No. 08-678

In the Supreme Court of the United States

MOHAWK INDUSTRIES, INC., PETITIONER

v.

NORMAN CARPENTER

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a party has the right to an immediate appeal under the collateral order doctrine, as set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), from a district court's order finding waiver of the attorney-client privilege and compelling production of privileged materials.

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INTEREST OF THE UNITED STATES

This case presents the question whether the collateral order doctrine permits immediate appeal of a district court's finding of waiver of the attorney-client privilege. As the Nation's most frequent litigator in federal court, the United States has a substantial interest in proper resolution of the question presented. The government litigates the applicability of the attorney-client privilege in discovery disputes, as well as the applicability of the collateral order doctrine in a variety of other contexts. Additionally, resolution of the question presented has potential implications for the immediate appealability of orders pertaining to unique governmental privileges.

STATEMENT

1. In 2004, a group of individuals (not parties to the present dispute) filed a class action lawsuit against petitioner, *Williams* v. *Mohawk Indus., Inc.*, No. 4:04-cv-00003-HLM (N.D. Ga. filed Jan. 6, 2004), alleging that petitioner (a carpet manufacturer) had unlawfully depressed the wages of its legally employed workers through a pattern of racketeering activity by knowingly employing, harboring, and encouraging entry of illegal aliens. J.A. 50-52. During the pendency of the *Williams* action, petitioner hired respondent as a shift supervisor at one of its manufacturing facilities and subsequently terminated him. J.A. 54, 61. Respondent brought suit in federal court against petitioner and certain of its executives, alleging that he had informed petitioner's human resources department that it was employing illegal aliens; that petitioner's outside counsel had sought to compel him to recant his statements in order to insulate the company from liability in *Williams*; and that when he had refused, petitioner had terminated his employment based on pretext. Pet. App. 3a-4a; J.A. 48-66. Respondent sought recovery under 42 U.S.C. 1985(2) (conspiracy to deter him from testifying in *Williams*) and under various Georgia laws. Pet. App. 3a; J.A. 66-78.

Shortly after respondent filed suit, the plaintiffs in *Williams* sought an evidentiary hearing to explore the allegations in respondent's complaint. Pet. App. 4a. In its response to that motion, petitioner offered its account of the "true facts" behind respondent's termination. *Ibid*. Petitioner represented that respondent had "engaged in blatant and illegal misconduct" in circumvention of federal immigration laws; that petitioner had commenced an investigation of respondent's conduct and

claims; that "[a]s part of that investigation" petitioner's outside counsel had interviewed respondent; and that, as a result of respondent's misconduct, petitioner had fired him. *Id.* at 4a-5a; see J.A. 208-211.

Respondent subsequently sought to compel production of information relating to his meeting with petitioner's outside counsel, as well as information relating to petitioner's decision to terminate his employment. Pet. App. 5a-6a, 22a. The district court granted respondent's motion to compel. *Id.* at 29a-54a. The court held that the information at issue was protected by the attorney-client privilege, *id.* at 36a-42a, but that petitioner had impliedly waived the privilege through its response to the *Williams* plaintiffs' request for an evidentiary hearing, *id.* at 43a-51a. The district court explained:

> By making those representations, [petitioner] placed the actions of [petitioner's outside counsel] in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between [petitioner's outside counsel] and [respondent] and between [petitioner's outside counsel] and [petitioner's] personnel. Consequently, the Court must conclude that [petitioner] has waived the attorney-client privilege with respect to the communications relating to the interview of [respondent] and the decision to terminate [respondent's] employment.

Id. at 6a, 51a. The district court stayed its order pending appeal. *Id.* at 52a.

2. The court of appeals dismissed petitioner's appeal for lack of jurisdiction under 28 U.S.C. 1291, holding that the challenged discovery order did not qualify for immediate review under *Cohen* v. *Beneficial Indus-*

trial Loan Corp., 337 U.S. 541 (1949). The court explained that "[u]nder *Cohen*, an order is appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." Pet. App. 7a-8a.

The court held that an order finding waiver of the attorney-client privilege and compelling production of the underlying information satisfied the first and second elements of *Cohen*'s test. Pet. App. 8a. The court held, however, that the district court's order did not satisfy *Cohen*'s third element, reasoning that attorney-client privilege rulings could effectively be reviewed after final judgment by vacating any tainted verdict and ordering a retrial without the use of the privileged evidence. *Id.* at 8a-9a.

The court also relied on circuit precedent rejecting collateral order review for denials of the accountant-client privilege in the discovery context. Pet. App. 10a-11a. Emphasizing the "potentially large volume of appeals [that] may arise out of such discovery orders" and the "powerful prudential reasons to avoid commonplace interlocutory appeals," the court noted that aggrieved parties possess adequate alternative avenues of review, including a petition for a writ of mandamus and an appeal of a contempt order imposing sanctions for declining to produce the assertedly privileged material. *Id.* at 13a.

The court of appeals then denied petitioner's companion mandamus petition, reasoning that even if the district court had erred in holding the privilege waived, petitioner "still ha[d] not shown that its right to the issuance of the writ [was] clear and indisputable." Pet. App. 15a.

SUMMARY OF ARGUMENT

Discovery orders finding waiver of the attorney-client privilege do not warrant immediate appeal under the collateral order doctrine. In addition to failing the second and third requirements of the traditional *Cohen* test, these numerous and routine orders are insufficiently important to outweigh the strong interest against pre-finality appeals.

