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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

REPLY BRIEF

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RULE 29.6 STATEMENT

The corporate disclosure statement in the Petition for a Writ of Certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The question presented in this case is whether, under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a party can immediately appeal a district court's order finding waiver of the attorney-client privilege and compelling the production of privileged information. Rather than address the question on which this Court granted certiorari, Carpenter literally rewrites the question presented, and at various points attempts to recast it to include immediate appeals of all pre-trial discovery rulings, all privilege rulings, and all attorney-client privilege rulings.

Carpenter's expansive treatment of the question presented is no accident. By broadening the category of cases at issue, Carpenter frees himself to argue against the application of *Cohen* to a broader and different category because his arguments otherwise falter on the actual question presented. Thus, rather than addressing the propriety of allowing an immediate appeal of an order compelling the production of attorney-client privileged information on the basis of a finding of waiver, Carpenter repeatedly substitutes other categories of orders. This effort distracts from the important issue in this case.

Carpenter argues that his alteration of the question presented is justified by this Court's instruction that collateral order jurisdiction is determined based on categories of cases and not the facts of any given case. *See e.g.*, *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) ("the issue of appealability under

[28 U.S.C.] § 1291 is to be determined for the entire category to which a claim belongs"). Carpenter's repeated arguments concerning general discovery orders, orders denying the existence of the attorney-client privilege, and orders involving other unrelated privileges simply obfuscates the proper delineation of the "category" at issue in this case and calls for the Court to reach an unnecessarily broad question without a disciplined adherence to the legal issue and context of the case before it. This is not a case about the existence of the attorney-client privilege, the importance of other unrelated privileges, or whether it is wise to permit the appeals of "discovery" orders generally.

Notably, this Court has resisted the overly broad (and advisory opinion prone) approach suggested by Carpenter and has instead limited its collateral order jurisdiction analysis to the legal issue presented by the district court order from which appeal is sought. *See, e.g., Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 n.8 (1981) ("The Court of Appeals also stated that orders *granting* motions to disqualify counsel would be appealable under § 1291. That question is not presented by the instant petition, and we express no opinion on it . . . [or] whether an order denying a disqualification motion in a criminal case would be appealable . . ." (emphasis in original)); *Flanagan v. United States*, 465 U.S. 259, 260 (1984) (resolving immediate appeal question with respect to orders granting disqualification motions in criminal cases only); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440 (1985) (resolving immediate appeal question with respect to orders granting disqualification motions in civil cases). The sensibility of this approach is

demonstrated by the fact that the *Cohen* analysis sometimes results in different conclusions with respect to different categories of cases within a single area of the law. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985) (permitting collateral order review for a category of denials of motions to dismiss or motions for summary judgment in qualified immunity cases); *Johnson v. Jones*, 515 U.S. 304 (1995) (rejecting collateral order review for a category of denials of motions for summary judgment in qualified immunity cases). Thus, although the Court's analysis of whether a particular claim is immediately appealable under the collateral order doctrine is not limited to the facts of a given case, the analysis is (and should be) limited to the legal issue presented.

Here, notwithstanding Carpenter's claims to the contrary, the only category of cases at issue is district court orders that require the disclosure of attorney-client privileged information on the basis of a finding of waiver. When applied to this appropriately specified category of cases, the *Cohen* analysis permits immediate appeal.

I. The Requirements for Collateral Order Jurisdiction are Satisfied.

Carpenter contends that the District Court's order does not satisfy the three *Cohen* factors and does not implicate rights sufficiently important to warrant immediate review. As set forth below, Carpenter's arguments in this regard largely ignore the question presented and are contrary to this Court's prior decisions concerning both the collateral order doctrine and the attorney-client privilege.

A. The Question Presented is an Issue of First Impression.

As a threshold matter, Carpenter incorrectly asserts that the Court need not even consider whether collateral order review is available because prior decisions hold that orders enforcing discovery requests are not immediately appealable. While Carpenter suggests that the issue presented in this case has been settled for more than a century, the cases he relies upon do not address collateral order jurisdiction and its application to orders compelling the disclosure of attorney-client privileged information on the basis of waiver. Indeed, two of the cases relied on by Carpenter, *Alexander v. United States*, 201 U.S. 117 (1906) and *Cobbledick v. United States*, 309 U.S. 323 (1940), predate *Cohen* itself. As such, they can hardly be said to settle any questions concerning the applicability of the doctrine in this or any other case. Rather, these cases simply stand for the proposition that, absent the practical construction of Section 1291 first articulated in *Cohen*, the orders at issue in those cases were not "final" and could not be immediately appealed.

