

No. 08-678

IN THE
Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

NORMAN CARPENTER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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.

LIST OF PARTIES

Pursuant to Rule 24.1(b), the names of the parties appearing before the United States Court of Appeals for the Eleventh Circuit appear in the caption.

The Rule 29.6 Statement in the Petition for a Writ of Certiorari remains accurate.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is reported as *Carpenter v. Mohawk Industries, Inc.*, 541 F.3d 1048 (11th Cir. 2008). The order of the Northern District of Georgia (Pet. App. 16a) at issue in the appeal to the Eleventh Circuit is an unpublished October 1, 2007 order that is unofficially reported as *Carpenter v. Mohawk Industries, Inc.*, No. 4:07-CV-0049-HLM, 2007 WL 5971741 (N.D. Ga. Oct. 1, 2007).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its opinion and judgment in this matter on August 26, 2008. The Petition for a Writ of Certiorari was filed on November 20, 2008 and granted on January 26, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides in relevant part:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

The District Court in this case found waiver of the attorney-client privilege and ordered the production of otherwise privileged information. The question presented is whether such an order is immediately appealable under the collateral order doctrine.

Petitioner Mohawk Industries, Inc. (“Mohawk”) conducted an internal investigation, through outside counsel, following an employee’s allegation of a potential violation of federal immigration laws. The District Court found that Mohawk had waived the attorney-client privilege through limited statements Mohawk made in a brief filed in another case and ordered Mohawk to divulge privileged written and oral communications between the company, its in-house counsel, and Mohawk’s outside counsel who conducted the internal investigation. Mohawk immediately appealed the District Court’s order. The Court of Appeals for the Eleventh Circuit dismissed the appeal for lack of jurisdiction, refusing to find jurisdiction under the collateral order doctrine. The appeal of an order finding waiver of the attorney-client privilege and compelling the disclosure of privileged information, however, falls squarely within the scope of the collateral order doctrine as first articulated by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and the Eleventh Circuit should not have dismissed Mohawk’s appeal.

I. The Facts Giving Rise to the Underlying Lawsuit.

Mohawk is a leading producer and distributor of residential and commercial flooring products. Headquartered in Calhoun, Georgia, Mohawk employs more than 30,000 people worldwide. Respondent Norman Carpenter (“Carpenter”) is a former shift supervisor at a Mohawk manufacturing facility in Calhoun. During his employment at Mohawk, Carpenter requested that the company have a temporary agency hire an individual to work at Mohawk, even though he believed “[h]er [work authorization] papers . . . are not good.” J.A. 220a. Mohawk’s Human Resources division rejected Carpenter’s request. Carpenter then sent an e-mail to Human Resources stating that:

90% of the people that come through the temp do not have good papers thats [sic] why they come to us that way I can tell you that most of the people working today here through a temp do not have one of two things either a GA I.d. or good papers through the I.N.S.

J.A. 219a.

In response to this e-mail, Mohawk immediately initiated an investigation of Carpenter’s conduct and his assertions that a temporary agency had placed undocumented workers with Mohawk. As part of that investigation, Mohawk’s outside counsel, Juan P. Morillo, at the time a partner with Sidley Austin LLP, interviewed Carpenter and other individuals. Attorney Morillo was also counsel for Mohawk in a pending class

action lawsuit, *Williams v. Mohawk Industries, Inc.*, Civil Action No. 4:04-CV-03-HLM (N.D. Ga. filed Jan. 6, 2004).¹ Mohawk ultimately terminated Carpenter's employment. A few months later, Carpenter filed this lawsuit, claiming that Mohawk, some of its employees, and its in-house and outside counsel engaged in a conspiracy, threatened him (during Attorney Morillo's interview of Carpenter), and terminated his employment in an effort to keep him from testifying in the *Williams* case. *See* J.A. 58a-59a.

II. The District Court Order Finding Waiver of the Attorney-Client Privilege and Compelling the Production of Privileged Information.

In his initial discovery requests, Carpenter sought discovery related to Mohawk's internal investigation and the company's decision to terminate his employment. *See* Pet. App. 30a-36a. Because several of Carpenter's discovery requests specifically sought or otherwise encompassed privileged information concerning Attorney Morillo's investigation and his related communications with Mohawk, Mohawk objected to those requests on the grounds of attorney-client privilege and provided a privilege log for the documents withheld. Record 36, Ex. B. In response to Mohawk's objections, Carpenter filed a motion to compel

1. The plaintiffs in the *Williams* case allege that Mohawk has engaged in the improper hiring of illegal aliens. The *Williams* case has also been before this Court. *See Mohawk Indus., Inc. v. Williams*, 547 U.S. 516 (2006). As of the filing of this Brief, the *Williams* case is currently on appeal with the Eleventh Circuit from the District Court's denial of class certification. *Williams v. Mohawk Indus., Inc.*, No. 08-13446-GG (11th Cir. docketed June 17, 2008).

arguing: (i) that the attorney-client privilege did not apply to Attorney Morillo’s investigation or his communications with Mohawk; and (ii) that, even if the attorney-client privilege did apply, the privilege had been waived. *See* J.A. 162a.

In ruling on the motion to compel, the District Court first found that the communications at issue fell under the protection of the attorney-client privilege. Pet. App. 42a. The court found that Mohawk had sufficiently proven “that Attorney Morillo provided legal services and advice . . . when he interviewed [Carpenter] and discussed the results of that interview with Defendant Mohawk’s personnel.” *Id.* In this regard, the District Court explained that the “record demonstrates that Attorney Morillo conducted the interview [of Carpenter] as part of a legal investigation seeking to determine whether Defendant Mohawk or [Carpenter] had violated, or had attempted to violate, federal immigration law.” *Id.*

The District Court nevertheless granted the motion to compel, finding that, through certain written statements Mohawk made in a brief filed in the *Williams* case, Mohawk had waived the privilege with respect to the communications relating to Attorney Morillo’s interview of Carpenter and the decision to terminate Carpenter’s employment. Pet. App. 51a. Shortly after Carpenter filed this lawsuit, the *Williams* plaintiffs had filed (in the *Williams* case) an Emergency Motion for an Evidentiary Hearing to establish evidence of the unverified allegations set forth in Carpenter’s Complaint and sought to compel the testimony of Attorney Morillo. Pet. App. 18a. Mohawk filed a brief

opposing the motion. The district court in *Williams* denied the motion as premature and no hearing ever took place in the *Williams* case. Pet. App. 21a.