A. In its more recent cases applying the collateral order doctrine, the Court has emphasized that the class of eligible orders must remain "narrow and selective in its membership" and limited to cases where delaying review would "imperil a substantial public interest." *Will* v. *Hallock*, 546 U.S. 345, 347-353 (2006). While some orders adjudicating rights "embodied in a constitutional or statutory provision" or having a similarly "good pedigree in public law" (such as qualified immunity) are entitled to immediate review, orders adjudicating other rights are not. *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 875, 879 (1994). This Court's precedents have long denied collateral-order review to typical discovery orders because of the potential for undue delay arising from countless automatic appeals. The Court generally has insisted, as a filtering mechanism, that a party must instead disobey the disclosure order and appeal the resulting contempt order or pursue mandamus or an appeal under 28 U.S.C. 1292(b).

B. Although the attorney-client privilege serves an important purpose, it is not of constitutional or other exceptional public-law pedigree. And the instrumental interest in encouraging "full and frank communication" between client and counsel is not materially undermined by denying collateral order review of a finding of waiver. The sheer volume and garden-variety nature of produc-

tion orders involving assertions of the attorney-client privilege cut against petitioner's contention that those orders are categorically of such special significance as to warrant immediate review.

Such orders also do not satisfy the traditional requirements of the collateral order doctrine. A finding of waiver of the attorney-client privilege is ordinarily not "completely separate from the merits of the action." Whether the attorney-client privilege has been waived—which may depend on a determination of the unfairness to the opposing party of litigating the merits without the privileged information—often will require an assessment of the significance of the privileged information to the merits.

Nor is an order finding a waiver of attorney-client privilege "effectively unreviewable on appeal from a final judgment." Several reasonable alternatives exist: Assuming a party complies, a district court may enter a protective order barring disclosure prior to trial, and an appeals court can vacate an adverse final judgment and exclude the use of any tainted evidence in a retrial. Assuming non-compliance, a district court may issue, in lieu of an immediately appealable contempt order, other sanctions short of contempt that preserve a party's right to appeal. And, in especially important or egregious cases, a party can pursue a mandamus petition or an interlocutory appeal under 28 U.S.C. 1292(b). Should experience demonstrate that those various alternatives are inadequate, Congress—or the Court, pursuant to its rulemaking authority, see 28 U.S.C. 1292(e)—may classify attorney-client privilege orders as immediately appealable.

Although denials of the attorney-client privilege do not meet the Court's stringent standards for collateral-

order review, denials of certain governmental privileges —in light of their constitutional grounding, rare invocation, and unique importance to governmental functions —should qualify for immediate appealability. In particular, the ordered disclosure of a Presidential communication or state secret would more directly and irremediably harm the purpose of the corresponding privilege (*i.e.*, preserving confidentiality of top-level Executive Branch communications or protecting national security) than would disclosure of attorney-client privileged information.

ARGUMENT

DISCOVERY ORDERS FINDING WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE DO NOT WARRANT IMMEDIATE APPEAL UNDER THE COLLATERAL ORDER DOCTRINE

The Court should apply in this case the same principles that it has applied in its more recent cases addressing the collateral order doctrine. That analysis requires, as part of or in addition to consideration of the traditional *Cohen* factors, an inquiry into the relative importance of the interest at stake—according special weight to interests of constitutional dimension or other substantial public interests. Thus, for example, the Court has found denials of immunity under the Speech or Debate Clause, absolute or qualified immunity of federal officials, state sovereign immunity, and the assertion of the Presidential communications privilege to be immediately appealable under Section 1291. Applying that framework here, discovery orders concerning the attorney-client privilege—voluminous in quantity and often mundane in nature—are not subject to immediate appeal under the collateral order doctrine. But this is not to

say that no denial of a claim of privilege could satisfy the Court's stringent standards. Privileges that are at once rarely invoked and of substantial constitutional significance under the separation of powers would merit immediate appeal under the Court's framework, even though assertion of the privilege might arise in the discovery context.

A. The Collateral Order Doctrine Is Limited To A Small Class Of Orders Implicating Sufficiently Compelling Constitutional Or Other Public Interests

"Section 1291 of Title 28, U.S.C., gives courts of appeals jurisdiction over 'all final decisions' of district courts" not immediately appealable to this Court. *Behrens* v. *Pelletier*, 516 U.S. 299, 305 (1996). The Court has given Section 1291's requirement of a "final decision[]" a "practical rather than a technical construction," *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), so as to extend "appellate jurisdiction over 'a narrow class of decisions that do not terminate the litigation,' but are sufficiently important and collateral to the merits that they should 'nonetheless be treated as final.'" *Will* v. *Hallock*, 546 U.S. 345, 347 (2006) (quoting *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). So understood, Section 1291 encompasses orders "conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action'" that are "'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.'" *Id.* at 349 (quoting *Behrens*, 516 U.S. at 305; *Cohen*, 337 U.S. at 546).

The Court has applied a three-pronged test to determine whether a class of orders may qualify for immedi-

ate appeal under the "collateral order doctrine." The orders must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.* (*P.R. Aqueduct*), 506 U.S. 139, 144 (1993) (brackets in original) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). The Court has emphasized in its more recent cases that in order to preserve the important policies of judicial efficiency that underlie the finality requirement of Section 1291, the class of collateral orders must remain "narrow and selective in its membership" and limited to cases where later review would "imperil a substantial public interest." *Hallock*, 546 U.S. at 350, 353; see *id.* at 350 ("[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope."). As petitioner acknowledges (Br. 16), it must establish that the class of orders is sufficiently important to justify immediate appeal. See *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495, 503 (1989) (Scalia, J., concurring) (framing inquiry as whether right to be vindicated is "sufficiently important to overcome the policies militating against interlocutory appeals").

