No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a First Amendment objection to a federal district court discovery order requiring the production of private political communications and petitioning strategies by trade associations and their members falls within the *Cohen* collateral order or *Perlman* doctrines of appellate jurisdiction, or whether a timely objection to such an order may be raised on appeal only via an extraordinary petition for writ of mandamus.

2. Whether a district court order compelling trade associations and their members to disclose private political communications and petitioning strategies to their political opponents without limitation has so self-evident a chilling effect on First Amendment rights as to trigger First Amendment scrutiny without the need for any additional evidentiary showing.

RULE 14.1(b) STATEMENT

The Appellants/Petitioners in the Tenth Circuit proceeding were NATSO, Inc., The Association for Convenience & Petroleum Retailing, California Independent Oil Marketers Association, Circle K Stores, Inc., Kum & Go, L.C., Mac's Convenience Stores LLC, Marathon Petroleum Company LP, Murphy Oil USA, Inc., The Pantry, Inc., Petroleum Marketers and Convenience Store Association of Kansas, Inc., Petroleum Marketers Association of America, Inc., Pilot Travel Centers, LLC, QuikTrip Corporation, RaceTrac Petroleum, Inc., Sheetz, Inc., the Society of Independent Gasoline Marketers of America, Speedway LLC, and Wawa, Inc.

The Appellees/Respondents in the Tenth Circuit proceeding were 3 Girls Enterprises, Inc., Samantha Baylard, BCMF, Inc., Debra Berg, Hadley Bower, Larry O. Bower, Shonna S. Butler, Wayne Byram, Scott Campbell, Charles Cockrell, Jr., Jonathan Charles Conlin, Mathew Cook, S. Garrett Cook, Priscilla Craft, Brent Crawford, Barbara Cumbo, Clinton J. Davis, Ditzfeld Transfer, Inc., Ben Dozier, Ellison and Sons Trucking Co. LLC, Samuel Ely, Dennis Flaherty, Ruby Fowler, Michael Gauthreaux, Tia Gomez, James Graham, Doctor Don Hall, Heartland Landscape Group, LLC, W.E. Hicks, Jeff Jenkins, Jim's Trucking, Inc., Charles D. Jones, K & J Trucking, Inc., Gary Kohut, Joann Korleski, Kennedy G. Kraatz, Dawn Lalor, Lisa Ann Lee, Robert G. Locklier, Dixcee Millsap, Kristy Deann Mott, Elizabeth Murphy,

RULE 14.1(b) STATEMENT – Continued

Melissa D. Murray, Jean W. Neese, Gerald Panto, Jr., Patrick Exterminating, Inc., Edger Paz, Ronna Posen, Quint-Kat Trucking, Inc., Carl Ritterhouse, Bobby Roberts, Roy-Car, M.T.S., Inc., Rushing Enterprises, Inc., Jan Rutherford, Steven R. Rutherford, William Rutherford, Victor Ruybalid, Mark Scivner, Snake City Enterprises, Ltd., Jacob Steed, Team Trucking, TEMCO Distributors, L.L.C., TEMCO, Inc., Sara Terry, Joseph Tucker, Universal Transportation & Logistics LLC, Viking Marine Enterprise, Inc., W.E. Hicks, Inc. (d/b/a Trees Unlimited), Kim Wagner, Michael A. Warner, Cecil R. Wilkins, Zachary Wilson, Jim Wolfe, Wonderland Miracle Carnival Company, Inc., Mark Wyatt, and Evy Young.

RULE 29.6 STATEMENT

Petitioner NATSO, Inc. states that it does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Petitioner The Association for Convenience & Petroleum Retailing states that it does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Petitioner California Independent Oil Marketers Association states that it does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Petitioner Circle K Stores, Inc., states that it is an indirect wholly owned subsidiary of Alimentation Couche-Tard Inc., a publicly held Canadian company. Alimentation Couche-Tard Inc. is the only publicly held company that owns 10% or more of Circle K Stores, Inc.'s ownership interests.

Petitioner Kum & Go, L.C., an Iowa limited liability company, states that its common ownership units are owned by Krause Holdings, Inc., an Iowa corporation and no publicly held company owns 10% or more of Kum & Go, L.C.'s ownership interests.

