No. 08-678

IN THE

# Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,
*Petitioner*,
*v.*
NORMAN CARPENTER,
*Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

Are pretrial discovery orders denying claims of attorney-client privilege immediately appealable as "final decisions" under 28 U.S.C. § 1291?

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## STATEMENT OF THE CASE

In this case, respondent Norman Carpenter alleges that his former employer, petitioner Mohawk Industries, Inc., conspired with others to intimidate him from giving truthful testimony in a pending class action, in violation of 42 U.S.C. § 1985(2) and state law.

In pretrial discovery proceedings, the district court issued a 59-page order holding that certain communications between Mohawk and its outside counsel were protected by the attorney-client privilege, but that the privilege had been waived with respect to those communications because Mohawk deliberately put them at issue in the litigation. The Eleventh Circuit dismissed Mohawk's appeal on the ground that the district court's ruling was not an appealable collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and that mandamus was unwarranted.

### A. Facts and Background

In June 2006, Mohawk, a manufacturer of flooring materials, hired Carpenter as a salaried shift supervisor at its Union Grove Road facility in Calhoun, Georgia. Joint Appendix (JA) 24a. Carpenter supervised a number of "temporary" workers, *id.* 55a, employed through outside companies that provided the workers to Mohawk. *Id.* 83a.

In November 2006, in the course of his ordinary duties, Carpenter learned for the first time that most of these temporary Mohawk employees did not have documentation showing that they could work lawfully in the United States. *Id.* 55a-57a. On November 28, 2006, Carpenter sent an email to Becky Hale, an employee in Mohawk's human resources department, relaying this fact. The email said: "Becky, 90% of the people that come through the temp do not have good papers. [T]hats why

they come to us that way[.] I can tell you that most of the people working here today here through a temp do not have one of the two things[:] either a GA I.d. [a driver's license] or good papers through the I.N.S. Thanks, Norman." *Id.* 56a.

When he wrote the email, Carpenter did not know that Mohawk was a defendant in a class action lawsuit, *Williams v. Mohawk, Industries, Inc.*, No. 4:04-CV-0003-HLM (N.D. Ga.) ("*Williams*"), pending before the Honorable Harold L. Murphy. *See* JA 84a. *Williams* had been filed two years earlier by a group of current and former hourly Mohawk employees who charged Mohawk with violations of federal and Georgia racketeering laws. The *Williams* plaintiffs alleged that Mohawk conspired unlawfully with a group of independent companies to place undocumented workers at Mohawk in an effort to lower the wages of Mohawk's legal workers. The *Williams* complaint also alleged that Mohawk was engaged in a conspiracy to cover up evidence supporting their allegations. *See id.* 51a-53a (describing *Williams* suit).[1]

Because Carpenter was unaware of the *Williams* lawsuit, he was also unaware that his email concerned evidence potentially relevant to *Williams*. *Id.* 57a. But Mohawk understood the email's significance. When Carpenter arrived at work on December 4, 2006, a Mohawk

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[1]In 2006, this Court remanded *Williams* to the Eleventh Circuit in light of *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), which concerned the standards for proving causation in a civil RICO case. *See Mohawk Industries, Inc. v. Williams*, 547 U.S. 516 (2006). The Eleventh Circuit held that the plaintiffs had properly alleged a civil RICO claim. *See Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 549 U.S. 1260 (2007).

On May 28, 2009, the Eleventh Circuit reversed the district court's denial of class certification. *See Williams v. Mohawk Industries, Inc.*, --- F.3d ---, 2009 WL 1476702 (11th Cir. 2009).

employee told him to report immediately to Mohawk's business office to meet with a company lawyer. *Id.* 60a-61a. As directed, Carpenter drove to the office, where he met with Mohawk's outside trial counsel in *Williams*, Juan Morillo, a partner in the Washington, D.C. office of Sidley Austin. Morillo was accompanied by a woman identified as someone from Morillo's law firm who would be taking notes of the interview. *Id.* 61a. During the meeting, Morillo attempted to have Carpenter retract the statements in his email or admit either that he was unsure about the statements' truth or falsity or that they were exaggerations. *Id.* Carpenter refused to do so, and Mohawk fired him the following day. *Id.* 61a-63a.

### B. Proceedings Below

**1. Carpenter's Suit.** On March 15, 2007, Carpenter sued Mohawk under 42 U.S.C. § 1985(2), which provides a right of action to remedy injuries caused by conspiracies to threaten or intimidate witnesses from providing truthful testimony in any court of the United States. *See* JA 48a. Carpenter also brought claims under Georgia statutory and common law. *Id.* Carpenter alleged that the meeting with Morillo was designed to intimidate him into recanting his report that Mohawk employed undocumented employees and thus to prevent him from testifying truthfully in *Williams*. *Id.* 57a-59a. Carpenter also alleged that Mohawk attempted to deter him from testifying truthfully in *Williams* by terminating his employment and then making a knowingly false accusation that he—and not Mohawk—had been responsible for hiring an unauthorized worker. *Id.* 59a-60a.

**2. Overlap With the *Williams* Class Action.** Carpenter's suit was deemed related to the *Williams* class action and assigned to Judge Murphy. Doc. 1 in *Carpenter* (civil cover sheet). On March 21, 2007, the *Williams*

plaintiffs filed an "Emergency Motion For Hearing Regarding Mohawk's Contact With Witnesses," seeking an evidentiary hearing at which Norman Carpenter would testify. *See id.* 206a. Finding that Carpenter "likely ha[d] an interest" in the emergency motion, Judge Murphy issued an order allowing Carpenter's counsel to respond. Doc. 87 in *Williams*, at 3. Moreover, Mohawk filed two briefs in opposition to the emergency hearing, one submitted by Juan Morillo, as Mohawk's counsel in *Williams* case, *id.* 205a-224a, and the other submitted by attorneys at Alston & Bird, Mohawk's counsel in *Carpenter*. Doc. 91 in *Williams*. On April 9, 2007, Judge Murphy denied the *Williams* plaintiffs' motion for an evidentiary hearing without prejudice. He concluded that Carpenter's testimony could be taken in the normal course of discovery. *See* Pet. App. 21a-22a.

**3. Mohawk Places Its "Investigation" of Carpenter At Issue in the Litigation.** In its filings below and in *Williams*, Mohawk made affirmative representations indicating that Morillo had gathered factual information that Mohawk would rely on in its defense in *Carpenter*. Mohawk's opposition to the *Williams* plaintiffs' motion for an evidentiary hearing, filed by Morillo, accused Carpenter of making "wild allegations" amounting to "pure fantasy." JA 208a.

Specifically, Mohawk attacked Carpenter by interjecting what it claimed were "[t]he true facts." *Id.* Mohawk asserted that Carpenter was a "disgruntled former Mohawk employee," *id.* 206a, whose "ludicrous allegations" and "ridiculous version of events," *id.* 206a-207a, amounted to a "sad effort to extort Mohawk." *Id.* 211a. Mohawk further asserted:

> Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct.
>
> * * *
>
> [After Carpenter sent Hale the email], Hale immediately forwarded the email chain to Mohawk management to report Mr. Carpenter's attempt to have an unauthorized worker hired and his assertion that some of the temporary workers under his supervision were unauthorized.
>
> After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.
>
> As a result of Mr. Carpenter's misconduct, Mohawk fired Mr. Carpenter and did not give him any severance package. His attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker blatantly violated Mohawk policy.

*Id.* 209a-210a.

On May 17, 2007, the parties in *Carpenter* filed a Joint Preliminary Report and Discovery Plan in which Mohawk stated that it would seek an order "limiting discovery and approving appropriate protections related to Plaintiff's anticipated efforts to seek information pro-

tected by the attorney-client privilege." *Id.* 104a-105a. On the same date, Mohawk filed its initial discovery disclosures under Federal Rule of Civil Procedure 26(a)(1). Those disclosures identified Morillo, as well as another Sidley Austin employee, Kim Ladd (possibly the note taker during the Carpenter interview), as persons "believed to have discoverable information that Mohawk may use to support its defenses in this matter." *Id.* 113a; *see id.* (referring to exhibit identifying Morillo and Ladd as a "witness list"), 117a (witness list). The following day, Mohawk filed its Answer to Carpenter's First Amended Complaint. *Id.* 135a. Mohawk denied Carpenter's allegations and asserted that Carpenter "knowingly allowed illegal employees to work on his shift." *Id.* 148a.

**4. Attorney-Client Privilege Dispute.** Fact discovery began in *Carpenter* in May 2007. Carpenter sent Mohawk interrogatories and requests for production of documents seeking, among other things, information on Mohawk's "investigation" that, the company asserted, caused it to fire him. In response, Mohawk identified four people involved in the "investigation" of Carpenter, including its attorney, Morillo. *Id.* 174a. Mohawk objected, however, to providing other information, including memos about the Morillo-Carpenter meeting, claiming attorney-client privilege. Pet. App. 32a-36a.

Carpenter moved to compel responses, maintaining that the withheld materials were not privileged and that, even if they were, Mohawk had waived the privilege through its contentions about the "true facts" surrounding Mohawk's treatment of Carpenter and through other filings that had placed Morillo's "investigation" at issue. *See* JA 161a-192a. Meanwhile, Mohawk moved for a protective order on attorney-client privilege grounds. *Id.* 193a. Carpenter responded, as did the *Williams* plain-

tiffs, whom the district court had also directed to respond as interested parties. *Id.* 196a, 203a-204a.