The remaining cases relied on by Carpenter are similarly unavailing. For instance, *Church of Scientology v. United States*, 506 U.S. 9 (1992), *Maness v. Meyers*, 419 U.S. 449 (1975), and *United States v. Ryan*, 402 U.S. 530 (1971), did not include an analysis of the collateral order doctrine. Indeed, the language Carpenter relies on as a "rule" purportedly enunciated in *Church of Scientology* is but dicta in a footnote at the end of the Court's opinion that omits any reference to the collateral order doctrine. 506 U.S. at 18 n.11. Likewise, there is

no discussion of the collateral order doctrine in the Court's opinions in *Maness* or *Ryan*. In those cases, the Court relied on the need for expedition in the administration of the *criminal law* to justify putting the complaining party to a choice between compliance with an order to produce information or disobedience and contempt prior to any appellate review of the order. In both cases, the Court emphasized that it had:

> consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.

Maness, 419 U.S. at 460; *Ryan*, 402 U.S. at 533. Thus, in addition to including no analysis of the collateral order doctrine, the holdings in *Maness* and *Ryan* were specifically limited to the context of criminal proceedings.[1]

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[1] Carpenter also suggests that rulemaking alone is the appropriate way to expand appellate review. Resp. Br. 18. This argument, however, essentially challenges the viability of the collateral order doctrine itself and calls into question decades of application of the doctrine by this Court. The argument also ignores that the collateral order doctrine exists as a "practical construction" of Section 1291, not as an exception to it. *Digital Equip. Corp.*, 511 U.S. at 867.

B. The District Court's Order Implicates Important Rights that Merit Collateral Order Review.

District court orders finding waiver of the attorney-client privilege and compelling the disclosure of privileged information involve rights that are sufficiently important to merit collateral order review. This Court has repeatedly made clear the critical role that the privilege plays not only in the attorney-client relationship but also in maintaining a healthy judicial system. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Court's opinions confirm that the attorney-client privilege is not just important in "a general sense" (Resp. Br. 32), but also that it is sufficiently important in the *Cohen* sense.

In *Swidler*, the Court held that maintaining the strength of the attorney-client privilege, even following the death of the client, was important enough to reject a proposed limited exception in criminal cases where the privileged materials could exonerate the defendant. *See* 524 U.S. at 408-09. Certainly, if even the posthumous application of the attorney-client privilege has been deemed sufficiently important to outweigh the public interest in the accused being permitted access to evidence to defend their innocence, then it is sufficiently important when compared with the policy favoring limited interlocutory appeals.

In attempting to downplay the importance of the attorney-client privilege, Carpenter (along with the United States) relies on the cases in which this Court

rejected collateral order jurisdiction for orders regarding attorney disqualification motions. *See* Resp. Br. 34; United States Br. 14. His position is essentially that if the right to choose a particular attorney is not subject to immediate appeal under *Cohen*, then the protection afforded to privileged communications with one's counsel should not be deemed sufficiently "important" to satisfy that *Cohen* criterion. The critical flaw in this logic is that the reasoning in the attorney disqualification cases did not turn on the "importance" of the attorney-client relationship, much less the logically distinct attorney-client privilege, but instead those decisions held that the would-be appellant did not satisfy other elements of the *Cohen* analysis.

In *Firestone*, the Court held that there was no collateral order jurisdiction for orders denying motions to disqualify opposing counsel in a civil case. In reaching this decision, the Court reasoned that "[a]n order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment" – the third *Cohen* element – as the court of appeals could simply "vacate the judgment appealed from and order a new trial." 449 U.S. at 377-78. Similarly, in *Flanagan* and *Richardson-Merrell* the Court held that immediate appeals could not be taken from orders disqualifying counsel in criminal and civil cases, respectively, because such orders were either reviewable on appeal or otherwise not completely separate from the merits – the second and third *Cohen* elements. *See Flanagan*, 465 U.S. at 268 ("[I]f establishing a violation of their asserted right requires no showing of prejudice to their defense, a pretrial order violating the right does not meet the third

condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'"; "[T]he second *Coopers & Lybrand* condition – that the order be truly collateral – is not satisfied if petitioners' asserted right is one requiring prejudice to the defense for its violation"); *Richardson-Merrell*, 472 U.S. at 438, 440 ("[W]e conclude that orders disqualifying counsel in civil cases, as a class, are not sufficiently separable from the merits to qualify for interlocutory appeal").