Petitioner Mac's Convenience Stores LLC, states that it is an indirect wholly owned subsidiary of Alimentation Couche-Tard Inc., a publicly held Canadian company. Alimentation Couche-Tard Inc. is the

RULE 29.6 STATEMENT – Continued

only publicly held company that owns 10% or more of Mac's Convenience Stores LLC's ownership interests.

Petitioner Marathon Petroleum Company LP, is a limited partnership organized under the laws of Delaware. The general partner of Marathon Petroleum Company LP is MPC Investment LLC, a limited liability company organized under the laws of Delaware. The sole limited partner of Marathon Petroleum Company LP is Marathon Petroleum Corporation, a corporation organized under the laws of Delaware. Marathon Petroleum Corporation is also the sole member of MPC Investment LLC.

Petitioner Murphy Oil USA, Inc., states that it is a wholly owned subsidiary of Murphy Oil Corporation, a publicly held company with no parent corporations. Murphy Oil Corporation is the only publicly held company that owns 10% or more of Murphy Oil USA, Inc.'s ownership interests.

Petitioner The Pantry, Inc., states that it does not have a parent corporation and there is no publicly held corporation that owns 10% or more of the stock in The Pantry, Inc.

Petitioner Petroleum Marketers and Convenience Store Association of Kansas, Inc., states that it does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

RULE 29.6 STATEMENT – Continued

Petitioner Petroleum Marketers Association of America, Inc. states that it does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Petitioner Pilot Travel Centers, LLC, states that it is owned by Pilot Corporation (40.70%), Propeller Corp. (36.84%), FJ Management Inc. (13.97%), TON Service Inc. (0.74%), Flying J Real Estate Enterprises Inc. (2.14%), Flying J Franchise (0.19%), BDT Capital Partners Fund I AIV, LP (4.21%), BDT I-A Plum Corp. (0.77%), Miguel Loya (0.13%), LS Squared LP (0.04%), and R. Brad Martin (0.19%). Pilot Corporation is a privately held Tennessee corporation. Propeller Corp. is a privately held Delaware corporation. FJ Management Inc. is a privately held Utah corporation. TON Service Inc. is a privately held Utah corporation. Flying J Real Estate Enterprises Inc. is a privately held Utah corporation. Flying J Franchise is a privately held Utah corporation. BDT Capital Partners Fund I AIV, LP is a Delaware limited partnership, BDI I-A Plum Corp. is a Delaware limited partnership. Both BDT Capital Partners Fund I AIV, LP and BDI I-A Plum Corp. are private equity firms. Miguel Loya is an individual. LS Squared LP is a Delaware limited partnership. R. Brad Martin is an individual. There is no publicly held company that owns 10% or more of Pilot Travel Centers, LLC.

Petitioner QuikTrip Corporation states that it is a privately held company with no publicly held

RULE 29.6 STATEMENT – Continued

corporate owners. QuikTrip Corporation has no parent corporations.

Petitioner RaceTrac Petroleum, Inc. states that it is a privately held company with no parent corporations. There is no publicly held company that owns 10% or more of RaceTrac Petroleum, Inc.

Petitioner Sheetz, Inc., states that it is a privately held company with no parent corporations. There is no publicly held company that owns 10% or more of Sheetz, Inc.

Petitioner the Society of Independent Gasoline Marketers of America states that it does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Petitioner Speedway LLC states that it is an indirect wholly owned subsidiary of Marathon Oil Company, which is a wholly owned subsidiary of Marathon Oil Corporation, a publicly held company. No other publicly held company owns 10% or more of Speedway LLC's ownership interests.

Petitioner Wawa, Inc., states that it is a privately held company with no parent corporations. There is no publicly held company that owns 10% or more of Wawa, Inc.

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The Tenth Circuit's opinion is reported at 641 F.3d 470. The District Court's opinion and subsequent denial of reconsideration is reported at 707 F. Supp. 2d 1145. The Magistrate Judge's decision is reported at 258 F.R.D. 407. The Magistrate Judge's denial of reconsideration is unreported but available at 2009 WL 1683294.

JURISDICTION

The Tenth Circuit entered its decision on May 24, 2011 and denied a timely petition for reconsideration en banc on June 21, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. art. I § 8 cl. 5

The Congress shall have Power . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures. . . .

