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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

OF COUNSEL:
ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062

PAUL D. CLEMENT
Counsel of Record
JEFFREY S. BUCHOLTZ
MERRITT E. MCALISTER
KING & SPALDING LLP
1700 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20006
(202) 737-0500

Attorneys for Amicus Curiae

May 4, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community. The Chamber is well-situated to brief the Court on the importance of this case to companies embroiled in high-stakes litigation where an order requiring disclosure over a claim of attorney-client privilege — if not reviewable as a collateral order — can have devastating consequences, both in the litigation itself and, more fundamentally, with respect to companies' willingness to speak frankly and fully to their attorneys in the future.

---

[1] Pursuant to Rule 37.3(a), copies of the parties' consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT

Under the collateral order doctrine articulated by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a party may take an interlocutory appeal from an order that does not terminate the action but nevertheless "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. *Cohen* permitted an immediate appeal of an order requiring the plaintiff to post security. *Id.* at 547. Since *Cohen*, the Court has applied the collateral order doctrine to permit interlocutory appeals of a variety of orders, from those denying Westfall Act certification and substitution, *Osborn v. Haley*, 549 U.S. 225, 239 (2007), to those denying qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *in forma pauperis* status, *Roberts v. United States Dist. Court*, 339 U.S. 844 (1950). The Court has generally looked to three factors in deciding whether to allow an appeal. The order "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." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978) (citing *Cohen*, 337 U.S. at 546).

Although garden-variety discovery orders are not immediately appealable, the Third, Ninth, and D.C. Circuits have each recognized that orders that

vitiate a claim of attorney-client privilege are immediately appealable under *Cohen*. *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1087-89 (9th Cir. 2007); *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003); *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997). Recognizing both the weighty interests protected by the attorney-client privilege and the practical ramifications of compelled disclosure, those courts permit interlocutory appeals under *Cohen* of orders requiring disclosure of assertedly attorney-client-privileged materials.

The communications that petitioner seeks to protect from disclosure here — communications relating to an internal investigation — lie at the heart of the attorney-client privilege. Petitioner Mohawk Industries, a producer of consumer and commercial flooring products, hired outside counsel to conduct an internal investigation into petitioner's compliance with immigration law. In the course of that investigation, petitioner's outside counsel interviewed respondent, then an employee of petitioner. No one appears to dispute that the communications between petitioner's counsel and respondent were covered by petitioner's attorney-client privilege. Instead, the issue is waiver. Respondent contends in this suit that counsel pressured him during that interview to recant testimony that purportedly was damaging to petitioner in a different suit (*Williams v. Mohawk Industries, Inc.*, Civ. No. 4:04-cv-0003-HLM, a class action alleging RICO violations), and that petitioner terminated his employment when he refused. Pet. App. 3a. Respondent argued that petitioner waived

its attorney-client privilege over these communications by putting outside counsel's actions at issue in the *Williams* case. Pet. App. 4a-6a. The district court agreed and ordered disclosure of the privileged communications. Pet. App. 51a. At the same time, the district court "recognize[d] the seriousness of its finding that Defendant Mohawk has waived the attorney-client privilege," noted that petitioner, "understandably, likely will wish to appeal," and suggested that a collateral order appeal under *Cohen* could be appropriate. Pet. App. 52a. The court accordingly stayed its disclosure order in the event of an appeal. Pet. App. 52a.

The court of appeals disallowed petitioner's appeal on the rationale that the district court's order is not otherwise "effectively unreviewable," *Cohen*, 337 U.S. at 467, and identified two alternative avenues of potential relief. First, the court of appeals suggested that petitioner could obtain effective review by complying with the disclosure order, litigating the case to final judgment, and, if necessary, arguing on appeal that the disclosure order was erroneous and that "privileged information . . . was used to [petitioner's] detriment." Pet. App. 8a. Second, the court suggested that petitioner "*may*" have another avenue of review if it refuses to comply with the order "and contests its validity after being cited for contempt," though the court stated that whether immediate review would be available could depend on the type of sanction imposed for contempt. Pet. App. 13a (emphasis in original). The court also expressed concern that permitting an appeal under *Cohen* could lead to "[a] potentially large volume of appeals," and opined that

relegating would-be appellants to petitions for mandamus was "desirable" because of the more stringent standard for mandamus relief. *Id*.

SUMMARY OF ARGUMENT

Orders requiring disclosure of materials claimed to be attorney-client-privileged should be immediately appealable under the collateral order doctrine derived from *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). First, such disclosure orders conclusively determine the disputed question of privilege and thus are "final." Second, the privilege dispute is entirely separate from — *i.e.*, "collateral" to — the merits of respondent's case, and the dispute over whether materials claimed to be protected by the attorney-client privilege must be disclosed is plainly "important."

Indeed, this Court has consistently recognized that the attorney-client privilege is deeply rooted and vital to our legal system. The attorney-client privilege promises clients confidentiality to promote their full and frank communication with their attorneys. When a client communicates in reliance on the privilege, only to see those confidential communications disclosed to an adversary in litigation, the damage to the privilege and its ability to facilitate candid communication is devastating. Before a privilege so central to our adversary system is vitiated, an appellate court should have the opportunity to review whether the disclosure order is proper. The risk of undermining the attorney-client privilege if appeal is not permitted substantially

outweighs any concerns about piecemeal litigation or judicial efficiency.

The court below erroneously concluded that the harm caused by compelled disclosure can be effectively remedied on appeal after final judgment. In so concluding, the court took an exceedingly narrow view of what the privilege protects and failed to account for the real-world impact of such an order, especially in the context of mass tort actions or other high-stakes litigation. At the same time, the court vastly overestimated the utility of the "contempt route" to appellate review.