In the present case, however, the District Court found that Mohawk waived the attorney-client privilege based entirely on the following three sentences contained in Mohawk's brief in the *Williams* case opposing the emergency hearing:

After receiving [Mr. Carpenter's e-mail], Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel, Juan P. Morillo, interviewed Mr. Carpenter.

Pet. App. 51a. According to the District Court, by making those representations in the *Williams* case:

Defendant Mohawk placed the actions of Attorney Morillo in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between Attorney Morillo and [Carpenter] and between Attorney Morillo and Defendant Mohawk's personnel. Consequently, the Court must conclude that Defendant Mohawk has waived

the attorney-client privilege with respect to the communications relating to the interview of [Carpenter] and the decision to terminate [Carpenter's] employment.

Id.

Having concluded that the statements in Mohawk's brief in the *Williams* case constituted a waiver of the attorney-client privilege, the District Court ordered Mohawk to supplement its discovery responses to include information previously withheld as privileged and to produce the documents identified in its privilege log. Pet. App. 51a-52a. Among other things, Mohawk was thus ordered to produce: (i) all documents constituting, reflecting, or relating to any communications from Attorney Morillo regarding his meeting with Carpenter; (ii) all documents that reference Attorney Morillo's meeting with Carpenter; (iii) all communications between a member of Mohawk's Legal Department and Attorney Morillo that reference Carpenter; and (iv) all communications between a member of Mohawk's Human Resources Department and Attorney Morillo that reference Carpenter. *See* Pet. App. 52a.

III. Mohawk's Appeal to the Eleventh Circuit.

In granting the motion to compel, the District Court recognized "the seriousness of its finding that Defendant Mohawk has waived the attorney-client privilege" and observed that Mohawk "understandably, likely will wish to appeal from this Order." Pet. App. 52a. The District Court further observed that appealing the

order as interlocutory under 28 U.S.C. § 1292(b) would not necessarily be appropriate, but suggested that Mohawk may have other available avenues to appeal, such as appealing under the collateral order doctrine or a petition for mandamus. *Id.* The District Court then stayed the deadline for Mohawk to produce documents and supplement its discovery responses in the event that Mohawk chose to appeal. *Id.*

Mohawk filed both an appeal and a petition for writ of mandamus with the Court of Appeals for the Eleventh Circuit, seeking reversal of the District Court's order finding waiver and compelling the disclosure of privileged information. In its appeal, Mohawk urged the Eleventh Circuit to join the Third, Ninth, and D.C. Circuits, each of which has held that orders compelling the disclosure of information claimed to be protected by the attorney-client privilege are immediately appealable under the collateral order doctrine. *UMG Recording, Inc. v. Bertelsmann AG (In re Napster, Inc. Copyright Litig.)*, 479 F.3d 1078, 1087-88 (9th Cir. 2007) (holding that appellate jurisdiction was appropriate under the collateral order doctrine to review whether attorney-client privilege was lost under the crime-fraud exception); *United States v. Philip Morris Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003) (exercising jurisdiction under the collateral order doctrine to review the district court's order finding waiver of the attorney-client privilege); *Kelly v. Ford Motor Co., (In re Ford Motor Co.)*, 110 F.3d 954 (3rd Cir. 1997) (exercising collateral order jurisdiction over an appeal of a district court's order to produce attorney-client privileged documents).

The Eleventh Circuit dismissed Mohawk’s appeal, holding that “the challenged discovery order is not an appealable order under *Cohen*.” Pet. App. 10a. The court determined that the challenged order met the first two prongs of the three-part *Cohen* test because the order: (i) conclusively determined the disputed question and; (ii) resolved an important issue completely separate from the merits of the action. *Id.* at 8a. The court concluded, however, that the order failed to satisfy the third prong of the *Cohen* test because the court was unable to “find that a discovery order that implicates the attorney-client privilege is effectively unreviewable on appeal.” *Id.*²

The Eleventh Circuit granted Mohawk’s motion to stay the issuance of the mandate pending the filing of Mohawk’s Petition for a Writ of Certiorari, which this Court granted on January 26, 2009.

SUMMARY OF ARGUMENT

The Court should hold that, 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. Such an order not only satisfies the traditional three-part test established by this Court for collateral order jurisdiction, but also presents an issue that is sufficiently

2. The Eleventh Circuit also denied Mohawk’s petition for writ of mandamus because it found that Mohawk did not demonstrate that “its right to issuance of the writ is ‘clear and indisputable.’” Pet. App. 2a.

important to merit collateral order review. The attorney-client privilege lies at the heart of our adversary system, promotes loyalty and trust between attorney and client, and advances the broader public interests in the observance of law and administration of justice. Because the attorney-client privilege is deeply rooted in public policy and essential to achieving a healthy legal system, a district court order that compromises the privilege by compelling the disclosure of privileged information threatens rights critical to the public good and is sufficiently important to warrant collateral order jurisdiction, outweighing the traditional concerns against piecemeal appeals. The Eleventh Circuit thus erred in dismissing Mohawk's appeal of the District Court's order finding waiver and compelling the disclosure of privileged information.

In *Cohen*, the Court construed the "final decision" rule encompassed in 28 U.S.C. § 1291 to allow immediate appeals for that small class of pre-judgment orders which "finally 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 the whole case is adjudicated." *Cohen*, 337 U.S. at 546. A pre-judgment order is appealable under the collateral order doctrine if it: (i) conclusively determines the disputed question; (ii) resolves an important issue completely separate from the merits of the action; and (iii) is effectively unreviewable on appeal from final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Analysis of these three criteria serves to identify those classes of orders in which the considerations that favor immediate appeal outweigh

the traditional concerns against interlocutory review. Whether an order is immediately appealable under *Cohen* boils down to a value judgment as to whether the right at issue is sufficiently important to overcome the policies militating against interlocutory appeals. *Will v. Hallock*, 546 U.S. 345, 351-52 (2006).