STATEMENT OF THE CASE

In the words of the Tenth Circuit, this Petition presents the question of whether a court may "compel[ ] disclosure of trade groups' and their members' strategic pre-lobbying communications in a lawsuit between private parties." App. 13. The Tenth Circuit held that a district court order compelling the sweeping disclosure of private political communications and lobbying strategies to one's political opponents did not present a chilling effect on rights of speech, petition, and association sufficient to trigger First Amendment scrutiny. Instead, the Court of Appeals required even more evidence of a chilling effect just to implicate the First Amendment, a holding in conflict with decisions of this Court and of numerous other circuit courts of appeals.

If, instead of a Court, Congress had enacted a statute requiring these same disclosures, that statute would have automatically triggered strict scrutiny and undoubtedly run afoul of the First Amendment. The Tenth Circuit rejected the application of First Amendment scrutiny to a judicial order having the same effect – even though, ironically, the judiciary is the very branch charged with protecting the First

Amendment. *See Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (The federal constitution may not be "nullified openly and directly by . . . judicial officers. . . ."); *cf. Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) ("By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle.").

In addition, the Tenth Circuit refused to apply the collateral order doctrine to review the district court order, thereby drastically altering the standard of appellate review for constitutional rights. From the beginning, this Court has subjected discovery orders that threaten the First Amendment to the "closest scrutiny." *See NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

The Tenth Circuit did the opposite. It imposed extraordinary mandamus requirements on the parties *invoking* the First Amendment. But the mandamus standard of review subjects the discovery order to an extremely deferential abuse of discretion test that is very difficult to overcome for those seeking First Amendment protection. Thus, the Tenth Circuit applied the lowest level of scrutiny instead of the highest. Moreover, unlike *NAACP*, the underlying discovery order in this case did not merely require disclosure of *membership lists*, which the Plaintiffs conceded were protected from disclosure. Instead, the discovery order required blanket disclosure of the *content of speech* itself, nonpublic, political speech, *i.e.*, private strategies for lobbying the government

about public policy issues. The Tenth Circuit, therefore, effectively valued *speaker identity* more than *speech* itself.

Notably, by addressing this issue, this Court can answer a question that it left open in *Mohawk*: whether collateral order appeals are available for constitutional privileges. *See Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 n.4 (2009). Review is especially appropriate because the Tenth Circuit inverted the purpose of the collateral order doctrine. The doctrine exists to protect rights that are "too important to be denied review." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Here, the rights at issue were the core free speech rights of associations to craft their political strategies outside the gaze of curious outsiders and competitors while they undertake to petition governmental officials. The Tenth Circuit nevertheless denied collateral order review, despite the application of the doctrine to lesser rights.

There is a direct threat to free speech from denying collateral order review in First Amendment privilege cases: decisive legislation might pass while parties wait for a post-trial remedy. If one side has succeeded in silencing its political opponents when Congress was voting, the injury would be irreparable. The ramifications are tremendous. This would skew the public debate by altering the information available to lawmakers, thus raising the specter of unwitting judicial interference with the legislative process. Such judicial disclosure orders, therefore, risk giving

one side an "unfair advantage" in an ongoing political debate, which necessarily implicates separation of powers principles. The Tenth Circuit's decision may very well alter the outcome of continuing political debates regarding fair methods of motor fuel sales before Congress, state legislatures, and regulatory bodies and thereby impair representative and democratic decision-making by our elected representatives. Further, this potential advantage increases the incentive for parties to file lawsuits. *See AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003) ("[T]he release policy gives parties a large potential 'bonus' for filing a complaint because . . . [even if they lose] they may still obtain access to thousands of pages of their opponents' internal strategic information.").

The Tenth Circuit also rejected *Perlman* jurisdiction, which would have provided another basis to avoid imposing strict mandamus standards on First Amendment rights. This was a textbook case for the application of *Perlman* jurisdiction. Yet, instead of applying *Perlman*, the Tenth Circuit took the extraordinary step of categorically limiting *Perlman* to criminal proceedings, creating a conflict with *six* other circuits.