Several types of orders that the Court has held subject to immediate appeal under the collateral order doctrine involve a party's "entitlement not to stand trial or face the other burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity); see *Osborn* v. *Haley*, 549 U.S. 225 (2007) (Westfall Act certification); *P.R. Aqueduct*, *supra* (Eleventh Amendment immunity); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity); *Helstoski* v. *Meanor*, 442 U.S. 500

(1979) (Speech or Debate Clause immunity); *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy). One premise of these decisions is that such a right would be "effectively lost if a case [were] erroneously permitted to go to trial." *Forsyth*, 472 U.S. at 526. But the right to immediate appeal in such cases stems not merely (or necessarily) from "a right to avoid trial" as such, but as well from "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Hallock*, 546 U.S. at 350, 351-352 (citation omitted). The Court has thus denied immediate review of other collateral orders implicating a right to avoid trial, such as orders regarding application of the Federal Tort Claims Act's judgment bar to preclude constitutional tort actions against federal officers, *id.* at 354-355; rescission of a private settlement agreement that would otherwise prohibit suit, *Digital Equip.*, 511 U.S. at 873; and denial of dismissal based on asserted immunity from civil process for extradited persons and on *forum non conveniens* grounds, *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988).

Similarly, while the Court recently has permitted immediate review under the collateral order doctrine of orders implicating compelling interests of constitutional dimension, see *Sell* v. *United States*, 539 U.S. 166, 175-177 (2003) (forced medication of a prisoner to make him competent to stand trial), it has more often denied such review when important but non-constitutional interests are at stake, see, *e.g.*, *Cunningham* v. *Hamilton County*, 527 U.S. 198 (1999) (discovery sanctions order); *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424 (1985) (disqualification of counsel in civil case); *Coopers & Lybrand*, *supra* (order denying class certification).

In reconciling its modern collateral order precedents, the Court has explained that the doctrine applies only where the question considered implicates "some particular value of a high order," such as "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, [or] mitigating the government's advantage over the individual." *Hallock*, 546 U.S. at 352-353. It is thus not merely an immediate interest, but "a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable." *Id.* at 353. In assessing the substantiality of particular rights, the Court has made clear that those "originating in the Constitution or statutes" are to be shown particular solicitude. *Digital Equip.*, 511 U.S. at 879. While orders adjudicating certain rights "embodied in a constitutional or statutory provision" or having a similarly "good pedigree in public law" (such as qualified immunity) may be entitled to immediate review, orders adjudicating lesser interests are not. *Id.* at 875, 879.

Although the relevant inquiry does not categorically exclude discovery orders from the collateral order doctrine, "[a]s a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review." *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992). This Court's precedents have long treated discovery orders differently because of their sheer volume, their often routine nature, and the potential that appeals from such orders would cause undue delay. The Court typically has stated that a party must disobey the disclosure order and appeal the resulting contempt order as a means of filtering disputes that justify immediate review. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 533 (1971) ("[T]he neces-

sity 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."); *Behrens*, 516 U.S. at 319 (Breyer, J., dissenting) ("disobedience and contempt" requirement for discovery claims serves "to limit appeals to issues that are both important and reasonably likely to lead to reversal") (quoting 15B Charles Alan Wright et al., *Federal Practice & Procedure* § 3914.23, at 154 (2d ed. 1992)).

Application of the collateral order doctrine to the discovery context must be sensitive to the concerns expressed in those precedents. See, *e.g.*, *Cunningham*, 527 U.S. at 209 ("Not only would [immediate appeals of discovery sanctions] ignore the deference owed by appellate courts to trial judges charged with managing the discovery process, it also could forestall resolution of the case.") (citing *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)). Because the doctrine should "never be allowed to swallow the general rule" of a single post-judgment appeal, any allowance of an immediate appeal in the discovery context must be narrow and limited to issues of such importance as the Court has found necessary in recent cases. *Hallock*, 546 U.S. at 350 (quoting *Digital Equip.*, 511 U.S. at 868).

B. Orders Resolving Attorney-Client Privilege Disputes Do Not Qualify For Immediate Appeal Under The Collateral Order Doctrine

The question remains whether discovery orders to produce information based on a finding that the attor-

ney-client privilege has been waived satisfy the traditional *Cohen* criteria and implicate a sufficiently compelling interest to justify immediate appeal. Given the volume and nature of such orders, the answer should be no.

1. Discovery orders requiring disclosure of material allegedly subject to the attorney-client privilege do not as a class implicate an interest of a sufficiently high order

a. The attorney-client privilege is not "embodied in a constitutional or statutory provision" or in "public law." *Digital Equip.*, 511 U.S. at 875, 879. Rather, like most discovery privileges, its origins are in common-law practice. While it is one of the oldest of such privileges, see *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981), its modern evolution has been marked by an increasing array of exceptions designed to narrow the privilege's scope. See 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 503.10[2], at 503-13 (2d ed. 2009) (*Weinstein*) ("[T]he modern trend generally has been towards broader disclosure, manifested in ever-expanding provisions for discovery.").