Given the Court's express holdings that the attorney disqualification orders did not meet other prongs of the *Cohen* analysis, no amount of importance could have been sufficient to permit collateral order jurisdiction. Thus, the rejection of the collateral order doctrine in those contexts does not support Carpenter's argument that the attorney-client relationship is insufficiently important for collateral order review.[2]

In a similarly erroneous attempt to dilute the importance of the attorney-client privilege, Carpenter paints the privilege as tentative and subject to a

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[2] Carpenter notes that in *Firestone* the Court rejected an argument for immediate appeal based on "'the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of [attorney-client] confidence' by opposing counsel, and the effect of such a tainted proceeding in frustrating public policy." Resp. Br. 15 (citing *Firestone*, 449 U.S. at 376). The Court, however, rejected this argument because the petitioner merely hinted that there could be a breach of confidence and failed "to supply a single concrete example of the indelible stamp or taint of which it warn[ed]." 449 U.S. at 376. There is no such failure in this case.

balancing test to determine its application ("a common-law evidentiary privilege that gives way in the face of competing concerns"), going so far as to state that "the attorney-client privilege confers nothing approaching an absolute legal entitlement to avoid disclosure." *See* Resp. Br. 35-36. While it is generally true that the privilege "applies only where necessary to achieve its purpose" (Resp. Br. 36)[3], it does not follow that application of the attorney-client privilege is discretionary or subject to denial based merely on a desire for evidence. Such an approach was explicitly rejected in *Swidler*, where the Court found that introducing such uncertainty into application of the privilege was unacceptable even when the client was no longer alive. *See* 524 U.S. at 408-09[4] ("Balancing *ex post*

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[3] In arguing that confidentiality is not a "logical imperative" of the attorney-client privilege, Carpenter relies upon a treatise that is critical of the current formulation of the attorney-client privilege and calls for "[o]penly abolishing the confidentiality requirement." *See* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 6.4 at 28 (2d ed. 1999). Regardless of criticisms that may exist in the literature on the attorney-client privilege, no party or amicus has suggested that this case presents an occasion for the Court to revisit its long-standing precedent linking confidentiality and the attorney-client privilege.

[4] The *Swidler* opinion's discussion of the breadth of the confidences protected by the attorney-client privilege further emphasizes the privilege's importance. *See* 524 U.S. at 407-08 ("Clients consult attorneys for a wide variety of reasons . . . Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice.").

the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege."). Moreover, Carpenter's portrayal of the rights conferred by the attorney-client privilege directly conflicts with this Court's admonition in *Upjohn* that "[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." 449 U.S. at 393.

In suggesting that the attorney-client privilege is not a sufficiently important right, Carpenter and the United States also both attempt to draw bright-line rules unsupported by the Court's precedent. Carpenter asserts that collateral order jurisdiction should not be extended to any additional categories of orders where the right at issue is not grounded in a constitutional or statutory provision. This position is contrary to the Court's prior statements that the collateral order doctrine may extend to rights "deeply rooted in public policy" or of "a good pedigree in public law," and its refusal to reject the possibility that it could even extend to rights provided by private agreements. *See Digital Equip. Corp.*, 511 U.S. at 875, 879, 884. Moreover, it defies reason to suggest that a long-standing common law right that is recognized and applied in every jurisdiction in the country – and consistently held to be a critical component for a healthy judicial system – is somehow automatically categorically less important than any right embedded in a statutory provision.

In similar fashion, the United States (which also wrongly expands the category of cases at issue) attempts to graft a "volume" limitation onto the importance analysis, essentially claiming that if an issue comes up too frequently (the United States offers no standard for determining this threshold) then it cannot be sufficiently important. This Court has not adopted this additional criterion, which would improperly link importance with frequency as a prong of the *Cohen* analysis. Not only is there no case law to support this proposed limitation, but the fact that the Court has permitted collateral order appeals in qualified immunity cases demonstrates that the frequency with which an issue may arise is irrelevant. Indeed, while Carpenter asserts that "[a] Westlaw search for the terms 'attorney-client' and 'privilege' in the 'federal district courts' database between 2004 and 2009 produced a staggering 4,446 reported cases" (Resp. Br. 47), running the same search parameters with the term "qualified immunity" returns 10,000 cases (the maximum result permitted for a Westlaw search).[5]

C. The District Court's Order Satisfies Each of the *Cohen* Factors.

In addition to implicating rights sufficiently important for collateral order review, district court

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[5] With respect to interlocutory appeals, the Chamber of Commerce reports that in the time since the Third Circuit's decision in *Kelly v. Ford Motor Co.* (*In re Ford Motor Co.*), 110 F.3d 954 (3d Cir. 1997), that court has confronted 78 appeals from denials of qualified immunity in contrast to only six appeals involving compelled disclosure of privileged materials. *See* Chamber of Commerce Br. 8.

orders finding waiver of the attorney-client privilege and compelling the production of privileged information satisfy each of the three *Cohen* factors.

