No. 18-622

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,

v.

TEXAS CATHOLIC CONFERENCE OF BISHOPS,
Respondent.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:
JUDITH RESNIK
127 Wall Street
New Haven, CT 06511

STEPHEN I. VLADECK
Counsel of Record
727 E. Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

PRISCILLA SMITH
319 Sterling Place
Brooklyn, NY 11238

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The a*mici curiae* listed in the Appendix are law professors who teach and write about the federal courts, the structure of adjudication and appellate procedure, and/or evidentiary privileges within the federal system. Having immersed ourselves in the statutes and case law governing interlocutory appellate jurisdiction in the federal courts in the decades since *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), *amici* believe that the final judgment rule continues to play an essential role in the federal courts by enabling appellate review when necessary, by preserving scarce judicial resources through the promotion of efficient litigation, and by protecting the respective roles of the Article III district courts and courts of appeals. We come together here to explain why the Fifth Circuit's ruling in this case is at odds with those precedents and principles, and why we believe this Court should grant the Petition and reverse the decision below.

SUMMARY OF ARGUMENT

In *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009), this Court unanimously held that disputes over "privilege-related disclosure orders" are not appropriately subject to immediate,

[1] The parties have consented to the filing of this brief. Counsel for Petitioners and Respondents received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person other than the *amici* or their counsel made a monetary contribution to its preparation or submission.

interlocutory appeal under the narrowly circumscribed collateral order doctrine. *Id*. at 112; *see id*. at 119 (Thomas, J., concurring in part and concurring in the judgment). This was so, the Court explained, because "collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege." *Id*. at 108 (majority opinion). Instead, most such orders are generally subject to effective appellate review after final judgment. *Id*. at 109–10. In contrast, *Cohen* facilitates interlocutory appellate review only of those orders that, when taken as a class, are effectively unreviewable after final judgment—such as denials of claims to be immune from suit. *See, e.g.*, *Osborn* v. *Haley*, 549 U.S. 225, 238–39 (2007).

Mohawk directly addressed whether privilege-related disclosure orders would meet that standard. This Court held that, even if a specific order might produce "particularly injurious or novel" effects that would not be effectively reviewable after final judgment, such a possibility did not justify expansion of the collateral order doctrine. Not only has Congress provided one statutory "safety valve" for such cases through the certification procedure codified in 28 U.S.C. § 1292(b), but "in extraordinary circumstances—*i.e.*, when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice—a party may petition the court of appeals for a writ of mandamus." *Id*. at 111 (quoting *Cheney* v. *U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 390 (2004) (alteration in original)).

Until the ruling below, every court of appeals—including the Fifth Circuit—had properly understood

Mohawk's conclusions: Disclosure-related discovery disputes do not satisfy the collateral order doctrine, and any "particularly injurious or novel" rulings can be redressed, where appropriate, through the safety valves provided by § 1292(b) and mandamus. *See also In re United States*, 138 S. Ct. 443 (2017) (per curiam) (issuing a writ of mandamus in response to objections about the novel scope of discovery).

In this case, Respondent Texas Conference of Catholic Bishops (TCCB) has asserted that the third-party subpoena issued by the district court is subject to appeal as of right—because disclosure of the subpoenaed material would have impaired, *inter alia*, "the church autonomy guarantees of the Religion Clauses of the First Amendment." App. of Tex. Conf. of Catholic Bishops at 2 (U.S. Nov. 30, 2018). But TCCB declined to pursue interlocutory appellate review of its claim through either § 1292(b) or mandamus. *See Whole Woman's Health* v. *Smith*, 896 F.3d 362, 378 (5th Cir. 2018) (Costa, J., dissenting).[2] Instead, it invoked the Fifth Circuit's jurisdiction under 28 U.S.C. §§ 1291 and 1292(a).