The purpose of the attorney-client privilege is to promote "the observance of law and administration of justice" by encouraging "full and frank communication between attorneys and their clients." *Upjohn*, 449 U.S. at 389. All parties can agree that this purpose is important. But for a class of orders to be immediately appealable, more is necessary. Here, the harm to the attorney-client relationship resulting from unjustified disclosure of their communications must outweigh the substantial costs of permitting pre-final-judgment appeals in all cases finding a waiver of the privilege.

The Court has not found other protections of the attorney-client relationship to justify immediate appeal. Fundamental to this relationship is, of course, the right to retain an attorney of one's choosing. Indeed, for a criminal defendant, that right is protected by the Sixth Amendment. See, *e.g.*, *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). Yet an order infringing upon that interest cannot be immediately appealed. See *Flanagan* v. *United States*, 465 U.S. 259, 267 (1984) (order disqualifying criminal defense counsel not appealable under collateral order doctrine); *Richardson-Merrell*, 472 U.S. at 435 (order disqualifying civil counsel not appealable under collateral order doctrine). When disqualification of chosen counsel, potentially in violation of the Constitution, does not give rise to an immediate appeal, denial of a common-law claim of privilege designed to strengthen the attorney-client relationship cannot be thought to do so.

Although petitioner acknowledges that the Court's recent cases make clear that "a determination of the importance of the legal right at issue" is "central" to the collateral order inquiry (Br. 16), petitioner nevertheless relies on earlier collateral order cases when considering the relative importance of the interests at stake (*id.* at 30-31). Those earlier cases, however, offer little analysis of the importance of the right in question and appear to have placed much less weight on that factor.[1] Peti-

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[1] See *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 12-13 (1983) (order staying action pending resolution of previously filed state court action); *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 347 n.8 (1978) (order allocating to class action defendants costs and expenses of identifying class members); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171-172 (1974) (order imposing costs of notice on class action defendant); *Stack* v. *Boyle*, 342 U.S. 1, 6 (1951) (order

tioner's contention that the interests asserted here are "of equal importance" to those in the early collateral order cases thus has little relevance for today's inquiry.

In any event, for reasons explained later, the interest in encouraging "full and frank communication" between client and counsel is not materially undermined by requiring the holder of the privilege to pursue the traditional avenue of post-judgment appellate review (or where appropriate, mandamus or Section 1292(b) interlocutory review). See Pt. B.2.b, *infra*.

b. The sheer volume and routine nature of most discovery disputes involving assertions of the attorney-client privilege also cut against the immediate appealability of judicial orders resolving them. See Resp. Br. 47 & n.7 (surveying district court decisions that adjudicate attorney-client privilege disputes). Allowing immediate appeal of these decisions would potentially prolong much federal-court litigation and thereby undermine Section 1291's finality requirement.[2]

There are no structural restraints on the assertion of attorney-client privilege claims. Some litigants may seek a tactical advantage by asserting and then appealing attorney-client privilege claims, even if they are of

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denying reduced bail); *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 688-689 (1950) (order vacating attachment of vessel in admiralty action); *Cohen*, 337 U.S. at 545-547 (order refusing to apply state statute requiring posting of bond).

[2] Petitioner states (Pet. Br. 21, 39) that it seeks only a rule that would permit immediate appeal of findings of waiver of the attorney-client privilege. But petitioner provides no principled basis on which to limit the rule it seeks to waivers of the attorney-client privilege as opposed to denials of the applicability of the privilege in the first place. Regardless, petitioner's position at least covers all orders finding a waiver on any basis—itself a significant category.

little import or merit. See, *e.g.*, *MDK, Inc.* v. *Mike's Train House, Inc.*, 27 F.3d 116, 120 (4th Cir. 1994) ("Many parties faced with discovery requests are apt to regard the information sought as sensitive or confidential and seek, at a minimum, to delay its disclosure through an interlocutory trip to an appellate court."); cf. *Cunningham*, 527 U.S. at 210 (Kennedy, J., concurring) ("Delays and abuses in discovery are the source of widespread injustice; and were we to hold sanctions orders against attorneys to be appealable as collateral orders, we would risk compounding the problem.").

Even the threat of such appeals (with the accompanying delay and expense) could substantially alter the course of discovery and inhibit the district court's ability to control the process. That is why the collateral order doctrine, especially in the discovery context, "emphasizes the deference that appellate courts owe to the trial judge" and seeks to avoid "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals." *Cunningham*, 527 U.S. at 203 (quoting *Firestone Tire & Rubber*, 449 U.S. at 374).

Petitioner (Br. 39-40) and its amici (Chamber of Commerce (CoC) Br. 30-35) assert that only a relatively small number of appeals of attorney-client privilege disputes appear to have arisen in the three circuits that currently allow immediate review of such orders. But that may simply reflect a combination of the relatively recent nature of those precedents and uncertainty as to the precise class of orders entitled to collateral order review in those circuits. In any event, there is good reason to expect that immediate appeals would become substantially more common—both in those circuits and others—if this Court were to announce a uniform rule

allowing immediate appeal in all such cases throughout the federal courts.

