2020 WL 995376 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

HARBOR HEALTHCARE SYSTEM, L.P., Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA, Defendant-Appellee.

No. 19-20624.
February 14, 2020.

On Appeal from the United States District Court For The Southern District of Texas, Houston Division, Civil No. 4:18-cv-003195

Answering Brief of the United States

Ryan K. Patrick, United States Attorney, Brad Gray, Assistant United States Attorney, 1000 Louisiana, Suite 2300, Houston, Texas 77002, (713) 567-9599, for appellee.

*II *STATEMENT REGARDING ORAL ARGUMENT*

Pursuant to Fed. R. App. P. and 5th Cir. R. 34, the government states that oral argument is not necessary because the jurisdictional defects in this appeal, which are apparent from the briefs and record, warrant dismissal. Although it is therefore unnecessary to reach the merits, Harbor's substantive arguments are likewise overcome through a straightforward application of the factors in *Richey v. Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975), as set forth by the district court, and may readily be resolved on the briefs and record. Nevertheless, if the Court determines that oral argument would be helpful, counsel will be prepared to present argument.

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***1** The United States files this brief in response to that of Plaintiff-Appellant Harbor Healthcare System, L.P.

**2 STATEMENT OF JURISDICTION*

As the government argued in its motion to dismiss Harbor's appeal (filed Dec. 23, 2019), Harbor may not appeal the district court's dismissal of its Fed. R. Crim. P. 41(g) [1] (hereinafter "Rule 41(g)") action. Harbor seeks to suppress documents from the government's [Text redacted in copy] review, and its Rule 41(g) action [Text redacted in copy]. As such, the district court's order is not a final ruling, and this Court lacks jurisdiction under *Di Bella v. United States*, 369 U.S. 121, 131--32 (1962).

**3 STATEMENT OF ISSUES PRESENTED FOR REVIEW*

1. In *Di Bella*, the Supreme Court held that district court decisions on Rule 41(g) motions for return of seized property are not appealable where the movant seeks suppression, or where the motion relates to criminal proceedings *in esse* against the movant. Harbor, [Text redacted in copy], filed this action to halt the government's review of documents imaged or seized pursuant to search warrants. **Under *Di Bella*, does this Court have appellate jurisdiction over Harbor's appeal?**
2. This Court's decision in *Richey* instructs district courts to decline to exercise jurisdiction over pre-indictment motions for return of property under Rule 41(g) unless the movant demonstrates "callous disregard" on the part of the government and the likelihood of "irreparable harm." The government seized Harbor's electronic documents pursuant to judicially-authorized

search warrants, and created a filter team to protect Harbor's privilege. **Under these circumstances, did the district court abuse its *4 discretion under *Richey* when it declined to exercise jurisdiction over Harbor's Rule 41(g) action?**

STATEMENT OF THE CASE

A. *[Text redacted in copy], the Government Commences an Investigation*

Harbor Healthcare System, L.P. ("Harbor") runs a group of hospices and other healthcare entities across Texas, Louisiana, and other states. [Text redacted in copy]

In July 2015, in support of that investigation, the U.S. Department of Health and Human Services, Office of Inspector General ("HHS-OIG") served Harbor with a Request for Information. ROA.416--419. This request sought only the medical records for a select set of patients. ROA.416. In March 2017, the Civil Division of the Department of Justice issued a Civil Investigative Demand ("CID") to Harbor. ROA.420--43. ***5** The CID contained eleven document requests and five interrogatories, most of which focused on the ownership of Harbor's hospital, *not* its hospices. ROA.430--31.

B. *Pursuant to Three Judicially-Authorized Search Warrants, the Government Seizes Documents and Images Email Accounts*

[Text redacted in copy] [2] [Text redacted in copy] to evaluate Harbor's (or its employees') potential criminal liability. After further independent investigation, the criminal team prepared applications for premises search warrants. Although the investigation was being led by agents and attorneys from the United States Attorney's Office for the Eastern District of Texas, the warrant applications were submitted to magistrate judges in the three different judicial districts in this Circuit where the relevant Harbor facilities were located (the Western District of Louisiana, Eastern District of Texas, and Southern District of Texas). ***6** ROA.764--918. All three magistrate judges signed the warrants. Agents executed the warrants in May 2017.

Two aspects of the warrants and their execution are pertinent here. First, the warrants were not, as Harbor claims, the culmination of an intentional effort to seize attorney-client privileged communications by (a) staging service of the CID (which could cause Harbor to engage legal counsel) in March 2017 and (b) following up with the execution of the warrants two months later. Harbor's "pump-priming" allegations are supported by nothing more than the timing of both investigative actions. ROA.1006--08 (government's response to these allegations). Indeed, the warrants focused on separate issues. [Text redacted in copy] In contrast, the warrants generally sought separate categories of documents concerning Harbor's *hospice* business line (*e.g.*, billing records and other communications). *See, e.g.*, ROA.767--74.

Second, the warrants authorized the collection of emails and electronically stored information ("ESI"), which the government obtained ***7** by imaging accounts and computers. This collection of electronic evidence is the primary grievance Harbor has raised and is the main focus of its Rule 41(g) action. A Rule 41(g) action seeks the return of seized materials. However, aside from the brief time necessary for on-site imaging, the government left Harbor's servers and computers undisturbed and copied only a small subset of the electronic information retained by Harbor. ROA.141--45; ROA.192; ROA.940--41. Harbor has always retained the original electronic documents. [3]

C. *The Government Forms a Filter Team to Review Potentially Privileged Documents*

Government agents imaged (rather than seized) the email accounts of 15 Harbor employees, out of Harbor's workforce of over 900. Opening Brief, at 4. [4] These included high-level executives at Harbor, including CEO Dr. Qamar Arfeen and Compliance Director Eric Sprott. No ***8** lawyers' or outside law firms' email accounts (.pst files) were designated for imaging. [5] While Mr.

Sprott attended law school, he was not a lawyer licensed in any jurisdiction at the time of the search, and he told agents that there was not any type of attorney-client relationship between himself and anyone at Harbor. ROA.260.

Despite the fact that no attorney email accounts were imaged, the government recognized the possibility that there could be privileged material in the emails of some of Harbor's corporate employees. Accordingly, the government took careful steps to safeguard the integrity of its investigation and Harbor's privilege. In order to ensure that any privileged materials were not reviewed by the investigative team (which was being led by AUSAs from the Beaumont office of the Eastern District of Texas), a wholly-separate "filter team" from another division of the Eastern District was enlisted to review the documents that might be privileged. ROA.478--80, 657. The government also sought Harbor's assistance to identify potentially privileged documents. It asked Harbor ***9** to compile a list of lawyers and law firms who might have emailed with Harbor employees, which Harbor provided. ROA.478--80 (list of potential counsel provided by Harbor); ROA.490 ¶ 9; ROA.657. The filter team then ran searches using terms supplied by Harbor to identify and segregate documents that potentially could be privileged. Demonstrating even greater care, the filter team supplemented the searches with a more in-depth review of particular accounts where potentially privileged material was more likely to reside based on the search results. ROA.657.

D. *Harbor Files a Rule 41(g) Action and Advances Fourth Amendment Arguments to Attempt to Suppress the Review and Use of All Electronic Documents*

Harbor filed its Rule 41(g) motion in the Southern District of Texas on September 7, 2018. Because Rule 41(g) motions are treated as civil actions for equitable relief when no criminal indictment has been returned, Harbor's case was styled as a civil suit. *See Bailey v. United States*, 508 F.3d 736, 738 (5th Cir. 2007). On September 11, 2018, after the government became aware of the motion, the government confirmed that the investigative team and the filter team would both cease reviewing *any* electronic documents (even those that were clearly not privileged) while the district court considered the Rule 41(g) action. ***10** ROA.25. This compromise stalled the government's investigation for months.

Although Harbor's Rule 41(g) motion took issue with the government's filter review, ROA.938, the suit focused not on the return of seized documents solely in the government's possession (such as patient files) but on the suppression of all emails and ESI imaged in the search, whether privileged or not. (Harbor subsequently referred to this as its "scope" argument.) Harbor made this aim clear by seeking an expansive remedy: the return of *all* evidence, [Text redacted in copy] could not use in future criminal proceedings any evidence obtained through the search warrants, despite Rule 41's express requirement that only a *defendant* who has been criminally charged may move to suppress evidence. *See, e.g.*, ROA.963 [Text redacted in copy]); ROA.964. In so doing, Harbor lodged a number of Fourth Amendment arguments typically seen in a post-indictment suppression motion. *See* ROA.938 (challenging application of plain view doctrine); ROA.961 ([Text redacted in copy]); ROA.962 [Text redacted in copy].