Without addressing § 1292(a), the Fifth Circuit held that the district court's order was appealable under § 1291 under the collateral order doctrine, and purported to distinguish *Mohawk* by noting that

[2] After *in camera* review of the material at issue, both the magistrate and district judges concluded that the relevant communications "have no religious focus, do not discuss church doctrine or governance, and are more or less routine discussions." *Whole Woman's Health*, 896 F.3d at 377 (Costa, J., dissenting). Even as it repeatedly criticized both the reasoning and the motives of these jurists, the Fifth Circuit did not hold to the contrary. *See id.*

TCCB is not a party to the underlying litigation and/or that it raised a First Amendment objection. *See id.* at 368 (majority opinion). In so holding, the Court of Appeals not only ignored this Court's clear instructions in *Mohawk*, but also the more general understanding that appellate courts "decide appealability for categories of orders rather than individual orders. Thus, we do not now in each individual case engage in ad hoc balancing to decide issues of appealability." *Johnson* v. *Jones*, 515 U.S. 304, 315 (1999) (citation omitted).

Moreover, the Fifth Circuit did not conclude that the district court's disclosure order actually infringed upon any privilege held by TCCB, whether under the First Amendment or otherwise. Instead, the Court of Appeals held only that the third-party subpoena issued by the district court exceeded the scope of its discretion under Fed. R. Civ. P. 45(d). *Whole Woman's Health*, 896 F.3d at 376. In other words, the decision below ended up as a run-of-the-mill—but premature—appeal of a privilege-related disclosure order.

The Fifth Circuit's reliance upon the collateral order doctrine in this case undermines this Court's clear guidance about its scope—and opens the interlocutory appellate door to anyone seeking to challenge a third-party subpoena and to anyone invoking the First Amendment when responding to disclosure orders. Permitting that expansion to stand would lead to a significant increase in interlocutory appeals, undermining the relative roles of the district courts and courts of appeals while taxing already scarce judicial resources.

The collateral order doctrine has, at its core, the wise administration of justice. It limits piecemeal adjudication to those rare classes of orders for which ordinary appellate review will be inadequate to vindicate the injuries caused by trial-court errors. *Mohawk*, 558 U.S. at 108–09. Whatever the strength of TCCB's still-unadjudicated privilege claim, this Court could not have been clearer in *Mohawk* that "the limited benefits of applying 'the blunt, categorical instrument of collateral order appeal' to privilege-related disclosure orders simply cannot justify the likely institutional costs." *Id.* at 112 (quoting *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994)).

That is why this Court "ha[s] not mentioned applying the collateral order doctrine recently without emphasizing its modest scope . . . . And we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Will* v. *Hallock*, 546 U.S. 345, 350 (2006). Because the Fifth Circuit's ruling in this case failed to heed these consistent—and correct—admonitions, the Petition should be granted as to the first question presented,[3] and the decision below should be reversed.

[3] *Amici* take no position on the second question presented in the Petition.

ARGUMENT

I. THE DECISION BELOW CANNOT BE RECONCILED WITH *MOHAWK*

A. The Final Judgment Rule Avoids Piecemeal Litigation and Preserves the Proper Roles of Trial and Appellate Courts Within the Federal System

Throughout the history of the federal courts, the final judgment rule, codified at 28 U.S.C. § 1291, has been a bulwark against unwise expenditure of appellate resources and unnecessary pressure on appellate dockets. *See, e.g.*, *Kerr* v. *U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) ("[P]articularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation."). To that end, "[i]t has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Id*. (quoting *Will* v. *United States*, 389 U.S. 90, 96 (1967)).

More than just a tool for increasing the procedural efficiency of litigation, the final judgment rule serves a substantive function. The rule enables trial courts to work through the numerous issues that can arise during the course of an individual case, allowing appeal only if, at the conclusion of the matter, a party can still claim an injury. If and when such appeals are taken, moreover, the final judgment rule helps to ensure that the appellate court has the benefit of both the specifics of the trial record and

the percolation of the factual and legal particulars to the maximum extent possible under the circumstances. As Justice O'Connor explained for the Court in *Richardson-Merrell* v. *Koller*, "[i]mplicit in § 1291 is Congress' judgment that the district judge has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." 472 U.S. 424, 436 (1985).