2. An order finding waiver of the attorney-client privilege is not sufficiently separate from the merits or effectively unreviewable in other ways

An order requiring disclosure of information based on a finding of waiver of attorney-client privilege also does not satisfy the traditional requirements of the collateral order doctrine—in particular, the second ("important issue completely separate from the merits of the action") and third ("effectively unreviewable on appeal from a final judgment"). *Coopers & Lybrand*, 437 U.S. at 468.[3]

a. The relative importance of attorney-client privilege disputes has already been addressed (see pp. 13-16, *supra*). That leaves only the latter part of the second prong: whether rulings resolving attorney-client privilege disputes are sufficiently separate from a suit's merits. That requirement "is a distillation of the principle that there should not be piecemeal review of steps towards final judgment in which they will merge." *Van Cauwenberghe*, 486 U.S. at 527 (internal quotation

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[3] We do not address the first element—whether the order "conclusively determines the disputed question"—because 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. Respondent (Br. 19-22) raises the "disobedience and contempt" option as providing a further opportunity for the district court to revisit the privilege issue. Because any such reconsideration would be discretionary, the government believes that option should be addressed as an independent limiting principle (see pp. 11-12, *supra*) or as part of the third prong of the *Cohen* test (*i.e.*, whether the denial of the privilege is "effectively unreviewable" without the collateral order doctrine, see p. 25, *infra*).

marks and citation omitted). It is designed to avoid "repetitive appellate review of substantive questions" by precluding review of "interlocutory orders that involve considerations enmeshed in the merits of the dispute." *Id*. at 528. Orders that require a court to "scrutinize the substance of the [underlying] dispute * * * to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action," are not sufficiently separate from the merits of the case to satisfy the collateral order doctrine. *Ibid*.

Discovery sanctions, for example, ordinarily are not collateral orders because they "may require the reviewing court to inquire into the importance of the information sought or the adequacy or truthfulness of a response." *Cunningham*, 527 U.S. at 205. Class action assessments of typicality, commonality, and adequacy of representation are also too closely linked to the merits of a case to be considered collateral. See *Coopers & Lybrand*, 437 U.S. at 469 n.12. Orders disqualifying civil counsel are likewise insufficiently separable from the merits because they might require assessing the likely effect of an attorney's prior conduct or future testimony on trial proceedings. See *Richardson-Merrell*, 472 U.S. at 439-440.

Petitioner (Br. 21), like the court of appeals, contends that the second *Cohen* factor requires only that the disputed issue can be resolved "without *deciding* the merits of the case." Pet. App. 8a (emphasis added). But under that standard, the orders in all three of the above cases would have satisfied the second *Cohen* factor,

since none of them actually required the district court to decide the merits.[4]

Although the inquiry as to whether information is protected by the attorney-client privilege in the first place generally does not implicate the merits of the underlying suit, the further question whether that privilege was waived often does. A determination that the attorney-client privilege has been waived by implication —directly at issue here—will ordinarily require the district court to assess the significance to the litigation of the privileged information put into play by the client. See 3 *Weinstein* § 503.41[1], at 503-105 (describing "waiver by implication" as "plac[ing] protected information in issue for personal benefit through some affirmative act," such that applying the privilege would be "manifestly unfair to the opposing party"). One common example is where a client asserts reliance on the advice of counsel as part of its defense, thereby making the privileged communications a substantive issue in the litigation. See 2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 9:44, at 213-214 (rev. 2d ed. 2007). A court's waiver-by-implication inquiry—in determining the unfairness to the opposing party of litigating the merits without the privileged information relied upon by the client—thus implicates the underlying merits at least as much as the classes of orders that the Court has

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[4] As petitioner notes (Br. 22), the question of qualified immunity might also be said to overlap with the merits of an underlying dispute. The Court nevertheless has distinguished its immunity-related rulings from orders (such as those referred to in the text) the resolution of which may depend on the effect the order has on "the success of the parties in litigating the other legal and factual issues that form their underlying dispute." *Forsyth*, 472 U.S. at 529-530 n.10. This case falls into that latter category.

already held insufficiently collateral to warrant immediate appeal.

The same holds true for waivers of the attorney-client privilege based on other grounds. For instance, a party may contend that its opponent's intentional disclosure of certain privileged information warrants a finding of waiver with respect to related but undisclosed privileged information. Federal Rule of Evidence 502(a) provides that, for intentional disclosures of attorney-client privileged information in a federal proceeding or to a federal agency, the waiver's scope depends in part on whether undisclosed material "ought in fairness to be considered together" with the disclosed information. That analysis requires an assessment of the merits of a case to determine the practical effect of withholding the material at issue. See Fed. R. Evid. 502 explanatory note ("[A] party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.").

The crime-fraud exception to the attorney-client privilege also often implicates the merits of the underlying case. Under that exception, the attorney-client privilege "does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States* v. *Zolin*, 491 U.S. 554, 563 (1989) (citation omitted). In criminal cases, the alleged crime or fraud supporting the exception may well overlap with conduct related to the charged offense. See Resp. Br. 27-29 & n.4 (collecting cases). In such cases, determining the applicability of the crime-fraud exception would require a preview of the merits.

Although petitioner suggests (Br. 20-21) that the district court *in this case* did not assess the merits of respondent's suit, that is far from clear. In finding

waiver, the district court explained that by making representations regarding its investigation and outside counsel's interview of respondent, petitioner had "placed the actions of [petitioner's outside counsel] in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between [petitioner's outside counsel] and [respondent] and between [petitioner's outside counsel] and [petitioner's] personnel." Pet. App. 51a. That "fairness" determination was necessarily premised on the district court's assessment of the relevance of the privileged communications to the merits of respondent's claims.