***11** The district court held case management hearings on Harbor's motion on December 4, 2018 and January 29, 2019. ROA.282--346; ROA.1050--72. During the first hearing, the Court proposed a compromise: a privilege review protocol that focused on the most important custodians (*i.e.*, the Harbor email accounts most likely to contain privileged information) as "test run[s]" to evaluate the merits of Harbor's privilege claims. ROA.333--37. [6] Under this proposed protocol, Harbor would take the first pass at identifying potentially privileged documents and would prepare privilege logs for each custodian for the purposes of informing the district court's ruling on Harbor's privilege claims. ROA.335, 337. The Court noted that it would reevaluate the merits of Harbor's civil suit as the "test run" custodians' emails were reviewed. ROA.335 ("I'm using it as a test run for me to see.").

At the second hearing, Harbor's counsel confirmed that its civil suit was not just about protecting its attorney-client privilege. Instead, it was animated by Fourth Amendment "scope" concerns--and Harbor would ***12** not be satisfied unless (1) *every* email was removed from the government's possession and (2) Harbor, not the government, would get to decide whether an email fell within the scope of the search warrants.

> Well, one solution would be to basically have us conduct this scope review and have some separate group test it, but not the investigative team, and have them for[swear] plain view review. They don't have a right to keep stuff outside the scope that they never had probable cause to begin with to seize. So, I mean, that's our solution there.

ROA.1056 (lines 7 to 14) (Jan. 29, 2019 hearing). The district court agreed to accept briefing on this issue. ROA.1060.

E. *The Government Moves to Dismiss for Lack of Equitable Jurisdiction*

On February 8, 2019, the government moved to dismiss the civil suit pursuant to *Richey v. Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975), which holds that district courts should decline to exercise jurisdiction over pre-indictment motions for return of seized property unless a movant can show "callous disregard" for the movant's rights and irreparable harm resulting from the seizure itself (*i.e.*, where a movant has lost access to property necessary to run its business). ROA.182--96. The government explained that Harbor had not suffered any irreparable harm because it always possessed the devices containing the evidence at issue and that Harbor asserted no business need for the return of ***13** property.

After the motion was fully briefed, Harbor acknowledged in an April 2, 2019 letter to the Court that the district court's privilege review compromise had resolved "in princip[le]" its privilege concerns and that its requested relief extended well beyond its privilege arguments--stating that "[a] decision for [Harbor] on the particularity/overbreadth Fourth Amendment issue alone should require the return of *all the property*." ROA.252 (emphasis added).

The district court granted the government's motion to dismiss on August 19, 2019. ROA.1010--17. The district court noted that it [Text redacted in copy] The district court specifically held that [Text redacted in copy]

***14** Harbor then filed an "emergency" motion for reconsideration on August 29, 2019. ROA.1018--29. After hearing argument, the district court orally denied the motion for reconsideration at a September 3, 2019 telephonic hearing and memorialized its order on September 10, 2019. ROA.281; ROA.347--76. Harbor filed a timely notice of appeal on September 5, 2019. ROA.275.

F. *Harbor's Brief to this Court Advances Suppression Arguments*

In its Opening Brief, Harbor confirmed that its civil action hinged on its constitutional arguments, including under the Fourth Amendment, seeking to suppress evidence from any use [Text redacted in copy]. *See, e.g.*, Opening Brief, at 18--22 (arguing that the government's search and seizure violated the Constitution's particularity clause). Similarly, in its Statement of Jurisdiction, Harbor asserts that this Court has subject matter jurisdiction because its claims in the district court "arose under the Fourth Amendment." *Id*. at 1.

***15** G. *The Government Moves to Dismiss Harbor's Appeal*

The government moved to dismiss Harbor's appeal on December 23, 2019. The government argued that Harbor's Rule 41(g) motion was barred by *Di Bella v. United States*, 369 U.S. 121, 131--32 (1962), in which the Supreme Court held that a party may appeal the denial of a Rule 41(g) motion only if "the motion is [1] *solely* for return of property *and* is [2] in no way tied to a criminal prosecution *in esse* against the movant." *Id*. (emphasis added). On January 16, 2020, after Harbor filed a response and the government filed a reply, a motions panel of this Court denied the government's motion to dismiss without further elaboration.

SUMMARY OF ARGUMENT

Harbor's attempt to invoke Rule 41(g) to prevent the government [Text redacted in copy] from reviewing Harbor's electronic documents should be rejected for two separate and independent reasons.

First, Harbor's appeal is procedurally premature and should be dismissed for lack of appellate jurisdiction. The Supreme Court's holding in *Di Bella* mandates that denials of Rule 41(g) motions may only be appealed when "the motion is [1] solely for return of property and is [2] in no way tied to a criminal prosecution *in esse* against the movant." ***16** 369 U.S. at 131-- 32. Binding Fifth Circuit precedent "interpret[s] the language of *Di Bella* broadly," making that directive even plainer: "*[O]nly* if the motion is a collateral attempt to retrieve property [i.e., for its own sake] and not an effort to suppress evidence in related criminal proceedings is it appealable." *In re Grand Jury Proceedings (Uresti)*, 724 F.2d 1157, 1159 (5th Cir. 1984) (emphasis added); *id*. at 1160 ("It is readily apparent even upon the most cursory review that the notion of 'anomalous jurisdiction' [. . .] pertains to the District Courts and is not a supplement to this court's appellate jurisdiction."). Harbor's failure to satisfy both prongs of the *Di Bella* test mandates dismissal of this appeal.

Second, should this Court determine that it has jurisdiction to entertain the merits of Harbor's appeal, Harbor does not show any abuse of discretion by the district court. The Fifth Circuit's standard governing pre-indictment Rule 41(g) actions, announced in *Richey v. Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975), is exacting by design. *Richey* directs district courts to exercise their discretionary jurisdiction with "caution and restraint" and grant relief only if the movant shows, among other things, "callous disregard" on the part of the government and "irreparable harm" resulting from the seizure. Harbor has demonstrated ***17** neither. The searches here were pursuant to lawfully-issued warrants signed by three different magistrate judges. Harbor complains that the warrants were overbroad because they authorized the collection of entire email accounts, yet this process is expressly contemplated by recent amendments to the Federal Rules of Criminal Procedure. Harbor also challenges the government's use of a filter team to review potentially privileged documents. But a filter team was created to *protect* Harbor's privilege--and the parties are currently working under a joint privilege review protocol that provides even more protection by allowing Harbor to prepare a privilege log for each custodian, despite the resulting disruption to the criminal investigation. And, the only other "harm" alleged by Harbor (in the district court or on appeal) is the government's review of documents which, in Harbor's view, violates its Fourth Amendment rights. But, in addition to being meritless (as explained below), this Court has definitively established that such Fourth Amendment claims are properly addressed only in a post-indictment motion to suppress.

Exercising its discretion, the district court correctly found that Harbor's claims do not meet the high burden for relief under Rule 41(g), ***18** and that Harbor should instead advance its arguments in a post-indictment suppression motion if any indictment is returned. There was no error in the district court's decision, let alone an abuse of discretion.

ARGUMENT

I. *This Court Lacks Appellate Jurisdiction*

This Court lacks jurisdiction over Harbor's appeal under the two-prong test established by the Supreme Court in *Di Bella*. Harbor's Rule 41(g) motion fails both prongs because: (1) it sought the suppression of documents, and (2) it was tied to a criminal prosecution *in esse* against Harbor.

A. *This Panel Should Consider the Jurisdictional Issue Before Reaching the Merits of the Appeal*

The government incorporates and reiterates the arguments it advanced in support of its motion to dismiss Harbor's appeal for lack of jurisdiction. Those issues remain live for this Court's consideration. While the motions panel issued a one-sentence

denial of the motion to dismiss without articulating its reasoning, that order is not binding on this panel, nor is it a conclusive determination that this Court has jurisdiction over Harbor's appeal. Rather, as this Court has explained, "a panel hearing the merits of an appeal may review a motions panel ***19** ruling, and overturn it where necessary." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 704 (5th Cir. 1997) (citations omitted), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Indeed, the merits panel must be "especially vigilant where, as here, the issue is one of jurisdiction." *Id*.