On October 1, 2007, Judge Murphy granted Carpenter's motion to compel. Pet. App. 51a-52a. In a lengthy opinion, the court held that the information was privileged but that Mohawk had waived the privilege "with respect to the communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment" because Mohawk's assertions about the merits of Carpenter's claims and its defenses to those claims had "placed the actions of Attorney Morillo in issue." *Id.* 51a. "In fairness, evaluation of those representations," Judge Murphy explained, "will require an examination of otherwise-protected communications between Attorney Morillo and Plaintiff and between Attorney Morillo and Defendant Mohawk's personnel." *Id.*

**5. Mohawk's Interlocutory Appeal.** Mohawk filed a notice of appeal and a petition for a writ of mandamus to the Eleventh Circuit on October 31, 2007. Carpenter moved to dismiss the appeal for lack of appellate jurisdiction on the ground that the district court's order finding waiver of the attorney-client privilege was not a final decision under 28 U.S.C. § 1291. Carpenter also opposed the mandamus petition. The jurisdictional issues were carried with the appeal and briefed in full along with the merits. On the merits, Carpenter argued, first, that the contested discovery materials were not privileged and, alternatively, that any privilege had been waived by Mohawk's litigation conduct.

The Eleventh Circuit dismissed the appeal for lack of jurisdiction. The court held that the district court's order was not a final appealable decision. It explained that it would not extend the collateral order doctrine to reach "a discovery order implicating the attorney-client privi-

lege." *Id.* 11a. Such orders, the court held, are not "effectively unreviewable" after final judgment because, if the court of appeals later were to find that the district court's order was erroneous, it could reverse and require a new trial at which any privileged evidence, documents, or witnesses would be excluded. *Id.* 8a. The Eleventh Circuit also held that "[m]andamus is appropriate only when there has been a clear usurpation of power or abuse of discretion, and Mohawk has not shown that either occurred here." *Id.* 15a.

## SUMMARY OF ARGUMENT

**I.** The final judgment rule is longstanding, codified by statute, and essential to judicial administration. In keeping with that rule, this Court has consistently refused to permit immediate appeals from pretrial discovery orders, including orders denying privilege claims. That settled approach avoids the delay and expense of successive appeals and respects the district court's authority over the discovery process.

**II.** Discovery orders denying claims of attorney-client privilege, as a category, satisfy none of the stringent criteria for collateral-order review. First, privilege rulings are inconclusive because they are particularly subject to reconsideration. This Court's traditional insistence that parties face contempt before appealing discovery orders gives the judge and the parties a "second look," thereby facilitating *in camera* review and eliminating unnecessary and unimportant appeals.

Second, privilege denials are not completely separate from the merits. To the contrary, discovery disputes in general are enmeshed in the merits, and attorney-client privilege disputes, such as those involving the crime-fraud exception and waiver, almost always require courts

to assess the relevance of the evidence to the claims or defenses on the merits.

Third, attorney-client privilege claims are not important enough to overcome the final judgment rule. Unlike the rights that this Court has identified in recent years as sufficiently important to justify immediate review, such as qualified immunity or double jeopardy, the privilege does not confer a well established immunity or a constitutional or statutory right not to stand trial.

Fourth, orders denying attorney-client privilege claims are not effectively unreviewable after final judgment. The argument that the cat will get out of the bag—which could be made with respect to any discovery order—ignores existing options, such as protective orders and discovery sanctions, that prevent disclosure to the world while preserving the issue for review. The argument also relies on a mischaracterization of the privilege, whose purpose is to encourage future clients to communicate frankly with attorneys—an incentive that is in no way diminished by deferring appeal until final judgment.

**III.** To conclude that collateral-order review is unavailable is not to foreclose immediate review altogether. Although most privilege disputes are routine and factbound, mandamus and certification under section 1292(b) are available if a ruling is exceptionally important or raises novel questions. Those two safety valves allow appellate courts to deploy their scarce resources prudently without inviting a flood of appeals requiring document-by-document review.

If further interlocutory review of a category of discovery orders is needed, rulemaking—rather than expansion by court decision—is Congress's preferred way of addressing that need. Rulemaking not only avoids the hazards of making sweeping changes based on the brief-

ing in a single case, but permits experts to consider competing policy considerations, make empirical predictions, and submit their recommendations for ultimate review by Congress. And unlike the collateral-order doctrine, it allows policymakers to authorize discretionary review, as they have done for rulings on class certification.

**IV.** A decision from this Court allowing immediate appeals from privilege disputes would impose a significant burden on already overburdened appellate courts and stop much district-court litigation in its tracks. And because there are no principled distinctions between the various privileges and types of discovery disputes, such a decision would also generate considerable litigation testing the boundaries of the new exception—as has already occurred in the three circuits that have experimented with immediate appeals from privilege disputes.

## ARGUMENT

### I. THIS COURT HAS CONSISTENTLY REFUSED TO ALLOW IMMEDIATE APPEALS FROM PRETRIAL ORDERS CONCERNING DISCOVERY, PRIVILEGE DISPUTES, AND THE ATTORNEY-CLIENT RELATIONSHIP.

Mohawk asks this Court to bestow an entitlement to immediate appeal on "every litigant faced with an adverse finding of waiver or ordered to produce privileged information." Pet. 18. That request, however, cannot be reconciled with more than one hundred years of this Court's cases, which have consistently held that an "order enforcing a discovery request is not a 'final order'" and hence is not immediately appealable. *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992). That rule of nonappealability holds true even for discovery orders overruling important privileges that are central to "our adversary system of justice" and "found in the

Constitution," *Maness v. Meyers*, 419 U.S. 449, 461 & n.8 (1975), such as the Fifth Amendment's right against self-incrimination. *See Alexander v. United States*, 201 U.S. 117, 120-22 (1906).

Under this Court's cases, "litigants have not been able routinely to vindicate, through immediate appeal, a legal right to avoid discovery, even where the Constitution provides that antidiscovery right." *Behrens v. Pelletier*, 516 U.S. 299, 318 (1996) (Breyer, J., dissenting). It follows, *a fortiori*, that there can be no immediate appeal from orders overruling garden-variety claims of attorney-client privilege. It would be "highly anomalous for the law to deny a routine interlocutory appeal where the Constitution of the United States protects an antidiscovery interest, but to permit a routine appeal" asserting such an interest under a common-law evidentiary privilege. *Id.* at 319. That anomaly, however, would flourish under Mohawk's approach.

This Court has repeatedly cautioned against opening the door to appeals that would undermine "the deference owed by appellate courts to trial judges charged with managing the discovery process." *Cunningham v. Hamilton County*, 527 U.S. 198, 209 (1999). Such appeals "could forestall resolution of the case as each new [order] would give rise to a new appeal." *Id.* That concern has "particular force in the discovery context" because discovery "has a special potential for spawning rulings that aggrieved parties would seek to appeal." *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 119 (4th Cir. 1994). By its nature, "the process of turning over private—and often damaging—information to an adversary inevitably causes friction. The sheer number of discovery rulings and the myriad procedural requirements governing them, creates fertile soil for the growth of appealable orders." *Id.*

To deter the flood of appeals that would otherwise ensue, this Court has always insisted that a party on the losing end of a discovery order be put to a series of choices. On the one hand, the party may comply with the order, reserving its appeal until the end of the case. Complying with the order does not mean, however, that the discovery materials must be made available to the whole world. The court may enter a protective order, such that the documents may be used by opposing counsel in preparing for trial, and admitted in evidence under seal, but only made public in the relatively rare event that a trial occurs. Or the losing party may refuse to produce the materials but face sanctions, such as allowing the trier of fact to regard a contested fact as established, *see* Fed. R. Civ. P. 37(b)(2)(A)(i)—again, with the losing party reserving the right to appeal. On the other hand, if the party nonetheless desires an immediate appeal—but the order is insufficiently important to warrant either mandamus or certification, *see* 28 U.S.C. § 1292(b)—the party may "defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

Insisting on the latter procedure as a last resort encourages careful reconsideration by both the parties and the trial judge and discourages unnecessary or insubstantial appeals. Commonly known as the *Cobbledick* rule, after Justice Frankfurter's opinion in *Cobbledick v. United States*, 309 U.S. 323 (1940), the disobedience-and-contempt requirement as a precondition for immediate appeal has its foundations in early cases such as *Alexander*, was affirmed unanimously in *United States v. Ryan*, 402 U.S. 530, 533 (1971), and has been invoked in every case in which this Court has discussed the appealability

of discovery orders since that time. *See, e.g., Cunningham*, 527 U.S. at 204 n.4. Relying on that body of precedent, the Court deemed the "procedure described in *Ryan*" to be "an eminently reasonable method to allow precompliance review" of the denial of an attorney's constitutional privilege claim concerning the disclosure of confidential client materials in a civil case. *Maness*, 419 U.S. at 461.

This Court has recognized only two narrow "exception[s]" to the "requirement of submitting to contempt" for privilege disputes, *United States v. Nixon*, 418 U.S. 683, 691 (1974), and both are based on special circumstances of the appellant rather than the nature of the privilege asserted. *Nixon* held that the "unique" concerns raised by an assertion of privilege by the President made the "traditional contempt avenue" "peculiarly inappropriate." *Id.* at 691. Requiring a judge to hold the President of the United States in contempt could create an unnecessary "constitutional confrontation between two branches of the Government," and, indeed, there could even be protracted litigation over "whether a President can be cited for contempt" in the first place. *Id.* at 691-92. This separation-of-powers exception is limited to the President, who is perhaps the "'sole indispensable man in government.'" *Clinton v. Jones*, 520 U.S. 681, 713 (1997) (Breyer, J., concurring in judgment) (quoting P. Kurland, *Watergate and the Constitution* 135 (1978)).

The second exception derives from *Perlman v. United States*, 247 U.S. 7, 12-13 (1918), which allowed an immediate appeal where a subpoena was directed to a third party in possession of purportedly privileged information because "it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege." *Nixon*,

418 U.S. at 691; *see Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 179 (2d Cir. 1979) (Friendly, J.) (discussing *Perlman*). Neither one of the two exceptions applies here.

The pedigree of the *Cobbledick* rule, the consistency with which this Court has applied it, and the narrowness of its two exceptions all underscore the sea change that would result from allowing appeals as of right from every run-of-the-mill privilege dispute. Mohawk's approach would not simply create a broad new class of appeals; it could wipe out the *Cobbledick* rule entirely. In short, Mohawk's rule is incompatible with every one of this Court's precedents addressing the appealability of discovery orders.