1. The District Court's Order Conclusively Determines the Disputed Question.

The District Court's order satisfies the first *Cohen* factor, because it conclusively determines the disputed question. Simply put, there is nothing left to determine nor anything to re-visit once there has been a finding of waiver and the production of the privileged materials has been compelled. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13 n.14 (1983) (holding that the first *Cohen* criterion is satisfied unless "some revision might be reasonably expected in the ordinary course of litigation"). Indeed, as recognized by the Eleventh Circuit below, the order "leaves no room for the district court to further consider whether the information at issue is protected." Pet. App. 8a. Notably, even the United States agrees on this point. *See* United States Br. 17 n.3 ("a district court's order compelling disclosure of documents after rejecting any privilege-based objection presumably constitutes the district court's final determination of the privilege issue").

Carpenter nevertheless takes the position that the first *Cohen* criterion is not satisfied because the district court could reconsider its decision upon disobedience of the order and a motion for contempt. *See* Resp. Br. 20. According to Carpenter, this "'second look' procedure is especially apt for privilege disputes" because it affords *in camera* review of any documents at issue. *See* Resp. Br. 22. Carpenter's argument on this

point is flawed in multiple respects. First, as noted previously, he wrongly changes the category of cases at issue to include all "privilege disputes," rather than focusing on orders finding waiver of the privilege. This is important because it is not realistic that the suggested "second look" would cause a district court to change its decision that a waiver has occurred. Indeed, Carpenter's contention that a district court might change its initial ruling based on an *in camera* review of the documents claimed to be privilege has no application in the context of an order finding waiver. This is clear in the present case as the District Court's finding of waiver is based on statements contained in a publicly filed brief from another case.

Furthermore, under Carpenter's proposed approach, it would only be after the district court considered the issue a second time and held the violating party in criminal contempt that the issue would be "conclusively determined." By that time, however, collateral jurisdiction would be unnecessary as the criminal contempt citation would constitute an appealable final judgment. Thus, Carpenter's position (which involves extensive reliance on contempt cases (*see, e.g.,* Resp. Br. 20)) turns the *Cohen* analysis on its head by requiring that a party obtain an appealable final judgment (a criminal contempt citation) in order to satisfy the conclusiveness requirement set forth in the first prong of the collateral order doctrine. Such an approach would abolish the collateral order doctrine entirely.

2. Privilege Questions are Separate From the Merits.

Carpenter's arguments on the second prong of the *Cohen* test – separability – are similarly ineffective. "[T]he *Cohen* 'separability' component asks whether the question to be resolved on appeal is 'conceptually distinct from the merits of the plaintiff's claim.'" *Behrens v. Pelletier*, 516 U.S. 299, 309 n.3 (1996). An order finding waiver of the attorney-client privilege and compelling the production of privileged information resolves an issue that is "conceptually distinct" from the claims of the underlying lawsuit.

In the present case, the Eleventh Circuit correctly held that it could "resolve the privilege issues (*i.e.*, whether [Mohawk] must produce the disputed documents and communications)" without considering the merits of Carpenter's claims against Mohawk. *See* Pet. App. 8a. This is true not only for this case, but is generally true in the context of orders finding waiver of the attorney-client privilege. The analysis in such cases will turn on the applicable waiver law and the circumstances of the alleged waiver, rather than on any determination or analysis of the merits of the particular claims or defenses in the case.

In another attempt to create a dispute where the Eleventh Circuit found none, Carpenter contends that the "separability" element could never be met in any circumstance where the court might need to review the nature of the proceedings or the allegations in the pleadings. *See* Resp. Br. 25 (arguing that the "requirement is not met whenever the issue presented

. . . requires the court 'to review the nature and content of th[e trial court] proceedings.'"). Carpenter's proffered approach, however, was specifically rejected by the Court in *Mitchell*, 472 U.S. 511. There, in extending the collateral order doctrine in the context of qualified immunity, the Court held that the issue was "conceptually distinct from the merits" even though the district court would necessarily reference the plaintiff's pleadings. Understanding the context of the claims did not require the district court to "consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Mitchell*, 472 U.S. at 528. Moreover, the *Mitchell* decision noted that reference to the underlying allegations of the litigation was necessary for a variety of recognized collateral orders. *See id.* ("[R]esolution of these legal issues will entail consideration of the factual allegations . . . the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit . . . [under] the Speech and Debate Clause.").