First, the court of appeals failed to appreciate that disclosure of confidential communications to an adversary is at the heart of what the privilege protects. Even if review after final judgment can remedy the direct *use* of privileged communications, it comes far too late to remedy the privilege against *disclosure* that lies at the heart of the privilege. The final-judgment appeal route is even less effective in cases in which there is an asymmetry between the interests of plaintiffs and defendants in non-disclosure. A privileged communication may be relevant not just to a single plaintiff's claim, but to a wide variety of litigation and potential litigation involving the same subject, and once it is disclosed to a single plaintiff, it is effectively disclosed much more broadly. Moreover, because of these practical dynamics, a privilege holder facing a trial-court disclosure order may feel tremendous pressure to settle the case at hand — regardless of its merits or lack thereof — in order to avoid more extensive ripple effects from disclosure. The devastating

practical impact of disclosure thus makes it less likely that litigation will continue to final judgment and leaves courts of appeals with no practical ability to mitigate these pressures unless immediate appeal is permitted.

To the extent that the court below relied on the contempt route as an alternative to an immediate appeal, the court erred. This Court has squarely held that an order of civil contempt is not immediately appealable even if the order imposes a fine or imprisonment. *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936). Although a judgment of criminal contempt is appealable, a party in petitioner's position contemplating non-compliance in the hope of obtaining appellate review of a disclosure order could have no basis to predict that non-compliance would lead to criminal contempt as opposed to civil contempt or a non-appealable sanction other than contempt (such as an adverse inference). Moreover, it hardly makes sense to create a system where the only route to the appellate court is to be labeled a criminal contemnor.

In the end, the court below explicitly relied on its concern that allowing appeal would open the floodgates to "[a] potentially large volume of appeals." Pet. App. 13a. The court below cited no evidence in support of this concern, nor have other courts that have invoked the "floodgates" concern. Yet this proposition is readily subject to empirical verification. Ample evidence exists to test the proposition, in the form of the experience of the courts of appeals that do permit immediate appeals of orders compelling disclosure of attorney-client-

privileged materials. That body of evidence confirms that even in circuits where the gates are wide open, there has been no flood.

In the 12 years since the Third Circuit decided *Ford Motor Co.*, that court has issued only *six* opinions reviewing similar interlocutory orders compelling disclosure of material claimed to be privileged. Similarly, the D.C. Circuit has considered only *one* such order since it expressly authorized appeal under *Cohen* in 2003, and the Ninth Circuit has considered only *one* since it clearly permitted such appeals in 2007. By contrast, during this same time period, the Third Circuit has considered approximately 78 interlocutory appeals from denials of qualified immunity. Accordingly, whether viewed in absolute or relative terms, the flood feared by the court of appeals turns out to be a trickle. And when the *Cohen* factors are considered without misplaced concern about the volume of such appeals, it is clear that orders compelling disclosure of attorney-client-privileged materials satisfy the requirements of the collateral order doctrine.

ARGUMENT

I. AN ORDER COMPELLING DISCLOSURE OF MATERIAL CLAIMED TO BE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE SHOULD BE IMMEDIATELY APPEALABLE.

For immediate appeal to lie of an order that does not terminate the litigation, the order "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." *Coopers & Lybrand,* 437 U.S. at 468 (citing *Cohen*, 337 U.S. at 546). The Eleventh Circuit correctly recognized that compulsion of privileged material satisfies the first two prongs of the *Cohen* test. The court nonetheless held an immediate appeal unavailable based on its view that such orders can be reviewed effectively on appeal from a final judgment or possibly after a contempt citation. Pet. App. at 8a, 13a. The analysis of the third *Cohen* factor misconceives the interest protected by the attorney-client privilege and overlooks the practical reasons why review must be immediate in order to be effective.

A. Orders Compelling Disclosure of Assertedly Privileged Material Conclusively Determine the Disputed Issue of Attorney-Client Privilege.

There is no dispute that the order of the district court satisfies the first prong of the *Cohen* test. Pet. App. at 8a. Orders compelling disclosure of materials claimed to be protected by the attorney-client privilege conclusively resolve the question whether those materials are protected by the privilege and may remain confidential. Nothing in the record suggests that the district court's order was "tentative or subject to revision," *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003), and indeed it is difficult to imagine how an order could go so far as to require the actual disclosure of assertedly privileged material but still be classified as tentative. Nor is there any legal

principle that gives such disclosure orders a tentative character. *Compare Coopers & Lybrand*, 437 U.S. at 469 (holding that orders denying class certification are not immediately appealable, in part because such orders are subject to revision under Federal Rules of Civil Procedure). To the contrary, because the disclosure order directly vitiates the confidentiality guarantee at the heart of the privilege, the order's conclusive character is unmistakable. No court of appeals to consider the question has disagreed that such disclosure orders satisfy the first requirement of the *Cohen* test.

B. Orders Compelling Disclosure of Assertedly Privileged Material Resolve Important Issues that are Separable from the Merits.

The Eleventh Circuit's decision acknowledged that the second *Cohen* factor — that the order is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" — was satisfied here. *Cohen*, 337 U.S. at 546; Pet. App. at 8a ("[W]e agree that the attorney-client privilege is important and that the district court can resolve the privilege issues (*i.e.*, whether Appellant must produce the disputed documents and communications) without deciding the merits of the case.").

