No. 11-350

IN THE
# Supreme Court of the United States

NATSO, INC., ET AL.,
*Petitioners*,
v.
3 GIRLS ENTERPRISES, INC., ET AL.,
*Respondents*.

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

# BRIEF FOR THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN TORT REFORM ASSOCIATION, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL ORGANIZATION FOR MARRIAGE, AND THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. By what means may an association and its members appeal a discovery order that will require the production of private, internal communications in violation of the association's First Amendment rights?

2. What proof, if any, must an association and its members challenging a discovery order provide in order to establish that disclosure of private, internal communications will implicate the First Amendment right of association?

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici curiae* are national associations and organizations actively engaged in ongoing internal communications and discussions with their members on a wide range of topics and concerns. Many of those discussions directly involve strategies and issues relating to political and regulatory matters, including the agendas and goals that amici and their members may set in pursuit of either the enactment or repeal of legislation (including direct legislation through the initiative power), the adoption or rescission of regulatory rules and procedures, and the positions taken in litigation. Indeed, the *amici curiae* exist precisely as an exercise of the First Amendment freedoms of association and petition. "The freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* made a monetary contribution to the brief's preparation or submission. Counsel for the parties were given at least 10-day notice of the intention of the *Amici* to file this brief. By e-mail correspondence, all parties consented to the filing of the brief.

The American Society of Association Executives ("ASAE") is a membership organization of more than 22,000 association professionals and industry partners representing more than 11,000 organizations. Its members manage leading trade associations, individual membership societies, and voluntary organizations across the United States and in 50 countries around the world. ASAE's mission is to provide resources, education, ideas, and advocacy to enhance the power and performance of the association community. ASAE is a leading voice for legislative and regulatory policies that enable associations to carry out their vital missions, and also works to educate legislators, members of the Administration, and other key audiences about the true value of associations and the resources they bring to bear on our nation's most pressing problems.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that pool their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping an environment conducive to United States economic growth and to increase understanding among policymakers, the media, and the general public

about the importance of manufacturing to America's economic strength.

The National Federation of Independent Business ("NFIB") is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") represents the country's leading pharmaceutical research and biotechnology companies, which are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. PhRMA companies are leading the way in the search for new cures. PhRMA's mission is to conduct effective advocacy for public policies that encourage discovery of important new medicines for patients by pharmaceutical/biotechnology research companies.

The National Organization for Marriage is a non-profit organization with more than 600,000 supporters across the nation, with a mission to protect traditional marriage and the faith communities that support it.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose mission is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. The Center has participated as *amicus curiae* in more than 60 cases before the Court since the Center's founding in 1999, including cases involving the freedom of association under the First Amendment, such as *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), *California*

*Democratic Party v. Jones*, 530 U.S. 567 (2000), and *Citizens United v. FEC*, 558 U.S. ___ (2010).

* * * * *

Any decision, like the Tenth Circuit's decision here, that undermines the exercise of associational rights has a direct and potentially dramatic effect on *amici*. Each of the *amici* has been formed and operates for the precise purpose of furthering the political and other interests of its members, a core and quintessential First Amendment purpose. Each of the *amici* participates in public policy matters, whether by lobbying the political branches of federal, state and local governments, participating in the regulatory arena, lending support to ballot initiatives, or making their views known in litigation in the federal and state courts.

In order to effectively represent their members' interests in public policy and to engage in political activity, associations such as the *amici* require confidentiality as a necessary precondition for successful action. Because developing and coalescing around effective and fully-considered public messages and political strategies often involves vigorous, internal discussion among an association's members, an association needs the trust and confidence of its members.

In turn, an association's members need assurance that internal communications between members and the association will not in general be subject to public disclosure. Certainly, members want and expect that all communications between the members and their association will not be publicly disclosed simply because a plaintiff sues one of the members and then engages in a discovery fishing expedition seeking the

association's private, internal communications. Given that the memberships of *amici* range in size from 300 to more than 300,000, these are significant concerns for the *amici* and their members.