The District Court's order finding waiver and compelling Mohawk to produce privileged information satisfies each of the *Cohen* factors and concerns a right sufficiently important to merit collateral order jurisdiction. First, the District Court's order conclusively determined the disputed question, as the order leaves no room for further consideration about whether the information at issue is protected by the attorney-client privilege or whether it should be disclosed in the lawsuit.

Second, the District Court's order resolves an important issue that is separate from the merits of the underlying lawsuit. Indeed, the attorney-client privilege has long been recognized as essential not only to the vigorous and effective representation of clients by attorneys, but also to the administration of our system of public justice. The District Court's finding of waiver, moreover, is entirely separate from the merits of the underlying action because the court of appeals can resolve the privilege and waiver issues without deciding or even addressing the merits of the underlying case.

Third, the finding of waiver is effectively unreviewable on appeal from a final judgment. If Mohawk is required to wait until after a final judgment to appeal the District Court's order, the right Mohawk seeks to protect, namely, the right not to disclose

privileged information, will have been destroyed. It is this right of non-disclosure that is at the heart of the attorney-client privilege, and as the Third, Ninth, and D.C. Circuits have recognized, an appeal after final judgment cannot remedy the breach of confidentiality occasioned by erroneous disclosure of privileged material. See *In re Napster*, 479 F.3d at 1088; *Philip Morris*, 314 F.3d at 619; *In re Ford*, 110 F.3d at 963. Once the privileged information is disclosed, “there is no way to unscramble the egg scrambled by the disclosure.” *In re Ford*, 110 F.3d at 963.

Moreover, the traditional interests protected by the attorney-client privilege are sufficiently important to outweigh the interests in delaying appellate review until after final judgment. Undoubtedly, the attorney-client privilege is essential to our judicial system, and the Court has previously held that collateral order jurisdiction exists with respect to orders involving issues of arguably less importance. For instance, in *Cohen* itself the Court held that an order refusing to apply a state statute requiring a plaintiff in a stockholder derivative action to post a bond was immediately appealable under the collateral order doctrine. The Court has likewise held that collateral order jurisdiction exists to review, for example, orders: (i) vacating attachment of a vessel in an admiralty action; (ii) denying reduced bail; (iii) imposing notice costs on a defendant in a class action; and (iv) allocating to defendants \$16,000 of expenses for identifying class members. Collateral order jurisdiction should also exist to review an order impacting a right of arguably greater significance – the right of non-disclosure encompassed in the attorney-client privilege.

The alternative avenues to appellate review identified by the Eleventh Circuit and other circuit courts provide no basis for refusing collateral order jurisdiction. In this regard, neither the option of intentionally violating a federal court order nor mandamus are substitutes for collateral order review; nor are they practical or efficient means to preserve the protections afforded by the attorney-client privilege.

Setting aside the policy implications of encouraging parties and counsel to willfully violate federal court orders, the “disobedience and contempt” avenue is fraught with uncertainty. A party may seek an immediate appeal of an order of contempt only if the sanction is criminal in nature. *See, e.g., Fox v. Capital Co.*, 299 U.S. 105, 107 (1936). Because of the broad discretion of a district court to sanction the refusal to comply with a court order by civil contempt or other means that cannot be appealed until a final judgment is entered, there is no reasonable manner to predict whether a party will receive a criminal contempt citation if it refuses to comply with an order compelling the disclosure of information protected by the attorney-client privilege. Indeed, it would be the extraordinary case where a district court would go so far as to hold a party in criminal contempt for refusing to comply with such an order. And, in any event, a party should not have to subject itself to the consequences of criminal contempt in order to preserve the protections afforded by the attorney-client privilege. Likewise, it is well-settled that mandamus is not “the appropriate vehicle” for vindicating a right when collateral order review is available. *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979). Moreover, mandamus unquestionably imposes a

significantly limited standard of review and is no substitute for the more sifting review of an immediate appeal.

Finally, allowing collateral order review in this context will not give rise to a flood of interlocutory appeals. There is simply no evidence to support any “floodgates” argument on the question presented. To the contrary, the available evidence shows that the three circuits that have allowed collateral order review of orders compelling the disclosure of information claimed to be subject to the attorney-client privilege have dealt with a total of approximately eleven such appeals since 1997. Of these appeals, only three fell into the category at issue here in which the district court compelled the disclosure of privileged information based on a finding of waiver of the attorney-client privilege.

ARGUMENT

I. The Collateral Order Doctrine Permits Immediate Appeals of Certain Categories of Pre-Judgment Orders.

28 U.S.C. § 1291 provides that the courts of appeals are vested with “jurisdiction of appeals from all final decisions of the district courts” In *Cohen* and subsequent cases, this Court has construed Section 1291 to treat as final and permit immediate appeal from a small class of district court decisions made prior to final judgment.

Cohen was a shareholder derivative action in which the district court refused to apply a state statute

requiring a plaintiff to post security for fees and expenses for which they could potentially be held liable. After the district court's decision was reversed on interlocutory appeal, this Court held that jurisdiction over the appeal was proper pursuant to Section 1291 because the district court's decision fell "in that small class which finally 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 the whole case is adjudicated." *Cohen*, 337 U.S. at 546.

The collateral order doctrine articulated in *Cohen* "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." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cohen*, 337 U.S. at 546). Section 1291 thus "entitles a party to appeal not only from a district court decision that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment,' but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of 'achieving a healthy legal system,' nonetheless be treated as 'final.'" *Id.* at 867 (internal citations omitted).