The district court's authority to "police the prejudgment tactics of litigants" is implicated all the more when discovery orders are at issue. Both this Court's jurisprudence and the Federal Rules of Civil Procedure have recognized that, as Justice Powell put it, "[t]he district court before which a case is being litigated is in a far better position than a court of appeals to supervise and control discovery and to impose sanctions for its abuse." *ACF Indus., Inc.* v. *EEOC*, 439 U.S. 1081, 1087–88 (1979) (Powell, J., dissenting from the denial of certiorari).

The final judgment rule thus reflects a commitment to informed adjudication at both the trial and appellate levels, and a wise accommodation and acknowledgment of the strategic and tactical incentives parties will often have in litigation. Section 1291 functions to ward off what might otherwise be a deluge of interlocutory appeals—appeals that would unduly burden the courts of appeals, undermine the individual case-management authority of the district courts, and inevitably tilt civil litigation toward the party with greater financial resources. As Justice Marshall put it, this approach

> emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "[avoiding] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." The rule also serves the important purpose of promoting efficient judicial administration.

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368, 374 (1981) (alteration in original; citations omitted); *see also Koller*, 472 U.S. at 430 ("In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'" (citation omitted)).

B. Congress and this Court Have Recognized the Need for Limited and Specific Exceptions to the Final Judgment Rule

Both Congress and this Court have recognized that circumstances may arise in which an appeal after final judgment may be ineffective or inadequate

to remedy the injury caused by a trial court's wrongful order. The classic example is codified at 28 U.S.C. § 1292 (a), which authorizes appeals of interlocutory district court orders that (1) relate to injunctions; (2) appoint receivers or refuse orders to wind up receiverships; and (3) determine rights and liabilities of parties in admiralty cases in which appeals from final decrees are allowed. *See* 28 U.S.C. § 1292(a).

Concerned that § 1292(a) did not cover all of the instances in which exceptions to § 1291's more general bar on interlocutory appeals would be appropriate, Congress in 1958 empowered district courts in certain circumstances to certify additional issues for immediate interlocutory appeal under 28 U.S.C. § 1292(b). The statute puts appellate timing in the hands of those who know the case best, by first requiring litigants to obtain the permission of the district court. An otherwise unappealable order may be appealed "[w]hen a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Congress then gave authority to the courts of appeals, which have discretion to accept or decline the certification. And this Court has construed the scope of the circuit court's jurisdiction should it permit the appeal to be quite broad. *See, e.g.*, *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996) ("[A]ppellate jurisdiction applies to the order certified to the court of appeals, and is not

tied to the particular question formulated by the district court.").[4]

In extraordinary cases in which the district court declines certification or certification is rejected by the court of appeals, but litigants still believe that the trial court breached its nondiscretionary duties, petitions for writs of mandamus remain available under the All Writs Act, 28 U.S.C. § 1651(a), as interpreted by this Court. *See, e.g.*, *Cheney*, 542 U.S. at 380–81. Mandamus relief in turn depends upon a determination that appeal after final judgment will be inadequate to protect the rights of the aggrieved party, *i.e.*, that the alleged injury created by the order under review must be reviewed immediately because it will be effectively un-redressable after further proceedings.

C. The Collateral Order Doctrine is a Carefully Circumscribed Judicial Construction of § 1291

The collateral order doctrine was formally articulated by this Court in *Cohen*, almost a decade *before* Congress enacted § 1292(b).[5] The origins of the

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[4] A few statutes also provide for interlocutory appeals in specific cases, such as the Federal Arbitration Act, which allows an appeal from "an order . . . refusing a stay of any action under section 3 [of the Act]." 9 U.S.C. § 16(a)(1)(A); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 627 (2009). District courts also have discretion under the Federal Rules of Civil Procedure to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties . . . if the court expressly determines that there is no just reason for delay." FED. R. CIV. P. 54(b).