Perhaps most significantly, the *Mitchell* decision expressly confronted and rejected the narrow view now offered by Carpenter:

> In advancing its view of the "separate from the merits" aspect of the *Cohen* test, Justice Brennan's dissent fails to account for our rulings on appealability of denials of claims of double jeopardy and absolute immunity. If, as the dissent seems to suggest, any factual overlap between a collateral issue and the

> merits of the plaintiff's claim is fatal to a claim of immediate appealability, none of these matters could be appealed, for all of them require an inquiry into whether the plaintiff's (or, in the double jeopardy situation, the Government's) factual allegations state a claim that falls outside the scope of the defendant's immunity. . . .
>
> Contrary to Justice Brennan's suggestion, the *Richardson-Merrell* Court's alternative holding that the issue of disqualification of counsel in a civil case is not separate from the merits is not based only on the fact that the issue involves some factual overlap with the merits of the underlying litigation. Rather, the Court in *Richardson-Merrell* observes that the question whether a district court's disqualification order should be reversed may depend on the effect of disqualification (or nondisqualification) on the success of the parties in litigating the other legal and factual issues that form their underlying dispute. Accordingly, the propriety of a disqualification order–unlike a qualified immunity ruling–is not a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case.

Id. at 529 n.10. Thus, the propriety of collateral order jurisdiction is in no way threatened by Carpenter's assertions that waiver issues may "require[] the court to 'review the nature and content'" of the case (Resp. Br. 26 n.2), may involve "an assessment of the types of

claims and defenses asserted" (Resp. Br. 30), or may "require[] the court . . . to analyze the scope of the claims or defenses" (Resp. Br. 30). Each of these falls far short of any substantive determination regarding the merits of the underlying lawsuit.

The Court's rejection of a more restrictive approach is consistent with the purpose of the separability requirement, which is to avoid repetitive appeals of substantive issues. *See Johnson*, 515 U.S. at 311 ("The requirement . . . means that review *now* is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once . . ."); *Van Cauwenberghe v. Biard*, 486 U.S 517, 527-28 (1988) ("Allowing appeals from interlocutory orders that involve considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case."). A district court order finding waiver of the attorney-client privilege and compelling the production of privileged information would not risk any such repetitive review of substantive issues in the case. As illustrated by the District Court's order in this case, and confirmed by the Eleventh Circuit, the waiver issue can be ruled on by the district court and reviewed by the circuit court without any discussion of the merits of the underlying claims and defenses.

3. Once the Privileged Communications are Disclosed, the Order is Effectively Unreviewable on Appeal From a Final Judgment.

With respect to the final prong of the *Cohen* analysis – that the order be "'effectively unreviewable on appeal from a final judgment,'" *Sell v. United States*, 539 U.S. 166, 176 (2003) – Carpenter argues that an order finding waiver of the attorney-client privilege and compelling the production of privileged information, like any "pretrial discovery order," can be corrected on appeal by ordering that the privileged information not be used in the retrial of the case. Carpenter's overly simplistic approach ignores not only a fundamental aspect of the attorney client-privilege (the ability to communicate with one's attorney without fear of disclosure), but also that the utility of privileged materials to the opposing side often extends beyond mere evidentiary use of the materials (for example, gaining insight into the other side's litigation strategies).

The patent insufficiency of the remedies available on appeal from a final judgment has been acknowledged repeatedly even in circuits that have rejected collateral order review in this context. *See, e.g., In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1183 (10th Cir. 2006) ("'[i]n most cases disclosure makes meaningful review impossible because after disclosure whatever privilege attaches would be worthless.' . . . 'Any subsequent review, even after limited disclosure, would be for naught, because the damage would already be accomplished. Thus, appellate review of the claim would be meaningless.'" (*quoting Barclaysamerican Corp. v.*

Kane, 746 F.2d 653, 655 (10th Cir. 1984) and *United States v. West*, 672 F.2d 796, 799 (10th Cir. 1982))); *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 472 (6th Cir. 2006) ("an appeal after the disclosure of privileged communication is an inadequate remedy"); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC,* 964 F.2d 159, 165 (2d Cir. 1992) ("At best, an attorney can assure the client that the communication, although made known to adversaries, will not be admissible . . . This . . . 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.").