In any event, the Court has rejected "a case-by-case approach to deciding whether an order is sufficiently collateral," *Cunningham*, 527 U.S. at 206, and instead asks simply whether "many" orders of the sort at issue may be intertwined with the merits of a case, *Richardson-Merrell*, 472 U.S. at 439. Whether the class of orders here is limited to waivers by implication, or extends more broadly to encompass all waivers of and exceptions to the attorney-client privilege, a sufficient number of such orders are enmeshed in the merits of a dispute to render them non-collateral as a categorical matter. See *Cunningham*, 527 U.S. at 206; *Richardson-Merrell*, 472 U.S. at 439.

b. Attorney-client privilege disputes also are not "effectively unreviewable on appeal from a final judgment." As the decision below explains, established procedures exist to remedy the litigation effects of an erroneous waiver ruling and disclosure following appeal from final judgment: a reviewing court may "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 ob-

tained as a consequence of the improperly disclosed information." Pet. App. 8a-9a.

Petitioner contends (Br. 23-27) that because a party cannot "unlearn" disclosed information, review following final judgment cannot eliminate the litigation effects of an erroneous waiver ruling. But courts routinely confront the need to prevent a party from using improperly obtained evidence, not only in the discovery context but also in criminal prosecutions. Faced with the fruits of unconstitutional searches and seizures, as well as confessions, courts have developed longstanding rules to ensure that the prosecution cannot make use of knowledge that it would not possess but for improperly obtained information or evidence. See, *e.g.*, *Oregon* v. *Elstad*, 470 U.S. 298, 306 (1985) ("The *Wong Sun* doctrine applies as well when the fruit of the Fourth Amendment violation is a confession."); *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963) (verbal evidence derived from an unlawful entry or unauthorized arrest excluded as "fruit of the poisonous tree"); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920) (copies and photographs of documents obtained through illegal search and seizure inadmissible as derivatives of excluded evidence). While those remedies are available following appeal from a final judgment, a district court's denial of a pre-trial motion to suppress such information is not appealable under the collateral order doctrine. See *DiBella* v. *United States*, 369 U.S. 121, 131 (1962).

If vacating an adverse judgment and excluding the use of any tainted evidence is adequate to guarantee the rights of a criminal defendant, it is difficult to see why those remedies would be inadequate for a civil litigant. Indeed, the procedures afforded by Federal Rule of Evidence 502(b) and Federal Rule of Civil Procedure

26(b)(5)(B), which provide for the return and non-use of privileged documents inadvertently disclosed to an opposing party, are premised on the adequacy of such an approach.

Petitioner (Br. 25) and its amici (CoC Br. 18-21) also contend that the attorney-client privilege protects against the disclosure of information itself and not only its subsequent use at trial. But the attorney-client privilege does not rest on the premise that confidentiality is an end in itself; rather, confidentiality is a means of furthering a generalized societal goal of "encourag[ing] full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. In any event, a post-judgment order that unwinds the litigation consequences of an erroneously ordered disclosure of attorney-client privileged material would serve to mitigate any impact on the ex ante incentives for "full and frank communication"—the privilege's limited instrumental objective. See *Swidler & Berlin* v. *United States*, 524 U.S. 399, 407 (1998). And given that a district court's resolution of an attorney-client privilege dispute presumably would be infrequently reversed on appeal anyway, any impact on those ex ante incentives would be marginal. See *United States* v. *Philip Morris Inc.*, 314 F.3d 612, 625 (D.C. Cir. 2003) (Randolph, J., dissenting) (noting "the few erroneous discovery orders that might be corrected were appeals available") (quoting *Reise* v. *Board of Regents*, 957 F.2d 293, 295 (7th Cir. 1992)).

The case for immediate review is even more attenuated for *waivers* of attorney-client privilege. Such rulings do not require consideration of the core elements of attorney-client privilege, but rather concern the conse-

quences of a party's or attorney's subsequent conduct with respect to the privileged communications. That context is at least one step removed from the communication between attorney and client that the privilege seeks to promote. Accordingly, any impact on the ex ante incentives for "full and frank communication" is considerably diminished. See *Philip Morris Inc.*, 314 F.3d at 625 (Randolph, J., dissenting) ("If we did not hear the appeal, clients' incentives to communicate frankly with their attorneys would remain as strong as ever. The only possible change would be that clients might be more careful to hire attorneys who comply rigorously with the discovery rules.").

Petitioner and its amici nonetheless speculate that without immediate appeal of disclosure orders, the interests underlying the attorney-client privilege will be undercut in a variety of ways: individuals will be less forthcoming with their attorneys (CoC Br. 20-21); "corporations may be less likely to engage in internal investigations" (Pet. Br. 29); and society will suffer "a breakdown not only in attorney-client relations, but in the regulatory system that Congress envisioned and the Executive adopted" (DRI Br. 4). But a significant majority of circuits have never permitted collateral order review of attorney-client privilege disputes, and the rulings in the three circuits that have are recent. Yet neither petitioner nor its amici offer any evidence that the grave consequences they predict have come to pass in any of those jurisdictions.

In those rare instances in which attorney-client communications are sufficiently sensitive that an erroneously ordered disclosure cannot be remedied effectively on appeal after final judgment, other avenues of relief are available. The availability of those avenues counsels

against permitting automatic piecemeal review via the collateral order doctrine of all disclosure orders arising out of attorney-client privilege disputes. See, *e.g.*, *Firestone Tire & Rubber*, 449 U.S. at 378 n.13 ("Although there may be situations in which a party will be irreparably damaged if forced to wait until final resolution of the underlying litigation before securing review of an order denying its motion to disqualify opposing counsel, it is not necessary, in order to resolve those situations, to create a general rule permitting the appeal of all such orders. * * * [A] party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b), * * * and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available.").