Nor can Mohawk's position be squared with this Court's approach—in both the discovery and attorney-disqualification contexts—to concerns that certain pretrial orders will threaten to destroy attorney-client confidentiality or encroach on the attorney-client relationship.

This Court has decided a trilogy of cases concerning the appealability of rulings on attorney disqualification. The first, *Firestone*, held that immediate appeals cannot be taken from orders denying motions to disqualify opposing counsel in a civil case. 449 U.S. at 370. The next two held that immediate appeals cannot be taken from orders disqualifying the appellant's *own chosen counsel* in criminal and civil cases, respectively. *Flanagan v. United States*, 465 U.S. 259 (1984); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). Such orders involve at least as great an intrusion on the attorney-client relationship as orders denying privilege claims, given the "fundamental premise of the adversary system" that

"individuals have the right to retain the attorney of their choice." *Id.* at 441 (Brennan, J., concurring).

Notably, *Firestone* rejected an argument for immediate appeal based on attorney-client confidentiality concerns that echo those urged by Mohawk here—namely, "the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of [attorney-client] confidence" by opposing counsel, and "the effect of such a tainted proceeding in frustrating public policy." 449 U.S. at 376. The Court explained that any potential harm caused by precluding an immediate appeal, including the breach of attorney-client confidentiality, was not materially different from the harm resulting from "other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection." *Id.* at 378 (citation omitted).

Similarly, this Court has frankly acknowledged, in the context of the Fifth Amendment, Mohawk's concern that a party faced with a discovery order rejecting a privilege claim would be "compelled to surrender the very protection which the privilege is designed to guarantee," such that reliance on review at a later stage would "'let the cat out' [of the bag] with no assurance whatever of putting it back." *Maness*, 419 U.S. at 462-63. But the Court nevertheless held that an adequate response to this familiar dilemma—that "appellate courts cannot always 'unring the bell' once the information has been released"—is the "familiar procedure" of facing contempt and thereby pursuing precompliance appellate review. *Id.* at 460-63 (citing *Cobbledick*, *Alexander*, and *Ryan*). Although that case involved an appellant who secured review via contempt rather than an appellant seeking to appeal prematurely, its reasoning—and the earlier

holding in *Alexander* on which it relies—are nonetheless in substantial tension with Mohawk's position.

In sum, this Court has already concluded that appeals as of right cannot be taken from orders denying discovery objections based on the work-product doctrine or constitutional privileges, or from orders denying motions for attorney disqualification based on concerns of attorney-client confidentiality. Mohawk has articulated no principled distinction between those orders and orders denying attorney-client privilege based on waiver. In each case, allowing immediate appeals of such orders would "transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291." *Firestone*, 449 U.S. at 378.

## II. PRETRIAL ORDERS DENYING ATTORNEY-CLIENT PRIVILEGE CLAIMS ARE NOT IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE.

Since the first Judiciary Act of 1789, Congress has strictly limited appeals as of right within the federal courts to appeals from "final decisions of the district courts." 28 U.S.C. § 1291. The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted).

The final judgment rule represents a wise allocation of time and authority. By consolidating in one appeal all of the grounds for challenging a trial court's judgment, the rule avoids delay, promotes judicial efficiency, and reduces litigants' ability to harass opponents through a succession of time-consuming and costly appeals. And

because many cases settle or are resolved on other grounds in favor of the potential appellant, the rule avoids many appeals entirely. It also gives effect to Congress's determination that litigation is best managed at both the trial and appellate levels if the district courts are free from repeated second-guessing by the appellate courts in the midst of litigation. *Cunningham*, 527 U.S. at 203-04.

By contrast, a number of statutes illustrate Congress's ability to legislate where the final judgment rule embodied in section 1291 would "create undue hardship." *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981). One such statute is 28 U.S.C. § 1292(b), which provides for discretionary certification by the district court and discretionary acceptance by the court of appeals of important, non-final questions of law. Other statutes cover specific subjects, such as certain orders relating to arbitration. *See*, *e.g.*, *Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896, 1900 (2009) (discussing 9 U.S.C. § 16(a)(1)(A)).

Even where Congress has not drafted a specific exception to section 1291, the Court has allowed immediate appeals from a "small class" of collateral orders that do not end the litigation. *Will v. Hallock*, 546 U.S. 345, 349 (2006). The collateral order doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), imposes three "stringent" requirements for membership in that class—orders must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)).

Before explaining why orders denying attorney-client privilege claims fail each one of those requirements, two points about the doctrine warrant emphasis.

First, this Court has "consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral." *Cunningham*, 527 U.S. at 206. To provide certainty and reduce litigation over the scope of the doctrine, the appealability question "must be determined by focusing upon the category of order appealed from" rather than the "'facts of a particular case.'" *Behrens*, 516 U.S. at 311 (citation omitted). In other words, the relevant question here is whether attorney-client privilege rulings, *as a category*, meet each of the *Cohen* criteria—a principle that Mohawk fails to appreciate. *See* Mohawk Br. 11, 18, 20-22.

Second, in contrast with earlier periods of expansion, the Court has increasingly "stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule." *Digital*, 511 U.S. at 868 (quoting *Richardson-Merrell*, 472 U.S. at 436). Thus, in recent years, this Court has generally limited expansion of *Cohen* to well-established immunities—such as qualified immunity—or rights embodied in statutory or constitutional provisions. *See id.* at 869-78.

That restrained approach respects Congress's judgment that rulemaking, and "not expansion by court decision," is now the preferred method of determining which orders are immediately appealable. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 (1995) (discussing 1990 and 1992 Rules Enabling Act amendments); *see* 28 U.S.C. §§ 1292(e), 2072(c). Apart from the virtue of avoiding legislation from the bench, rulemaking is itself beneficial. Rather than using "the blunt, categorical instrument of § 1291 collateral order appeal," *Digital*, 511

U.S. at 883—which ushers in an entire family of appeals based on arguments in a single case—rulemaking employs an expert committee to make predictive judgments and assess competing policy considerations based on conditions on the ground, subject to final review by Congress. 28 U.S.C. §§ 2073, 2074(a). "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." *Cunningham*, 527 U.S. at 210 (quoting *Swint*, 514 U.S. at 48).

### A. Orders Denying Attorney-Client Privilege Claims Are Inconclusive, Subject To Reconsideration, And Inherently Tentative.

The first condition for an immediate appeal under *Cohen* is that the type of order at issue "conclusively determine the disputed question," *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)), or, put another way, that it constitute a "fully consummated decision." *Cohen*, 337 U.S. at 546. Orders denying claims of attorney-client privilege—as a category—fail two distinct conclusiveness requirements.

**1.** The conclusiveness prong is not satisfied unless the type of order is "a complete, formal and, in the trial court, a final rejection" of the claim, *United States v. MacDonald*, 435 U.S. 850, 858 (1978) (quoting *Abney v. United States*, 431 U.S. 651, 659 (1977)), meaning that "[t]here are simply no further steps that can be taken in the District Court to avoid" violating a party's claimed right. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (quoting *Abney*, 431 U.S. at 659). This requirement assesses whether the issue has fully ripened, such that nothing

stands between the challenged ruling and the point at which the asserted right is lost.

"Details of discovery are," as a general matter, "a long way from final decision." *Reise v. Bd. of Regents of Univ. of Wisc.*, 957 F.2d 293, 294 (7th Cir. 1992). Discovery orders denying privilege claims, in particular, are nonfinal because the conclusiveness prong "requires that the *more conclusive* order of contempt, which truly leaves nothing for the court but its execution, be entered before appeal is permitted." *In re Grand Jury Subpoena for N.Y. State Income Tax Records*, 607 F.2d 566, 569 (2d Cir. 1979) (emphasis added). This requirement can be traced at least as far back as this Court's 1906 decision in *Alexander*, which explained that "the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision." 201 U.S. at 122. Although "in a certain sense, finality can be asserted of any order of a court," such orders are not fully consummated because the court can "go farther" by issuing a contempt citation, permitting review "without unduly impeding the progress of the case." *Id.* at 121. If, and only if, the court takes that step will the objections be "ripe for appellate review." *Ryan*, 402 U.S. at 532; *see Cunningham*, 527 U.S. at 204 n.4; *Webster Coal & Coke Co. v. Cassatt*, 207 U.S. 181, 186-87 (1907).

**2.** The conclusiveness inquiry also encompasses a second, closely related, requirement that there be "nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion." *Mitchell*, 472 U.S. at 527. The rationale is that there is "little justification for immediate appellate intrusion so long as there is a plain prospect that the trial court itself may alter the challenged ruling." 15A Wright & Miller, *Federal Practice & Procedure* § 3911.1, at 372 (2d ed.

1992). For example, this Court has held that orders denying stays are inconclusive because they do not "'necessarily contemplate that the decision will close the matter for all time,'" *Gulfstream*, 485 U.S. at 276 (citation omitted), and that class certification orders are inconclusive because they are "inherently tentative" and "subject to revision in the District Court." *Coopers*, 437 U.S. at 469 & n.11.

**a.** This aspect of conclusiveness has special significance for privilege disputes because the disobedience-and-contempt requirement is designed to facilitate reconsideration by both the parties and the district judge. After a party indicates its intention to refuse to comply with the disclosure order, the privilege claims may be either accepted or "rejected *at that time* by the trial court," and only if they are rejected the second time are they "ripe for appellate review." *Ryan*, 402 U.S. at 532 (emphasis added).