Thus, when the Third Circuit permitted collateral order review in *Ford*, Judge Becker aptly noted, "once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed . . . underlying the attorney-client privilege is the policy of encouraging full and frank communications between an attorney and client, without the fear of disclosure, so as to aid in the administration of justice." *Ford*, 110 F.3d at 963 (citation omitted).

Carpenter suggests that a protective order limiting disclosure to opposing counsel would somehow protect Mohawk or other parties faced with a waiver order. This proffered solution likewise ignores the fundamental problem that, regardless of the scope of the protective order, the privileged materials will still be disclosed to opposing counsel (likely one of the last people to whom any party would want to disclose privileged materials – *see* ABA Br. 15-16). Again, even courts that reject collateral order jurisdiction recognize that a protective order is an inadequate remedy. *See, e.g., Chase*

Manhattan Bank, 964 F.2d at 164 ("[A] litigant claiming the privilege would probably prefer almost anyone other than adversary counsel to review the documents in question. The attorneys'-eyes-only condition . . . allows one kind of critical disclosure – to opposing counsel in litigation – that the privilege was designed to prevent."). Thus, a protective order ignores the significant and undeniable harm that arises from giving opposing counsel the opportunity to review the legal advice sought or requested regarding the very issues involved in the litigation.[6]

II. The Alternative Avenues for Review Identified By Carpenter Are Inadequate and Do Not Preclude Collateral Order Jurisdiction.

Carpenter contends that Mohawk has "other routes" to the appellate courts instead of collateral order review. But these suggested alternative avenues to appellate review present neither a likely nor efficient means to preserve the protections afforded by the attorney-client privilege.

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[6] The suggested protective order approach also does nothing to address the issues confronting a party involved in multiple related lawsuits who is found to have waived the privilege in one of the cases. This was exactly the situation for the appellants in *Ford*, 110 F.3d 954, and *United States v. Philip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003), and is likewise the reality that Mohawk confronts here. *See* Pet. Br. 26-27; Chamber of Commerce Br. 17, 23-25.

A. Disobedience and Contempt Is Not an Adequate Alternative to Collateral Order Review.

Throughout their briefs, Carpenter and his supporting *amici* argue that "disobedience and contempt" is a reasonable and proper approach for Mohawk to challenge the District Court's order. This argument ignores the practical and legal reality that a party cannot simply disobey, be held in contempt, and then appeal. Unlike non-parties, a party to a lawsuit can only appeal a criminal contempt citation. *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) ("The rule is 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."). Thus, a party confronted with an adverse waiver order would not have the simple option of defying the order and appealing the resulting contempt order, but instead would have to defy the order and hope for a criminal contempt citation rather than a civil contempt citation.[7]

It is unlikely, though, that a party violating an order to produce privileged documents would be held in

[7] Another possibility is that the disobedience could result in the issuance of sanctions pursuant to Rule 37 of the Federal Rules of Civil Procedure, which likewise would not be subject to an immediate appeal. Carpenter's suggestion of a Rule 37 sanction as an alternative to collateral order review is somewhat transparent. The Rule 37 sanction would not provide a path to appeal, but would instead require Mohawk to litigate the remainder of the case with the handicap of whatever unpredictable negative inference, admission of adverse facts, or stricken defenses or pleadings the district court chooses.

criminal contempt.[8] As an initial matter, a district court could be expected to issue a punishment designed to coerce compliance (*i.e.*, production of the documents). Any such citation designed to coerce would be deemed a civil contempt order upon an attempted appeal, regardless of the designation provided by a district court. *See Shillitani v. United States*, 384 U.S. 364, 369-70 (1966) ("The fact that both the District Court and the Court of Appeals called petitioners' conduct 'criminal contempt' does not disturb our conclusion . . . their sentences were clearly intended to operate in a prospective manner–to coerce, rather than punish. As such, they relate to civil contempt." (citations omitted)). Moreover, a civil contempt order is often viewed as the appropriate remedial measure for noncompliance with a discovery order. Indeed, the Eleventh Circuit has said, "[a] finding of a failure to comply with discovery orders is a finding of civil contempt." *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1147 (11th Cir. 2006).