1. The court correctly recognized that the question whether assertedly privileged materials must be disclosed is entirely separate from the merits of the underlying action. This is true even where the communications in question may be

highly relevant to the adjudication of the merits of the action, for even then the privilege dispute turns on questions of the law of privilege (be it scope, crime-fraud, or waiver) entirely separate from the merits of the action. *See United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) ("Clearly, the privilege question is separable from the merits of the underlying case."). The "separable" nature of the privilege dispute here is underscored by the fact that it arose as a result of a document filed in a separate lawsuit. Pet. App. at 4a-5a.

2. Although the court below ultimately found the second *Cohen* factor satisfied, it downplayed the critical role the attorney-client privilege plays in the administration of justice and misunderstood the interests it protects. As a result, the court incorrectly balanced the relative importance of vindicating the privilege through interlocutory appeal against the cost of doing so.

a. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This Court has affirmed, time and again, the privilege's significance — indeed, its centrality — to our adversary legal system. Over a century ago, the Court explained that the privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice," and emphasized that such aid by lawyers "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn,* 128

U.S. 464, 470 (1888). More recently, the Court reiterated that the "central concern" animating the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *United States v. Zolin*, 491 U.S. 554, 562-63 (1989) (internal quotation omitted). By "promot[ing] trust in the representational relationship," the privilege produces "systemic benefits [that] are commonly understood to outweigh the harm caused by excluding critical evidence." *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). So fundamental is the privilege to our legal system that it even survives the death of the client, *see id*. at 407-09, and protects communications that reveal evidence of past wrongdoing, on the rationale that full and frank disclosure will be discouraged unless the privilege extends to "protect the confidences of wrongdoers." *See Zolin*, 491 U.S. at 562.

Plainly, and in the broadest sense, the proper application of the attorney-client privilege is an "important" issue — not just to an individual client, but to our adversarial system as a whole.

b. Not only is the attorney-client privilege "deeply rooted in public policy," *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 884 (1994), but a guarantee of confidentiality is at the heart of the privilege. An order compelling disclosure of materials arguably protected by the attorney-client privilege is important, therefore, because it vitiates the protection at the heart of the privilege. That reality is critical for both the second and third

prongs of *Cohen*. As this Court underscored in warning against the conclusion "that 'importance' is itself unimportant,"

> the third *Cohen* question, whether a right is "adequately vindicable" or "effectively reviewable," simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.

Digital Equip. Corp., 511 U.S. at 878-79 (internal citations omitted).

Judge Becker, in his characteristically thorough opinion in *Ford Motor Co.*, explained that the interests being balanced may be incommensurable, but that the key is the degree to which the interests that interlocutory appeal would protect are important and the degree to which those interests would be impaired if interlocutory appeal were denied:

> [T]he Court has compared the apple of the desire to avoid piecemeal litigation to the orange of, for example, federalism. * * * What is important for present purposes is that, in a number of the just-cited cases, the Court felt that, because of the imperative of preventing impairment of some institutionally significant status or relationship, the danger of denying justice by reason of delay in appellate adjudication

> outweighed the inefficiencies flowing from interlocutory appeal.

Ford Motor Co., 110 F.3d at 960 (citation omitted).

When viewed through this lens, the case for allowing *Cohen* appeals of orders like that at issue here is magnified. The attorney-client privilege is at its core a privilege against disclosure, so compelled disclosure cuts to the core of the confidentiality interests that the privilege is supposed to protect. Moreover, for the privilege to succeed in its function of encouraging clients to communicate fully and frankly with their attorneys, confidentiality must be guaranteed, not merely likely. This is why the privilege is absolute rather than qualified, for a qualified privilege would not give clients the necessary assurance that their communications will remain confidential. *See Swidler & Berlin*, 524 U.S. at 409; *Upjohn*, 449 U.S. at 393 ("[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all"). Erroneous compelled disclosure of privileged material thus threatens to undermine the societal benefits of the privilege in the most direct and central way, as it fosters the "apprehension of disclosure" (*Hunt*, 128 U.S. at 470) that precludes the frank and full communication between client and attorney that the privilege seeks to promote — not just in that case, but across the board because of the chilling effect of that erroneous disclosure on other clients.

In short, once privileged material is disclosed, the privilege has been defeated. Even assuming that remedies relating to *liability* may exist on appeal

from final judgment, *but see infra* at 21-26, a court of appeals after final judgment cannot provide any remedy that can redress or undo a compelled disclosure that has already occurred. Accordingly, the Third Circuit correctly held that the interest "protected by the attorney-client privilege (which would be eviscerated by forced disclosure of privileged material) is sufficiently significant relative to . . . the interests protected by the final judgment rule to satisfy the importance criterion of the second *Cohen* prong." *Ford Motor Co.*, 110 F.3d at 961. In light of "the value of the interests that would be lost through rigorous application of a final judgment requirement" in this context, allowing interlocutory appeal ranks as "important" in the *Cohen* analysis. *Digital Equip. Corp.*, 511 U.S. at 878-79.[2]

---

[2] Many of the reasons why review after final judgment fails to protect clients' interests in the confidentiality promised by the attorney-client privilege may apply at least to some extent in the context of other privileges. Nonetheless, given the venerable nature and special importance of the attorney-client privilege, the Court need not decide in this case how the "importance" balancing may turn out in cases involving other privileges. *Cf. Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001) (dismissing appeal of order compelling discovery from state legislators); *Bacher v. Allstate Ins. Co.*, 211 F.3d 52 (3d Cir. 2000) (dismissing appeal of order requiring disclosure of sensitive confidential (but not privileged) information regarding settlement amounts).