In fact, when addressing a similar jurisdictional issue ([Text redacted in copy] could appeal a pre-indictment decision concerning the government's retention of documents), this Court dismissed an appeal after the motions panel allowed that appeal to proceed to a merits panel. *In re Grand Jury Subpoena*, 190 F.3d 375, 378 n.6 (5th Cir. 1999). The Court relied upon prior precedent stating that a motions panel's decision is only "provisional" and may be reviewed by the merits panel "with the benefit of full briefing and [] oral argument." *Id*. (quoting *Ventana Invs. v. 909 Corp.*, 65 F.3d 422, 425 n.7 (5th Cir. 1995)). Thus, this panel can--and should--consider whether it has jurisdiction to entertain this appeal.

B. *Legal Standard -- The* Di Bella *Test*

With narrow exceptions, this Court's appellate jurisdiction is limited to "final decisions of the district courts." 28 U.S.C. § 1291. It is well-settled that the denial of a motion to suppress, even during a ***20** criminal proceeding, is not "final" for the purposes of appeal. *United States v. Acosta*, 669 F.2d 292, 293 (5th Cir. 1982). If a Rule 41(g) motion for return of seized property is filed before an indictment is returned by the grand jury, appellate jurisdiction is governed by *Di Bella v. United States*, 369 U.S. 121, 131--32 (1962).

In *Di Bella*, the Supreme Court announced a bright-line test governing when decisions on Rule 41(g) motions are appealable. *First*, rulings on motions for the return of property are appealable only if "the motion is [] solely for return of property" and is in no way tied to suppression. *Id. Second*, the motion also must be "in no way tied to a criminal prosecution *in esse* against the movant." *Id*. In order to satisfy the second prong, under this Court's decisions it is *not* necessary for a subsequent indictment to be returned for a matter to be tied to a criminal prosecution *in esse*, and "[t]he relevant focal point is whether or not the motion was made primarily to withhold evidence from the anticipated grand jury hearings[.]" *Uresti*, 724 F.2d at 1159; *Sealed Appellant v. Sealed Appellee* ("*Sealed v. Sealed*"), 199 F.3d 276, 278 (5th Cir. 2000) (same).

***21** While *Richey* allows the district court to exercise anomalous jurisdiction in order to protect movants' rights from "callous disregard," that jurisdictional grant "pertains to the District Courts and is not a supplement to this court's appellate jurisdiction." *Uresti*, 724 F.2d at 1160 (emphasis added). This standard strikes a balance--allowing meaningful, though limited, judicial review in the district court pursuant to *Richey* but preventing subjects of criminal investigations from using appeals to cause "serious disruption" to a future criminal proceeding. *Di Bella*, 369 U.S. at 129.

The Court in *Di Bella* recognized that full judicial review (including appeal) would permit subjects of criminal investigation to "seek advantages conferred by the rules governing civil procedure, to the prejudice of proper administration of criminal proceedings." 369 U.S. at 129 n.8. Harbor sought to do just that here--indicating in Fed. R. Civ. P. 26(a) disclosures that it sought to take the depositions of case agents, AUSAs, and others involved in the investigation. ROA.1007 n.4. Moreover, *Di Bella* recognized that Rule 41(g) motions could become an "instrument of harassment, jeopardizing by delay the availability of other ***22** essential evidence." 369 U.S. at 129. Such appeals could be used to try to run out the clock on, or otherwise delay, criminal prosecution.

Although Harbor does not address the *Di Bella* test or any of this Court's binding precedent construing *Di Bella* in its Opening Brief, [7] as explained below, Harbor fails both of the *Di Bella* prongs. Accordingly, this appeal must be dismissed because the Court lacks appellate jurisdiction.

C. *Prong One: Harbor's Rule 41(g) Motion "Primarily" Seeks the Suppression of Documents*

The first prong of *Di Bella* alone bars Harbor's appeal. Harbor's Rule 41(g) motion is not "solely for return of property." 369 U.S. at 131--32. The stated relief sought by Harbor, the arguments it made in the district court, and the natural consequence of its lawsuit--to order the return and effective suppression of evidence ***23** [Text redacted in copy]--make it clear that "the motion was made primarily to withhold evidence." *Uresti*, 724 F.2d at 1159.

1. *Harbor Seeks to Suppress Evidence, Not the Return of Documents Already in its Possession*

This Court has held on numerous occasions that the critical factor in determining whether a case is aimed at suppressing evidence (and therefore not immediately appealable) is whether the movant seeks the return of documents for their own sake, *i.e.*, for some legitimate business need. *See Sealed v. Sealed*, 199 F.3d at 278 (dismissing appeal because "[n]ot only did Appellants indicate to the trial court that they were seeking suppression, but also they failed to demonstrate a business need for return of the property as [the government] provided Appellants with copies of all of the seized items"); *see also In re Search of Law Office, Residence, & Storage Unit of Alan Brown ("Alan Brown")*, 341 F.3d 404, 414 (5th Cir. 2003) (no irreparable harm where "the government has allowed Brown constant access to the records since their seizure and has been hospitable to his staff's copying of any needed record").

Other circuits have likewise interpreted *Di Bella* to require a showing of a legitimate need for the property itself. For example, in an analogous case presented to the Third Circuit, ***24** *In re Grand Jury*, 635 F.3d 101 (3d Cir. 2011), the appellant [Text redacted in copy], and the government executed a search warrant on the appellant's property. *Id*. at 102. The government seized numerous documents and made copies of hard drives, leaving the original computers undisturbed. *Id*. The government agreed to furnish the appellant with copies of all seized documents. *Id*. Like here, the appellant moved for return of all documents, including copies. *Id*. The appellant did not assert that the government's retention of the evidence caused undue hardship, but instead claimed that the search and seizure violated the Fourth Amendment. *Id*. The district court denied the motion, and the Court of Appeals determined that the order was not final and appealable. *Id*. at 103, 106. Specifically, the court found that "the motion plainly sought not just the equitable return of property, but also the suppression of evidence--*i.e.*, to prevent the government from using the evidence in criminal proceedings." *Id*. at 104. "This is evidenced by the motion's request for any *copies* of the seized documents and for an order directing the government to cease inspecting the evidence pending a ruling." *Id*. (emphasis in original). "Similarly, if the appellant really sought just the return of property--and not also suppression-- then the ***25** government's offer to furnish him with copies of the seized evidence should have sufficed (after all, the appellant has not explained why he needs the originals, as opposed to copies, of the seized evidence)." *Id*. at 104--05.

Other circuits have reached similar conclusions. *See, e.g.*, *In re Sealed Case*, 716 F.3d 603, 607--08 (D.C. Cir. 2013) ("[W]hen the movant has already recovered the property from the government, those courts are reluctant to find that the motion is 'solely' for its return."); *In re Warrant & Records Seized from 3273 Hubbard*, 961 F.2d 1241, 1244 (6th Cir. 1992) ("Nowhere in the record does it show that counsel filed an affidavit which asserted that the records were needed in order to conduct business. Thus, we conclude that appellants' motion was not 'solely for the return of property.' "); *Church of St. Matthew v. United States*, 845 F.2d 418, 419 (2d Cir. 1988) ("appellants have apparently received back some of the materials seized and copies of all or substantially all of the seized documents"); *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 895 (1st Cir. 1980) (holding that appellants' "primary purpose" was suppression, because appellants had not responded to government's offer ***26** to make copies available and because "appellants have not argued that they need the property").

As the district court found, ROA.1014, Harbor has no legitimate business need for the actual documents it seeks to have "returned" because the government imaged copies of devices, and did not take the devices at issue. The only plausible remedy Harbor could seek, then, is suppression.

2. *Harbor's Fourth Amendment Arguments Reflect Its Suppression Aim*

The relief sought by Harbor and the arguments it has advanced confirm that its end goal is suppression. In its motion, Harbor took an all or nothing approach--asking for the court to "intervene and order the return of all of the documents seized in the search warrant." ROA.413. Asking for the return of all documents prevents their use in future proceedings and is tantamount to suppression.