As Judge Friendly explained, this procedure gives both the parties and the district judge "a second look" and thus "serves a useful purpose in curtailing appeals." *Nat'l Super Spuds*, 591 F.2d at 180. The party seeking to avoid discovery "may decide . . . that the importance of the issue and the risk of adverse appellate determination do not warrant being branded as a contemnor," while "the person seeking information . . . may decide that the quest is not important enough to seek a contempt citation, thereby entailing the delay of an appeal." *Id.* The procedure acts, in other words, as a filtering mechanism; it "works, in part, because it 'encourages reconsideration both by the party resisting discovery and by the party seeking discovery, and in part because it tends to limit appeals to issues that are both important and reasonably likely to lead to reversal.'" *Behrens*, 516 U.S. at 319 (Breyer, J., dissenting) (quoting 15B Wright & Miller,

*Federal Practice* § 3914.23, at 154). By contrast, "the alternative to the contempt route"—immediate appeals for everyone—"encourages appeal of every unpalatable discovery ruling," however routine. *MDK,* 27 F.3d at 122.

**b.** The "second look" procedure is especially apt for privilege disputes, which often involve hundreds or thousands of documents overall but must be decided as to specific documents (for discovery requests) or specific questions (for depositions or trial testimony). *See, e.g., In re Vioxx Prods. Liab. Litig.*, 2006 WL 1726675, at *2 (5th Cir. 2006) (30,000 documents alleged to be privileged). Privilege claims may not be "tossed as a blanket" over an "undifferentiated" mass of documents, *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982), and any attempt to make a privilege ruling without being "exposed to the contested documents and the specific facts which support a finding of privilege" for each document "amounts to nothing more than a waste of judicial time and resources." *Holifield v. United States*, 909 F.2d 201, 204 (7th Cir. 1990). Indeed, because it can require detailed scrutiny and involve a large volume of evidence, the task of "reviewing discovery documents for privilege" is often delegated to a special master. Fed. R. Civ. P. 53(a)(1)(C), 2003 Adv. Comm. Notes. One district judge recently observed that "[t]he need for special masters to conduct privilege reviews is likely to expand" in light of the "huge volume" of electronically-stored information increasingly produced in discovery. Scheindlin, *Special Masters and E-Discovery*, 30 Cardozo L. Rev. 347, 385-86 (2008). Such time-consuming consideration and reconsideration of factbound issues is just the sort of task that "trial judges, not appellate judges, confront almost daily," and is thus especially ill-suited for review under the collateral order doctrine. *Johnson v. Jones*, 515 U.S. 304, 316 (1995).

Giving the trial court a chance to double-check its privilege rulings is also useful because it facilitates *in camera* review. In *Kerr v. U.S. Dist. Court*, 426 U.S. 394 (1976), this Court held that a mandamus petition seeking review of a privilege denial was premature because the district judge had not had a chance to engage in that "relatively costless and eminently worthwhile method to ensure that the balance" was "correctly struck" between the privilege claim and the asserted need for the documents—a balance that would "inevitably vary with the nature of the specific documents." *Id.* at 405; *see United States v. Zolin*, 491 U.S. 554, 572 (1989) (authorizing *in camera* review for attorney-client privilege disputes).

To be sure, all trial court orders short of judgment "may be revised at any time." Fed. R. Civ. P. 54(b). But orders concerning privilege disputes are "inherently tentative" as a class, *Coopers*, 437 U.S. at 469 & n.11, in part because they are often the first in a two-step process facilitated by the Federal Rules of Civil Procedure: first, a ruling based on a privilege log or other specific description and, second, if necessary, *in camera* review. *See, e.g., In re BankAmerica Corp. Securities Litigation*, 270 F.3d 639, 644 (8th Cir. 2001); *Pengate Handling Sys. v. Westchester Surplus Lines Ins. Co.*, 2007 WL 1176021, at *1 (M.D. Pa. 2007); *United States v. Davis*, 131 F.R.D. 427 (S.D.N.Y. 1990). Parties asserting a privilege claim must first "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that," without revealing the information, "will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A)(ii). This requirement is designed to "reduce the need for *in camera* examination of the documents." *Id.*, 1993 Adv. Comm. Notes. The precise procedure to be used, however, is not defined further. "The matter is left entirely to the discretion of

the judge." 2 Rice, *Attorney-Client Privilege in the United States* § 11.13, at 111 (2d ed. 1999 & Supp. 2009); *see Matter of Walsh*, 623 F.2d 489, 494 n.5 (7th Cir. 1980). In some cases, trial judges may specifically invite litigants to seek either a restrictive protective order or *in camera* review following an initial denial of a privilege claim. *See, e.g., N.Y. Teamsters Council Prepaid Legal Servs. Plan v. Primo & Centra*, 159 F.R.D. 386, 388 (N.D.N.Y. 1995).

Finally, in many cases, attorney-client privilege rulings, such as those deciding motions *in limine*, govern only the "use of confidential communications as evidence at trial." *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 164 (2d Cir. 1992). For this reason, privilege denials may not actually lead to disclosure; that will depend on the outcome of other pretrial motions, whether the case settles before trial, or the evidence the parties choose to introduce over the course of the trial. *See, e.g., B.H. ex rel. Holder v. Gold Fields Mining Corp.*, 239 F.R.D. 652, 656 (N.D. Okla. 2005); *Rutgard v. Haynes*, 185 F.R.D. 596, 602 (S.D. Cal. 1999). Indeed, a party that prevails in a privilege dispute might nevertheless decide not to seek or rely on the documents to avoid facing an appeal at the end of the case. For this reason, "[i]nstead of trying to predict how the trial will play out," appellate courts "defer review until the end, when [they] can see how matters *did* play out." *In re Lewis*, 212 F.3d 980, 985 (7th Cir. 2000).

One last example—something that happens regularly in district courts—reveals the unworkability of Mohawk's approach: At trial, a party objects to a question asked of a witness on attorney-client privilege grounds. The court overrules the objection—on the ground, for example, that the privilege has been waived—and orders the witness to answer (an order, in other words, "compel-

ling the production of privileged information," Mohawk Br. i). Under Mohawk's theory, that party is entitled to take an immediate appeal in the middle of trial.

### B. Orders Denying Attorney-Client Privilege Claims Are Intertwined With, Not Completely Separate From, The Merits Of The Underlying Case.

To obtain collateral-order review, Mohawk must show that attorney-client privilege rulings are "completely separate from the merits of the action." *Coopers,* 437 U.S. at 468. That requirement is not met whenever the issue presented may be "entangled in the merits of the underlying dispute," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988), "involve[s] an assessment of the likely course of the trial," *Richardson-Merrell*, 472 U.S. at 439, or requires the court "to review the nature and content of th[e trial court] proceedings." *Id.*

The Court's "warn[ing] that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs," *Digital*, 511 U.S. at 868, is particularly relevant to the separateness inquiry. Even where it is "undoubtedly true" that some cases within the category are separate from the merits and "appeal might result in substantial savings of time and expense," the Court "look[s] to categories of cases, not to particular injustices." *Van Cauwenberghe*, 486 U.S. at 529. As a category, district court orders that reject claims of attorney-client privilege are entwined with, not completely separate from, the merits.[2]

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[2] Mohawk's separateness argument (at 20-22), by contrast, concerns only the dispute in this case. In any event, the privilege dispute in this case *is* enmeshed in the merits. Carpenter argued below that Mohawk's "investigation" was not privileged because it was (continued…)

Pretrial discovery rulings—of which attorney-client privilege rulings are one example—are quintessentially "enmeshed in the merits of the dispute," *id.* at 528, precisely *because* they concern whether parties may obtain evidence "that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); *see Cunningham*, 527 U.S. at 205. A privilege is not, of course, lost simply because the material is relevant. But because the attorney-client "privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Zolin*, 491 U.S. at 562 (citation and quotation omitted). Courts must often balance the privilege's importance against the search for truth, which is why applicability of the privilege's exceptions turns on whether the information sought is "relevant" to the merits. *See* Proposed Fed. R. Evid. 503(d)(2)-(5) (reproduced in *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 236-37 (1972)).[3]

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(…continued)
part of an effort to intimidate Carpenter, not to provide the company legal advice. Alternatively, Carpenter argued that even if the communications were privileged, Mohawk's defense to liability in this case and in *Williams* had placed the communications "at issue" and, thus, waived the privilege. The district court's ruling on these issues required the court to "review the nature and content" of the merits. *Richardson-Merrell*, 472 U.S. at 439; *see* Pet. App. 17a-21a, 42a, 51a-52a.

[3] Proposed Federal Rule of Evidence 503(d)—also known as Supreme Court Standard 503(d) because it was approved by this Court in 1972—incorporates the "well established exceptions" to the attorney-client privilege at common law, 56 F.R.D. at 239, and therefore "has considerable utility as a guide to the federal common law." 3 Weinstein & Berger, *Weinstein's Federal Evidence*, § 503.02, at 503-10 (2d ed. 1997).

A review of two of the most common types of attorney-client privilege disputes helps explain why such disputes generally are inseparable from the merits.

**a. The Crime-Fraud Exception**

Under the crime-fraud exception, the attorney-client privilege "does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *Zolin*, 491 U.S. at 563; *see Clark v. United States*, 289 U.S. 1, 15 (1933); Proposed Fed. R. Evid. 503(d)(1). Some courts have extended the exception beyond crime and common-law fraud to communications about other intentional torts. *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994); *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982); *Recycling Solutions, Inc. v. District of Columbia*, 175 F.R.D. 407, 409 (D.D.C. 1997); *see generally* Mueller & Kirkpatrick, *Evidence* § 5.22, at 362 (3d ed. 2003). Regardless of its exact parameters, "there has been a pronounced trend toward utilizing [the crime-fraud] exception to the attorney-client privilege" and there is a large amount of litigation over whether it applies. Kanner & Nagy, *Perspectives on the Attorney-Client Privilege and the Work-Product Doctrine*, *in The Attorney Client Privilege in Civil Litigation* 81, 92 (Vincent S. Walkowiak ed., ABA 2008).