Since *Cohen*, the Court has reaffirmed the collateral order doctrine in a variety of contexts and now applies three well-established criteria to determine if collateral order jurisdiction exists. To be immediately appealable as a collateral order, a district court's order must: (i) conclusively determine the disputed question; (ii) resolve an important issue completely separate from

the merits of the action; and (iii) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand*, 437 U.S. at 468.

These requirements “help qualify for immediate appeal classes of orders in which the considerations that favor immediate appeals seem comparatively strong and those that disfavor such appeals seem comparatively weak.” *Johnson v. Jones*, 515 U.S. 304, 311 (1995). Central to this analysis is a determination of the importance of the legal right at issue. Indeed, the decision of whether to allow an immediate appeal “boils down to ‘a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.’” *Will*, 546 U.S. at 351-52. Collateral order jurisdiction exists if the right to be vindicated is sufficiently important to overcome the policies weighing against interlocutory appeals. *See Digital Equip.*, 511 U.S. at 879 (recognizing that a right “qualifies as ‘important’ in *Cohen’s* sense,” if the interests protected by the right are “weightier than the societal interests advanced by the ordinary operation of final judgment principles”); *see also Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 502-03 (1989) (Scalia, J., concurring) (reasoning that the collateral order doctrine did not apply because the right to be vindicated “is not sufficiently important to overcome the policies militating against interlocutory appeals”). This determination, however, is made for the entire category of cases to which a claim belongs and not on a case-by-case basis. *Digital Equip.*, 511 U.S. at 868.

II. The District Court's Order Finding Waiver of the Attorney-Client Privilege and Compelling Disclosure of Privileged Information Is Immediately Appealable Under the Collateral Order Doctrine.

Consistent with the well-reasoned holdings of the Third, Ninth, and D.C. Circuits, an immediate appeal should be allowed in this case because district court orders finding waiver of the attorney-client privilege and compelling the disclosure of privileged information satisfy each of the *Cohen* factors and threaten a sufficiently important right.³

3. As noted in the Petition for a Writ of Certiorari, six circuit courts of appeals (prior to this case) are in conflict with the Third, Ninth and D.C. Circuits, and have held that a discovery order involving the attorney-client privilege is not appealable under the collateral order doctrine. *FDIC v. Ogden Corp.*, 202 F.3d 454, 458, 459 n.2 (1st Cir. 2000) (“discovery orders generally are not thought to come within [the collateral order doctrine]”; a “perfect example of a discovery order that is not immediately appealable” under the collateral order doctrine is one involving a party’s claim of attorney-client privilege); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993) (declining jurisdiction); *Texaco Inc. v. La. Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993) (order requiring plaintiff to produce certain documents that it claimed were subject to attorney-client privilege was not immediately appealable under the collateral order doctrine); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir. 1992) (holding that discovery orders are not appealable under the collateral order doctrine); *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992) (“orders to produce information over strong objections based on privilege are not appealable”); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991) (order compelling discovery of attorney opinion letters was not immediately appealable under the collateral order doctrine).

A. The District Court’s Order Conclusively Determined the Disputed Question.

The first requirement for collateral order jurisdiction is that the district court’s order conclusively determine the disputed question. *Sell v. United States*, 539 U.S. 166, 176 (2003). This criteria is satisfied when the order constitutes a complete, formal, and final ruling by the trial court on the right at issue. *Abney v. United States*, 431 U.S. 651, 659 (1977). As the Eleventh Circuit recognized, this criteria is satisfied here because the District Court’s order finding waiver and compelling Mohawk to disclose privileged information is a final ruling on the attorney-client privilege issue and the challenged order “leaves no room for the district court to further consider whether the information at issue is protected.” Pet. App. 8a.

B. The District Court’s Order Resolved an Important Issue that is Separate from the Merits.

The Eleventh Circuit also recognized that the second *Cohen* criteria – that the disputed order must resolve an important issue that is completely separate from the merits of the dispute – was satisfied. Pet. App. 8a. This factor has two components: importance and separateness. Both are satisfied here.

1. The Propriety of an Order Finding Waiver of the Attorney-Client Privilege and Compelling Disclosure of Privileged Information is an Important Issue.

It is well-settled that the attorney-client privilege plays an essential and foundational role in the American legal system. Indeed, “[i]t is often stated that the attorney-client privilege is at the heart of the adversary system; its purpose is to support that system by promoting loyalty and trust between an attorney and a client.” *In re Ford*, 110 F.3d at 961. Every jurisdiction in the country recognizes the attorney-client privilege and this Court has emphasized the importance of the privilege as a means to advance the “broader public interests in the observance of law and administration of justice.” *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). In our representational system, fostering open and frank communication between attorney and client is paramount not only to the vigorous and effective representation of the client’s interest, but also to the administration of our system of public justice. *See Upjohn*, 449 U.S. at 389.

Given the fundamental significance of the attorney-client privilege to the judicial system, the District Court’s order finding waiver and compelling Mohawk to produce privileged information resolved an important issue. Moreover, as discussed below, the attorney-client privilege issue resolved by the District Court’s order is not only important in a general sense, but is also

sufficiently important to outweigh the policies militating against interlocutory appeals.

2. The Privilege Issue Is Separate From the Merits.

The issue on appeal must also be separate from the merits of the underlying case. *See Sell*, 539 U.S. at 176. In this context, separateness means an appeal that involves “a claimed right which is not an ingredient of the cause of action and does not require consideration with it.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974). In *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), this Court explained that “the requirement that the order be completely separate from the merits is a distillation of the principle that there should not be piecemeal review of steps towards final judgment in which they will merge.” 486 U.S. at 527-28 (internal quotations omitted). The Court further explained that “[a]llowing 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.” *Id.*

The issue of whether Mohawk waived the attorney-client privilege is separate from the merits of the case. Carpenter claims primarily that Mohawk engaged in a conspiracy, threatened him, and ultimately fired him to deter him from testifying in another lawsuit, in violation of 42 U.S.C. § 1985(2). *See* J.A. 49a. The District Court’s finding on waiver, however, was based entirely on three sentences contained in a brief Mohawk filed in another case and had nothing to with the merits of the claims

asserted in Carpenter’s Amended Complaint. The Eleventh Circuit agreed that the separateness requirement was satisfied, ruling that it could “resolve the privilege issues (*i.e.*, whether [Mohawk] must produce the disputed documents and communications) without deciding the merits of the case.” Pet. App. 8a. Plainly, the court of appeals can determine whether the statements made by Mohawk in the *Williams* case constituted a waiver of the privilege without ever touching the merits of Carpenter’s claims in this case. *See Philip Morris*, 314 F.3d at 617 (holding that privilege issue arising out of district court order finding waiver of the attorney-client privilege was “clearly” separable from the merits of the underlying case). As such, there is no danger that allowing Mohawk to proceed with its appeal now will waste judicial resources by requiring repetitive review of substantive questions in this case.