The *amici* have private and internal discussions on matters of great importance to their members on an ongoing basis. Of course, one of the fundamental reasons for joining together in an association is precisely to conduct and facilitate such discussions among those who have shared interests: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The type of evidence the district court here ordered be disclosed in discovery—an order that the Tenth Circuit erroneously affirmed—lies at the very heart of the First Amendment freedoms of association and petition. Indeed, "a half century of [the Supreme Court's] case law . . . firmly establishes that individuals have a right to privacy of belief and association." *Doe v. Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2824 (2010) (Alito, J., concurring).

Thus, the amici are profoundly interested in and affected by both of the fundamental questions presented in this case: (1) by what avenues may an association and its members appeal a broad discovery order that will result in the disclosure of the association's private, internal communications?; and (2) what proof, if any, must an association and its members provide in order to establish the "self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery request?" *Perry*, 591 F.3d at 1163.

## INTRODUCTION

The First Amendment provides in relevant part that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for redress of grievances." These rights are fundamental to our constitutional system of government, and this Court repeatedly has recognized their importance: "An individual's freedom to speak, to worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Consequently, the "freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *see also* Jason Mazzone, *Freedom's Associations*, 77 Wash. L. Rev. 639, 711-17 (2002) (reviewing the history to demonstrate that the Framers understood freedom of association to be an integral part of the rights of assembly and petition, and essential for the achievement of popular sovereignty).

Government actions—whether federal or state, and whether by statute, regulation or court order—that limit or interfere with associational rights and therefore chill the exercise of such rights "must survive exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) (under "'exacting scrutiny . . . .' we uphold the restriction only if it is narrowly tailored to serve an overriding state interest"). In particular, compelled disclosure such as the broad discovery order at issue in this case necessarily has a

chilling effect on freedom of association. The Court "repeatedly [has] found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64; *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (disclosure of internal communications "carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.")

Thus, one "who objects to a discovery request as an infringement of [that] party's First Amendment rights is in essence asserting a First Amendment *privilege*." *Perry*, 591 F.3d at 1160 (emphasis original). Indeed, the "Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003); *FEC*, 655 F.2d at 389 (a demand for disclosure "implicates the rigorously protected first amendment interest in privacy of political association").

The First Amendment right of association privilege with respect to discovery orders "has never been limited to the disclosure of identities of the rank-and-file members." *Perry*, 591 F.3d at 1162. Rather, the "freedom of members of a political association to deliberate internally over strategy and messaging is an incident of associational autonomy." *Id.* at 1163 n.9. Thus, the critical question is "whether the disclosure of the information will have a deterrent effect on the exercise of protected activities." *Id.* at 1162. In spite of the obvious answer to that question in this case, the Tenth Circuit placed two

unnecessary obstacles in petitioners' path for vindicating their associational rights, both of which undermine constitutional rights of association.

Indeed, the Tenth Circuit's decision warrants plenary review for at least two important reasons, both addressed more fully below. First, the Tenth Circuit held that petitioners could not obtain appellate review under either *Perlman v. United States*, 247 U.S. & (1918), or the *Cohen* collateral order doctrine, a position in conflict or in tension with the decisions of other Circuits. The question of what avenues of appeal are available in this context has caused the Courts of Appeal no end of headaches. As Judge Easterbrook put it: "Appellate approaches to this topic are now so disparate that only Congress or the Supreme Court could clear the air." *Burden-Meeks v. Welch*, 319 F.3d 897, 901 (7th Cir. 2003).

Second, in contrast to decisions from other Circuits, the Tenth Circuit imposed an artificial and illogical evidentiary burden on those asserting the privilege. The Tenth Circuit rejected the self-evident proposition that disclosure will have a negative effect on the private and internal communications of associations. Instead, the Tenth Circuit held that unsworn testimony that was the equivalent (if not more) of affidavits expressly held to be sufficient in similar cases was inadequate as a matter of law to establish that the discovery order at issue here implicated petitioners' associational rights.