Even if a district court were inclined to issue a criminal contempt citation, this Court has indicated that, pursuant to the "least possible power" doctrine, trial courts are required to consider the feasibility of coercive civil contempt penalties prior to issuing a criminal contempt citation. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987); *Shillitani*, 384 U.S. at 372 n.9. Only when it becomes clear that the civil fines/imprisonment will not result in compliance

[8] In their *amicus* brief supporting Carpenter, the Former Article III Judges and Law Professors concede that criminal contempt orders in this context "will – and should – be rare." Fmr. Judges Br. 24 n. 14.

would a criminal contempt citation be issued, which may not occur for months or even years. Moreover, the criminal contempt proceedings may themselves be laborious, because criminal contempt is a crime in the ordinary sense and therefore its issuance is subject to constitutional due process requirements. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994). Therefore, the suggestion that "disobedience and contempt" is a reasonable or predictable path to appeal is incorrect.

B. Mandamus and Review Under 1292(b) Are Also Inadequate Alternatives to Collateral Order Review.

The potential availability of mandamus provides no basis for rejecting collateral order jurisdiction. *See Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979) (holding that mandamus is not "the appropriate vehicle" for seeking review of an adverse order when collateral order review is available). Moreover, from a practical perspective, the high standard of review and the circuit courts' apparent inconsistent application of mandamus in the context of waiver of the attorney-client privilege render it merely an illusory option. *Compare Powerhouse*, 441 F.3d at 471-73 (reviewing substance of privilege waiver issue on mandamus petition, finding no clear error, but stating that "the scope of the attorney-client privilege implicates the kind of important interests that would normally favor mandamus") *with United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 473-74 (6th Cir. 2006) (rejecting mandamus petition without consideration of substance of waiver issue, and stating that mandamus

may only be used for such orders in an "extraordinary case")[9] *and* Pet. App. 14a-15a (holding, without substantive review of the privilege waiver issue, "[e]ven if we were to conclude that the district court had erred in finding that Mohawk waived the attorney client privilege, Mohawk still has not shown that its right to the issuance of the writ is clear and indisputable."). Given multiple circuit courts' hostility to mandamus petitions from even erroneous orders finding a waiver of the attorney-client privilege, mandamus cannot reasonably be considered an alternative avenue for immediate review.

Carpenter also suggests that some parties could seek an appeal under 1292(b). *See* Resp. Br. 42. But this is not an alternative to collateral order review. Indeed, they are conceptual opposites. Interlocutory appeals under 1292(b) are for issues involving "controlling question[s] of law" that "materially advance" the litigation. 28 U.S.C. § 1292(b). The collateral order doctrine, on the other hand, applies to orders that "determine 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

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[9] That *Powerhouse* and *Pogue* were decided by the same circuit within weeks of each other in 2006 underscores the inconsistency and uncertainty of mandamus petitions in the context of waiver of the attorney-client privilege. The volume and length of recent mandamus cases involving the attorney-client privilege support collateral order jurisdiction, because it would provide a more uniform and orderly approach to appellate review.

the whole case is adjudicated." *Cohen*, 337 U.S. at 546. That Carpenter and the United States concede that an order finding waiver of the attorney-client privilege will rarely, at best, involve a "controlling question of law" that "materially advance[s]" the litigation, only serves to further support the conclusion that such orders are, in fact, collateral orders.

III. A Decision in Mohawk's Favor Will Not Give Rise to a Flood of Interlocutory Appeals.

Carpenter urges that a decision in Mohawk's favor will cause a flood of interlocutory appeals because, absent some limiting principle, Mohawk's proposed application of the collateral order doctrine "would logically encompass all denials of attorney-client or work-product privilege, constitutional and common-law evidentiary privileges, and other anti-discovery interests, as well as disputes over protective orders." Resp. Br. 44. In this regard, Carpenter contends that no principled distinctions can be drawn between orders finding waiver of the attorney-client privilege and orders concerning the various other types of privileges and discovery disputes that might arise in any given case. Resp. Br. 10. This line of argument is misguided in numerous respects.

First, Carpenter's "slippery slope" argument is simply a variation on his efforts to rewrite the question presented so that it encompasses other categories of cases that are broader and more common than the issue presented in this case. Carpenter undertakes to expand the question presented to invoke the specter of a flood of appeals and to task Mohawk with explaining how

every type of conceivable privilege order would or would not be immediately appealable under *Cohen*. As previously explained, however, this Court's analysis for purposes of collateral order jurisdiction, evidenced by its treatment of cases in the context of qualified immunity and attorney disqualification, is limited to the legal issue presented through the district court order from which an appeal is sought, and not the infinite number of legal issues that might eventually be – but are not currently – before the Court.