Arguing against collateral order jurisdiction, Carpenter has already asserted that the separateness requirement is not satisfied here because “discovery orders generally (and particularly ones addressing the doctrine of implied waiver of a privilege) are not completely separate from but instead inextricably intertwined with the merits of the action.” Response to Petition, p. 25. Carpenter’s contentions are flawed in multiple respects. First, this case is not about whether “discovery orders generally” are immediately appealable as collateral orders. Instead, the category of cases at issue in this appeal includes only those cases in which a district court orders the disclosure of privileged information after finding waiver of the attorney-client privilege.

Second, Carpenter’s position appears to be that questions of implied waiver are always intertwined with the merits because they might require a court to consider the plaintiff’s factual allegations (without determining their merit) in resolving the waiver issue. This argument not only fails on the facts of this case, where the alleged waiver took place by statements made in another case, but ignores that this Court has specifically rejected the notion that the presence of *any* factual overlap defeats collateral order jurisdiction. *Mitchell v. Forsyth*, 472 U.S. 511, 529 n.10 (1985). Indeed, in *Mitchell*, the Court specifically “recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff’s factual allegations in resolving the immunity issue.” *Id.* at 528-29.

C. The District Court’s Order is Effectively Unreviewable after Final Judgment.

The final *Cohen* criterion requires that the underlying order be “effectively unreviewable on appeal from a final judgment.” *See Sell*, 539 U.S. at 176. An order is “effectively unreviewable” if it affects “rights that will be *irretrievably lost* in the absence of an immediate appeal.” *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985) (emphasis added). In *United States v. MacDonald*, 435 U.S. 850 (1978), this Court noted that a claim is effectively unreviewable on appeal when it involves “an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.” 435 U.S. at 860. More recently, the Court has explained that “the requirement

that the issue underlying the order be ‘effectively unreviewable’ later on, for example, means that failure to review immediately may well cause significant harm.” *Johnson*, 515 U.S. at 311.

In this case, the right Mohawk seeks to vindicate will be irreparably destroyed absent immediate appeal. At its core, the attorney-client privilege provides a right not to disclose privileged information. *See Hunt*, 128 U.S. at 470 (acknowledging that the attorney-client privilege arises from “the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”); *In re Ford*, 110 F.3d at 963 (“[U]nderlying 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.”) (emphasis added). Once information subject to the attorney-client privilege is disclosed, this right of non-disclosure is lost forever and cannot be repaired. *See Philip Morris*, 314 F.3d at 619 (“In this case, the right sought to be protected – BATCo’s privilege – would be destroyed if interlocutory appeal is not allowed.”); *see also In re Ford*, 110 F.3d at 963 (holding that “once putatively protected material is disclosed, the very ‘right sought to be protected’ has been destroyed.”).

This is plainly true in the present case, as once Mohawk discloses the information at issue, it will irretrievably lose the protections afforded by the attorney-client privilege. Carpenter and his lawyers will

have enjoyed the opportunity to review and consider the privileged communications and the legal impressions of its adversary's counsel. Indeed, for any litigant, there could hardly be any worse recipient of attorney-client privileged information than his adversary. This information could not be effectively recovered on appeal from a final judgment, since there is no way to force Carpenter and his counsel to forget what they learned from the privileged communications. *See In re Ford*, 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.”).

The predicament faced by Mohawk is illustrated in this Court's decision in *Sell*. There, the Court held that a district court's pretrial order requiring a defendant to involuntarily receive medication in order to render him competent to stand trial was immediately appealable as a collateral order. *See* 539 U.S. at 176-77. The Court determined that the issue was effectively unreviewable on appeal from final judgment because by the time of trial, the defendant would have undergone the forced medication, the very harm that he sought to avoid. *Id.* This harm, the Court recognized, could not be undone even if the defendant was acquitted. *Id.* at 177. Indeed, if he were to be acquitted, there would be no appeal through which he could obtain review. *Id.* at 176-177.

The same is true for Mohawk in this case. Absent immediate appeal, by the time of trial, Mohawk will have suffered the very harm it seeks to avoid—the disclosure of privileged information. Moreover, even if Mohawk were to prevail at trial, there would be no appeal through

which Mohawk might obtain review and remedy the District Court's order.

In finding that the third *Cohen* criteria is not satisfied here, the Eleventh Circuit reasoned that any error by the District Court could be adequately remedied after final judgment by requiring a new trial. According to the Eleventh Circuit, if it “were [determined] on appeal from a final judgment 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, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information.” Pet. App. 8a-9a. This rationale, which has been adopted by the Tenth Circuit, *see Boughton*, 10 F.3d at 749, misses the mark.

A post-judgment appeal resulting in a reversal and a new trial would be manifestly useless in vindicating the right against disclosure that Mohawk seeks to protect, since by that point, “the cat is already out of the bag” and there is “no way to unscramble the egg scrambled by the disclosure[.]” *In re Ford*, 110 F.3d at 963. While the Eleventh and Tenth Circuits correctly recognize the harm occasioned by the improper use of privileged information at trial, these courts fail to recognize that the attorney-client privilege is not simply an evidentiary privilege that prohibits use of protected information at trial. Rather, when properly invoked, the privilege provides an absolute right not to disclose the privileged information in the first place.