C. Orders Compelling Disclosure of Assertedly Privileged Material Are Effectively Unreviewable Unless Immediate Appeal Is Allowed.

1. The Harms Caused by Compelled Disclosure of Privileged Communications Cannot Be Effectively Remedied without Immediate Appeal.

The courts that have refused to apply the collateral order doctrine to orders compelling disclosure of potentially attorney-client-privileged materials have concluded that adequate and effective review is possible on appeal from final judgment. Pet. App. at 8a-9a. This conclusion suffers from two serious defects.

First, an appeal after final judgment can do nothing to remedy the disclosure of confidential communications. Even if the consequences of the actual use of privileged materials can be remedied on appeal from final judgment, such an appeal cannot protect the privilege against disclosure, which is the essence of the privilege. Compelled disclosure vitiates the privilege at the moment of disclosure. To protect the privilege and ensure that it can fulfill its important function in our legal system, the law must protect against erroneous compelled disclosure itself. Barring review of disclosure orders until after disclosure, use, and final judgment have occurred and providing review only of liability implications of such orders thus misses the point of the privilege.

Second, the courts' analysis of the ability of a final judgment appeal to provide an effective remedy not only misconceives the nature of the privilege, but also fails to appreciate the reality of the litigation dynamic. In the real world of mass-tort and other high-stakes litigation, there is often a fundamental asymmetry between the plaintiff's stake in the particular case in which the privilege is in dispute and the defendant's exposure in multiple cases to which the information may be relevant. In such situations, disclosure orders frequently have dramatic spillover effects beyond the specific case in which the disclosure order is entered. Winning reversal of the disclosure order after final judgment would be an empty victory where the disclosure already had caused adverse effects beyond the specific case at hand. Indeed, in practice, final judgment review will come not merely too late, but not at all: a disclosure order in one of a large number of related cases may force a litigant to settle to avoid disclosure, regardless of the merits of the privilege claim or the underlying action, to avoid use of the disclosed material against it by countless other parties.

a. The court below based its conclusion that final-judgment review is adequate on the notion that if it were to hold that "privileged information was wrongly turned over and was used to the detriment of the party asserting the privilege, we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information . . . ." Pet. App. 8a. Other courts reaching the same conclusion as the court below likewise have focused on the ability of a final-

judgment appeal to reverse a liability judgment based at least in part on the use of improperly-disclosed privileged materials. *See, e.g., Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993) ("The practical consequences of the district court's decision on the controversy between the parties can be effectively reviewed on direct appeal following a judgment on the merits.").

That conclusion would be relevant if the attorney-client privilege were primarily a "use privilege," precluding only the use of attorney-client communications as evidence. But the attorney-client privilege is primarily a privilege guaranteeing confidentiality and protecting against disclosure. And post-final-judgment review does nothing to remedy the breach of the privilege against disclosure. "[O]nce putatively privileged material is disclosed, the very right sought to be protected has been destroyed." *Ford Motor Co.*, 110 F.3d at 963 (internal quotation omitted); *see also Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 164 (2d Cir. 1992) ("The attorney-client privilege prohibits disclosure to adversaries as well as the use of confidential communications as evidence at trial.").[3]

---

[3] Although the Fifth Circuit has since adopted the same position as the court below, that court long ago correctly recognized that disclosure itself causes irreversible injury where the claimed right is a right against disclosure. In *Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979), the court held that *Cohen* permitted immediate appeal of an order requiring anonymous plaintiffs to reveal their identities: "[B]ecause the identities of the

The Seventh Circuit has reasoned that *Cohen* appeals of disclosure orders are improper because even though "[t]he travail and expense of discovery and trial cannot be reversed at the end of the case . . . this has never been thought sufficient to allow pre-trial appeals." *Reise v. Board of Regents of University of Wisconsin Sys.*, 957 F.2d 293, 295 (7th Cir. 1992). But that rationale fails to appreciate what the attorney-client privilege protects. The harm inflicted on the attorney-client privilege by the erroneous disclosure of privileged material is not simply, or even principally, the "travail and expense of discovery." Although such harms can be substantial, incurring unrecoverable discovery costs is the ordinary and inevitable consequence of the "American rule" for attorney's fees. A party that

---

Association's members, once revealed, could not again be concealed, review following a decision on the merits would come too late to remedy any injury caused by the order to disclose the membership information." *Id*. at 712. Regardless of whether the claimed right to proceed anonymously is sufficiently important, compared to the attorney-client privilege, to justify immediate appeal in that specific context, the Fifth Circuit's decision illustrates the inadequacy of final-judgment review to vindicate a right against disclosure. In *Texaco Inc. v. Louisiana Land and Exploration Co.*, 995 F.2d 43, 44 (1993), the Fifth Circuit found that its precedents were inconsistent and chose to follow *Honig v. E.I. DuPont de Nemours & Co.*, 404 F.2d 410 (5th Cir. 1968) (per curiam), and to reject *SMU Ass'n of Women Law Students*, despite the fact that *Honig* was a one-paragraph opinion that did not involve an order vitiating a privilege and merely stated the general rule that discovery orders are not immediately appealable.