Furthermore, to the extent necessary, "principled distinctions" can be drawn between orders finding waiver of the attorney-client privilege and orders concerning the various other types of privileges and discovery disputes. This is exactly the type of value judgment applied in a collateral order case. *See Will v. Hallock*, 546 U.S. 345, 351 (2006) ("boils down to 'a judgment about the value of the interests'" (quoting *Digital Equip. Corp.*, 511 U.S. at 878-79)). For instance, the Court can conclude that certain other common law privileges are less important to the proper and fair administration of the judicial system than the attorney-client privilege and therefore not sufficiently important for purposes of collateral order jurisdiction. By way of example, the Court might conclude that the spousal privilege, which is applied differently depending on the context in various jurisdictions, is not sufficiently important under the *Cohen* analysis. Of course, such a decision would be based on the arguments made, evidence offered, or facts and circumstances present for that category of orders.

Likewise, principled distinctions may be drawn between orders finding waiver of the attorney-client privilege and orders denying the existence of the privilege. As a practical matter, the legal analysis conducted by the district court (and appellate court) in assessing whether the attorney-client privilege has been waived is wholly different than the analysis required to determine whether the attorney-client privilege exists. This fact is readily demonstrated by the District Court's two-pronged analysis in the present case.

Additionally, a principled distinction may be drawn between waiver orders and other attorney-client privilege orders in the context of the *Cohen* framework. Indeed, it is for this very reason that Carpenter repeatedly substitutes other categories of privilege orders in his analysis of the *Cohen* factors. With respect to the conclusiveness prong of the analysis, Carpenter argues that orders holding that the attorney-client privilege does not apply to documents are inherently tentative because they are prone to a "second look" which could include *in camera* review. As discussed above, though, the same rationale does not apply to orders finding waiver. Once the district court finds waiver, there is no reason to believe that the district court will revise its ruling in the ordinary course of litigation. Therefore, if the Court were to accept Carpenter's argument with respect to orders denying the existence of the privilege, such orders may be distinguished from waiver orders with respect to the "conclusiveness" prong.

In similar fashion, in discussing the separability prong, Carpenter discusses, at some length, orders applying the crime fraud exception to the attorney-client privilege, and argues that the orders applying the crime-fraud exception almost always include a specific finding based on the allegations of liability before the district court. Again, this argument does not apply to orders finding waiver of the attorney-client privilege, which need not include any consideration of the merits.

Moreover, orders finding a waiver of the attorney-client privilege may also be distinguished on the basis that they are more important in the *Cohen* sense than orders finding that the attorney-client privilege does not apply in the first instance. An order finding that the attorney-client privilege has been waived generally results in the disclosure of information that the court has already determined would otherwise be protected by the attorney-client privilege. Thus, there is no question that the disclosure will, in fact, cause harm that cannot be remedied on an appeal from a final judgment. Further, the purported waiver can extend beyond a specific document or documents and encompasses entire subject matters or even the entirety of the attorney-client relationship. As such, orders finding that the privilege has been waived are inherently more damaging to a party – and more desirable to the opposing party – than an order denying the applicability of the privilege in the first instance to a given document or set of documents.

These distinctions show that allowing collateral order jurisdiction here does not logically encompass all other cases compelling the production of information claimed

to be protected by the attorney-client privilege or some other privilege.[10]

CONCLUSION

For the foregoing reasons and those set forth in the initial Brief for Petitioner, the Court should reverse the judgment of the Eleventh Circuit Court of Appeals dismissing Mohawk's appeal and hold that, under the collateral order doctrine established in *Cohen*, a party can immediately appeal a district court's order finding waiver of the attorney-client privilege and compelling the production of privileged information.

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[10] In any event, even if orders concerning the applicability of the attorney-client privilege in the first instance were "logically encompassed" in the category of cases at issue here, Carpenter's floodgates argument is illusory. As noted in Mohawk's initial brief, a review of the opinions published in the Federal Reporter and those included in the Federal Appendix from the three circuits that have recognized collateral order jurisdiction in this context (the Third, Ninth, and D.C. Circuits) reveals that since *Ford* was decided in 1997, these circuits have exercised collateral order jurisdiction in a total of approximately eleven appeals in which the appellant sought immediate review of an order compelling a party to disclose information claimed to be protected by the attorney-client privilege. *See* Pet. Br. 40.

Respectfully submitted,

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