Violation of this non-disclosure right causes harm beyond the use of privileged information at trial that simply cannot be remedied through a new trial. While privileged communications often contain facts – facts the opposing party has alternative avenues to discover – attorney-client communications also contain the attorney’s legal conclusions and litigation strategies. These mental impressions cannot be recovered on appeal after disclosure and final judgment; nor can the harm occasioned by their improper disclosure be undone. Thus, without interlocutory appeal, an erroneous finding of waiver will allow opposing counsel to proceed using mental impressions and litigation strategy borrowed from their adversary.

Additionally, the disclosed information may be sought in connection with other litigation, thereby causing additional harm that extends beyond the present case that could likewise never be addressed in a post-judgment appeal. This plain reality is true in many cases, as the complaining party will have no avenue to resist later discovery of the same privileged information during the pendency of their case. Further, there will be no meaningful mechanism for the trial court to protect against such occurrences, having already ruled that the privilege will not prevent discovery of such information. During the pendency of the case and before appellate review, the trial court’s mistaken order leaves the door open for intrusion by others. After such intrusion, there is no adequate remedy in the initial case, much less the related or unrelated cases that have also invaded the privilege domain.

The risk of such additional harm is readily illustrated in this case due to the *Williams* plaintiffs' previous attempt to obtain the privileged information at issue. Absent an immediate appeal, the information will likely be disclosed to the *Williams* plaintiffs as discovery proceeds in their case. In addition, the privileged information would in all likelihood be disclosed during the course of a public trial, or potentially in media reports or to other third parties, making it all the more clear that the privilege could never be fully retrieved. *See Philip Morris*, 314 F.3d at 619 (“By that point, the entirety of the [privileged memorandum] will have been disclosed to third parties, making the issue of privilege effectively moot.”).

D. The Right to Be Vindicated Is Sufficiently Important to Warrant Immediate Appeal.

Because the District Court's order satisfies each of the *Cohen* factors, the decision then “boils down” to a value judgment as to whether the right to be vindicated is sufficiently important to outweigh the considerations against piecemeal appeals. *Will*, 546 U.S. at 351-52; *Digital Equip.*, 511 U.S. at 878-79. This Court's prior opinions concerning the attorney-client privilege and the collateral order doctrine demonstrate that an issue as to the propriety of the compelled disclosure of otherwise privileged information is sufficiently important to merit collateral order review.

The attorney-client privilege is “one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn*, 449 U.S. at 389. The Court has long

acknowledged that the attorney-client privilege arises from “the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.” *Hunt*, 128 U.S. at 470; *Blackburn v. Crawford’s Lessee*, 3 Wall. (70 U.S.) 175, 192-93 (1865) (“If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case.”).

The importance of the attorney-client privilege, though, is founded on more than just its historical role in the American legal system. The privilege is based on a strong public policy that recognizes “that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” See *Upjohn*, 449 U.S. at 389. The strength of the policy supporting the attorney-client privilege is demonstrated by the fact that the privilege, by its very nature, will often prevent a litigant from obtaining potentially relevant evidence. Nevertheless, this Court has even refused to soften the posthumous application of the privilege in circumstances where the attorney-client communication could potentially exonerate a criminal defendant. See *Swidler & Berlin*, 524 U.S. at 408-11.

The attorney-client privilege is of increased importance in the context of internal investigations by corporate counsel, such as the investigation Mohawk conducted in this case. Indeed, in *Upjohn*, the Court

held that a narrowly defined attorney-client privilege would “threaten[] to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.” 449 U.S. at 392. In so holding, the Court rejected the government’s argument that “civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege.” *Id.* at 393 n.2. Instead, the Court reasoned that the government’s argument “ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken.” *Id.*

Allowing immediate appeals of erroneous findings of waiver will support the policies articulated in *Upjohn*. Absent the possibility of such relief, corporations may be less likely to engage in internal investigations to ensure their compliance with the law because the assurance that the legal findings and conclusions resulting from such investigations could be maintained in confidence would be weakened considerably. At the very least, the quality and depth of such investigations could suffer.

In exercising collateral order jurisdiction over appeals from orders compelling the disclosure of information claimed to be protected by the attorney-client privilege, the Third Circuit properly analyzed the question of importance in the *Cohen* sense. Relying on this Court’s prior discussion of the importance criterion, the Third Circuit explained that “[i]mportance has a particular meaning in [the collateral order doctrine] context . . . [and] does not only refer to general jurisprudential importance.” *In re Ford*, 110 F.3d at 959.

“Rather, the overarching principle governing ‘importance’ is that, for the purposes of the *Cohen* test, an issue is important if the interests that would potentially go unprotected without immediate appellate review of that issue are significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule.” *Id.*

Applying this principle, the Third Circuit held that “the interests protected by the attorney-client privilege (which would be eviscerated by forced disclosure of privileged material) [are] sufficiently significant relative to . . . the interests protected by the final judgment rule to satisfy the importance criterion [for collateral order jurisdiction].” *Id.* at 960-61. In this regard, the court noted that the attorney-client privilege is recognized by “every jurisdiction in this nation” and “is one of the pillars that supports the edifice that is our adversary system.” *Id.* at 962. The court explained that the purpose of the privilege is to support our adversary system “by promoting loyalty and trust between an attorney and a client.” *Id.* at 961. Ultimately, the Third Circuit correctly concluded that these interests served by the attorney-client privilege were “of sufficient importance that the danger of denying justice by delay in appellate adjudication . . . outweighs the inefficiencies introduced by immediate appeal.” *Id.* at 962.