Similarly, Harbor's focus on the constitutional issues that arise in a typical suppression motion (the warrants' scope, whether probable cause existed, or whether the plain view doctrine applied) make it clear that Harbor's suit was part of its larger strategy seeking to withhold evidence. This concern was stated well by the D.C. Circuit in *In re Sealed* ***27** *Case*, which noted that the relevant question is whether a Rule 41(g) movant seeks "strategic gain at a future hearing or trial." 716 F.3d at 607. The court pointed to two requests as indicative of the fact that suppression was the real remedy sought: (1) that the movant requested that the government "waive the plain view doctrine with respect to the electronic documents"--something that would be a "benefit [] at trial" and "has nothing to do with the return of property"; and (2) that the movant sought to "prevent the government from reviewing all or most of the evidence for a period of time, while [movant] and an independent third party screen the seized material"--something that would work "delay [that] could shape the course of the criminal investigation and the content of the case the government will present at trial." *Id*. at 608.

Harbor made both of those arguments repeatedly in this case. For example, at the January 29, 2019 hearing, Harbor asserted that:

> [The government] maintain[s] that once they have a warrant for something, [] they have the right to seize everything and to review everything and to obtain documents outside the scope under the plain view exception. . . . Well, one solution would be to basically have us conduct this scope review and have some separate group test it, but not the investigative team, and have them for [swear] plain view review.

ROA.1055--1056.

***28** Harbor has maintained that "the Government can use a subpoena, Civil Investigative Demand, or other means to later obtain documentary evidence it has a right to obtain." Response to Motion to Dismiss Appeal, at 15. This solution involves the suppression of documents. Rather than retaining the documents seized from the search warrant, the government would have to return all documents and rely on Harbor to determine what is relevant to a subpoena. Those documents that Harbor chooses not to produce would be suppressed from any future proceeding.

In case there was any doubt, Harbor's Opening Brief in *this* Court highlights the nature of the relief it would seek upon remand. Harbor claims the government sought "general warrants [that] failed to limit the discretion of the executing agents" under the Fourth Amendment, Opening Brief, at 28, and that the "irreparable harm" identified by Harbor was the government's review of documents, not Harbor's loss of those documents. Opening Brief, at 51 (focusing on the "unjustified review" of documents). Harbor even argues that the district court should have foreclosed the government's hypothetical future use of the plain view doctrine in the event that it discovered evidence of other crimes. Opening Brief, at 56--60.

***29** 3. *The 1989 Amendments to Rule 41 Did Not Eliminate the First Prong of the* Di Bella *Test*

In its response to the motion to dismiss for lack of appellate jurisdiction, Harbor argued that the 1989 amendments to Rule 41--which eliminated *automatic* suppression from future criminal proceedings as a remedy--also meant a party could never seek suppression and therefore eliminated "any plausible need for searching inquiries into whether an appellant sought suppression."

Response to Motion to Dismiss Appeal, at 19. This position has been roundly rejected. As multiple courts of appeals have held, this position would "render one prong of the *Di Bella* test moot." *In re Warrant & Records Seized From 3273 Hubbard*, 961 F.2d at 1244; *see also In re Grand Jury*, 635 F.3d at 105 ("While it is true that a Rule 41(g) motion no longer *necessarily* seeks suppression, this hardly means that it is *impossible* for such a motion to seek suppression.") (emphasis in original). [8] And, this Court has continued to analyze cases under *both* prongs of *Di Bella*, even after 1989. ***30** *Sealed v. Sealed*, 199 F.3d at 278 ("This is a suppression case. We agree with the district court that Appellants' protestations to the contrary are flimsy at best, disingenuous at worst.").

Conversely, Harbor is wrong that a ruling in the government's favor means that "*every* Rule 41(g) motion would seek suppression." Response to Motion to Dismiss Appeal, at 15 (emphasis added). As *Di Bella* recognizes, many Rule 41(g) motions--especially those concerned with tangible physical property, unlike here--are in fact about the "return" of property for its own sake. Harbor did not file such a motion, and it expressly disclaimed any "business need" for the return of documents before the district court. ROA.1014 [Text redacted in copy]

D. *Prong Two: There Are Anticipated Criminal Proceedings* In Esse

Although Harbor's failure to meet the first prong of *Di Bella* is sufficient to warrant dismissal of its appeal for lack of jurisdiction, Harbor's appeal also is barred because it fails the second prong of the *Di Bella* test requiring that Harbor's motion be "in no way tied to a criminal prosecution *in esse* against the movant." 369 U.S. at 131--32.

***31** 1. [Text redacted in copy]

Harbor and persons affiliated with Harbor [Text redacted in copy], and the materials at issue were copied or seized [Text redacted in copy]. The emails and ESI sought here (*e.g.*, email exchanges between Harbor's senior executives and other employees) are, as one would expect, highly relevant to the ongoing criminal investigation which may lead to the return of one or more criminal indictments. The inability of government agents to review electronic information has, unsurprisingly, obstructed and delayed [Text redacted in copy] and risks the possibility that certain charges may be barred by the applicable statute of limitations. *See In re Sealed Case*, 716 F.3d at 608 (noting that "the delay [from a Rule 41(g) motion] could shape the course of the criminal investigation and the content of the case the government will present at trial"). These complications are precisely why *Di Bella* precludes appellate review of cases like the one here.

2. Di Bella *Applies in the Pre-Indictment Setting*

The fact that no indictment has been returned does not change the fact that the motion is directly tied to an anticipated criminal ***32** prosecution. This Court has *not* required that an indictment be returned in order for there to be criminal proceedings "*in esse*" against a Rule 41(g) movant. *See Uresti*, 724 F.2d at 1159 ("The 'related criminal proceedings' language [used by the Fifth Circuit] does not make essential a subsequent indictment to a finding of non-appealability. The relevant focal point is whether or not the motion was made primarily to withhold evidence from the *anticipated* grand jury hearings . . . ." (emphasis added)); *see also Simons v. United States*, 592 F.2d 251, 252 (5th Cir. 1979) (noting that "[w]e have interpreted *Di Bella* broadly" and rejecting appeal even in the absence of an indictment).

In its response to the government's motion to dismiss Harbor's appeal, Harbor argued that this Court's precedent was "inconsistent." Response to Motion to Dismiss Appeal, at 20--21. However, to the extent Harbor points to language in *United States v. Sealed Search Warrants*, 868 F.3d 385, 389--90 (5th Cir. 2017), to suggest that an indictment is required, that language is dicta. The movant in *Sealed Search Warrants only* sought to unseal search warrant affidavits, and did not seek the "return" (much less the "suppression") of property.

***33** [Text redacted in copy] *Id.* at 1159--60 & n.5; *see also Di Bella*, 369 U.S. at 131--32 (holding that appellate jurisdiction may not lie unless motion for return of property is "in no way tied to a criminal prosecution *in esse*"); *In re Grand Jury*, 635 F.3d at 105 (dismissing appeal for lack of appellate jurisdiction where [Text redacted in copy] and "[g]iven the clear connection between the motion and a criminal prosecution (albeit an incipient one), the appellant does not satisfy the second requirement of *Di Bella*") (internal quotation marks and alterations omitted). [9]

***34** In sum, Harbor seeks to suppress documents that are relevant to [Text redacted in copy]. Consequently, both prongs of the *Di Bella* test mandate the dismissal of this appeal for lack of appellate jurisdiction.

E. *Harbor's Other, Ancillary Claims Do Not Justify Appellate Review*

Although Harbor has claimed that the government invaded its attorney-client privilege and that the search warrant affidavits should be unsealed, neither argument provides a basis for appellate jurisdiction.

1. *Harbor's Assertions of Privilege Do Not Give Rise to Appellate Jurisdiction*

The mere fact that Harbor asserted attorney-client privilege over some of its documents is not an independent justification for appellate jurisdiction. As the D.C. Circuit held in *In re Sealed Case*, *Di Bella* remains the "exclusive test" for appealability of Rule 41(g) actions even where potentially privileged documents are seized. *In re Sealed Case*, 716 F.3d at 610--11.

While it appears no Fifth Circuit case has directly addressed this issue in the context of a Rule 41(g) challenge, Fifth Circuit precedent counsels against the exercise of jurisdiction at this stage. As the district court correctly recognized, ***35** [Text redacted in copy] ROA.1012 n.3 (Aug. 19, 2019 order dismissing action) (citing *Alan Brown*, 341 F.3d at 415 n.54); *see also United States v. Martin*, 682 F.2d 506, 509 (5th Cir. 1982) ("Defendants complain that the government has obtained evidence from the breach of the attorney-client privilege. The complaint is not well taken. For purposes of appealability, this case is indistinguishable from the denial of a suppression motion."); *In re Grand Jury Subpoena*, 190 F.3d at 384 (holding that pre-indictment challenge to order permitting government to review allegedly privileged documents was not appealable); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009) ("Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment[.]").