[5] Had § 1292(b) existed at the time *Cohen* was decided, there might have been less of a felt need for the collateral order doctrine in the first place. *See, e.g.*, Tr. of Oral Arg. at 9,

rule can be traced to earlier decisions adopting pragmatic constructions of "finality" under the precursors to § 1291. *See generally* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 557-63 (1932) (describing the range of choices entailed in determinations of "finality" in early twentieth-century case law).

Thus, *Cohen* was an important step in the development of a clear rationale for allowing interlocutory appeals based upon functional (but not formal) finality in particular classes of cases. *See Digital Equip. Corp.*, 511 U.S. at 867 ("The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." (citation omitted)); *see also* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662–63 (1994) ("The need for [interlocutory appeals] must have seemed more pressing with the adoption of procedural rules that lengthened the pretrial process and made it less likely that cases would ever come to trial. One can thus see the collateral order doctrine as a result of the Rules' creating new stages of pretrial process without changing the final judgment rule.").

As this Court would later explain, the class of immediately appealable district court orders under *Cohen* is limited to those that "conclusively determine the disputed question, resolve an

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Mohawk, 558 U.S. 100 (No. 08-678) (Ginsburg, J.) ("[G]iven 1292(b), shouldn't we be particularly reluctant to extend *Cohen* v. *Beneficial* to include a case of a privilege that maybe was wrongfully denied?").

important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); *see also Cohen*, 337 U.S. at 546.

At the heart of the collateral order doctrine is thus an assessment of whether appeals after final judgment would be ineffective or inadequate in all cases to remedy the claimed injury—whether, assuming error by the trial court, the injury caused by the ruling would be functionally unredressable after final judgment. The categories of trial-court rulings this Court has treated as final underscore this point—including orders that criminal defendants be involuntarily medicated for their trial, *see Sell* v. *United States*, 539 U.S. 166 (2003); orders that might subject defendants to a second trial in violation of the Double Jeopardy Clause, *see Abney* v. *United States*, 431 U.S. 651 (1977); and orders rejecting immunity defenses that, if valid, would bar the case from going forward. *See, e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity); *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985) (qualified immunity); *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (Eleventh Amendment immunity); *Osborn*, 549 U.S. 225 (Westfall Act immunity). The essence of a collateral order is thus an "entitlement not to stand trial or face the other burdens of litigation." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (citation and internal quotation marks omitted).

Just as importantly, the collateral order doctrine only encompasses those classes of orders that are functionally unreviewable after final judgment when

that class of orders is taken as a whole. *See, e.g.*, *Digital Equip. Corp.*, 511 U.S. at 868 ("[We] have warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustice' averted, by a prompt appellate court decision." (quoting *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988)) (alteration in original)); *see also Richardson-Merrell*, 472 U.S. at 439 ("This Court . . . has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case [appealability] determination."); *Carroll* v. *United States*, 354 U.S. 394, 405 (1957) ("Appeal rights cannot depend on the facts of a particular case.").[6]

D. *Mohawk* Properly Refused to Extend the Collateral Order Doctrine to "Privilege-Related Disclosure Orders"

In *Mohawk*, this Court applied this understanding to the specific context of "privilege-related disclosure orders," and concluded that the collateral order doctrine should not be extended to encompass such trial-court rulings. 558 U.S. 100. This Court "readily acknowledge[d] the importance of the attorney-client privilege," *id.* at 108, and the

[6] Focusing on the class of orders rather than the facts of the specific case is necessary in any collateral order case, since "[a]llowing appeals of right from non-final orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts, . . . a goal very much worth preserving." *Coopers & Lybrand*, 437 U.S. at 476.

concern that the privilege could, in individual cases, be "irreparably destroyed absent immediate appeal of adverse privilege rulings." *Id.* (citation internal quotation marks omitted).

