"), *aff'd*, 78 F. App'x 588 (9th Cir. 2003). The offending lawyers here—one being the government's lead prosecutor at trial—cannot forget what they learned by having access to troves of privileged material, nor can they redo a case built, at least in part, on illicitly obtained privileged materials.

So this case is quite different from this Court's prior decisions, where the prosecutor in *DeLuca* saw only one privileged email and the prosecutor in *Ofshe* saw no privileged material. *See supra* p.21. No presumption is needed here for the defendant to show "prejudice, or substantial threat" of prejudice when the government had access to hundreds of privileged materials during its ongoing investigation—and openly used some of those materials in pre-trial witness interviews.[5]

Nor can substituting a new prosecution team to retry the case at this late stage address the prejudice to the defendant. Any new prosecution team would inherit the transcripts, investigation, and case file from the first trial—and thus review tainted strategic decisions, made by tainted prosecutors, supported by tainted investigative agents. The taint will linger over any subsequent proceedings, even with different government actors. So under the circumstances here, dismissal is "necessary to 'restore [] the defendant to the circumstances that would have existed had there been no

[5] *Cf. United States v. Danielson*, 325 F.3d 1054, 1070-72 (9th Cir. 2003) (applying presumption of prejudice and shifting the burden to the government to show that its wrongful privilege intrusion was not prejudicial); *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995) (same); *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984) (same).

constitutional error.'" *Stein*, 541 F.3d at 144 (alteration in original) (quoting *United States v. Carmichael*, 216 F.3d 224, 227 (2d Cir. 2000)).

C. None of the arguments offered by the district court or the government justifies a lesser remedy than dismissal. The district court grievously erred by ordering only the "less drastic remedy" of suppression of *evidence from trial* for a small subset of evidence acquired from the tainted recordings. *See* Dist.49-50.

Simply suppressing the privileged evidence at trial cannot account for the government's unfair advantages with pre-trial investigations, developing case theories, or other strategic decisions before and during trial. Nor is it practical or even possible for the Court to distinguish which evidence is "fruit of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341 (1939). Any such effort would require post hoc deconstruction of the prosecutors' thought processes in the months after the search through trial. Furthermore, prejudice does not merely stem from evidence presented at trial. The strategic advantage gained from knowledge of privilege material can be leveraged in pre-trial decisions to hone legal theories, influence witnesses, and guide investigatory decisions. The district court's minimal suppression order essentially allowed the government to take full advantage of its

knowledge of privileged material—knowledge it never would have had without the government's pervasive privilege violations.

Dismissal is therefore necessary because "any lesser sanction will put the defense at a greater disadvantage than it would have faced had the government" adhered to its obligations in the first place. *Bundy*, 968 F.3d at 1043. If the only remedy here is trial suppression, the government loses nothing by seizing, reviewing, and using these privileged materials before trial. The district court's minimal suppression order therefore creates perverse incentives: It encourages prosecutors to review and use privileged materials—that they otherwise could never have accessed—so long as the government does not use the evidence at trial. This inadequate remedy is an "open invitation to others to abuse the judicial process." *Eagle Hosp.*, 561 F.3d at 1306.

The "integrity of the justice system" does not tolerate privilege violations just because "invading counsel promised not to use any privileged information that might come into their hands." *Camden v. Maryland*, 910 F. Supp. 1115, 1123 (D. Md. 1996). The district court thus critically erred in believing that the government's agreement not to use privileged documents at trial rendered it "unnecessary to adopt the Magistrate Judge's credibility determination and findings of 'misconduct,' 'attempts to obfuscate the

record, and creating a 'new narrative,' particularly given the adverse consequences of such findings to the careers of the prosecutors." Dist.44-45.

The district court also mentioned that the government's violation did not "produce any charges." Dist.44. But the government also did not drop any charges after accessing all this privileged material. As explained above, criminal defendants are prejudiced from pervasive privilege violations in all sorts of ways beyond formally adding charges. *See supra* pp.18-22. Revealing sensitive defendant-attorney communications to the government lets prosecutors and agents better plan the investigation, hone their theories, and buttress strategic decisions before and during trial.

D. To top it off, the government invited the district court's most glaring error: In the district court's own words, the court denied the defendant's motion for an adequate remedy "particularly given the adverse consequences of such findings to the *careers of the prosecutors*." Dist.45 (emphasis added). At the hearing on the defendant's motion, the district court commented that it had an "additional moral burden, okay, to worry about whatever ruling I make here is going to have on the career of a prosecutor." 11/8/2018 Hearing Tr., Dkt. 974, at 218:24-219:1.

There is no colorable argument that this is a permissible or even relevant rationale in a criminal proceeding where a defendant's liberty is in

jeopardy. The court's concern is not to protect government attorneys from the consequences of their misconduct but to ensure that "the integrity of the judicial system is preserved and that trials are conducted within ethical standards." *United States v. Ross*, 33 F.3d 1507, 1523 (11th Cir. 1994). A criminal defendant cannot be saddled with the risk of an unfair criminal prosecution, with liberty or even life at stake, just because there could be consequences for government attorneys and agents who knowingly reviewed privileged documents without alerting the court or the defendant for months.