incurs discovery costs before prevailing later in the litigation does not suffer the "irretrievabl[e] los[s]" of an important right. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 525 (1988); *cf. Digital Equip. Corp.*, 511 U.S. at 882 (distinguishing "an unusual interest in preventing disclosure of particular information" from "the generic desire to triumph early" in litigation). Instead of the "travail and expense" noted by the Seventh Circuit, the harm caused by an order erroneously compelling disclosure of privileged material is the loss of confidentiality in that material, as well as the broader apprehension of disclosure and resulting loss of confidence that clients' communications with their attorneys will remain confidential. And without that assurance, the privilege cannot succeed in its core function of encouraging full and frank communication. *See Philip Morris*, 314 F.3d at 618 ("Only by ensuring that privileged information is never disclosed will [the broader public interests in the observance of law and administration of justice] be advanced."). The "limited assurance" that material later held to be privileged ultimately will not be admissible "will not suffice to ensure free and full communication by clients who do not rate highly a privilege that is operative only at the time of trial." *Chase Manhattan Bank*, 964 F.2d at 165. If that were a sufficient assurance, the privilege would provide only a protection against use. The privilege is a much more robust protection against disclosure precisely because that level of assurance is necessary

to foster the necessary candor between client and lawyer.[4]

b. For the reasons just discussed, the court below simply failed to appreciate the nature of the privilege in concluding that a final-judgment appeal could provide an effective remedy. A final-judgment appeal cannot vindicate the privilege holder's interest in confidentiality. But the court also overstated the extent to which final-judgment review is adequate even to vindicate a privilege holder's secondary interest in avoiding liability based on the use of privileged communications. The court's simplistic conclusion that a court of appeals can set aside a liability judgment if the judgment flowed

---

[4] In *Chase Manhattan Bank*, the district court had ordered disclosure to opposing counsel for an attorney's-eyes-only review before adjudicating the privilege claim. Even though the court intended to adjudicate any privilege dispute that remained after this procedure, and to order return of any material held to be privileged before proceeding to trial, the Second Circuit recognized that even the temporary disclosure of privileged material causes "a pertinent aspect of confidentiality [to be] lost." 964 F.2d at 165. That court's admonition that excluding previously-disclosed privileged material at trial is insufficient to preserve clients' faith in the privilege applies *a fortiori* to the present case, because clients "rate" even less "highly" a privilege that is operative only at the time of *retrial*, after the client has persevered through final judgment and suffered an adverse liability finding. Indeed, this Court has cautioned that freely allowing disclosure even to the court alone *in camera* "would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." *Zolin*, 499 U.S. at 571 (permitting *in camera* review to decide applicability of crime-fraud exception only upon substantial threshold showing).

from an erroneous disclosure order assumes that the privilege holder will comply with the disclosure order, litigate to final judgment, be held liable, and then appeal, and then further assumes that the court of appeals can provide full redress by setting aside the judgment in that particular case. These assumptions are highly doubtful because they overlook the real-world importance of compelled disclosure of assertedly privileged material.

First, there are powerful practical reasons why the case in which disclosure is ordered is unlikely to make it to the court of appeals after final judgment. A litigant facing a disclosure order often will feel extreme pressure to settle rather than comply with the order, especially where there is an asymmetry between the plaintiff's interest in the particular case and the defendant's broader interest in other related litigation in which the disputed information may be relevant. As the present case illustrates, these privilege decisions do not occur in a vacuum. Rather, the privilege holder may be embroiled in extensive and high-stakes litigation involving other parties (such as the *Williams* class action against petitioner), and disclosure in one case may have dramatic spillover effects in other cases. To contain the damage caused by the disclosure order to the case at hand, the privilege holder may have little choice but to preempt the disclosure order by settling that case, regardless of its merits.

Second, and relatedly, even if the privilege holder resists the pressure to settle and takes a final-judgment appeal, the court of appeals can provide redress only in that particular case and is powerless

to remedy the ripple effects that already have been suffered in other cases not before it. *See, e.g., In re Qwest Communications, Int'l*, 450 F.3d 1179, 183 (10th Cir. 2006) (recognizing in mandamus context that "given the litigation pending outside this court's jurisdiction, normal appellate review could not return the parties to the status quo . . . [and] review after production would essentially be meaningless"). In short, relegating privilege holders to final-judgment appeals would mean, in practice, that most disclosure orders would go unreviewed and that adequate relief often would not be available even in the few cases that are reviewed.

These concerns are exemplified by the context of the cases in which the Third, Ninth, and D.C. Circuits have held that *Cohen* appeals are permitted. Each case involved high-stakes litigation in which the privilege holder could not have secured adequate relief if review had been postponed until after final judgment.

In *Ford Motor Co.*, the plaintiff who obtained the disclosure order was but one claimant alleging that Ford was liable for a rollover fatality purportedly caused by safety issues associated with Ford's Bronco II. *Ford Motor Co.*, 110 F.3d at 956. More than 700,000 claimants were part of class-action and multi-district litigation involving similar claims. *See In re Ford Motor Co. Bronco II Prods. Liability Litig.*, No. 94-MD-991 (E.D. La.). The assertedly privileged material at issue in the Third Circuit appeal was "two groups [of documents] — minutes of a meeting attended by top-level executives of Ford Motor Company regarding the Bronco II, and

agendas for a discussion of the technical characteristics of the Bronco II." *Ford Motor Co.*, 110 F.3d at 956. These documents related to legal and business decisions concerning the Bronco II's safety and reflected the fact that Ford "had concerns about the Bronco II" in the early stages of its development. *Id.* at 966. In deciding how to proceed in the particular case before the Third Circuit, Ford thus had to take account the enormous mass of related litigation in which the disputed material was relevant. If immediate review had not been permitted, it blinks reality to imagine that Ford would have complied with the disclosure order and litigated that case to final judgment in order to preserve its privilege appeal, rather than settle — at a substantial premium having nothing to do with the underlying merits of the suit — in order to avoid the exponentially greater harm that would be caused by disclosure. It is even harder to imagine how, if Ford somehow had pursued its privilege claim after disclosure and final judgment, the court of appeals could have done anything to provide redress remotely adequate to account for the damage caused in 700,000 related cases.