Nevertheless, Justice Sotomayor's opinion for the Court rightly identified as "[t]he crucial question . . . not whether an interest is important in the abstract," but "whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the *entire class* of relevant orders." *Id.* (emphasis added). So construed, this Court's unanimous answer was "no." *See id.* at 109 ("In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege.").

And for those specific cases in which post-judgment appeals would be inadequate or ineffective, *Mohawk* explained that "litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal," including seeking certification under § 1292(b), filing a petition for a writ of mandamus under § 1651, or defying the order and appealing the court-imposed sanctions that follow. *Id.* at 111–12. Thus, this Court concluded that "sufficiently effective review of adverse attorney-client privilege rulings can be had without resort to the *Cohen* doctrine." *Id.* at 113. As Judge Costa explained in his dissent below, the same is true of the third-party subpoena at issue here. *See Whole Woman's Health*, 896 F.3d at 377–78 (Costa, J., dissenting).

Mohawk also emphasized a distinct point that the decision below did not discuss: Judicial extensions of the collateral order doctrine are especially inappropriate today in light of "the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." 558 U.S. at 113 (quoting *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 48 (1995)). Thus, "[a]ny further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides." *Id*. at 114. As Justice Thomas explained in his opinion concurring in the judgment,

> This [legislative] determination is entitled to our full respect, in deed as well as in word. Accordingly, I would leave the value judgments the Court makes in its opinion to the rulemaking process, and in so doing take this opportunity to limit—effectively, predictably, and in a way we should have done long ago—the doctrine that, with a sweep of the Court's pen, subordinated what the appellate jurisdiction statute says to what the Court thinks is a good idea.

Id. at 119 (Thomas, J., concurring in part and concurring in the judgment). *Mohawk* thus not only shut the door on expanding the collateral order doctrine to encompass privilege-related disclosure orders in discovery, but more generally imposed an exceptionally high bar on expanding the doctrine through *any* judicial decision—rather than through rulemaking or statute.

Until this case, the lower courts had received the message. Even in cases presenting a "particularly injurious or novel" ruling demanding immediate intervention, every circuit has held that the proper remedy is to resort to the safety valves of § 1292(b) certification or mandamus.[7] However, and like the Petitioner in *Mohawk*, *see id*. at 111 n.3 (majority opinion), TCCB did not pursue either of these avenues.

E. This Case is Indistinguishable from *Mohawk*

In shoehorning TCCB's appeal into the collateral order doctrine, the Fifth Circuit identified two reasons why it believed that *Mohawk* is distinguishable. Neither is availing.

First, the Fifth Circuit attempted to distinguish *Mohawk* on the grounds that TCCB is a non-party "whose claims to reasonable protection from the

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[7] *See, e.g.*, *United States* v. *Gorski*, 807 F.3d 451, 458 (1st Cir. 2015); *S.E.C.* v. *Rajaratnam*, 622 F.3d 159, 168 (2d Cir. 2010); *N.J. Dep't of Treasury* v. *Fuld*, 604 F.3d 816, 820–21 (3d Cir. 2010); *United States* v. *Meyers*, 593 F.3d 338, 347 (4th Cir. 2010); *In re Deepwater Horizon*, 793 F.3d 479, 490–91 (5th Cir. 2015); *Swanson* v. *Desantis*, 606 F.3d 829, 832–33 (6th Cir. 2010); *JP Morgan Chase Bank, N.A.* v. *Asia Pulp & Paper Co.*, 707 F.3d 853, 869 (7th Cir. 2013); *Alpine Glass, Inc.* v. *Country Mut. Ins. Co.*, 686 F.3d 874, 879 & n.4 (8th Cir. 2012); *Metabolic Research, Inc.* v. *Ferrell*, 693 F.3d 795, 802–03 (9th Cir. 2012); *United States* v. *Copar Pumice Co.*, 714 F.3d 1197, 1205 (10th Cir. 2013); *Drummond Co.* v. *Terrance P. Collingsworth, Conrad & Scherer, LLP*, 816 F.3d 1319, 1326 (11th Cir. 2016); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (Kavanaugh, J.); *Waymo LLC* v. *Uber Techs., Inc.*, 870 F.3d 1350, 1357–58 (Fed. Cir. 2017).

courts have often been met with respect." *Whole Woman's Health*, 896 F.3d at 367–68. But mandamus review is just as available to nonparties as it is to parties—and their claims are also "met with respect." *Id.* at 378 (Costa, J., dissenting).