The result is that in future cases any non-party seeking to appeal such a discovery order must file a boilerplate affidavit from any single member of the association, an affidavit which states that the member would be deterred from communicating freely with and within the association if it knew that

such communications might one day be publicly disclosed via discovery in a civil case. Such artificial requirements are particularly inappropriate in the context of important First Amendment interests, and fly in the face of the "self-evident" effect that disclosure has in this situation.

For both of these reasons, this case merits the Court's plenary review.

## REASONS FOR GRANTING THE WRIT

### I. There Is A Split In The Circuits On The Question Of What Avenues Of Appeal Are Available To A An Association Or Its Members Appealing A Discovery Order On Constitutional Privilege Grounds.

#### A. The Tenth Circuit Is The *Only* Circuit To Hold That Appellate Jurisdiction Under *Perlman v. United States*, 247 U.S. 7 (1918), Is Limited To "Criminal" Cases.

The Court has recognized that there "is a distinction in the law between the enforcement of discovery orders directed at parties and the enforcement of discovery orders directed at disinterested third parties . . . ." *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992). Thus, "under the so-called Perlman doctrine, see *Perlman v. United States*, 247 U.S. 7 (1918), a discovery order directed at a disinterested third party is treated as an immediately appealable final order . . . ." *Id.* Likewise, *Perlman* jurisdiction permits an appeal where, as here, the privilege-holders are non-parties and the parties themselves are either unwilling or unable to appeal a discovery order. *See In re Sealed Case (Medical Records)*, 381

F.3d 1205, 1210-11 & n.4 (D.C. Cir. 2004). In either situation, the *Perlman* doctrine permits an avenue of appeal that does not require the disinterested parties to "risk contempt by refusing compliance." *Church of Scientology*, 506 U.S. at 18 n.11.

Although the lower courts certainly have at times wrestled with the scope of the now almost 100-year-old *Perlman* doctrine, *no* court other than the Tenth Circuit in this case has ever categorically held that the doctrine does not and cannot extend "beyond criminal grand jury proceedings." 641 F.3d 470, 485. To the contrary, this Court has certainly implied that *Perlman* applies in civil cases, *Church of Scientology*, 506 U.S. at 18 n.11, and numerous Circuit decisions recognize that the *Perlman* doctrine applies in *civil* cases. None have ever embraced the Tenth Circuit's extraordinarily narrow view of the doctrine.

For example, in *In re Air Crash at Belle Harbor, New York on November 12, 2001*, 490 F.3d 99, 106 (2nd Cir. 2007) (emphasis added), the Second Circuit observed that the *Perlman* doctrine allowing interlocutory appeals "applies to appeals from orders issued in both grand jury proceedings and criminal *and civil actions*." Other Circuits plainly have applied the *Perlman* doctrine in civil cases. *See, e.g.*, *FDIC v. Ogden Corp.*, 202 F.3d 454 (1st Cir. 2000) (applying *Perlman* in a breach of contract case); *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005) (applying *Perlman* in a suit under 42 U.S.C. § 1983); *Burden-Meeks v. Welch*, 319 F.3d 897, 900 (7th Cir. 2003) (discussing *Perlman* in a suit under 42 U.S.C. § 1983 and adhering to a prior holding that "non-parties always may appeal immediately when they contest discovery orders."); *see also* Petition for a Writ of Certiorari, No. 11-350 at 19-20 (citing

decisions also applying the *Perlman* doctrine in civil cases in the D.C., Third, Fifth and Eleventh Circuits).

The Tenth Circuit's holding that the *Perlman* doctrine cannot apply "beyond criminal grand jury proceedings" is contrary to the law of every other Circuit, and alone warrants an exercise of this Court's plenary review, especially given the importance of the associational rights at stake here.

### B. The Circuits Are Confused On The Question Whether This Court's Decision In *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ___, 130 S. Ct. 599 (2009), Precludes Reliance On Either *Perlman* Jurisdiction Or The *Cohen* Collateral Order Doctrine In These Circumstances.