The crime-fraud exception almost invariably is intertwined with the merits because the alleged crime, fraud, or tort giving rise to invocation of the exception almost always concerns conduct at issue in the underlying case, as illustrated by this Court's decision in *Zolin*. That case involved an investigation into the tax returns of the Church of Scientology's founder in which the IRS sought allegedly privileged audiotapes under the crime-fraud exception. 491 U.S. at 556-57; *see United States v. Zolin*,

809 F.2d 1411, 1414 (9th Cir. 1987) (discussing tax evasion allegations). Specifically, the government claimed that the party opposing a privilege claim has the right to submit the very evidence claimed to be privileged for *in camera* review. 491 U.S. at 560. The Court agreed, so long as the party seeking discovery makes a threshold showing that *in camera* review may yield evidence establishing that the crime-fraud exception applies. *Id.* at 572-73.

By authorizing *in camera* review of the "best evidence establishing the applicability of the 'crime-fraud' exception," 809 F.2d at 1418—that is, "an integral part of the intended illegality that the [party opposing the privilege] seeks to establish," *id.*—*Zolin* assured that future rulings on the crime-fraud exception would almost always be a preview of the merits. *See, e.g., Cent. States, Se. & Sw. Areas Pension Fund v. Quickie Transp. Co.*, 174 F.R.D. 50, 52 (E.D. Pa. 1997) (transferring subpoena proceeding to district court in which main litigation was pending because "the resolution of whether the crime-fraud exception to the attorney-client privilege applies would require this court to delve into the merits of the underlying action.").

One of the cases on which Mohawk relied in its petition for certiorari illustrates the close relationship between the merits and adjudication of a crime-fraud dispute. In *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078 (9th Cir. 2007), the merits concerned whether a corporation, Bertelsmann, could be held secondarily liable for copyright infringement because it controlled the primary infringer, Napster. One theory for establishing secondary liability was that "Bertelsmann used its lawyers to create sham loan documents that were designed to disguise what was, in fact, a purchase of control of Napster." *Id.* at 1084. Although the Ninth Circuit au-

thorized *Cohen* review, the court's discussion of whether the crime-fraud exception applied, *id.* 1096-98, focused almost entirely on the merits—that is, whether the loan documents and other evidence demonstrated that "the entire loan was a sham intended for use in future legal proceedings as a means of disguising Bertelsmann's purchase of control of Napster." *Id.* at 1096.

*Zolin* and *Napster* illustrate what common sense dictates: A party seeking to overcome the attorney-client privilege by discovering evidence of a crime, fraud, or other intentional tort will be seeking material it believes is relevant to the underlying claim.[4]

**b. Waiver of the Attorney-Client Privilege**

Disputes over whether the attorney-client privilege has been waived occur frequently. The privilege can be waived expressly when otherwise privileged communications are revealed outside of the attorney-client relationship. More important for present purposes, the privilege can be waived impliedly when attorney-client communications are injected into the litigation. Disputes over whether an implied waiver has occurred generally require an inquiry into the merits. As the leading treatise explains:

> Communications between attorney and client can be made a substantive issue of the cause of action through claims made by the

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[4] *See also, e.g., United States v. Ruhbayan*, 406 F.3d 292, 299 (4th Cir. 2005), *aff'g* 201 F. Supp. 2d 682, 685-86 (E.D. Va. 2002); *White v. Am. Airlines, Inc.*, 915 F.2d 1414 (10th Cir. 1990); *Alcon Mfg., Ltd. v. Apotex Inc.*, 2008 WL 5070465 (S.D. Ind. 2008); *Invesco Inst. (N.A.), Inc. v. Paas*, 244 F.R.D. 374, 391 (W.D. Ky. 2007); *Abbott Labs. v. Andrx Pharms., Inc.*, 241 F.R.D. 480, 488-89 (N.D. Ill. 2007).

> client (*e.g.*, a good-faith reliance on advice of counsel defense or a charge of ineffective assistance of counsel), or when those communications are *relevant to*, but not operative facts of, the client's claims (*e.g.*, lack of knowledge defense). When the client makes the communications with counsel a substantive issue in the litigation, courts have consistently held that the attorney-client privilege protecting those communications is waived. A client will be required to disclose privileged attorney-client communications whenever she is perceived as placing, directly or indirectly, those communications "at issue" in the cause of action.

2 Rice, *Attorney-Client Privilege* § 9:44, at 213–14 (footnote omitted, emphasis in original).

A claim of waiver thus requires an assessment of the types of claims and defenses asserted by the client and, in some instances, the degree to which the attorney-client communications are relevant to the client's claims or defenses. *See, e.g., Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1206-07 (8th Cir. 1982); *Greater Newburyport Clamshell Alliance v. Public Serv. Co. of New Hampshire*, 838 F.2d 13, 18-20 (1st Cir. 1988).

Perhaps the most significant type of waiver is where a client maintains that it relied on advice of legal counsel "as a defense or as the basis for [its] claims, or otherwise offers proof of such reliance in establishing the claim or defense." 2 Rice, *Attorney-Client Privilege* § 9:45, at 220. Determining whether this type of waiver applies requires the court, at a minimum, to analyze the scope of the claims or defenses to determine whether the client has relied on advice of counsel in asserting those claims

or defenses. Moreover, the waiver extends only to "communications with counsel *relating to* the reliance." *Id.* § 9:45, at 220–221 (emphasis added). Thus, in determining the scope of the waiver, the court must inquire into exactly what communications the client relied on, which will, in turn, also define the scope of the defense or claim in the litigation, which itself depends on the extent of the client's reliance. The courts have considered this type of waiver in dozens upon dozens of cases, and the question whether the party opposing waiver has put the privileged communications "at issue" is bound up with the merits in most of them. *Id.* § 9:45, at 221–238 & nn. 1-3.

Three of this Court's precedents underscore the lack of separateness here. First, *Richardson-Merrell* held that orders disqualifying counsel on the ground that they might be required to testify at trial "are inextricable from the merits because they involve an assessment of the likely course of the trial and the effect of the attorney's testimony on the judgment." 472 U.S. at 439. Notably, the Court reached that conclusion even though the strength or relevance of the evidence need not be assessed to resolve most disqualification disputes. Such an assessment *is* required, however, to resolve many attorney-client privilege disputes, such as crime-fraud and waiver disputes.

Second, *Van Cauwenberghe* held that orders denying *forum non coveniens* motions are not completely separate from the merits because, in determining whether a particular forum affords access to the evidence, a court must assess whether the evidence is "critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action." 486 U.S. at 528. That observation applies here because adjudication of many attorney-client privilege disputes requires courts to de-

termine the *relevance* of the evidence to the underlying claim or defense.

Finally, *Cunningham* held that orders imposing discovery sanctions on attorneys are not immediately appealable because, in deciding whether a failure to respond to a discovery request is sanctionable, the court may need "to inquire into the importance of the information sought or the adequacy or truthfulness of a response." 527 U.S. at 205. That inquiry is similar to the relevance assessments that a court must make when considering whether an exception to the attorney-client privilege applies.

### C. Discovery Objections Based On Attorney-Client Privilege Are Not Sufficiently Important To Override The Final Judgment Rule.

In recent years, this Court has stressed the need to assess the "importance" of the right at stake to determine whether immediate appeal is warranted. *Will*, 546 U.S. at 351-52; *Digital*, 511 U.S. at 877-81. It has explained that "importance" straddles two of the *Cohen* prongs: the second, which requires that the type of order present "important questions completely separate from the merits," and the third, which requires that "the decision on an 'important' question could be 'effectively unreviewable' upon final judgment." *Id.* at 869.

**1.** To be sure, the attorney-client privilege is important in a general sense. But importance is a relative concept, and it is therefore meaningless without comparisons. Its role in the doctrine—as *Digital* explained at length—is to restrict membership in the "small class" of immediately appealable orders by balancing the value of the interests at stake against the need for finality. *Id.* at 879; *Will*, 546 U.S. at 351-52. This Court "has identified as 'sufficiently important' interests that are considerably

more important" than the interest in "avoiding discovery," *Behrens*, 516 U.S. at 317-18 (Breyer, J., dissenting), such as the rights not to stand trial guaranteed by the qualified immunity doctrine, or the interest in avoiding imprisonment guaranteed by the Excessive Bail Clause.

Mohawk discusses the importance of attorney-client privilege in a vacuum, omitting any meaningful comparison to this Court's treatment of analogous rights under the collateral order doctrine. *See* Mohawk Br. 19-20, 27-30 (discussing importance generally), *id.* 12, 30-31 (making comparisons only to earlier *Cohen* cases involving imposition of costs, stay orders, bail reduction, and attachment of vessels). Mohawk thus fails to grapple with a central problem in this case: why this Court should regard orders overruling attorney-client privilege claims as *more important* than, for example, "'orders requiring discovery over a work-product objection,'" *Firestone*, 449 U.S. at 378 (citation omitted); orders denying a motion to disqualify an opposing attorney based on concerns about the "breach of [attorney-client] confidence," *id.* at 376; or orders requiring discovery over objections based on the Fourth or Fifth Amendments. *Alexander*, 201 U.S. at 120-22.

**2.** One critical measure of importance is whether the rights at issue are among "those originating in the Constitution or statutes." *Digital*, 511 U.S. at 879. In the nearly two decades since Congress designated rulemaking rather than "expansion by court decision" as the preferred way of defining which orders are appealable, *Swint*, 514 U.S. at 48, this Court has not recognized a new category of collateral orders that did not involve important rights "embodied in a constitutional or statutory provision." *Digital*, 511 U.S. at 879. Even orders requiring discovery over claims of constitutional privilege are not immediately appealable. *Alexander*, 201 U.S. at 120-

22. And "the attorney-client privilege is merely a rule of evidence," not a "constitutional right." *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985); *see Maness*, 419 U.S. at 461 & n. 8 (distinguishing constitutional privileges from common-law privileges such as "priest and penitent, lawyer and client, physician and patient, and husband and wife"); *see also id.* at 466 n.15. Indeed, although the Rules now address inadvertent waiver, Congress has declined to set the privilege itself in stone, leaving it on the same footing as any other common-law privilege in the eyes of Federal Rule of Evidence 501, to be "determined on a case-by-case basis." *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (quoting S. Rep. No. 93-1277 at 13 (1974)); *see* Fed. R. Evid. 502(g)(1).