The government injected these improper personal concerns into the defendant's criminal proceeding. At the hearing on the defendant's remedial motion, the prosecutors were represented by their own *personal*, *non-governmental lawyers* in their *individual* capacities. Young Mot. for Leave to Appear, Dkt. 961, at 1 (moving "for leave to appear in her individual capacity"); Bernstein Mot. for Leave to Appear, Dkt. 948, at 1 (moving "for leave to appear in his individual capacity"); *see* Notice of Appearance, Dkt. 969 (Notice of Appearance of counsel for Interested Party Attorney Bradylyons).

These personal, outside counsel asked the district court to reject the magistrate judge's adverse credibility findings, asserting that the district court should not harm the prosecutors' personal careers and reputations. *See*

11/8/2018 Hearing Tr., Dkt. 974, at 1-2, 217:4-220:12, 231:10-232:7, 238:23-241:23, 250:14-15. The district court even allowed one outside counsel to present a narrative account of the lead prosecutor's life history. *Id.* at 232:8-234:5. Separate counsel representing the United States similarly asked the court to "affirmatively reject" the magistrate judge's findings in part due to the potential consequences faced by the offending prosecutors. *Id.* at 178:6-179:15.

In short, during the defendant's criminal proceedings, outside personal counsel represented the lawyers prosecuting the defendant in their individual capacities to argue that "the proposed findings may have significant professional consequences" to them "personally." Young Mot. for Leave to Appear, Dkt. 961, at 2; *see* Bernstein Mot. for Leave to Appear, Dkt. 948, at 1 (arguing that "without any notice or opportunity to respond, [Bernstein] could face professional sanctions"). The government supported these efforts by outside counsel. *See* Response to Bernstein Mot. for Leave to Appear, Dkt. 956, at 2 (agreeing that Bernstein "is entitled to appear personally at the upcoming argument and speak to any issues in the R&R affecting him").

It is doubtful that the Department of Justice can constitutionally delegate prosecutorial authority by allowing non-governmental counsel to

argue against a remedy urged by and benefitting a criminal defendant in his criminal proceeding. Private attorneys may represent the government in limited contexts. *See Young v. United States ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (criminal contempt); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993) (qui tam). Those situations do not appear to include private counsel, who represent a non-party, arguing at a single remedial hearing in the middle of an ongoing criminal case otherwise conducted by government prosecutors.

Even when permissible, private attorneys "represent the United States, not the party that is the beneficiary of the court order allegedly violated." *Young*, 481 U.S. at 803-04; *see* 28 C.F.R. § 50.15(a) (providing representation for federal employees "in the interest of the United States"). As the Supreme Court observed, "[t]he Government's interest is in dispassionate assessment of the propriety of criminal charges for affronts to the Judiciary. The private party's interest is in obtaining the benefits of the court's order. While these concerns sometimes may be congruent, sometimes they may not." *Young*, 481 U.S. at 805.

Here, those interests markedly diverged. The government prosecutors acted on *personal* interests—as confirmed by their outside counsel's express arguments—to impugn findings about the proper remedy in the defendant's

criminal case. They did so not to ensure that "justice shall be done," *Berger*, 295 U.S. at 88, but because of concerns that an adverse ruling would adversely affect their personal careers and reputations. Their outside personal counsel were not bound by the special obligations imposed on prosecutors by the Supreme Court in *Berger* and this Court in *Dawson*. Quite the contrary, the outside lawyers' professional duties of loyalty and zealous representation required them to press their client's personal interests to the exclusion of all others. *See* R. Regulating Fla. Bar 4-1.2(a), 4-1.3 cmt.

But "[t]he only parties in a federal criminal case are the named defendant and the United States." *United States v. Rogers*, 119 F.3d 1377, 1384 (9th Cir. 1997). Allowing outside counsel to argue the prosecutors' personal interests effectively inserted non-parties—with interests adverse to the defendant's and incompatible with the government's solemn responsibilities—into a criminal case. This Rube Goldberg scheme upset the fine constitutional balance applicable to criminal cases and enabled the prosecutors, through their outside surrogates, to strike not merely "hard blows," but "foul ones." *Berger*, 295 U.S. at 88.

The "appointment of an interested prosecutor" is *per se* structural error. *Young*, 481 U.S. at 814. A criminal proceeding should never turn on the prosecutor's personal interests; the Constitution requires the utmost

fairness to criminal defendants. Outside personal counsels' appearance representing government prosecutors in this criminal proceeding speaks volumes about the institutional chaos created by the government's wholesale, protracted, and deliberate disregard for the defendant's attorney-client privilege. Outside counsel diverted the district court's attention from preserving the defendant's fair-trial rights to protecting the conflicted prosecutors from the consequences of the government's misconduct. This is due process stood on its head.

CONCLUSION

Once the prosecutorial misconduct came to light, the government should have moved to dismiss with prejudice pursuant to Federal Rule of Criminal Procedure 48(a). It certainly never should have allowed outside counsel, representing non-parties, to inject the prosecutors' personal interests into this criminal proceeding. *Amici* hope that the government will now confess error rather than defend this ill-gotten conviction. Failing that, this Court should restore the integrity of these criminal proceedings by vacating the defendant's conviction and remanding with instructions that the district court dismiss this indictment with prejudice.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28 and 32(g)(1), the undersigned counsel certifies that this brief:

(i) complies with the page/type-volume limitation of Rule 32(a)(7) because it contains 6,456 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and (6) because it has been prepared using Microsoft Office Word and is set in Georgia font and size 14-point or higher.

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2020, I electronically filed the foregoing Brief with the Clerk of the Court using the CM/ECF system, and service will be accomplished by the appellate CM/ECF system.

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