1. The Tenth Circuit also held that the discovery order at issue here was not immediately appealable under the *Cohen* collateral order doctrine. As the Tenth Circuit recognized, that doctrine "permits interlocutory review of district courts orders which '(1) finally decide (2) an important question collateral to (or separate from) the merits of the underlying proceeding and (3) [are] 'effectively unreviewable' after final judgment.'" 641 F.3d at 482 (citations omitted). "Without addressing the first two Cohen requirements," the Tenth Circuit concluded that "discovery orders adverse to a claimed First Amendment privilege are not immediately appealable under the *Cohen* doctrine because they are effectively reviewable after final judgment and by other means." *Id.*

The Tenth Circuit recognized that "[p]reservation of the right to associate privately in order to pursue

common objectives is undoubtedly a substantial public interest," 641 F.3d at 483, and that "no perfect remedy can be obtained once a party discloses information which it has a right and a desire to keep private," *id.*, but the Court felt compelled by this Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), to dismiss the interlocutory appeal. The Tenth Circuit opined that the "fact that the privilege at issue here is derived from the First Amendment rather than common law does not render *Mohawk* unpersuasive." 641 F.3d at 483 n.8. The Tenth Circuit instead concluded that, "in *Mohawk*, the Supreme Court rejected an argument which is nearly identical to the one appellants now propound." *Id.* at 483. Ultimately, the Tenth Circuit was "not persuaded" that disallowing an interlocutory appeal in these circumstances "will discourage individuals and businesses from associating to pursue common purposes and stifle full and frank communications among members of associations." *Id.* at 484.

Contrary to the Tenth Circuit's view, however, the state of interlocutory review of discovery orders is not crystal clear following *Mohawk*. Importantly, in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), a post-*Mohawk* decision, the Court of Appeals strongly suggested that the *Cohen* collateral order doctrine would permit an interlocutory appeal in the circumstances effectively identical to those presented in this case. In *Perry*, the Ninth Circuit recognized that "[a]fter *Mohawk*, it is uncertain whether the collateral order doctrine applies to discovery orders denying claims of First Amendment privilege . . . ." 591 F.3d at 1154. That said, the Ninth Circuit opined that the "first prong [of *Cohen*] is easily satisfied" in

this context, *id.*, and that "the second prong is also satisfied" because the "overall scope of the First Amendment privilege is a question of law that is entirely separate from the merits of the litigation." *Id.* at 1155.

Thus, like the Tenth Circuit, the Ninth Circuit focused on the third *Cohen* requirement but, unlike the Tenth Circuit, the Ninth Circuit observed that "[i]t is the third prong that poses the most difficult question." 591 F.3d at 1155. In stark contrast to the Tenth Circuit, the Ninth Circuit emphasized that there are "several reasons the class of rulings involving the First Amendment privilege differs in ways that matter to a collateral order appeal analysis from those involving the attorney-client privilege." *Id.* Specifically, the Ninth Circuit identified four important considerations: (1) "The right at issue here—freedom of political association—is of a high order"; (2) "the public interest associated with this class of cases is of greater magnitude than that in *Mohawk*. Compelled disclosures concerning protected First Amendment political associations have a profound chilling effect on the exercise of political rights"; (3) unlike the attorney-client privilege, the First Amendment privilege is rarely invoked"; and (4) *Mohawk* expressly reserved whether the collateral order doctrine applies in connection with other privileges." Id. at 1155-56.

Summing up, the Ninth Circuit declared that "whether *Mohawk* should be extended to the First Amendment privilege presents a close question." 591 F.3d at 1156. Indeed, the "distinctions between the First Amendment privilege and the attorney-client privilege—a constitutional basis, a heightened public interest, rarity of invocation and a long recognized

chilling effect—are not insubstantial." *Id*. Nonetheless, given the uncertainty regarding *Mohawk* and its potential effect on interlocutory review of discovery orders implicating First Amendment privileges, the Ninth Circuit granted the appellants the relief they sought in *Perry* under mandamus principles, thus avoiding an ultimate decision on the *Cohen* question.