The lack of a constitutional right takes on added significance in light of the attorney-disqualification cases. In *Richardson-Merrell*, for example, Justice Brennan's concurrence acknowledged that a "fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice," 472 U.S. at 441, and Justice Stevens's dissent similarly described it as a "fundamental right." *Id.* at 442. That right, however, was insufficiently fundamental to overcome the congressional policy of finality. *Id.* at 440-41; *see also Firestone*, 449 U.S. at 378.

Similarly, the absence of a constitutional right distinguishes *Sell v. United States*, 539 U.S. 166 (2003), a case on which Mohawk relies. *Sell* justified immediate appeals from orders requiring mentally ill defendants to take antipsychotic drugs against their will, reasoning that the "severity of the intrusion and the corresponding importance of the constitutional issue" distinguished such orders from attorney-disqualification or evidence-suppression rulings, which do not involve a right not to be tried and hence are not immediately appealable. *Id.* at

177; *see id.* at 190-91 (Scalia, J., dissenting). Common-law privilege disputes involve no "sever[e]" bodily "intrusion[s]" and present no "constitutional issue[s]," let alone "important" ones. *Sell* thus undermines rather than supports Mohawk's argument.

**3.** Lacking a constitutional footing, Mohawk and its *amici* discuss the importance of the attorney-client privilege by emphasizing its place in the adversarial process, its status as one of the oldest evidentiary privileges, and its justification based on a public policy that promotes the giving of sound legal advice. Mohawk Br. 19, 27-30; DRI Br. 6-16. Those same sorts of things could be said for every other common-law privilege. For example, the psychotherapist-patient privilege is justified because it "serves the public interest by facilitating" mental health treatment, and the "mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Jaffee*, 518 U.S. at 11. And the spousal privilege is similarly justified because it "furthers the important public interest in marital harmony," *id.*, and has "ancient roots." *Trammel v. United States*, 445 U.S. 40, 43-44 (1980).

Mohawk and its *amici*, moreover, mischaracterize the purpose of the attorney-client privilege and exaggerate the scope and nature of its protection, wrongly suggesting that it embodies an absolute legal right not to disclose confidential information rather than a common-law evidentiary privilege that gives way in the face of competing concerns. *Compare* Mohawk Br. 11-12 ("right not to disclose privileged information"), *and* Chamber Br. 14 ("absolute"), *with* ABA Br. 6-12 (emphasizing that the privilege is not an absolute right against disclosure, but a "balance between the public interests served by the privilege and the competing interest in access to evidence").

The purpose of the attorney-client privilege is not to protect "confidentiality" for its own sake, Chamber Br. 14, and, indeed, confidentiality is not even a logical imperative of the privilege. *See* 1 Rice, *Attorney-Client Privilege* § 6:4, at 24 (section entitled "Confidentiality Not a Logical Imperative"). Instead, confidentiality is a byproduct of the goal of encouraging full and frank communication, which is itself subservient to the goal of encouraging sound legal advice and promoting the administration of justice. "[I]t is important not to confuse these overarching policy goals with the means of achieving them. Communication between counsel and client is not, in and of itself, the purpose of the privilege; rather, it only protects the free flow of information because it promotes compliance with the law and aids administration of the judicial system." *In re Teleglobe Comm'ns Corp.*, 493 F.3d 345, 360-61 (3d Cir. 2007); *see Zolin*, 491 U.S. at 563.

Nor is the attorney-client privilege absolute. Because it "has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976); *see Zolin*, 462 U.S. at 562. "The privilege cannot stand in the face of countervailing law or strong public policy and should be strictly confined within the narrowest possible limits underlying its purpose." *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991) (citing 8 *Wigmore on Evidence §* 2192, at 67 (3d ed.)). Thus, contrary to the suggestion of Mohawk and its *amici*, the attorney-client privilege confers nothing approaching an absolute legal entitlement to avoid disclosure, let alone a constitutional or statutory right, a well-established immunity, or a right not to stand trial.

### D. Orders Denying Claims Of Attorney-Client Privilege Are Not Effectively Unreviewable After Final Judgment.

The final requirement for collateral-order appeal under section 1291 is that the category of orders at issue would be "effectively unreviewable" and the rights at stake "irretrievably lost" after final judgment, such that strict observance of the final judgment rule "would render impossible any review whatsoever," *Ryan*, 402 U.S. at 533, or "would practically defeat the right to any review at all." *Flanagan*, 465 U.S. at 265 (quoting *Cobbledick*, 309 U.S. at 324-25).

This requirement cannot be applied mechanically because a case "can no more be untried than a law's proverbial bell can be unrung, and almost every pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewriting history." *Digital*, 511 U.S. at 872. Instead, a practical analysis that takes into account both the importance of the rights at stake and the policy against piecemeal appeals is required. *Id.* This Court has given "erroneous evidentiary rulings" and "grants or denials of attorney disqualification" as examples of orders that are "only imperfectly reparable by appellate reversal of a final district court judgment" but nonetheless unappealable. *Id.* Orders denying attorney-client privilege, like other evidentiary rulings, may sometimes be "imperfectly reparable," but they are not "effectively unreviewable."

This Court has consistently held that "pretrial discovery orders" do not satisfy the effectively-unreviewable test in part because, even "in the rare case when appeal after final judgment will not cure an erroneous discovery order," a party can, as a last resort, pur-

sue review via the *Cobbledick* disobedience-and-contempt procedure. *Firestone*, 449 U.S. at 377. Mohawk (at 25) contends that discovery orders rejecting attorney-client privilege claims should be treated differently because "the cat is already out of the bag" once disclosure occurs. But this Court has already held that concerns that reliance on review after final judgment would "'let the cat out,'" *Maness*, 419 U.S. at 463, leading to a "breach of [attorney-client] confidence," are no different from the harm resulting from "other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection." *Firestone*, 449 U.S. at 376-78.

In any event, "the argument that the cat is being let out of the bag could logically be made in any case where a court rejects" a privilege claim. *In re Weisman*, 835 F.2d 23, 26 (2d Cir. 1987). Unable to articulate some reason why attorney-client privilege claims should be elevated above all other rights and privileges subject to the *Cobbledick* rule, Mohawk attacks the rule itself, raising what it calls "fundamental problems" with an approach to which this Court has consistently adhered for more than one hundred years. Mohawk Br. 33-36 (describing the contempt requirement as "highly unpredictable" and "barbaric"). Accepting that argument would require this Court to overrule a century's worth of precedent, beginning with *Alexander*, *Cobbledick*, and *Ryan*. Even apart from that unattractive consequence, Mohawk's argument presents several independent problems.

First, Mohawk's argument rests on the false premise that a party faced with an order rejecting its privilege objection has only two choices: disclose the allegedly privileged material to the world, or risk contempt. The Federal Rules do not limit the parties' or the court's options in this way. The court, either with or without the

agreement of the parties, can enter a restrictive protective order that prevents public disclosure. Indeed, in this very case, the district court ordered that depositions be filed under seal because they might contain material subject to attorney-client privilege. Pet. App. 26a. The Federal Rules also provide for a wide range of sanctions, such as (1) ordering that certain facts be taken as established; (2) precluding the opposition of certain claims or introduction of certain evidence; or (3) striking parts of pleadings. Fed. R. Civ. P. 37(b)(2). These "sanctions enumerated in the rule are not exclusive and arbitrary but flexible, selective, and plural," and the district judge is entrusted to make such orders "as are just." 8A Wright & Miller, *Federal Practice* § 2284, at 612. A sanction under Rule 37 would not require the party asserting the privilege to disclose the evidence to anyone (including opposing counsel) and would preserve its ability to seek review after final judgment.

Second, Mohawk's cat-out-of-the-bag argument rests on the same mischaracterization of the privilege that leads Mohawk to exaggerate its importance. Because the privilege is "instrumental or utilitarian," Mueller & Kirkpatrick, 2 *Federal Evidence* § 181, at 302 (2d ed. 1994), what matters are the incentives for frank communication created by the privilege, viewed from an *ex ante* perspective. *See Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998).[5] For that reason, "[t]he interests protected by the attorney-client privilege are not threat-

[5] *See also* Farnsworth, *The Legal Analyst* 9 (2007) (citing the privilege as a classic example of an *ex ante* rule: "forcing the attorney to talk this time makes it less likely that a client will talk to an attorney next time"); Easterbrook, *The Court and the Economic System*, 98 Harv. L. Rev. 4, 32-33 (1984) (discussing *ex ante* versus *ex post* analysis of evidentiary privileges).

ened by requiring [the appellant] to await final judgment." *United States v. Philip Morris, Inc.*, 314 F.3d 612, 624 (D.C. Cir. 2003) (Randolph, J., dissenting). A privilege dispute that turns on an exception or waiver, in particular, does "not affect the *ex ante* incentives for frank communication created by the attorney-client privilege" because "communication is facilitated so long as the client believes herself to be protected from disclosure at the time of communication." Miller, *The Costs of Waiver*, 83 N.Y.U. L. Rev. 1248, 1257 (2008). Moreover, "few trial court decisions rejecting claims of attorney-client privilege are reversed on appeal—erroneous disclosure is thus rare," *Chase,* 964 F.2d at 164, and so the costs of allowing appeals greatly outweigh any benefits. In any event, if the "cat" is the purportedly privileged material and the "bag" is what is preventing its use as evidence in the trial court proceedings, then the cat can be put back in the bag if an appellate court upholds the privilege and orders a new trial without use of the privileged material.