Indeed, following *Mohawk*, every other circuit to reach the issue has specifically required nonparties *as well as* parties seeking to resist discovery to pursue mandamus relief rather than interlocutory appeal through the collateral order doctrine. *See, e.g.*, *Drummond Co.*, 816 F.3d at 1326; *Copar Pumice Co.*, 714 F.3d at 1205; *Ott* v. *City of Milwaukee*, 682 F.3d 552 (7th Cir. 2012); *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 478 (10th Cir. 2011); *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015). Mandamus review for nonparties serves the same function as it does for parties—protecting the institutional interests of the courts while providing a "safety valve" for the small subset of cases in which extraordinary appellate intervention is nevertheless appropriate.

Second, the Fifth Circuit asserted that the assertion of a First Amendment privilege by TCCB also distinguishes this case from *Mohawk*. To that end, it cited several prior rulings in which it had allowed collateral order review of interlocutory court orders bearing on the First Amendment. *See Whole Woman's Health*, 896 F.3d at 368. But none of those cases involved the kind of privilege-related challenge to a disclosure order at issue in *Mohawk* and here.

Instead, the prior Fifth Circuit cases involved whether challenges to prior restraints, denials of anti-SLAPP dismissals, or rejections of press access

to judicial proceedings were immediately appealable collateral orders. *See, e.g.*, *Marceaux* v. *Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 490 (5th Cir. 2013); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168 (5th Cir. 2011); *Henry* v. *Lake Charles Am. Press, LLC*, 566 F.3d 164, 180–81 (5th Cir. 2009). Each of those rulings is consistent with *Cohen* because they involve trial-court rulings that, if erroneous, will inflict injuries that are effectively un-redressable on post-judgment appeal in *all* cases, rather than in cases that a particular appellate panel deems to be "exceptional."

Amici do not dispute the potential importance of TCCB's privilege claim—on which the Fifth Circuit based its collateral order analysis below. But there is a reason why importance is only one of the four factors this Court identified in *Cohen*. And even there, the Fifth Circuit did not conclude that the district court's third-party subpoena infringed upon such a privilege. Instead, the Court of Appeals invoked the *potential* First Amendment implications of the subpoena and "the doctrine of constitutional avoidance," 896 F.3d at 370, to justify finding that the subpoena constituted an abuse of discretion under Rule 45(d). That kind of jurisdictional bootstrapping is not only inconsistent with the general contours of the collateral order doctrine, but it also fails to explain how the arguments raised in favor of the collateral order doctrine in this case are different from those this Court rejected in *Mohawk*.

II. IF LEFT INTACT, THE DECISION BELOW WOULD IMPOSE SERIOUS INSTITUTIONAL COSTS ON BOTH LITIGANTS AND THE FEDERAL COURTS

As noted above, this Court has long warned of the institutional costs of unwarranted expansions of the collateral order doctrine. And *Mohawk* specifically emphasized that "the limited benefits of applying 'the blunt, categorical instrument of § 1291 collateral order appeal' to privilege-related disclosure orders simply cannot justify the likely institutional costs." *Mohawk*, 558 U.S. at 112. These costs do not just provide further reason to conclude that the Court of Appeals erred in this case; they underscore the imperative for this Court's intervention—and for reversal of the decision below.