2. This Court's decision in *Mohawk* also has caused some Circuits to question whether the *Perlman* doctrine survives, even though this Court never mentioned nor even cited *Perlman* in its *Mohawk* decision. Nonetheless, as the Ninth Circuit put it, "[t]his interlocutory appeal presents, inter alia, the question whether the *Perlman* rule survives *Mohawk Industries*." *United States v. Krane*, 625 F.3d 568, 570 (9th Cir. 2010). In *Krane*, the Ninth Circuit held that "we conclude that it does, and that we have jurisdiction over this appeal." According to the Ninth Circuit, "*Perlman* and *Mohawk* are not in tension." 625 F.3d at 572. Instead, the court pointed out that it has always "considered the *Perlman* rule and the *Cohen* collateral order exception separately, as distinct doctrines." *Id*.

The Seventh Circuit, however, has questioned the continued vitality of *Perlman* and the interlocutory appeal of discovery orders after *Mohawk*. In *Wilson v. O'Brien*, 621 F.3d 641 (7th Cir. 2010), the court pointed out that in the Seventh Circuit the rule is that non-parties always may take an interlocutory appeal of adverse discovery orders, but went on to observe that the Circuit's cases were based on an analogy to *Perlman*. *Id*. at 642. Furthermore, the Seventh Circuit opined that "*Mohawk Industries* calls *Perlman* and its successors into question,

because, whether the order is directed against a litigant or a third party, an appeal from the final decision will allow review of the district court's ruling. Only when the person who asserts a privilege is a non-litigant will an appeal from the final decision be inadequate." *Id.* at 643.

The Sixth Circuit similarly and recently struggled with the effect of *Mohawk* on the *Perlman* doctrine and the interlocutory review of discovery orders in general. In *Holt-Orsted v. City of Dickson*, 641 F.3d 230 (6th Cir. 2011), decided the same day as the Tenth Circuit issued its decision in this case, the Sixth Circuit observed that "the *Mohawk* decision has altered the legal landscape related to collateral appeals of discovery orders adverse to the attorney-client privilege and narrowed the category of cases that qualify for interlocutory review." *Id.* at 238. After reviewing both the Ninth Circuit's decision in *United States v. Krane*, and the Seventh Circuit's decision in *Wilson v. O'Brien*, the Sixth Circuit declared:

> We agree with the Ninth Circuit that the collateral order doctrine and the *Perlman* exception have historically been viewed as discrete jurisdictional bases for immediate appeal. The *Mohawk* decision, however, appears to have narrowed the scope of the *Perlman* doctrine.

*Id.* at 239. Thus, the Sixth Circuit concluded that *Perlman* jurisdiction—after *Mohawk*—applies where neither the privilege holder nor the custodian of the requested documents is a party to the litigation.

Ultimately, the state of the law in this context—both with respect to the scope of the *Perlman* doctrine and the *Cohen* collateral order doctrine—was perhaps best summarized by the Seventh Circuit

in the following observation: "Appellate approaches to this topic are now so disparate that only Congress or the Supreme Court could clear the air." *Burden-Meeks v. Welch*, 319 F.3d 897, 901 (7th Cir. 2003).

Furthermore, as the Tenth Circuit recognized in this very case, "[m]andamus is not the same as, nor is it a substitute for, a direct appeal." 641 F.3d at 487. Yet, with the Tenth Circuit's rejection of both *Perlman* and *Cohen* jurisdiction in this case, mandamus is the sole realistic avenue for those in petitioners' position to seek protection of their First Amendment privilege.[2] Because the question of what avenues of appellate review are available to assert this important First Amendment privilege is critical to the protection of that privilege, this question warrants an exercise of the Court's plenary review.