In short, because confidentiality is a "condition precedent to the *creation* of the privilege" rather than "a requirement for its *continued* existence," "a delayed review is not inconsistent with the privilege." 2 Rice, *Attorney-Client Privilege* § 11:27, at 160-61 (emphasis in original). If this Court declines to create a new right to immediately appeal from privilege disputes, "clients' incentives to communicate frankly with their attorneys would remain as strong as ever." *Philip Morris*, 314 F.3d at 625 (Randolph, J., dissenting).

## III. OTHER ROUTES TO THE APPELLATE COURTS ARE AVAILABLE.

Mohawk's plea for immediate appeal overlooks the value of discretionary review as both a safety valve and a

means of rationing limited appellate resources. Apart from options such as protective orders, Rule 37 sanctions, and the traditional contempt procedure, a party on the losing end of a privilege dispute "may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b)" or, "in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available." *Firestone*, 449 U.S. at 378 n.13.

Mohawk (at 37-38) points to *Helstoski v. Meanor*, 442 U.S. 500 (1979), which denied mandamus because the petitioner there could have appealed under *Cohen*, and contends that mandamus therefore provides no "alternative" for collateral-order review. This argument assumes the very thing it attempts to prove because mandamus is only categorically unavailable if collateral-order review is available.

Although most privilege decisions are too factbound and insignificant to qualify, *see*, *e.g.*, *Am. Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 284 (2d Cir. 1967), mandamus can be "an escape hatch from the finality rule" when "a discovery question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment." *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987) (citation and quotation marks omitted). Notably, mandamus also allows appellate courts, in the rare case where it is necessary, to provide guidance concerning *procedures* for managing complex privilege disputes, without having to micromanage the document-by-document outcome of those disputes. *See Chase,* 964 F.2d at 164-65. In *In re Vioxx,* for example, after "[t]he district judge undertook the herculean task of personally reviewing 30,000 documents over a two-week period," the Fifth Circuit "examine[d] only the process, not the

merit of the privilege claim on any single or group of documents" and "limited its response to suggesting a slight change of course." 2006 WL 1726675, at *2. That limited, commonsense approach quickly would be rendered meaningless if full-scale appeals were available as of right from every privilege ruling.

In the unusual case where a district court decides a central and important legal issue concerning the attorney-client privilege, and an early appellate determination is likely to expedite the case's final resolution, appellate certification may be available under 28 U.S.C. § 1292(b). This process allows courts to distinguish between "a typical attorney-client case inappropriate for interlocutory review," *Union County v. Piper Jaffray & Co.*, 525 F.3d 643, 647 (8th Cir. 2008), and the rare case where an expenditure of appellate resources before final judgment may be appropriate. *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,* 293 F.3d 289 (6th Cir. 2002). Although "not a panacea," section 1292(b)'s availability is one factor counseling against expansion of *Cohen*. *Digital*, 511 U.S. at 883 & n.9.

Taken together, the availability of mandamus and certification mean that "the law is not without its safety valve to deal with cases where the contest over" attorney-client privilege "raises serious . . . questions taking the case out of the ordinary run." *Id.* at 883. The problem here is that Mohawk seeks review as of right squarely within the "ordinary run" of discovery disputes, running headlong into section 1291's ban on piecemeal review.

Finally, the history of appellate review of rulings on class certification underscores both the wisdom of discretionary review and why the rulemaking process, not *Cohen* expansion, is the rational way to consider whether to enlarge the interlocutory appellate docket. Rulings on

class certification are often important. An order refusing certification may signify the case's practical demise because it terminates the action for the putative class and may render what remains—the named plaintiff's individual action—economically unsustainable. *See Coopers*, 437 U.S. at 469-70. On the other hand, an order granting certification "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Id.* at 476. Indeed, *Coopers* rejected interlocutory review of orders denying class certification in part because that would "operate[] only in favor of plaintiffs even though the class issue" "will often be of critical importance to defendants as well." *Id.*

But *Coopers* did not render the civil justice system powerless to address the reviewability of class-certification rulings. Acting under 28 U.S.C. § 1292(e), which authorizes rulemaking to expand the types of interlocutory orders subject to appellate review, the Civil Rules Advisory Committee studied the issue and embraced an approach that provides the courts of appeals with discretion to review orders denying or granting class certification. *See* Fed. R. Civ. P. 23(f). The Committee noted the genuine needs of both plaintiffs and defendants, but also observed that many class certification rulings "present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23(f), 1998 Adv. Comm. Notes. Rule 23(f) not only avoided the one-way street that would have resulted had *Coopers* expanded *Cohen* to orders denying, but not granting, class certification (as would occur here if the Court were to extend *Cohen* to orders rejecting, but not accepting, privilege claims), but it made review discretionary, thus refusing to unleash a large category of appeals and preserving the

appellate courts' control over their own dockets. That discretionary option is not available under *Cohen*.

The rulemakers were also able to do something else that the courts cannot: They provided in Rule 23(f) that district court proceedings presumptively go forward during the appeal, thus ameliorating a key concern of the final judgment rule: delay and interference with the district court's ability to fairly and efficiently manage the litigation. This Court should not set down the scalpels of mandamus, certification, and rulemaking in favor of the hammer of collateral-order review.

## IV. THE RULE MOHAWK ADVOCATES HAS NO LIMITING PRINCIPLE, WOULD TAX ALREADY OVERBURDENED APPELLATE COURTS, AND HAS PROVED UNWORKABLE IN PRACTICE.

**1.** As Judge Wilkinson has observed, "a judicially created exception to nonappealability for categories of sensitive information is the quintessential slippery slope." *MDK,* 27 F.3d at 120. "Many parties faced with discovery requests are apt to regard the information sought as sensitive or confidential and seek, at a minimum, to delay its disclosure through an interlocutory trip to an appellate court." *Id.*

Absent the "limiting principles" of which finality jurisprudence is "sorely in need," *Gulfstream*, 485 U.S. at 292 (Scalia, J., concurring), an exception for waivers of attorney-client privilege would logically encompass all denials of attorney-client or work-product privilege, constitutional and common-law evidentiary privileges, and other antidiscovery interests, as well as disputes over protective orders. This Court has always "denied review of pretrial discovery orders," *Firestone*, 449 U.S. at 377, but Mohawk's exception would, case-by-case and cate-

gory-by-category, swallow that rule—illustrating the "tendency of a principle to expand itself to the limit of its logic." Cardozo, *The Nature of the Judicial Process* 51 (1921). The other option would be arbitrary line drawing and ad hoc fact-based distinctions—anathema to *Cohen*'s emphasis on categorical rules—that would prove unworkable in practice and generate constant litigation over the scope of an ever-changing new incursion on section 1291.

Mohawk does not even attempt to offer this Court a limiting principle. Instead, it asserts that this case "is not and has never been about all claims of privilege" and vaguely suggests that "[o]ther privileges … might be deemed less important." Mohawk Br. 39. Conspicuously lacking is any explanation of *why* orders denying attorney-client privilege claims must be treated differently from orders rejecting other privileges and antidiscovery interests. Mohawk also claims that this case involves only rulings on *waiver* of the privilege, but it never explains why it makes any sense to exclude trial court rulings on exceptions to the privilege or the existence of the privilege itself. *Id.* 39. In this case, as in many cases, the parties dispute whether the material is privileged *and* whether the privilege was waived, and both issues were briefed in the Eleventh Circuit. If Mohawk is correct that the question presented is limited to waiver, and if Mohawk were to prevail in this Court, the Eleventh Circuit on remand would have authority to rule on the waiver issue, but not on the underlying privilege issue. The absurdity of that outcome exposes Mohawk's failure to articulate a sensible categorical rule.

In seeking certiorari, Mohawk was more candid, acknowledging that the rule it seeks would go well "beyond the facts and parties to this case" and "expand[] to every litigant" that is "ordered to produce privileged informa-

tion," Pet. 18—hardly a recipe for keeping the collateral order doctrine "narrow and selective in its membership." *Will*, 546 U.S. at 350.

**2.** A decision of this Court (as opposed to a circuit court) that entitles every discontented litigant in a privilege dispute to appeal immediately through the federal courts can be expected to open the floodgates. In an effort to reassure the Court through arithmetic, Mohawk (at 39-40) and *amicus* Chamber (at 30-35) count up the number of reported opinions in the three circuits that have recently begun experimenting with immediate appeals from discovery disputes and proclaim that there is nothing to worry about—that "while the court below feared a flood, empirical research shows barely a trickle." Chamber Br. 35.

Even assuming that a sound empirical prediction of the effect of an affirmance by this Court can be made based on the number of lower-court decisions, Mohawk and its *amici* are looking at the wrong numbers. The more relevant statistics are those reflecting the number of privilege claims denied every day in the federal district courts (all of which would be subject to immediate appeal under Mohawk's rule) and the already overburdened dockets of the federal appellate courts (which would be burdened further still under Mohawk's rule). The place to look for a prediction of the impact, in other words, is not what has been filed but what *could* be filed were this Court to give a green light to appeals from routine privilege disputes.[6]

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[6] In addition to encouraging appeals that otherwise would not have been pursued, a decision in favor of Mohawk here would also distort discovery negotiations. If parties could take their claims to an appellate court, district judges would lose their influence in (continued…)

**a.** Not surprisingly, there is a very high volume of litigation over the attorney-client privilege in federal district courts. A Westlaw search for the terms "attorney-client" and "privilege" in the "federal district courts" database between 2004 and 2009 produced a staggering 4,446 reported cases. To get a more detailed sense of the volume, we searched that database for those same terms in six two-month periods over the last three years and examined each case to learn whether the attorney-client issue was actually adjudicated (as opposed to being mentioned in passing or in relation to some other privilege) and whether disclosure was ordered. Our search revealed that, on a monthly basis, there are dozens of reported orders from which appeals might be taken in cases that run the gamut of the federal docket—from patent infringement to habeas, from ERISA to civil rights, from securities fraud to insurance coverage.[7]

**b.** A rule permitting immediate appeals from all of those privilege disputes would "threaten[] busy appellate

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(…continued)
hammering out a compromise. And the party asserting the privilege would possess a powerful bargaining chip: the threat of a costly and lengthy appeal. Perhaps most troubling, some parties would find it in their interest to be uncooperative, thus prolonging litigation, increasing judicial workload, and raising costs for clients.