Notably, this Court has permitted collateral order jurisdiction in cases implicating other arguably less important, less entrenched legal rights. The original *Cohen* case stemmed from a district court’s order refusing to apply a state statute requiring a plaintiff to

post security for costs. *See Cohen*, 337 U.S. at 546. The Court has similarly permitted collateral order jurisdiction in other contexts that do not present issues as central and fundamental to our legal system as the attorney-client privilege. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978) (allowing appeal under the collateral order doctrine of a district court order allocating to defendants in a class action the costs and expense of identifying class members); *Eisen*, 417 U.S. 156 (allowing collateral order review of a district court order imposing costs of notice on the defendant in a class action); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (allowing an appeal under the collateral order doctrine of an order staying an action pending resolution of a previously filed state court action); *Stack v. Boyle*, 342 U.S. 1 (1951) (allowing an appeal under the collateral order doctrine of an order denying reduced bail); *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684 (1950) (allowing appeal under the collateral order doctrine of an order vacating attachment of a vessel in an admiralty action). While the rights implicated in these cases are of undoubted importance, there should be little question that the non-disclosure rights arising out of the attorney-client privilege are, at the very least, of equal importance and thus subject to appeal under the collateral order doctrine.

III. Alternative Avenues for Review Are Inadequate and Do Not Provide a Basis for Refusing Collateral Order Jurisdiction.

In dismissing Mohawk’s appeal, the Eleventh Circuit noted that “there are other possible avenues for immediate review” available to Mohawk. Specifically, the court suggested that Mohawk could simply refuse to comply with the District Court’s order and contest its validity if subsequently cited for contempt. Pet. App. 9a, 13a. The Eleventh Circuit also conjectured that the potential option of “mandamus is often an appropriate method of review of orders compelling discovery.” Pet App. 11a. Neither of these options is a likely or efficient way to preserve the protections afforded by the attorney-client privilege; nor do they provide any basis for refusing collateral order jurisdiction.

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

The first approach proposed by the Eleventh Circuit is commonly referred to as the “disobedience and contempt’ requirement.” *See Behrens v. Pelletier*, 516 U.S. 299, 319 (1996) (Breyer, J., dissenting). In the past, this Court has “generally denied review of pretrial discovery orders” under the rationale that 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. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981). The Court has noted, however, that “[t]he

requirement of submitting to contempt . . . is not without exception and in some instances the purposes underlying the finality rule require a different result.” *United States v. Nixon*, 418 U.S. 683, 691 (1974).

Although this Court has never addressed the issue, some courts of appeals have proffered the same approach as the Eleventh Circuit and rejected collateral order review of orders compelling the production of attorney-client privileged information, suggesting that a party should instead refuse to comply with the order and then seek review of the resulting contempt sanction. For instance, in *Ogden*, the First Circuit explained its view that:

One reason that most discovery orders do not fall within the collateral order exception is because they do not meet the “otherwise effectively unreviewable” requirement; the party resisting the discovery order “can gain the right of appeal . . . by defying it, being held in contempt, and then appealing from the contempt order, which would be a final judgment as to [him].”

202 F.3d at 459. Similarly, in *United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, the Sixth Circuit stated that “discovery orders are generally not appealable under the collateral order doctrine” and that “to obtain review from this court, a complaining party must disobey the discovery order and incur an appealable contempt citation if that party is able to do so.” 444 F.3d 462, 472 (6th Cir. 2006). There are a number of fundamental problems with this approach.

First, contempt is not an adequate avenue through which to obtain effective appellate review because it is highly unpredictable and not always an available avenue to appeal. While a party may seek an immediate appeal of a finding of criminal contempt, an immediate appeal may not be had from a finding of civil contempt. *See, e.g., Fox*, 299 U.S. at 107 (“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.”); *Combs v. Ryan’s Coal Co.*, 785 F.2d 970, 976 (11th Cir. 1986) (noting that “[g]enerally a finding of civil contempt is not reviewable on interlocutory appeal”). There is no reasonable manner to predict that a party will receive a criminal contempt citation, however, as a district court is free to sanction defiance of its orders by civil contempt, by the striking of pleadings, or by other means that cannot be appealed until a final judgment is entered. Indeed, given the various alternative options available to the district courts, it would seem to be only the exceptional case in which criminal contempt would result from a party’s failure to produce privileged information. It is this uncertainty that explains the Eleventh Circuit’s emphasis that another avenue of appeal “*may exist*” if the party challenging the discovery order refuses to comply with the order. Pet. App. 13a.

Thus, forcing a party seeking to protect lawful and important rights to gamble that a court will impose the appropriate kind of sanction fails to afford the party a reliable means of appeal:

[T]he disobedience and contempt route to appeal cannot be labeled an adequate means

of relief for a party-litigant. . . . Petitioner cannot know, *ex ante*, whether refusal to comply with the discovery order will result in a civil contempt order or a criminal contempt order. The uncertainty of this means to relief bespeaks its inadequacy in this case.

In re Sealed Case No. 98-3077, 151 F.3d 1059, 1065 (D.C. Cir. 1998). As Wright & Miller have aptly stated:

Several circuits have ruled that the party resisting discovery should disobey the order and be held in contempt. But a civil contempt order against a party is not appealable before final judgment, and for that matter there is no assurance that the sanction would be contempt rather than some other order. Disobedience is not a satisfactory alternative path to appeal.

15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.23 n.6 (2d ed. Supp. 2009).

Second, the policy of the federal courts should not be to encourage intentional disobedience of court orders in order to protect the attorney-client privilege. Since appeal is possible only following a criminal contempt citation, the disobedience and contempt approach would require a party not simply to risk, but to affirmatively seek, criminal penalties in order to vindicate its rights afforded by the attorney-client privilege. As described by the Second Circuit, this is a “barbaric” means for

litigants to protect the sanctity of the attorney-client privilege:

At the outset we reject the suggestion that an appeal can properly come before us only if [Petitioner] refuses to deliver the 1,200 documents, subjects himself to the consequences of contempt, and appeals from the contempt judgment. The law today must be more ingenious, flexible and resourceful in its ability to avoid any such old-fashioned and semi-barbaric procedure.