Even if such claims could be raised independent from a suppression motion, Harbor's privilege claims here are moot because of the protocol proposed by the district court and currently being implemented by the parties. Pursuant to that protocol, Harbor has been taking the first pass at privilege review on a custodian-by-custodian basis and preparing ***36** privilege logs, and the government's investigative team is not reviewing, and will not review, a custodian's documents until Harbor has finished that custodian's privilege log. ROA.258. Any documents on Harbor's privilege logs continue to be excluded from the government's review. To the extent Harbor may take issue with the government's *future* use of a filter team to challenge the documents on Harbor's privilege logs, that claim is unripe and not properly presented for review because the government has agreed, at Harbor's request, not to begin any such filter team review until this appeal is complete. *See infra*, section II.C; *Shields v. Norton*, 289 F.3d 832, 837 (5th Cir. 2002) ("we must not proceed until the issue is ripe").

2. *Harbor's Request that the Search Warrant Affidavits Be Unsealed Does Not Give Rise to Appellate Jurisdiction*

Similarly, the fact that Harbor has asked for the search warrant affidavits to be unsealed does not give this Court jurisdiction. *See* ROA.413 (arguing that the affidavits would be evidence "necessary to decide the [Rule 41(g)] motion"). This Court has previously held that attempts to gather evidence showing the alleged unlawfulness of a seizure (*e.g.*, a request for a "*Franks* hearing" to determine whether a police officer's affidavit used to obtain a search warrant contained false ***37** statements) cannot give rise to appellate jurisdiction. *Sealed v. Sealed*, 199 F.3d at 277--79 (refusing to exercise jurisdiction over entire appeal and holding that request for *Franks* hearing would "obstruct the orderly progress of an ongoing grand jury proceeding");

see generally Franks v. Delaware, 438 U.S. 154 (1978) (allowing for evidentiary hearing where defendant makes substantial preliminary showing that a material false statement was used in connection with search warrant affidavit). The Third Circuit addressed this precise situation where a party sought the search warrant affidavits to advance its Rule 41(g) request. *In re Grand Jury*, 635 F.3d at 106. The Court held that, because "unsealing was requested merely to assist the appellant in arguing for return and suppression," "the District Court's refusal to unseal the affidavit--like its decision denying the return and suppression of evidence--is not appealable." *Id*. Here, Harbor has requested the search warrant affidavits as part of its Fourth Amendment argument regarding the scope and particularity of the search warrants--an argument aimed directly at suppression.

Even if such a request could establish jurisdiction, it would not do so here because Harbor failed to preserve this issue in the district court. ***38** Harbor did not renew its request for the search warrant affidavits in response to the government's motion to dismiss below or upon reconsideration following the district court's order. *See generally* ROA.215--240; ROA.1018--29; *see also Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002) (noting that "[e]ven an issue raised in the complaint but ignored at summary judgment may be deemed waived" (citations omitted)). Because Harbor failed to preserve the issue in the district court, it is not cognizable on appeal.

F. *The* Di Bella *Test Applies to the District Court's "Dismissal" of Harbor's Rule 41(g) Action*

In response to the government's motion to dismiss for lack of appellate jurisdiction, Harbor claimed that this court has jurisdiction to consider its appeal because the district court only "dismissed" Harbor's civil action on jurisdictional grounds and did not "deny" Harbor's request. Harbor's reading is unsupported by precedent, is based on dicta from *Richey*, and reads "magic words" into this Court's ruling in *Richey*. As this Circuit's consistent application of *Di Bella* makes clear, regardless of whether the district court "denied" or "dismissed" Harbor's claim for relief under Rule 41(g), *Di Bella* governs here.

There is no functional difference between a "denial" and a ***39** "dismissal" in the context of pre-indictment Rule 41(g) actions. District courts only have jurisdiction over Rule 41(g) civil actions under the district court's "anomalous jurisdiction"--*i.e.*, for the sole purposes of analyzing whether the *Richey* factors warrant the extreme relief contemplated by Rule 41(g). 515 F.2d at 1243. Because the entire civil action is predicated on one motion, denial of that motion resolves the lawsuit--which, *Richey* counsels, should be effectuated by *declining* to exercise continued jurisdiction. *Id*. at 1244 (the district court "can decide whether to exercise its anomalous jurisdiction"). By necessity, then, denial of a Rule 41(g) motion involves dismissal of the civil case, and vice versa. *See In re Search of 5444 Westheimer Road Suite 1570*, Misc. No. H-06-238, 2006 WL 1881370, at *4 (S.D. Tex. July 6, 2006) (declining to exercise equitable jurisdiction and ordering that Rule 41(g) motion be "denied" and "further order[ing] that the instant action is dismissed"). Given that district courts are required to determine whether a case merits their exercise of equitable jurisdiction using the *Richey* factors, a district court cannot "dismiss" a case for lack of equitable jurisdiction but then determine that it has jurisdiction to "deny" a movant relief. Harbor's proposal would seem to allow for automatic appeals--rendering ***40** *Di Bella* a nullity-- whenever the district court fails to employ the word "denial."

This Court was faced with the same procedural posture as here in *Uresti* and *Sealed v. Sealed*, and applied *Di Bella*. The government has not located a case in which an appellate court declined to apply *Di Bella* because a district court stated that it was dismissing the Rule 41(g) motion on jurisdictional grounds, rather than stating that it was dismissing the Rule 41(g) motion by denying the motion.

This is unsurprising because the setting of *Richey* was unique. In *Richey*, the district court decided that it lacked jurisdiction primarily on mootness grounds because "the IRS had stipulated that it would return [] original records as soon as it had completed microfilming them." 515 F.2d at 1242. This Court held that the district court's decision "rested *solely* on jurisdictional grounds [*i.e.*, mootness] and was not a ruling on the merits of the motion as was the case in *Di Bella*." *Id*. at 1243. Because the district court also "did not have the benefit of [the] holding in *Hunsucker* [outlining the standard for equitable jurisdiction] when it considered the appellants' motion[,]" this Court remanded for further consideration. *Id*. at 1244 (citing to ***41** *Hunsucker v. Phinney*, 497 F.2d 29, 34 (5th Cir. 1974)).

However, even if Harbor is correct (which it is not), the district court here *did* initially exercise jurisdiction to address the merits of Harbor's arguments. The civil action was pending for almost a full year, the district court held multiple hearings, and the parties thoroughly briefed Harbor's privilege claims and Fourth Amendment argument. In the end, the district court, evaluating the *Richey* factors, addressed the merits of the Rule 41(g) motion. The district court stated in its order that it [Text redacted in copy] ROA.1012.

Harbor received meaningful judicial review in the district court before its motion was dismissed. However, that is not relevant to the issue of whether this Court has appellate jurisdiction. *Di Bella* applies and, under *Di Bella*, this Court does not have jurisdiction.

*42 II. *The District Court Properly Exercised its Discretion to Decline Jurisdiction Over Harbor's Rule 41(g) Motion*

Even if the Court decides to address the merits of Harbor's appeal, an application of the *Richey* factors confirms that the district court did not abuse its discretion in dismissing Harbor's Rule 41(g) action.

A. *Standard of Review -- Abuse of Discretion*

Rule 41(g) is a unique procedural device providing that "a person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). Where no indictment has returned, the motion is treated as a quasi-civil action under the court's equitable, or "anomalous," jurisdiction. *Richey*, 515 F.2d at 1243. That jurisdiction should be exercised sparingly and with "caution and restraint." *Alan Brown*, 341 F.3d at 409 (quoting *Hunsucker*, 497 F.2d at 34).

Richey established that decisions, like the order on appeal here, concerning "whether to exercise [general equitable] jurisdiction in a given case [are] subject to the sound discretion of the district court." 515 F.2d at 1243. Accordingly, an abuse of discretion standard applies. Under that standard, the district court's decision and decision-making process "need only be reasonable." ***43** *Matter of Life Partners Holdings, Inc.*, 926 F.3d 103, 128 (5th Cir. 2019). A district court "abuses its discretion only when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *United States v. Ebron*, 683 F.3d 105, 126 (5th Cir. 2012). A district court's assessment of evidence is not "clearly erroneous as long as it is plausible in light of the record as a whole." *Id*. at 126-- 27.