The Fifth Circuit's decision opens the door to interlocutory appeals of routine discovery orders at times when any litigant or a third party asserts a First Amendment privilege to a discovery order. While the caseload burdens of the appellate courts have improved slightly over the past decade, the number of cases filed in the appellate courts in 2017 was about the same as the number of cases filed twenty years ago[8]—a time when appellate caseloads

[8] 50,506 cases were filed in the regional appellate courts in 2017, while 52,319 were filed in the regional appellate courts in 1997. *See* Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts 2017, http://www.uscourts.gov/statistics-reports/judicial-business-2017; Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts 1997, http://www.uscourts.gov/statistics-reports/judicial-business-1997.

were widely considered too high. Numerous studies have warned of the impact of these increased workloads on judicial decisionmaking. *See generally, e.g.*, WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2013).

At the same time, the number of judges on the regional courts of appeals has remained virtually unchanged since 1990. "Whereas in 1950 circuit judges had to review an average of only 73 appeals, their modern counterparts must decide more than four times as many, with an average of 329 appeals per annum today." Marin K. Levy, *Judging Justice on Appeal Injustice on Appeal: The United States Courts of Appeals in Crisis*, 123 YALE L.J. 2386, 2388 (2014). The number of inter-circuit assignments requested of and approved by the Chief Justice has continued to increase,[9] another example of an appellate court system that is stretched too thin.

Most cases that come before the appellate courts today receive no oral argument, are handled mostly by staff attorneys, and end in an unpublished order. *See id.* at 2391. *See generally* RICHMAN & REYNOLDS, *supra.* A flood of interlocutory appeals of discovery orders with assertions of First Amendment privilege would only increase the problems the appellate courts face in giving each case the time and attention

[9] In fiscal year 2017, the Chief Justice approved 223 intercircuit appointments, up 27 percent from 2016. *See* Admin. Office of the U.S. Courts, Activities of the Administrative Office of the U.S. Courts: 2017 Annual Report of the Director, *available at* http://www.uscourts.gov/statistics-reports/federal-bench-annual-report-2017.

it deserves—all the more so in a context in which courts of appeals would be asked to decide potentially momentous constitutional questions on underdeveloped lower-court records. *Cf. Pearson* v. *Callahan*, 555 U.S. 223, 241 (2009).

An expansion of the collateral order doctrine to include discovery orders that rejected constitutional privilege claims (and, potentially, *all* privilege claims by non-parties) would also unduly burden the federal district courts, which have faced growing workloads in recent years.[10] As *Mohawk* recognized, "[p]ermitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation . . . ." 558 U.S. at 112–13. The same would necessarily follow for all discovery rulings adverse to third-parties and/or privileges derived from constitutional considerations.

Moreover, as Justice Sotomayor wrote for this Court in *Mohawk*, judicially compelled disclosure of potentially privileged information can come in many forms, which is all the more reason why privilege-related disclosure orders make for a singularly inappropriate extension of the collateral order doctrine—and why the Fifth Circuit's decision in this case would risk converting that exception *from* the final judgment rule into the new rule going forward.

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[10] 344,787 cases were filed in the federal district courts in 2017, compared to the 272,027 that were filed in the federal district courts in 1997. *See* Judicial Business of the United States Courts 2017, *supra*; Judicial Business of the United States Courts 1997, *supra*.

District courts have long exercised substantial discretion in deciding the scope of discovery and in ensuring efficient case management. Given that appellate courts already face significant burdens from appeals *after* final judgments, having an odd-lot set of discovery orders subject to interlocutory appellate review going forward would both increase caseloads and put circuit judges in the difficult position of trying to resolve cases while the record is still evolving below. At a more basic level, it would undercut the core institutional distinctions between trial and appellate courts in the federal system. *See, e.g.*, *Firestone Tire & Rubber Co.*, 449 U.S. at 378 ("Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291.").