As an initial matter, compliance with a disclosure order does not mean that the allegedly privileged information must be made available to the whole world. The district court may enter a protective order, shielding the information from public use (at least until trial). Alternatively, the party invoking the privilege may refuse to comply with a disclosure order. Although the district court may hold a non-compliant party in contempt and impose sanctions—which could give rise to a right of immediate appeal (see pp. 11-12, *supra*)—district courts regularly impose sanctions short of contempt, such as allowing the trier of fact to treat a contested fact as established. See Fed. R. Civ. P. 37(b)(2)(A)(i). That compromise may be worthwhile to a party possessing the allegedly privileged information in some cases, because it would preserve the right to appeal after final judgment while not disclosing the information.

In any event, where the district court's error "amount[s] to a judicial usurpation of power, or a clear abuse of discretion," a party may seek relief through a petition for a writ of mandamus. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citation omitted). As the court of appeals correctly recognized, "[u]tilizing the writ of mandamus, as opposed to the collateral order doctrine, as the appropriate avenue to seek review of discovery orders involving claims of privilege strikes an appropriate balance between the concerns of furthering the important policies of full and frank communication sought to be furthered by the privilege and the concerns of judicial efficiency." Pet. App. 13a; see *Cunningham*, 527 U.S. at 211 (Kennedy, J., concurring) ("If * * * the result is an exceptional hardship itself likely to cause an injustice, a petition for writ of mandamus might bring the issue before the Court of Appeals to determine if the trial court abused its discretion in issuing the order.").

Petitioner's amici express concern (CoC Br. 17, 22) that an erroneous disclosure order can produce "dramatic spillover effects" or "extreme pressure to settle." Appellate courts are well suited to prevent such consequences through their mandamus authority and have not hesitated to apply the writ to do so. See, *e.g.*, *In re Lott*, 424 F.3d 446 (6th Cir. 2005), cert. denied, 547 U.S. 1092 (2006); *In re Regents of Univ. of Cal.*, 101 F.3d 1386 (Fed. Cir. 1996), cert. denied, 520 U.S. 1193 (1997); *Chase Manhattan Bank, N.A.* v. *Turner & Newall, PLC*, 964 F.2d 159 (2d Cir. 1992); 16 Charles Alan Wright et al., *Federal Practice & Procedure* § 3935.3, at 605-606 n.6 (2d ed. 1996 & Supp. 2009) (citing examples). Amici offer no reason why such review would not adequately address the practical concerns that they raise.

Petitioner contends that "even palpably erroneous rulings * * * can be left unremedied via a cursory analysis based on the 'stringent standard' for mandamus." Pet. Br. 38 (quoting *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 289 (1988)). There is no reason, however, to presume that courts will shirk their responsibility to correct significant errors through their mandamus authority. To be sure, mandamus offers little recourse where a claim of privilege lacks merit or serious consequence. But that is the point: to allow immediate appeals as of right in every case in which a claim of attorney-client privilege is asserted and denied would unnecessarily disrupt and undesirably protract litigation throughout the federal courts.

Nor is mandamus the only alternative for an aggrieved party to obtain review of an attorney-client privilege dispute. Where the privilege is of sufficient importance to constitute "a controlling question of law," the immediate appeal of which may "materially advance" the litigation, parties may seek certification for an interlocutory appeal under 28 U.S.C. 1292(b). See *Van Cauwenberghe*, 486 U.S. at 529 ("Our conclusion that the denial of a motion to dismiss on the ground of *forum non conveniens* is not appealable under § 1291 is fortified by the availability of interlocutory review pursuant to 28 U.S.C. § 1292(b)."). And should experience demonstrate that the various alternatives to mitigate harm and secure appellate review in certain circumstances are inadequate, Congress (see, *e.g.*, 28 U.S.C. 1292(a)(1)-(3)) or the Court (pursuant to its rulemaking authority under 28 U.S.C. 1292(e)) could classify attorney-client privilege orders as immediately appealable in appropriate circumstances. See *Cunningham*, 527 U.S. at 210.

3. Certain privileges implicate interests of constitutional significance under the separation of powers and qualify under the collateral order doctrine

As noted above (pp. 11-12, *supra*), the collateral order doctrine does not categorically exclude all discovery orders irrespective of their nature or the interests that are at stake. This Court has recognized that important governmental interests, principally of constitutional and statutory significance, justify immediate appealability under the collateral order doctrine. See, *e.g.*, *Osborn*, *supra* (Westfall Act certification); *P.R. Aqueduct*, *supra* (Eleventh Amendment immunity); *Helstoski*, *supra* (Speech or Debate Clause immunity). Although the attorney-client privilege does not meet that high bar, privileges such as those protecting Presidential communications and state secrets qualify for such treatment in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to governmental functions.[5]

The Presidential communications privilege, which draws its authority from the constitutional role of the Executive and "can be viewed as a modern derivative of sovereign immunity," is well established. *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395, 398 n.2 (D.C. Cir. 1984) (citing Raoul Berger & Abe Krash, *Government Immunity from Discovery*, 59 Yale L.J. 1451, 1459 n.46 (1950)). "The privilege is fundamental to the operation of Government and inextricably rooted in the

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[5] Likewise, the D.C. Circuit has held that a Member of Congress may take an immediate appeal of an order rejecting a claim of privilege from the disclosure of information under the Speech or Debate Clause. See *United States* v. *Rayburn House Office Bldg., Room 2113*, 497 F.3d 654, 658 (D.C. Cir. 2007), cert. denied, 128 S. Ct. 1738 (2008).

separation of powers under the Constitution," and it derives largely from the "necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States* v. *Nixon*, 418 U.S. 683, 708 (1974). Unlike the attorney-client privilege (see pp. 15-17, *supra*), the Presidential communications privilege is invoked relatively rarely and only after authorization of senior Executive Branch officials.