B. *The District Court Did Not Abuse Its Discretion in Applying the* Richey *Factors*

The deferential standard governing district courts' exercise of jurisdiction over Rule 41(g) actions is well-settled, and Harbor cannot argue that the district court held "an erroneous view of the law." *Ebron*, 683 F.3d at 126. In fact, the district court recognized that the parties [Text redacted in copy] ROA.1012. Those factors include (1) whether the plaintiff "accurately alleges that the government agents [. . .] displayed 'a callous disregard for [its] constitutional rights' "; (2) whether the plaintiff "has an individual interest in and need for the material whose return he seeks"; (3) "whether the plaintiff would be irreparably injured by denial of the return of the property"; and (4) whether "the plaintiff has an adequate remedy at law for the redress of ***44** his grievance." *Richey*, 515 F.2d at 1243--1244. As the district court found, all of these factors weigh in the government's favor.

1. *There Was No "Callous Disregard" for Harbor's Rights*

Harbor's contention that the government exercised "callous disregard" rests on two points: (1) Harbor's "scope" argument, or its claim that the collection of entire email accounts resulted in an unconstitutional general search in violation of the Fourth Amendment's particularity clause; and (2) its privilege argument, which effectively asserted that the government should never be permitted to use filter teams. The district court carefully reviewed Harbor's allegations supporting these two arguments (both

in briefing and at multiple hearings), and ultimately determined that [Text redacted in copy] ROA.1014. Consequently, the district court determined that [Text redacted in copy] ROA.1014. The district court did not abuse its discretion in reaching those conclusions.

45** ***a. The imaging of email accounts and other ESI pursuant to search warrants is not "callous disregard"

Harbor argues that the imaging of its documents was unconstitutional because the warrants permitted the collection of entire email accounts or large quantities of electronic information. The district court acted within its discretion in finding that these claims did not rise to the extreme level of "callous disregard." ROA.1014 [Text redacted in copy]

First, the district court properly [Text redacted in copy] ROA.1013. The district court's deference at this stage to the decisions of those magistrate judges was entirely consistent with the limited aims of Rule 41(g), which is to be used with "caution and restraint." *Alan Brown*, 341 F.3d at 409 (quoting *Hunsucker*, 497 F.2d at 34). The district court properly recognized the questions it was ***not*** called to answer: it did not need to determine the precise metes and bounds of a constitutionally reasonable search for electronic evidence, or even whether agents relied in good faith on the warrants. Instead, the district ***46** court followed this Court's directive that "callous disregard" is generally shown only in truly extreme situations where, for example, the seizure was not simply [Text redacted in copy] ROA.1013 (quoting *Richey*, 515 F.2d at 1243 n.8). Harbor's allegations came nowhere close to satisfying that standard. *See Hunsucker*, 497 F.2d at 34 (finding no callous disregard for constitutional rights because the challenged conduct was taken pursuant to a search warrant); *In re Search of 5444 Westheimer Road*, 2006 WL 1881370, at *2 ("The items recovered from [the] offices were taken pursuant to, and within the scope of, a search warrant issued by a United States Magistrate Judge. Thus, the Court finds no callous disregard for [the business's] constitutional rights.").

Second, even if the district court were called upon to address the constitutionality of the warrants (which was not required), Rule 41 expressly authorizes the procedure used by the agents here. Rule 41(e)(2)(B) acknowledges that for large repositories of electronic information, it is proper for agents to copy electronic storage media (*i.e.*, ***47** disks and email accounts like the ones here) in their entirety for the purposes of conducting a "later review of the media or information consistent with the warrant." Fed. R. Crim. P. 41(e)(2)(B). This is because, as the Advisory Committee noted at the time the rule was amended in 2009 to add this language, "it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location." Advisory Committee Notes to Fed. R. Crim. P. 41 (2009 Amendments). This Court, and countless others across the country, have rejected arguments like Harbor's suggesting that the government must either segregate relevant documents at the site of the search (taking hours, days, or weeks) or require that warrants specify in advance the precise search parameters that agents would use. *See United States v. Triplett*, 684 F.3d 500, 506 (5th Cir. 2012) ("Although officers should limit exposure to innocent files, for a computer search, in the end, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes the documents contained within their folders.") (quotations omitted); *see also United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999) ("A sufficient chance of finding some needles in the computer haystack was established by the probable-cause showing ***48** in the warrant application; and a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs."); *In re Email Account xxxxxxx@gmail.com Maintained at Premises Controlled By Google, Inc.*, 33 F. Supp. 3d 386, 394 (S.D.N.Y. 2014), *as amended* (Aug. 7, 2014) ("*In re Google*") ("Notably, every case of which we are aware that has entertained a suppression motion relating to the search of an email account has upheld the Government's ability to obtain the entire contents of the email account to determine which particular emails come within the search warrant.").

Third, the district court properly considered and rejected Harbor's argument that the warrants were facially overbroad. ROA.1014 [Text redacted in copy] Harbor mischaracterizes the nature of the warrants. They did not authorize the review of every email for any purpose and for all time, as Harbor seems to allege. *See* Opening Brief, at 26 (describing warrants as "without meaningful subject matter limitation"). Rather, the warrants were limited to 22 categories of documents that were related to potential health care fraud violations. ROA.767--74. The fact that the ***49** suspected fraud here might have been wide-ranging or might have covered much of Harbor's business activities only heightens the need for a more fulsome picture of Harbor's e-

mail communications. *See United States v. Sanjar*, 876 F.3d 725, 736 (5th Cir. 2017) (noting that "[t]he scope of the seizure depends on the scope of the suspected crime" and affirming decision to seize entire set of defendant's patient files).

b. The government's use of a filter team properly preserved Harbor's privilege and was not "callous disregard"

Likewise, the district court acted within its discretion when it found that Harbor had not established "callous disregard" given the fact that the government employed a filter team in order to limit any unintentional disclosure of potentially privileged information to the investigative team.

First, the district court properly found that the creation of the government's filter team weighed against a finding of "callous disregard." *See* ROA.1013 [Text redacted in copy] Filter teams are routinely used as a method to safeguard parties' privileged documents without needlessly hindering an ongoing investigation or requiring *in camera* review of countless thousands of documents. *See Alan Brown*, 341 F.3d at 407--09 (discussing without criticism the ***50** government's use of a filter team to review documents seized from a law office and holding that district court erred when ordering return of documents); *In re Search of 5444 Westheimer Road*, 2006 WL 1881370, at *2 (citing cases approving filter teams and expressly approving a filter procedure that would "allow expeditious review of all seized documents" and protect the movant's privilege rights). Contrary to Harbor's allegations, the filter team here actively took steps to protect Harbor's privilege--informing Harbor that a filter review was ongoing and consulting with Harbor on attorney and law firm names to be used as search terms to identify and cull potentially privileged information. ROA.478--80; ROA.490 ¶ 9; ROA.657. The filter team ran the search terms and segregated potentially privileged documents from the case team's review. [10] Importantly, Harbor remained in possession of its original emails and electronic documents and was granted access to ***51** review and copy any hard-copy documents in person. ROA.259; ROA.264--74. Throughout these discussions, Harbor could certainly have performed its own privilege review or identified certain documents or categories of documents that it considered to be protected by any applicable privilege and notified the filter team of its position as to those documents.

Second, in executing the search the government did not "target Harbor's privileged communications," as Harbor alleges. Opening Brief, at 29--30. Harbor is not a law office. The documents at issue primarily concerned the operations of Harbor's hospice business, not legal communications. Harbor did not have a legal department or an in-house attorney at the time of the search. Harbor points to the collection of emails from Harbor's compliance director, Eric Sprott. However, while Mr. Sprott attended law school, he was not a lawyer licensed in any jurisdiction at the time of the search, and he told agents that there was not any type of attorney-client relationship between himself and anyone at Harbor. [11] ROA.260. Moreover, the government's warrant application ***52** intentionally did not seek to image the email mailbox of Harbor's former in-house counsel Justo Mendez. ROA.143; ROA.195 n.5; ROA.260.