Int'l Bus. Machs. Corp. v. United States, 471 F.2d 507, 511 (2d Cir. 1972), *vacated on other grounds*, 480 F.2d 293 (2d Cir. 1973) (*en banc*). Awaiting a contempt citation is an unrealistic, impractical, and unnecessarily risky method of obtaining appellate review, particularly to protect the critical rights encompassed in the attorney-client privilege.⁴

4. The analysis of the First Circuit in *Ogden* and other similar cases is further flawed because it essentially re-writes the third *Cohen* prong that the underlying order be “effectively unreviewable on appeal from a final judgment.” *See Sell*, 539 U.S. at 176. In *Ogden*, the First Circuit reasoned that the third prong is not satisfied by discovery orders compelling the disclosure of privileged information because the availability of the disobedience and contempt option means that the orders “do not meet the ‘otherwise effectively unreviewable’ requirement.” 202 F.3d at 459. This reasoning, however, twists the analysis to be applied under the third prong. The proper analysis focuses not on whether review may be had through some other means, but instead whether effective review may be had on appeal from a final judgment in the underlying case. Thus, the purported availability of another means to review through disobedience and contempt does not preclude collateral order jurisdiction.

B. Mandamus Is Not an Adequate Alternative to Collateral Order Review.

Many circuit courts have indicated that mandamus, as opposed to collateral order review, is the proper avenue for review of discovery orders compelling production of information over a claim of privilege. *See e.g.*, Pet App. 11a; *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568 (5th Cir. 2006) (stating that “[m]andamus is appropriate if the district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal”); *Chase Manhattan Bank*, 964 F.2d at 163 (rejecting the application of the collateral order doctrine in an appeal from a discovery order that required disclosure of documents claimed to be protected by the attorney-client privilege, and instead, overturning the discovery order through a writ of mandamus). The ability to file a petition for a writ of mandamus, however, does not prevent the exercise of collateral order jurisdiction. Rather, it is the very existence of collateral order jurisdiction that precludes mandamus as an appropriate remedy. *See Helstoski*, 442 U.S. at 506-08 (holding that mandamus is not “the appropriate vehicle” for vindicating a given right when an appeal may be had pursuant to the collateral order doctrine).

In *Helstoski*, the Court explained that the “general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it*. It lies only when there is practically *no other remedy*.” *Id.* at 505. Based on this principle, the Court held that

mandamus was not an available remedy to the petitioner because he could have pursued an appeal under the collateral order doctrine. *Id.* at 505-08. Therefore, mandamus is neither an alternative to nor substitute for collateral order review and provides no basis for rejecting collateral order jurisdiction.

Mandamus is an inadequate alternative to collateral order jurisdiction for the additional reason that it imposes a significantly limited standard of review. “[O]nly ‘exceptional circumstances amounting to a judicial ‘usurpation of power’” will justify issuance of the writ” and “the party seeking mandamus has the ‘burden of showing that its right to issuance of the writ is ‘clear and indisputable.’”” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967) and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)). As a result, even palpably erroneous rulings that a party waived the attorney-client privilege can be left unremedied via a cursory analysis based on the “stringent standard” for mandamus. *Id.* at 289; *see also Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 (1978) (plurality opinion) (“Although the District Court’s exercise of its discretion may be subject to review and modification in a proper interlocutory appeal, we are convinced that it ought not to be overridden by a writ of mandamus”). Thus, as occurred in this case, mandamus will not correct the error by the District Court, resulting in the irretrievable disclosure of privileged communications.

IV. Allowing Collateral Order Review Will Not Give Rise to a Flood of Interlocutory Appeals.

The Eleventh Circuit expressed the view that utilizing the writ of mandamus is preferable to collateral order jurisdiction for the very reason that it “places a higher burden on the challenging party than a direct appeal.” Pet. App. 13a. The Eleventh Circuit’s rationale is that a higher standard of review is preferable simply to reduce the high volume of appeals the court presumed would arise out of Mohawk’s proposed application of the collateral order doctrine. *Id.* This “floodgates” argument has been seized upon by other appellate courts rejecting collateral order review in this context. *See, e.g., Quantum Corp.*, 940 F.2d at 644 n.2 (stating that if discovery orders involving privilege were appealable before trial, “a flood of piecemeal appeals would undoubtedly ensue”).

The Eleventh Circuit apparently believed that application of the collateral order doctrine to Mohawk’s narrow appeal will more generally permit interlocutory appeals of all “discovery orders involving claims of privilege.” Pet. App. 13a. This case, however, is not and has never been about all claims of privilege. Rather, the narrow category at issue here includes only those cases in which a party seeks to appeal a district court order finding waiver of the attorney-client privilege and requiring the disclosure of information protected by that privilege. Other privileges that might be deemed less important to our system of justice than the attorney-client privilege are not at issue in this case. Moreover, this category does not include appeals of district court orders that do not require the disclosure of privileged information.

In any event, there is no evidence to support any “floodgates” argument on the question presented. Indeed, 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 *In re 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 protected by the attorney-client privilege. *Montgomery County v. MicroVote Corp.*, 175 F.3d 296 (3d Cir. 1999); *United States v. Legal Servs. for N.Y. City*, 249 F.3d 1077 (D.C. Cir. 2001); *Philip Morris*, 314 F.3d 612; *Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C.*, 57 F. App’x 58 (3d Cir. 2003); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658 (3d Cir. 2003); *Alvarez v. Woodford*, 81 F. App’x 119 (9th Cir. 2003); *United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884 (D.C. Cir. 2004); *In re Napster*, 479 F.3d 1078; *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007); *Newman v. Gen. Motors Corp.*, 228 F. App’x 245 (3d Cir. 2007); *Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc’ns Corp.)*, 493 F.3d 345 (3d Cir. 2007). Of these appeals, only three fell into the category at issue here, in which the district court order compelling the disclosure of privileged information was based on a finding of waiver of the attorney-client privilege. *Philip Morris*, 314 F.3d 612; *British Am. Tobacco*, 387 F.3d 884; *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345. There simply is no evidence to support the alleged potential flood of interlocutory appeals.

CONCLUSION

For the foregoing reasons, 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.

Respectfully submitted,

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