[7] In the most recent two-month period surveyed, May-June 2008, there were 216 reported written decisions mentioning the attorney-client privilege, 93 decisions adjudicating an attorney-client privilege claim, and 46 disclosure orders. The previous two-month periods reflect similar volume: January-February 2008 (190, 92, 47), May-June 2007 (219, 97, 51), January-February 2007 (203, 100, 66), January-February 2006 (91, 38, and 21), and May-June 2006 (159, 64, 37). These numbers understate matters significantly because they reflect only decisions reported by one online service and exclude all oral rulings, such as those made in pretrial conferences, by phone during depositions, or in response to objections at trial.

courts with added numbers of essentially similar, if not repetitive, appeals, at a time when overloaded dockets threaten the federal appellate system." *Behrens*, 516 U.S. at 322 (Breyer, J., dissenting) (citing Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* 31-51 (1994)).[8] Appellate workload continues to increase. Between 1999 and 2008, regional circuit filings rose 11.7 percent and pending appeals increased 25.7 percent.[9] Yet, since 1990, the number of authorized appellate judgeships has stayed constant at 179.

**3.** Until 1997, the federal courts of appeals "consistently held that disclosure orders are neither too important nor too independent of the cause of action itself to justify immediate appellate consideration." 2 Rice, *Attorney-Client Privilege* § 11:34, at 213 (footnotes omitted). Over the last dozen years, three circuits—the Third, Ninth, and D.C.—have broken, in varying degrees, from the nonappealability rule. The experience in these circuits does nothing to alleviate the concern that a similar ruling from *this* Court would unleash a deluge of new interlocutory appeals. But it does tell us something: that the rule advanced by Mohawk would undermine the policy against piecemeal appeals, lead to a series of amorphous exceptions to the final judgment rule, and encourage litigation simply to test the exceptions' parameters.

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[8] *See also* Posner, *The Federal Courts: Challenge and Reform*, 140-57, 160-75 (1996); King, *Current Challenges to the Federal Judiciary*, 66 La. L. Rev. 661, 667 (2006).

[9] *See* Administrative Office of the United States Courts, *2008 Annual Report to the Director: Judicial Business of the United States Courts*, 13, *available at* http://www.uscourts.gov/judbus2008/JudicialBusinespdfversion.pdf (hereinafter *2008 Judicial Business*).

**a.** The Third Circuit, in *In re Ford Motor Company*, 110 F.3d 954 (3d Cir. 1997), was the first to authorize collateral-order appeals of attorney-client privilege claims. Finding itself "bound by the holding[]" in *Smith v. BIC Corp.*, 869 F.2d 194 (3d Cir. 1989), which had extended *Cohen* to trade-secrets claims, *Ford* further extended the doctrine to cover attorney-client privilege claims. 110 F.3d at 964. Two years later, the court read *Ford* as embodying "a bright-line rule permitting appeals from discovery orders requiring the disclosure of content putatively privileged by the attorney-client and work-product privileges." *Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 300 (3d Cir. 1999). Before long, however, the *Smith-Ford* approach began to exhibit internal inconsistencies and practical problems.

Just a year after *Montgomery County*, the court limited *Ford*'s holding "in light of the narrower approach to the collateral order doctrine taken by other courts of appeals." *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 55 (3d Cir. 2000). The question in *Bacher* was whether rulings regarding claims of highly sensitive but unprivileged information were immediately appealable. Influenced by this Court's statement in *Cunningham*, 527 U.S. at 206, that courts of appeals should not employ a "case-by-case approach," to collateral-order appeals, *Bacher* dismissed the appeal for lack of jurisdiction. 211 F.3d at 56. Though the appellants' arguments in *Bacher* were essentially the same as those made in *Ford*, the court unmistakably put on the brakes, acknowledging that "if we take jurisdiction here we may have difficulty drawing the jurisdictional line in future cases." *Id.* at 55.

The Third Circuit has spent the years since *Bacher* attempting to draw (and redraw) this arbitrary jurisdictional line. It has been confronted with multiple discovery appeals raising privilege claims, which it has had to

dismiss on an ad hoc basis.[10] The continual case-by-case development of appealability jurisprudence in these cases has even caused the court to apply the *Cohen* test to the facts of specific attorney-client privilege disputes, despite its prior embrace of a bright-line rule. *See*, *e.g.*, *In re Teleglobe,* 493 F.3d at 357-58 (discussing "whether the privilege issue is sufficiently separate from the merits of the suit," but ultimately finding that "[i]n this context, we have little trouble concluding that we have jurisdiction over this appeal").

Last year, the Third Circuit indicated that it is growing weary of such difficult line drawing. In an appeal from an order granting partial trade-secrets protection, the court observed that *Bacher* "went to some length to cabin *Smith* and, to a lesser extent, *Ford*, to their specific fact situations." *In re Carco Elec.*, 536 F.3d 211, 213 (3d Cir. 2008). The court did not stop there, however. After acknowledging that "*Smith* has been widely criticized," the court highlighted the tension between its approach and recent precedent from this Court: "Admittedly, there are strong statements in both Supreme Court opinions [*Cunningham* and *Digital*] and, in particular, our opinion in *Bacher*, that seem to suggest that our holding in *Smith* is flawed. But, a reversal of *Smith* must be left to the wise counsel of the Court *en banc*." *Id.* at 214 (citation omitted). Nevertheless, the court pro-

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[10] *See, e.g., Wexco Inds. v. ADM21 Co. Ltd.*, 260 Fed. Appx. 450 (3d Cir. 2008) (denial of request to obtain client's papers from prior attorney); *In re Horn*, 185 Fed. Appx. 199 (3d Cir. 2006) (dismissing appeal on grounds that work-product privilege claim was raised in a footnote in trial court); *In re Flat Glass Antitrust Litig.*, 288 F.3d 83 (3d Cir. 2002) (adhering to *Cobbledick* rule and dismissing appeal by nonparty witnesses claiming attorney work-product privilege); *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001) (denial of legislative privilege).

ceeded to dismiss the appeal for lack of jurisdiction, distinguishing *Smith* on the theory that it does not apply to appeals concerning "the form or scope of the protection given," *id.*—a distinction that is hard to fathom.

In sum, the Third Circuit has had a short-lived experience with the rule that Mohawk advocates, and that experience has been a failure.

**b.** The D.C. Circuit first adopted the *Smith-Ford* approach in 2003, in *Phillip Morris*, 314 F.3d 612. In dissent, Judge Randolph predicted that the rule would become unworkable and emphasized that the "costs of delay via appeal, and the costs to the judicial system of entertaining these appeals, exceed in the aggregate the costs of the few erroneous discovery orders that might be corrected were appeals available." *Id.* at 625 (quoting *Reise*, 957 F.2d at 295 (Easterbrook, J.)).

Judge Randolph's dissent has already proved prescient. After employing *Cohen* to grant a stay in *Philip Morris* itself, 314 F.3d at 615, the D.C. Circuit went on to consider three plenary interlocutory appeals concerning attorney-client privilege in the very same litigation. It took up the initial appeal flowing from the stay order, *United States v. Philip Morris, Inc.*, 347 F.3d 951 (D.C. Cir. 2003), and then a follow-on appeal after a remand to the district court—both concerning the question whether a party had waived the privilege by failing to include a single document on its privilege log. *United States v. British Am. Tobacco (Inv.) Ltd.*, 387 F.3d 884, 885 (D.C. Cir. 2004). Thereafter, in a particular affront to the final judgment rule, the court heard an interlocutory appeal from an order overruling objections to testimony during trial. *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235 (D.C. Cir. 2006).

Meanwhile, the rule has expanded to include the federal psychotherapist-patient and state-law medical-records privileges, *In re Sealed Case (Medical Records)*, 381 F.3d 1205 (D.C. Cir. 2004), and an appeal from a protective order based on a claim of confidential commercial information, *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892 (D.C. Cir. 2006). That development led Judge Rogers to express concern that the circuit's "liberality" was at odds with this Court's precedents and had created a slippery slope that "could open the way for immediate appellate review of all manner of discovery disputes." *Id.* at 900 (Rogers, J., concurring).

**c.** The Ninth Circuit followed *Ford* just two years ago in *Napster*, 479 F.3d 1078, and has already had difficulty drawing lines between privileges. *Napster* itself came on the heels of rulings allowing appeals from denials of the marital and peer-review privileges. *See United States v. Griffin*, 440 F.3d 1138 (9th Cir. 2006); *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005). Thus, although Mohawk claims (at 39) that "the narrow category at issue here" encompasses only "order[s] finding waiver of the attorney-client privilege," *Napster*, *Griffin*, and *Agster* show the conceptual difficulty in separating one type of privilege from another.

Even within the attorney-client privilege category, the Ninth Circuit has encountered problems. The year after *Napster*, the court dismissed an appeal from an order denying an attorney-client privilege claim over a single, inadvertently-disclosed email, creating an inadvertent-disclosure exception to what is supposed to be a categorical rule. *Truckstop.net, LLC v. Sprint Corp.*, 547 F.3d 1065, 1068 (9th Cir. 2008). The Ninth Circuit's collateral-order jurisprudence, then, allows immediate appeals from orders involving several different types of

privileges, including the attorney-client privilege, but not from the entire class of attorney-client privilege orders.

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The experience of the courts that have allowed immediate appeals of attorney-client privilege denials has made clear the contradictions and inefficiencies involved with that approach. This Court should draw a lesson from their experience and put an end to the failed experiment.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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