The *Philip Morris* privilege dispute involved similar dynamics. In that case, perhaps the "the largest piece of civil litigation ever brought," *United States v. Philip Morris USA, Inc.*, No. 1:99-cv-02496-GK (D.D.C.), slip op. at 15 (Sept. 8, 2006), the D.C. Circuit stayed an order compelling disclosure of the "Foyle Memorandum," a document that allegedly showed an intent to hide relevant documents from the public. *See* 314 F.3d at 615-16. The stakes were extremely high in the *Philip Morris* case itself, but

the effect of the disclosure order would have been magnified greatly by the existence of countless other tobacco cases in courts around the nation involving similar issues and billions in damage claims.

In the *Napster* litigation as well, the privilege dispute arose in the context of quintessential bet-the-company litigation involving multi-district copyright infringement claims that threatened to (and did) shut down Napster, as well as fraud claims against Bertelsmann, Napster's lender. *See* 479 F.3d at 1083. If the assertedly privileged material had been disclosed, it likely would have had dramatic consequences both with respect to Bertelsmann, the privilege holder, and to Napster.

As these cases illustrate, the ripple effects of compelled disclosure of assertedly privileged information often will make appellate review after final judgment a wholly unrealistic option. For these litigants, it is an immediate appeal or nothing. Even putting aside the fundamental point that the privilege is a privilege against disclosure and as such cannot be vindicated even in principle by post-disclosure review, these practical considerations demonstrate that a final-judgment appeal is not adequate even to vindicate the interest in avoiding liability flowing from an erroneous disclosure order.[5]

---

[5] Post-disclosure appeal is not adequate even in the narrower sense of ensuring that the privilege holder is not subjected to liability in the case at hand as a consequence of an erroneous disclosure order. Although the court of appeals can set aside a liability judgment and forbid use of the privileged material on remand, the court of appeals cannot erase the erroneously-disclosed material from the minds of the parties or their

Because both "the legal and practical value [of the attorney-client privilege] would be destroyed if it were not vindicated before trial," interlocutory appeal should be permitted. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989) (internal quotation omitted).

2. Appeal of a Contempt Order is Not a Viable, Let Alone An Effective, Form of Review.

The Eleventh Circuit also suggested that the collateral order doctrine did not apply because petitioner "*may*" have had an effective avenue of review if it "refuse[d] to comply with the order and contest[ed] its validity after being cited for contempt." Pet. App. 13a. But the "contempt route" fares no better than the final-judgment appeal route as a means for effective appellate review of a disclosure order.

In reality, the supposed contempt alternative is no alternative at all: it has been effectively foreclosed by this Court's decisions. "The rule is

---

counsel. *See, e.g., Ford Motor Co.*, 110 F.3d at 963 ("'[A]ttorneys cannot unlearn what has been disclosed to them in discovery'; they are likely to use such material for evidentiary leads, strategy decisions, or the like.") (quoting *Chase Manhattan Bank*, 964 F.2d at 165); *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005). Moreover, evaluating whether an erroneous disclosure order amounted to prejudicial error would be no simple matter. Even a court that attempted to bar any use of the privileged information, *see* Pet. App. 8a-9a, likely would find it "impossible . . . to sort out and redress the harm caused by the incorrect disclosure." *Philip Morris*, 314 F.3d at 619.

settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt." *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) (citing *Doyle v. London Guar. & Accident Co., Ltd.*, 204 U.S. 599 (1907); *In re Christensen Eng'g Co.*, 194 U.S. 458 (1904); *Hayes v. Fischer*, 102 U.S. 121 (1880); *Worden v. Searls*, 121 U.S. 14 (1887)); *see also Philip Morris*, 314 F.3d at 620 ("In this circuit, however, it is settled that a civil contempt citation is not appealable as a collateral order."); *Powers v. Chicago Transit Authority*, 846 F.2d 1139, 1142 (7th Cir. 1988) ("So long as *Fox* and *Doyle* define the meaning of a 'final decision' under § 1291, an order holding a party in civil contempt for failure to reveal information to the district court is not appealable.").

The Eleventh Circuit's tentative suggestion that a party "*may*" have a right to appeal a certain class of contempt orders that impose "a fine or penalty . . . that may not be avoided by some form of compliance" — *i.e.*, a "*noncontingent*" sanction — is inconsistent with *Fox*. Pet. App. at 13a (quotation omitted). The *Fox* Court held that the would-be appellant could not challenge even his non-contingent $10,000 contempt sanction by way of direct appeal. *Fox*, 299 U.S. at 108. So long as *Fox* and *Doyle* remain good law — and no one suggests that this case presents any occasion to re-examine them[6] — it is settled that the

---

[6] This Court has recognized exceptions to the rule of *Fox* and *Doyle* in certain specific contexts, but the Court has never

only form of contempt giving rise to an immediate appeal is a punishment for *criminal* contempt. Thus, the Eleventh Circuit's potential alternative avenue of review is illusory.