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[2] The option of disobeying a discovery order, being held in contempt, and then appealing the contempt sanction imposes an extreme burden on anyone, but especially on non-parties, and has been harshly criticized: "We are accustomed to appeals that are available as a matter of right or that depend on an explicit exercise of discretion by the trial court, court of appeals, or both. A system that depends on a gamble with contempt . . . seems unprincipled." 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.23, p. 155 (2d ed. 1992).

Furthermore, that option was not even available to the non-party associations in this case at the time the appeal was taken, because there were no pending discovery orders directed to the non-party privilege-holders. Instead, the subpoenas to the non-parties had been quashed, and the plaintiffs did not appeal that ruling. Thus, the non-parties could not rely on contempt as a means of challenging the discovery orders directing the parties to disclose private, internal association communications.

## II. The Tenth Circuit Imposed An Arbitrary And Illogical Evidentiary Requirement That Is Inconsistent With The Decisions Of Other Circuits.

Although the Tenth Circuit recognized that the petitioners in this case satisfied the "initial prerequisites" for mandamus relief, that court made at least two important errors in denying such relief that warrant this Court's review. First, and perhaps most importantly, the Tenth Circuit rejected the proposition that the disclosure of core associational activity is "presumptively privileged." Instead, the Tenth Circuit held that "we cannot say the district court committed any error in refusing to presume that the information at issue is privileged under the First Amendment . . . ." 641 F.3d at 488. Second, like the District Court, the Tenth Circuit relied on hair-splitting distinctions and required an unspecified and arbitrary quantum of evidence to establish the self-evident consequences of disclosure of an association's private, internal communications.

1. As the Petition makes clear at pages 22-32, this Court's decisions (and many lower court decisions) regarding the First Amendment right of association have embraced a presumption of privilege in contexts where the potential for chilling associational activities and speech was self-evident, as they are in this case. As one scholar put it,

> most decisions make clear that no foundation of proof is required to trigger the balancing of one party's need to establish the maintenance of confidentiality against another party's interest in disclosure. *A contention of infringement will do*. The strength of the

> objecting party's showing that freedom of association is threatened thus affects the outcome of the court's balancing of interests, but not its analytical approach.

Joan Steinman, *Privacy of Association: A Burgeoning Privilege in Civil Discovery*, 17 Harv. C.R.-C.L. L. Rev. 355, 395 (1982) (emphasis added).

Indeed, the Tenth Circuit's decision seems to denigrate the activities at issue in this case because they (1) in some sense relate to commercial and economic activities and (2) involve corporate or other entities to some extent, rather than solely individual persons. See 641 F.3d at 489-90 and n.14 (noting that this case involves "the policy debate over the implementation of ATC" and that "the dispute before us does not involve campaign communications regarding a public referendum); *id.* at 488 n.12 ("*Citizens United* has no bearing on the issues involved in this interlocutory appeal and petition for mandamus").

In other words, the Tenth Circuit appeared to think that because this case involves political activities and expression in the context of commercial and economic interests, and because the targets of the discovery subpoenas are not individuals but rather associations many of whose members may not be individuals, the Tenth Circuit downplayed the First Amendment interests at stake. That treatment is inconsistent with both this Court's cases involving associational claims, *e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) ("The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.' Through exercise of these First Amendment rights, petitioners sought to bring about

political, social, and economic change.") (citation omitted), and the Court's recent insistence on equal constitutional respect for the political speech of those other than individuals. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010) (rejecting the argument that the "political speech of corporations *or associations* should be treated differently under the First Amendment simply because such associations are not 'natural persons.'") (emphasis added) (citations omitted).

2. Equally important, the Tenth Circuit drew completely arbitrary and illogical lines in concluding that the petitioners had failed to establish a prima facie showing that the disclosure would adversely affect their associational rights. The Tenth Circuit opined that "we have not articulated the precise quantum of proof necessary to establish a prima facie case of privilege under the First Amendment . . . ." 641 F.3d at 491. After criticizing the petitioners for initially offering only unsworn testimony of the vice president for government affairs of one petitioner, the court then proceeded to caution that "[t]o be clear, we do not purport, in this opinion, to create a bright-line rule delineating the minimum proof necessary to satisfy the prima facie burden." *Id*.