Finally, TCCB cannot claim that it had no other mechanism for seeking appellate review of district court orders that allegedly infringed upon a constitutionally protected privilege or otherwise violated a nondiscretionary duty. Since *Mohawk*, lower courts have repeatedly granted mandamus relief to correct district court errors in cases presenting discovery orders that truly were "extraordinary," and in which ordinary appellate relief was likely to be ineffective to redress the injury. *See, e.g.*, *In re The City of New York*, 607 F.3d 923 (2d Cir. 2010); *In re Petition of Boehringer Ingelheim Pharm., Inc., & Boehringer Ingelheim Int'l GmbH, in Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, 745 F.3d 216 (7th Cir. 2014); *In re Mo.*

Dep't of Corr., 839 F.3d 732 (8th Cir. 2016); *Hernandez* v. *Tanninen*, 604 F.3d 1095 (9th Cir. 2010); *In re Perez*, 749 F.3d 849 (9th Cir. 2014); *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015); *In re United States*, 678 F. App'x 981 (Fed. Cir. 2017); *In re KBR*, 756 F.3d at 762–63. Just last Term, this Court took the unusual step of issuing similar relief. *See In re United States*, 138 S. Ct. at 445 ("[T]he District Court may not compel the Government to disclose any document that the Government believes is privileged without first providing the Government with the opportunity to argue the issue.").

And as recently as this February, the Fifth Circuit likewise recognized mandamus as the appropriate vehicle for reviewing district court discovery orders purporting to inflict injuries that could not meaningfully be redressed through post-judgment appeal. *In re Itron, Inc.*, 883 F.3d 553, 567–68 (5th Cir. 2018). *See generally* Danny S. Ashby, David Coale, and Christopher D. Kratovil, *The Increasing Use and Importance of Mandamus in the Fifth Circuit*, 43 TEX. TECH L. REV. 1049, 1050 (2011) ("The current trend in the Fifth Circuit towards the increased issuance of writs of mandamus commenced in 2003 and continues through the present."). But for whatever reason, TCCB did not seek a writ of mandamus from the Fifth Circuit, even though "that is the avenue for appellate relief [it] originally planned to pursue." *Whole Woman's Health*, 896 F.3d at 378 (Costa, J., dissenting).

* * *

Like the Fifth Circuit, *amici* take no position on whether the district court's third-party subpoena in fact violates the rights of TCCB or its members under the First Amendment or any other federal law. The critical points for present purposes are that such a fact-bound privilege determination was properly for the district court in the first instance, and that, even if the district court erred, case-specific routes to interlocutory review were available to TCCB—but were not utilized. If this Court still intends to keep the collateral order doctrine "narrow and selective in its membership," *Will*, 546 U.S. at 350, the decision below should not be allowed to stand.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the Petition and reverse the decision below.

Respectfully submitted,

Of Counsel:
JUDITH RESNIK
127 Wall St.
New Haven, CT 06511

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

PRISCILLA SMITH
319 Sterling Place
Brooklyn, NY 11238

Counsel for Amici Curiae

December 14, 2018

APPENDIX

List of *Amici Curiae* Law Professors[11]

JANET COOPER ALEXANDER
Frederick I. Richman Professor of Law, Emerita
Stanford Law School

BENJAMIN BARTON
Helen and Charles Lockett Distinguished Professor of Law
University of Tennessee, Knoxville College of Law

ERWIN CHEMERINSKY
Dean and Choper Distinguished Professor of Law
University of California, Berkeley School of Law

JUDITH RESNIK
Arthur Liman Professor of Law
Yale Law School

ELIZABETH SCHNEIDER
Rose L. Hoffer Professor of Law
Brooklyn Law School

ANDREW M. SIEGEL
Associate Professor of Law
Seattle University School of Law

MICHAEL E. SOLIMINE
Donald P. Klekamp Professor of Law
University of Cincinnati College of Law

[11] Institutional affiliations are provided for identification purposes only.

JOAN E. STEINMAN
University Distinguished Professor, Emerita
Professor of Law, Emerita
Chicago-Kent College of Law

JAY TIDMARSH
Judge James J. Clynes, Jr., Professor of Law
Notre Dame Law School

STEPHEN I. VLADECK
A. Dalton Cross Professor in Law
University of Texas School of Law

HOWARD M. WASSERMAN
Professor of Law
FIU College of Law