Because the government did not target privileged communications, and indeed took steps to segregate potentially privileged communications from the investigative team, the cases cited by Harbor disapproving of the use of filter teams are inapplicable. For example, in the recent case cited by Harbor, *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019), the Fourth Circuit held that the movant, a law firm that was itself under investigation for potentially conspiring with one of its clients to launder drug money, satisfied the factors for a preliminary injunction halting the continued review of its emails that were seized pursuant to a search warrant. *Id*. at 164--65. The Fourth Circuit relied heavily on the facts that, unlike here: (a) the movant was itself a law firm; and (b) 99.8 percent of the 52,000 seized emails were related to clients ***other*** than the one at the center of the government's investigation, including many criminal targets in unrelated investigations being conducted by the same U.S. Attorney's office that was investigating the law office. *Id*. at 172. Harbor's emails, most of which are business communications, present no such concerns. Even ***53** Harbor has acknowledged that only a small minority of the emails are privileged in nature. ROA.993 (confirming that, even for Sprott's account, only 3,843 out of 23,000 documents (16.7%) were tagged as potentially privileged).

The remaining cases cited by Harbor, Opening Brief, at 44--45, stand for the general proposition that the government may utilize a filter team with appropriate precautions when it comes into possession of potentially privileged information through a warrant--just as the government did here. Harbor cites to the Sixth Circuit's opinion in *In re Grand Jury Subpoenas*, 454 F.3d 511 (6th Cir. 2006) which required the use of a special master. But the name of that case--*In re Grand Jury* Subpoenas--is instructive. The Sixth Circuit was not faced with a case where the government came into possession of documents following the execution of search warrants (requiring, of course, judicial oversight and probable cause determinations). In that case, the government did not "actually possess the potentially-privileged materials here, so the exigency typically underlying the use of taint teams is not present." *Id*. at 523. [12] The Sixth Circuit expressly recognized that "[i]n such cases, the ***54** potentially-privileged documents are already in the government's possession, and so the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege." *Id*. at 522.

The district court decision cited by Harbor where a warrant was used, *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1037--39 (D. Nev. 2006), mentioned that some courts "have taken a skeptical view [] of taint teams." However, while it expressed some concerns with the execution of the filter team in that case, the court also noted that the use of a taint team was generally "not improper" especially where the search warrant was, like here, "directed at seizing non-privileged business records[.]" *Id*. at 1038.

Third, and perhaps most importantly, Harbor's claims at this point are moot. In an attempt to provide even more protections for Harbor's privilege, the district court proposed, and the parties accepted, a privilege review protocol. As even Harbor acknowledged to the district court, that protocol has now resolved its remaining privilege claims. *See* ROA.252 ***55** (April 2, 2019 letter from Harbor stating that "the [privilege] issue has been resolved, at least in princip[le], by the government's agreement to return seized documents to [Harbor] for [Harbor's] privilege review"). Under the protocol, Harbor is conducting its own review of the electronic materials on a custodian-by-custodian basis and creating a privilege log. The filter team then is releasing to the government case team only the documents for that custodian that are not on Harbor's privilege log. The protocol is ongoing, and there is nothing at this point for the district court--let alone this Court--to oversee. [13]

2. *Harbor Has No Business Need for* Copies *of Its Emails*

Harbor has conceded, and the district court correctly found, that it cannot establish the second factor--whether Harbor "has an individual interest in and need for the material." *Richey*, 515 F.2d at 1243. Harbor never claimed that it had a "business need" for the return of documents. ROA.1014 [Text redacted in copy]. [14] ***56** Indeed, Harbor does not need the government's image of the electronic devices returned. The government has provided Harbor a copy of the images of electronic materials copied pursuant to the search warrants, and Harbor has had possession of the imaged devices since the search warrant was executed.

3. *Harbor Is Not Suffering "Irreparable Harm," and Harbor Will Have an Adequate Remedy at Any Future Suppression Hearing*

The third and fourth *Richey* factors--irreparable harm and the availability of an adequate remedy at law--are interrelated, and both weigh in the government's favor, as the district court correctly found. Harbor's alleged harm is not "irreparable" because, as the district court determined, [Text redacted in copy] ROA.1015. Echoing its arguments on "callous disregard," Harbor spends eleven pages of its Opening Brief claiming that filter review of any sort gives rise to "irreparable harm." Opening Brief, at 42--53. Harbor's brief does not cite (much less attempt to distinguish) the binding Fifth Circuit ***57** decision on this factor, *Alan Brown*, 341 F.3d at 414--15. That decision controls here and requires that the district court's decision be affirmed.

In *Alan Brown*, a Rule 41(g) action following the search of an attorney's home, law office, and storage units, this Court roundly rejected the argument that the government's continued use of documents for the purposes of conducting a criminal investigation was an "irreparable harm." 341 F.3d at 415. The Court noted that "the irreparable harm which [the movant] must have proven to prevail in the Rule 41([g]) proceeding must have focused on the injury to [the movant] *from loss of the property*, not simply

harm from the grand jury's reliance on the illegally seized evidence in indicting him[.]" *Id*. (citing *United States v. Calandra*, 414 U.S. 338 (1974)) (emphasis added). Otherwise, "every potential defendant could point to the same harm and invoke the equitable powers of the district court"--needlessly creating "protracted interruption" [Text redacted in copy]. *Id*. [15]

***58** Harbor's case presents the very same concerns that animated the decision in *Alan Brown*. Like the movant in that case, Harbor has always had access to copies of its documents. ROA.159; ROA.164--74. Just as in *Alan Brown*, the principle "harm" claimed by Harbor is the government's continued use of documents to advance its investigation. Opening Brief, at 39--51 (describing Harbor's aim as protecting its "privacy"); *Alan Brown*, 341 F.3d at 415 (harm may not simply focus on the grand jury's "reliance on the illegally seized evidence in indicting him"). Moreover, Harbor's motion has resulted in "protracted interruption," 341 F.3d at 414, [Text redacted in copy]. Because Harbor's "scope" argument challenged as unconstitutional the government's review of *any* emails, the government agreed on September 11, 2018 to cease reviewing any electronic evidence (privileged or not) during the pendency of Harbor's civil case. ROA.25. Only recently, in September 2019, did such review re-commence after the district court dismissed Harbor's action. (The parties agreed to continue the ongoing privilege review, and the government is presently reviewing only those emails that have not been logged as privileged by Harbor.)

***59** The "irreparable harm" analysis is not changed simply because Harbor claimed privilege over some of the imaged documents. The movant in *Alan Brown* did as well, and the Court noted that the privilege arguments there were more appropriately considered in a post-indictment suppression motion, stating that "[w]e do not pass upon Brown's allegations that the government possesses potentially privileged information." *Id*. at 415 n.54. Despite Harbor's concern that "one cannot put the toothpaste back in the tube," Opening Brief, at 52, this Circuit has held that the interest in finality is paramount and a party's privilege claims do not give rise to automatic (and instantaneous) full judicial review. *In re Grand Jury Subpoena*, 190 F.at 384 (holding that pre-indictment challenge to order allowing government to review allegedly privileged documents was not appealable); *see also Mohawk*, 558 U.S. at 109 ("Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment[.]"). In any event, the district court here went even further and oversaw the successful effort to negotiate a solution that would best protect Harbor's ongoing interest in its privileged documents. The district court properly ***60** determined that this [Text redacted in copy] ROA.1015.

For these reasons, all of the *Richey* factors weigh in the government's favor, and the district court did not abuse its discretion in declining to continue to exercise jurisdiction over Harbor's 41(g) action.

C. *Harbor's Concerns With the Future Use of a Filter Team are Unripe*

As of the filing of this brief, Harbor's counsel continues to review documents for the purposes of preparing a privilege log. Harbor argues that the district court erred in allowing the government's filter team to second-guess those privilege determinations. ROA.281 (district court's order on reconsideration stating that the "Government's taint team can continue to review the documents over which a claim for privilege is asserted and confer with counsel for Plaintiff to determine if an agreement can be reached").

As Harbor has acknowledged, the government is not presently conducting any filter review (of any sort) while the appeal is pending. Instead, the investigative team is only reviewing those documents that Harbor has agreed are not privileged and the filter team has paused its review. Opening Brief, at 53 n.5. Accordingly, Harbor's challenge is ***61** unripe. While the government reserves its right to utilize a filter team at a later date to review and challenge Harbor's privilege determinations (either by conferring with Harbor or by presenting a dispute to the district court), if necessary, that has not occurred. To the extent the parties reach an impasse down the road, that disagreement is more properly presented to the district court in the first instance. *Shields*, 289 F.3d at 837 ("we must not proceed until the issue is ripe").