Thus, no party could know what "quantum of proof" was necessary before the Tenth Circuit's decision in this case and, unfortunately, even after this case, no party knows what "quantum of proof" will suffice. Indeed, in this respect, the Tenth Circuit's opinion has a definite tone of we cannot tell you exactly what we are looking for, but we "know it when [we] see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring).

Furthermore, the Tenth Circuit appears to have construed the offered testimony in a way that denigrates any notion of an associational interest deserving of protection in this case. For instance, the court devalued the testimony by commenting that it "appears to mischaracterize the extent of the disclosure to which the appellants might be subject...." 641 F.3d at 491. And although the witness addressed "the impact that [disclosure] would have on NATSO's fact-finding and lobbying efforts," *id.*, the Tenth Circuit instead substituted its own judgment that disclosure would not have a significant effect on the association. *Id.*

The concurring opinion amply demonstrates the arbitrariness of the Tenth Circuit's decision on this issue. Although purporting to recognize that "the burden for establishing this prima facie showing is not difficult when supported by available evidence," 641 F.3d at 492 (Kelly, J., concurring), the concurring judge also concludes that the testimony in this case fails to suffice, without ever explaining why. Furthermore, the concurring opinion emphasizes that other Circuits have found sufficient (1) an affidavit that asserts disclosure would "drastically alter" future association communications, (2) an affidavit that disclosure would "frustrate the group's decisions as how to organize itself, conduct its affairs, select its leaders, and effectively select its message and the best means to promoting that message," and (3) "a letter from a member stating that he or she would no longer attend meetings if communications are disclosed." *Id.* at 492-93.

To add insult to injury, the concurring opinion notes that petitioners on appeal offered additional declarations precisely to the effect of the above

examples, which the concurring judge declared "similarly assert a reasonable probability of chill on core First Amendment associational rights." 641 F.3d at 493. Nonetheless, those declarations were rejected as untimely, even though they state self-evident propositions; thus, this case ultimately boils down essentially to an argument over the "magic words," *Foucha v. Louisiana*, 504 U.S. 71, 118 n.13 (1992) (Thomas, J., dissenting) ("constitutionality of state action should not turn on 'magic words'"), that an association or its members must incant when asserting their First Amendment privilege.

Such artificial and illogical distinctions are inconsistent with the approaches of other Circuits. For example, in a comparable situation, the Ninth Circuit recently upheld a claim of First Amendment associational privilege, granting mandamus relief: "Although the evidence presented by Proponents is lacking in particularity, it is consistent with the self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery request." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163 (9th Cir. 2010). To the same effect, the Second Circuit has declared that "[m]indful of the crucial place speech and associational rights occupy under our constitution, we hasten to add that in making out a *prima facie* case of harm the burden is light." *Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1355 (2nd Cir. 1989).

In the Tenth Circuit, however, threatened injury to associational rights is apparently not "self-evident," nor is the burden of establishing such potential injury "light," nor is it at all clear *ex ante* what proof an association must provide when seeking to invoke its constitutional privilege against a

discovery fishing expedition. The concurring judge in the Tenth Circuit opined that, with the additional declarations from petitioners which that court rejected, "this would be a different case, and it would be necessary to engage in an ad hoc balancing." 641 F.3d at 493.

But, with all due respect to the Tenth Circuit, with or without those declarations, this case was already the precise case that the concurring judge posited. Artificial and illogical proof requirements that can be satisfied in *any* case merely by the incantation of the proper "magic words" in the form of a single affidavit should not be the basis for the upholding or denial of constitutional rights. The Court therefore should grant plenary review to address the important and recurring questions whether a presumption of privilege applies in this context or, if not, what quantum of proof is necessary to establish the existence of the privilege.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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