In *Nixon*, for example, the Court recognized the immediate appealability of a district court order denying the President's assertion of the Presidential communications privilege against a subpoena to produce certain materials before a criminal trial. 418 U.S. at 690-692. Although the Court acknowledged the "strong congressional policy against piecemeal reviews" embodied in 28 U.S.C. 1291, the Court held that the traditional route for generating an appealable order in that context—contempt—was "peculiarly inappropriate" for questions of privilege involving the President of the United States. 418 U.S. at 690-691. Permitting immediate review would avoid an unnecessary "constitutional confrontation between two branches of the Government." *Id.* at 692.

In addition to the Presidential communications privilege, this Court has long recognized a state-secrets privilege. That privilege may be invoked to avoid "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953). The state-secrets privilege, whose origins extend to early Anglo-American law, "performs a function of *constitutional significance*, because it allows the executive branch to protect information whose secrecy is necessary to its military and for-

eign-affairs responsibilities." *El-Masri* v. *United States*, 479 F.3d 296, 303 (4th Cir.), cert. denied, 128 S. Ct. 373 (2007) (emphasis added); cf. *Totten* v. *United States*, 92 U.S. 105, 107 (1876) (noting that in comparison to cases involving common-law privileges—including the attorney-client privilege—"[m]uch greater reason exists for the application of the principle [against maintenance of a suit resulting in disclosure of confidential matters] to cases of contract for secret services with the government"). As a matter of practice, the privilege is invoked by a formal request "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer," underscoring its unique significance to the functions of the Executive Branch and the restraints on its invocation. *Reynolds*, 345 U.S. at 7-8 (footnote omitted).

In addition to their paramount "public importance" and "the need for their prompt resolution," *Nixon*, 418 U.S. at 687, orders denying the applicability of the Presidential communications and state-secrets privileges also satisfy the other traditional elements of the *Cohen* inquiry. First, an order requiring the disclosure of information over the government's assertion of those privileges would conclusively resolve the issue. The Executive cannot be expected to persist in withholding information that a court has ordered to be disclosed; to suggest otherwise would be to invite the "unseemly" interbranch conflict that this Court declined to let unfold in *Nixon*. *Id.* at 692.

Second, neither the Presidential communications privilege nor state-secrets privilege turns on the merits of the action in which they arise, but rather on the nature of the constitutional prerogatives of the Executive Branch. Accordingly, when compared to the attorney-

client privilege (see pp. 17-21 *supra*), the governmental privileges are more readily severable from the merits of the underlying case. For example, the question whether disclosure of a state secret would endanger national security or diplomatic efforts is independent of the merits of the underlying action that seeks the disclosure. If information is properly deemed a state secret, then any assessment of the potential merits of the action or the disclosure's impact on the merits is beside the point—the state secret cannot be divulged regardless. See *Reynolds*, 345 U.S. at 11 (state-secrets privilege cannot be overcome by "even the most compelling necessity"). The Court in *Nixon*, a criminal case where the asserted Presidential communications privilege reflected a "generalized interest in confidentiality," engaged in a more case-specific inquiry, but only *after* finding appellate jurisdiction. 418 U.S. at 711.[6]

Third, an order denying invocation of the Presidential communications or state-secrets privilege is effectively unreviewable after compliance. "Once the information is disclosed, the 'cat is out of the bag' and appellate review is futile." *Al Odah* v. *United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (citation omitted) (order direct-

[6] Although the Court in *Nixon* recognized the Presidential communications privilege to be qualified in the context of that criminal case, the privilege is exceedingly difficult to overcome in the civil context. See *Cheney*, 542 U.S. at 384 ("The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. * * * The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*. As *Nixon* recognized, the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions.'") (quoting *Nixon*, 418 U.S. at 711). The second *Cohen* criterion thus poses even less of an obstacle to immediate appealability of a denial of the Presidential communications privilege in civil litigation.

ing disclosure of classified information subject to collateral order appeal). Although a post-judgment appeal can generally undo the litigation-specific effects of an erroneously ordered disclosure (see pp. 21-22, *supra*), the broader harm to the national interest from disclosure of material protected by the Presidential communications or states-secret privilege cannot be undone. Those constitutionally rooted privileges protect information pertaining to top-level communications within the Executive Branch or national security or foreign affairs; once that information is released, a reversal of judgment cannot mitigate the harm to the national interest. The ordered disclosure of communications with the President or his top aides or a state secret, therefore, would much more directly harm the purpose of the corresponding privilege than would disclosure of attorney-client privileged information.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1291 provides:

Final decisions of district courts

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. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

2. Federal Rule of Evidence 502 provides, in pertinent part:

Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure.—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

* * * * *

3. Federal Rule of Civil Procedure 26 provides, in pertinent part:

Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

* * * * *

(B) *Information produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.