Needless to say, the possibility of appeal of a criminal contempt finding is not an effective alternative route to appellate review. A party in petitioner's position that wishes to obtain timely appellate review of a disclosure order cannot know whether its non-compliance will lead to criminal contempt or to a non-appealable sanction such as civil contempt. Indeed, in the context of an order compelling a party with at least a colorable legal basis to resist to take some action, civil rather than criminal contempt would appear to be the appropriate sanction. *See, e.g., U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988) ("If either of the two orders appears efficacious, the better practice is to enter civil contempt to persuade a party to comply, reserving the more drastic, punitive sanction only if

---

called their basic holding into question. *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 7 (1941) (accepting appeal from civil commitment order without expressly addressing appellate jurisdiction); *Cobbledick v. United States*, 309 U.S. 323, 327 (1940) (permitting appeal of contempt order against non-party grand jury subpoena recipient). *But cf. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (stating in dictum, citing *Cobbledick*, that "in the rare case when appeal after final judgment will not cure an erroneous discovery order, a 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").

disobedience continues.") (citation omitted). And non-contempt sanctions are within the district court's discretion as well "and are therefore not reliable avenues to appeal." *Philip Morris*, 314 F.3d at 620. In addition, it would be more than passing strange to create a system where a litigant has an incentive to seek out criminal contempt as the only route to appellate review.

For these reasons, the court below erred in relying on the possibility that contempt could be a substitute for appeal under *Cohen*. Other courts disallowing immediate appeals have made similar errors. *See Philip Morris*, 314 F.3d at 620 (stating that "[a]t least some of the holdings [rejecting appeal under *Cohen*] are based in part upon the assumption that disobedience may lead to a contempt citation that would itself be an appealable order"). When this erroneous reliance on contempt is laid bare, it is even more obvious that there is no adequate alternative to permitting immediate appeal of orders compelling disclosure of assertedly privileged material.

II. RECOGNIZING THE RIGHT TO APPEAL ORDERS COMPELLING DISCLOSURE OF ASSERTEDLY PRIVILEGED MATERIAL WILL NOT LEAD TO A FLOOD OF LITIGATION.

In refusing to allow immediate appeal of disclosure orders, the court below and other courts have expressed fears about opening the proverbial floodgates and engendering substantial appellate litigation over countless discovery orders. Pet. App. at 13a ("A potentially large volume of appeals may

arise out of such discovery orders, and, thus there are powerful prudential reasons to avoid commonplace interlocutory appeals."); *see also Reise*, 957 F.2d at 295. The court below did not substantiate this concern, even though it is readily subject to empirical verification or disproof. The Third, Ninth, and D.C. Circuits each permit this class of interlocutory appeals, and so each presents a ready context in which to test the floodgates concern. Their experience clearly demonstrates that there is no need to fear a flood of new litigation.

As measured by the available published and unpublished decisions of the Third, Ninth, and D.C. Circuits, the floodgates concern appears to be entirely unfounded.[7] The results are striking: even in the circuits where the gates have been open, there has been only a trickle of interlocutory appeals.

The first of the courts of appeals to clearly permit direct appeals of orders vitiating the attorney-client privilege was the Third Circuit. In the 12 years since issuing its opinion in *Ford Motor Co.* in May

---

[7] To conduct this research, counsel searched the relevant Westlaw and LexisNexis databases using the search terms "interlocutory appeal" OR "collateral order" (appearing anywhere within the opinion), with a date range of the dates of decision in *Ford Motor Co.*, *Philip Morris*, and *Napster*, respectively, to the present. Counsel also limited the search to those decisions that used the word "privilege." Additionally, counsel searched the databases for these three circuits for decisions citing *Ford Motor Co.*, *Philip Morris*, and *Napster*, respectively. Counsel then reviewed the search results to determine whether the decision involved an interlocutory appeal of an attorney-client privilege determination.

1997, that court has issued only *six* decisions where a party sought immediate review of such an order. *See In re Teleglobe Commc'n Corp.*, 493 F.3d 345 (3d Cir. 2007); *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007); *In re Cendant Corp. Securities Litig.*, 343 F.3d 658 F.3d 658 (3d Cir. 2003) (work product); *Montgomery County v. Microvote Corp.*, 175 F.3d 296 (3d Cir. 1999); *Newman v. General Motors Corp.*, No. 06-2473, 228 Fed. Appx. 245 (3d Cir. June 20, 2007); *Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C.*, No. 01-4517, 57 Fed. Appx. 58 (3d Cir. Jan. 27, 2003).[8]

By way of comparison, during this same time period, the Third Circuit has issued approximately

---

[8] Additionally, the Third Circuit has dismissed appeals under the collateral order doctrine in six cases where a party sought review of an order involving a different type of privilege. *See In re Carco Elec.*, 536 F.3d 211 (3d Cir. 2008) (dismissing appeal of order granting trade secrets protection); *In re Flat Glass Antitrust Litig.*, 288 F.3d 83 (3d Cir. 2002) (dismissing appeal of order compelling production of attorney work-product documents from non-party where non-party had not been held in contempt); *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001) (dismissing appeal of order compelling discovery from state legislators); *Bacher v. Allstate Ins. Co.*, 211 F.3d 52 (3d Cir. 2000) (dismissing appeal of order requiring disclosure of sensitive confidential (but not privileged) information regarding settlement amounts); *Wexco Inds. v. ADM21 Co. LTD*, Nos. 05-4853, 05-5174, 260 Fed. Appx. 450, 450 (3d Cir. Jan. 9, 2008) (dismissing appeal because it did not "immediately implicate the disclosure of any documents purportedly protected by the attorney-client privilege"); *In re Horn*, No. 04-9017, 185 Fed. Appx. 199 (3d Cir. June 23, 2006) (dismissing appeal of order granting access to prosecutor's jury selection notes in habeas corpus proceeding).