D. *The District Court Properly Declined to Rule on Harbor's Other Suppression Arguments*

Directly undercutting the notion that Harbor does not seek "suppression" for the purpose of the jurisdictional test under *Di Bella*, Harbor's Opening Brief argues that the district court erred in "failing to decide the issue of the general warrants and plain view review." Opening Brief, at 56--60. To the contrary. The district court correctly analyzed these arguments *only* under the *Richey* framework--*i.e.*, for the purposes of determining whether the government showed "callous disregard." Because Harbor's allegations did not rise to the extreme level required by *Richey*, the district court correctly refused to entertain these ***62** constitutional arguments that should instead be advanced in a post-indictment motion to suppress. [16]

E. *No "Evidentiary Hearing" Was Needed Here, and Harbor Waived its Request for Affidavits*

Harbor is likewise incorrect that the district court was required to conduct a full evidentiary hearing or unseal the search warrant affidavits in order to adjudicate Harbor's Rule 41(g) motion.

Rather, the district court properly determined in its discretion that such a hearing would have been meaningless given the trial court's limited role under *Richey*. *See In re Singh*, 892 F. Supp. 1, 5 (D.D.C. 1995) (holding that copies of documents would satisfy movant's Rule 41(g) request and refusing to compel depositions that would "serve no constructive purpose"). In fact, this Court in *Alan Brown* expressly ***63** disapproved of the delay that could result from such hearings--noting that, "[a]s the *Calandra* Court feared [. . .], the result of Brown's 41([g]) motions has been 'protracted interruption' of the grand jury investigation, and a three-day evidentiary hearing that was 'effectively . . . [a] preliminary trial[] on the merits.' " *Alan Brown*, 341 F.3d at 414 (quoting *Calandra*, 414 U.S. at 349--50).

Further, although unsealing the search warrant affidavits at this time would have been similarly unnecessary, Harbor has waived this issue for appeal by failing to preserve the issue in the district court. *See supra* section I.E.2; *Keenan*, 290 F.3d at 262.

CONCLUSION

Harbor's Rule 41(g) motion seeks the suppression of documents, and Harbor [Text redacted in copy]. The district court's order dismissing Harbor's action is, therefore, not immediately appealable and this appeal must be dismissed for lack of jurisdiction pursuant to *Di Bella* and *Uresti*.

Alternatively, Harbor's appeal lacks merit and the district court's order should be affirmed. Because Harbor failed to show "callous disregard" or any irreparable harm aside from the government's ***64** continued review of documents, the district court did not abuse its discretion by finding that the *Richey* factors weighed against the continued exercise of jurisdiction over Harbor's Rule 41(g) action.

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Footnotes

1 In 2002, Rule 41(e) was relettered as Rule 41(g). It was not otherwise changed. All references in this brief will refer to the rule as "Rule 41(g)."

2 [Text redacted in copy]

3 Boxes of hard-copy documents (mostly patient files) remain in the government's possession. The government has always made these available to Harbor's counsel for copying and inspection upon request. ROA.259, 264--74 (email chains showing that government accommodated requests to review and copy physical files). Before the district court, Harbor affirmatively disclaimed that its Rule 41(g) action was directed at the return of these hard-copy materials. *See, e.g.*, ROA.342 ("I'm fine with patient--hard copy patient files.").

4 Harbor's Opening Brief states that 17 employees' emails were imaged. The apparent reason for the discrepancy is that two additional folders were created following execution of the search warrants in the document review database.

5 Although some emails from Harbor's *former* in-house counsel, Justo Mendez, were imaged, that was only because files from Mr. Mendez's account were "nested" in other folders on Harbor's servers or within other employees' email accounts when he left the company. ROA.143; ROA.195 n.5; ROA.260.

6 At that time, the parties and the district court did not address the question of whether the government's filter team could subsequently review the documents on Harbor's privilege log for the purpose of challenging privilege determinations. However, the district court noted that "U.S. attorneys have tainting processes all over the United States. I mean, they are pretty standard." ROA.289 (lines 4--6).

7 Footnote 4 of Harbor's brief passingly mentions *Linn v. Chivatero*, 714 F.2d 1278, 1285--86 (5th Cir. 1983), a case raising Fourth Amendment issues in the context of an IRS summons that did *not* involve Rule 41(g). Opening Brief, at 24 n.4; *see In re Search Warrant Issued July 14, 1987*, 684 F. Supp. 1417, 1420 n.2 (N.D. Tex. 1988), *cause dismissed sub nom. In re Search Warrant Issued*, 857 F.2d 790 (5th Cir. 1988) (noting that *Linn* did not address Rule 41 and "[t]his court has found no authorities which would undermine the propositions that a district court acts upon a Rule 41[g] motion pursuant to its anomalous jurisdiction and that principles of equity apply."). Of course, this *is* a Rule 41(g) case and *Di Bella*, *Uresti*, and *Sealed v. Sealed* control.

8 One isolated Tenth Circuit panel stated that the amendment "made every Rule 41[g] motion into one solely for the return of property." *In re Search of Kitty's East*, 905 F.2d 1367, 1370 (10th Cir. 1990). As recognized by the Sixth Circuit, this statement was (1) inconsistent with *another* panel from the Tenth Circuit, and (2) legally unsound because it would

"render one prong of the *Di Bella* test moot." *3273 Hubbard*, 961 F.2d at 1244. The government has not found another case adopting the *Kitty's East* viewpoint.

9 Harbor also argued that this Court should adopt the view of "at least four circuits" holding that criminal proceedings are *in esse* only after an arrest, information, or indictment. Response to Motion to Dismiss Appeal, at 19--20. This position has already been rejected by this Court more than forty years ago, and remains the minority view to this day. *United States v. Glassman*, 533 F.2d 262, 263 n.3 (5th Cir. 1976) ("The Eighth Circuit [] found jurisdiction to review a Rule 41(e) motion made prior to arrest, arraignment and indictment because no criminal prosecution was *in esse*. We respectfully reject this view."); *see also* 15B Wright & Miller, at § 3918.4 n.29 (collecting cases from the First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits holding that the *in esse* prong is satisfied by [Text redacted in copy]).

10 Harbor claims that the filter team "disclosed privileged material to the investigative team," and that "the extent of the breach was far more significant than Harbor initially knew." Opening Brief, at 47. This claim, however, is based only on Harbor's mischaracterization of a stray statement from government counsel at a hearing that documents were "removed" from a database. ROA.354:23--355:25. (Government counsel later clarified, "[N]ot that the investigative team was looking at anything already, but--and I can reconfirm that." ROA.369:22--25.) In any event, the government represents that the filter team took careful precautions to protect Harbor's privilege-- segregating, for example, all emails involving former in-house counsel Justo Mendez. ROA.260.

11 That said, Mr. Sprott's emails and other documents have been subject to the compromise privilege review protocol instituted by the district court, in an abundance of caution.

12 For that same reason, Harbor's references to *United States v. Zolin*, 491 U.S. 554, 571 (1989) are inapposite. *Zolin* involved a challenge by the estate of L. Ron Hubbard to the enforcement of an IRS summons--and said nothing about the use of filter teams following the execution of a search warrant. *Id*.

13 As mentioned below, *infra* section II.C, Harbor's concerns with the future use of a filter team are unripe.

14 Harbor incorrectly characterizes the district court's observations on this point. The district court did not, as Harbor argues, suggest that Rule 41(g) may *only* be "limited to the need for actual physical possession of property." Opening Brief, at 40. It simply held, correctly, that this factor weighed against Harbor. ROA.1014 [Text redacted in copy]

15 The Court did note that there could be extreme examples of "irreparable harm" that could give rise to suppression--for example, where the government has retained materials long after *closing* an investigation. *Alan Brown*, 341 F.3d at 413 (discussing Advisory Committee notes to Rule 41 and example of a case where the FBI "created a file" on a student suspected of being a socialist). The test designed under *Richey* is meant to be limited to only those truly extreme situations, and this Court cautioned that there must be "at the very least, a *substantial* showing of irreparable harm." *Id*. at 314 (emphasis added). Harbor has not identified any extreme example of irreparable harm here.

16 In any event, neither proposition has merit. Harbor asserts that the warrants were "general warrants" simply because the government seized a large quantity of electronic information. Opening Brief, at 56--57. This contention, a reformulation of its "scope" argument, runs contrary to Rule 41 and precedent governing electronic searches. *See supra* section II.B.1.a; *United States v. Williams*, 592 F.3d 511, 523 (4th Cir. 2010) ("At bottom, we conclude that the sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents."). With respect to Harbor's plain view argument, it is entirely consistent with Fourth Amendment standards to expect that the government could invoke the plain view doctrine during its ongoing investigation.

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