78 written decisions in interlocutory appeals from the denial of qualified or absolute immunity under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).[9] This represents a thirteen-to-one ratio between the numerosity of interlocutory appeals in these different procedural contexts. Thus whether measured in absolute (six) or relative (1/13th) terms, the floodgate problem has been non-existent in the Third Circuit.

The D.C. Circuit has permitted this class of direct appeals since at least January 2003, when it issued an emergency stay in *Philip Morris*. Notably, the D.C. Circuit's decision in *Philip Morris* is broader than the decision in either *Napster* or *Ford Motor* because the court held that any order which has the *effect* of compelling disclosure of attorney-client-privileged materials is directly appealable. *Philip Morris*, 314 F.3d at 618 ("A decision defining the contours of a waiver of privilege is no less 'important' for *Cohen* purposes than a ruling on the contours of the privilege itself.").[10] Nevertheless, since the

---

[9] To determine the prevalence of interlocutory appeals under *Mitchell* in the time since the Third Circuit decided *Ford Motor Co.*, counsel searched the Westlaw and LexisNexis databases of that court's published and unpublished decisions since May 2, 1997 for the terms "qualified immunity" or "*Mitchell v. Forsyth.*" This search netted 327 results on Westlaw and 329 results on LexisNexis. Counsel then reviewed the search results to determine whether the decision involved an appeal of the denial of a motion to dismiss or for summary judgment based on immunity.

[10] More specifically, the D.C. Circuit's decision considered an order compelling disclosure of privileged materials as a result of alleged discovery abuse — failure to disclose or log a

Philip Morris decision in 2003, the D.C. Circuit has decided only *one* other appeal involving a challenge to an order compelling disclosure of attorney-client privileged materials — and that appeal arose in the same case and addressed the same Foyle Memorandum. *See United States v. British American Tobacco (Investments), LTD.*, 387 F.3d 884 (D.C. Cir. 2004).[11]

---

presumptively privileged communication — and thus implicates a broader class of orders than directly at issue here. *See Philip Morris*, 314 F.3d at 618. The Court need not decide in the present case whether orders compelling disclosure of privileged material as a sanction for discovery misconduct should be treated the same as orders compelling disclosure of assertedly privileged material based on a substantive, non-discretionary conclusion about the merits of a privilege claim.

[11] The D.C. Circuit has also issued five other decisions that could be loosely described as pertaining to compelled disclosure of privileged materials generally, but not the attorney-client privilege specifically. *See United States v. Rayburn House Office Building, Room 2113*, 497 F.3d 654 (D.C. Cir. 2007) (considering appeal of congressman's motion for return of seized privileged legislative materials); *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007) (considering denial of plaintiff's motion to quash subpoenas for his psychoanalyst's records); *In re Sealed Case (Medical Records)*, 381 F.3d 1205 (D.C. Cir. 2004) (considering appeal of non-party whose medical records were compelled in litigation); *In re England*, 375 F.3d 1169 (D.C. Cir. 2004) (considering direct appeal of order compelling disclosure of military selection and promotion board); *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003) (dismissing appeal under collateral order doctrine where appellant asserted that separation of powers excused him from having to assert executive privilege to avoid production of documents), *rev'd sub nom. Cheney v. U.S. Dist. Ct. for Dist. of Columbia,* 542 U.S. 367 (2004). As observed in footnote 2, *supra*, the Court need not consider

The Ninth Circuit has permitted this class of direct appeals since at least March 2007, when the court decided *Napster*.[12] In the two years since the *Napster* decision, the court has issued only *one* decision reviewing an order related to a claim of attorney-client privilege, *Truckstop.net LLC v. Sprint Corp.*, 547 F.3d 1065, 1068 (2008).[13]

---

whether other privileges should be treated identically to the attorney-client privilege for purposes of allowing immediate appeal.

[12] Immediate appeal of this class of orders was arguably available under Ninth Circuit caselaw even before *Napster*, but the availability of such review was not crystal clear. *See United States v. Griffin*, 440 F.3d 1138, 1142 (9th Cir. 2006) (permitting appeal of order vitiating marital privilege); *Agster*, 422 F.3d at 838 (considering appeal of order requiring disclosure of materials allegedly protected by peer-review privilege, but limiting conclusion that appeal is proper to "the specific circumstances of this case"); *Bittaker v. Woodford*, 331 F.3d 715, 717-18 (9th Cir. 2003) (en banc) (considering appeal of protective order sought to protect disclosure of privileged materials in a habeas corpus ineffective assistance of counsel challenge).

[13] *Truckstop.net* underscores that, to be effective, appellate review must occur before privileged material is disclosed. In that case, a party inadvertently disclosed privileged material and sought to appeal the district court's subsequent decision concerning how much of the disclosed material could be retained by the opposing party. Precisely because it was too late, post-disclosure, to provide an effective remedy for the loss of the privilege, the Ninth Circuit dismissed the appeal. *See* 547 F.3d at 1068 ("irreparable harm from the disclosure of the allegedly privileged material has already taken place when the material has been inadvertently disclosed").

In short, in the 12 years since the Third Circuit first applied the collateral order doctrine to this class of orders, there have been a total of *eight* decisions on direct appeals of orders compelling disclosure of assertedly attorney-client privileged materials. Thus, while the court below feared a flood, empirical research shows barely a trickle. And with concerns about an inundation of interlocutory appeals properly set aside, it is clear that the *Cohen* factors point uniformly to allowing interlocutory appeal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY S. BUCHOLTZ
MERRITT E. MCALISTER
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
202-737-0500

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

Of Counsel:

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062