A. Factual Background.

The underlying litigation involves a 28-state and nationwide putative class action in a Multi-District Litigation ("MDL") proceeding regarding the appropriate method of selling retail motor fuel. Plaintiffs claim

that the traditional method of sale (*i.e.*, by gallons of volume sold), without compensation for the effects of temperature on its volume, is inherently deceptive. Petitioners include both nonparty trade associations and certain defendants who have urged government officials to retain the traditional, statutorily-prescribed method for the sale of motor fuel as the better and fairer method. The Plaintiffs and their attorneys include some of Petitioners' political opponents who advocate a change in that method. The underlying political issues, therefore, go to the heart of a hotly contested national debate: how gasoline is sold at the pump.

The specific discovery dispute is about the production of private, associational documents regarding the formulation of government policy regulating weights and measures standards for motor fuel. The development of weights and measures standards is a political process that the nation's founders delegated to Congress. *See* U.S. CONST. art. I § 8 cl. 5. Congress has directed the National Institute of Standards and Technology ("NIST") "to develop, maintain, and retain custody of the national standards of measurement. . . ." 15 U.S.C. § 272(b)(2). NIST accordingly created the National Conference of Weights and Measures ("NCWM"), NCWM has become *the* forum for the development of uniform weights and measures and is the entity in which government decision-makers are petitioned about those standards. Between 2007-2009, the NCWM considered and rejected a proposal to adopt an automatic temperature

compensation ("ATC") standard in place of the volumetric gallon standard.

While the political debate was ongoing, Plaintiffs filed the underlying lawsuits, in which they seek to enjoin the sale of fuel by volume and to mandate implementation of a different measurement, the ATC standard.

B. Proceedings Below.

Plaintiffs issued discovery requests on Defendants, such as the following, that openly sought Petitioners' confidential petitioning activity:

> Produce DOCUMENTS for the time period ***1970 to the present*** RELATING TO COMMUNICATIONS between YOU, or any other person acting on YOUR behalf, and any other person or entity RELATING TO any proposed, drafted, enacted, or contemplated investigation, ***legislation, regulation***, rule, guideline, or practice ***regarding*** the following:
>
> A. TEMPERATURE ADJUSTMENT in retail sales of MOTOR FUEL; or . . .
>
> C. ATC EQUIPMENT; or . . .

These discovery requests to the Defendants were the only requests before the Tenth Circuit. Plaintiffs had also issued subpoenas on the *nonparty* trade associations. However, the Magistrate Judge enjoined the enforcement of those subpoenas, and Plaintiffs

did not appeal. The trade associations thus participated in the dispute by objecting to the *Defendants'* production of documents in which the *nonparty associations* claimed a privilege. Any ruling on the First Amendment privilege necessarily implicated the *nonparty* associations' interests in protecting the associational documents from disclosure.

In response to the Plaintiffs' discovery requests, the Defendants produced *public* documents relating to the associations in which they were members but objected to producing (1) *private* communications relating to internal, strategic legislative activities and (2) similar communications between associations sharing a common interest in the political advocacy.

Petitioners supported their motion for a protective order with (1) the *discovery requests* themselves, which *on their face* sought protected information; (2) *four declarations* from the trade organizations discussing, *not only* the burden (time, effort, and cost) of responding to the requests *but also* the fact that production of the documents would disrupt the associations' internal operations and divert the associations from exercising their First Amendment rights in the political arena; and (3) a *live statement* from Ms. Alfano, during the hearing before the Magistrate Judge, that the production of documents would:

(i) *inhibit* communication between the association and its members;

(ii) *discourage* members from providing information to assist in the association's petitioning; and

(iii) *alter* the association's testimony at weights and measures hearings.

App. 123-30.

On this factual record, the Magistrate Judge issued an order that recognized First Amendment protection for these intra-associational communications. *See* App. 65-66. The District Court reversed, requiring production of *all* the confidential communications. *See* App. 113, 119. When the District Court held that the above evidence was not sufficient, Petitioners promptly supplemented it with additional declarations and moved for reconsideration. *See*, *e.g.*, App. 8. The District Court denied reconsideration.

The Tenth Circuit declined to accept appellate jurisdiction under either the collateral order doctrine or the *Perlman* doctrine. *See* App. 14-15. The Tenth Circuit proceeded to hear the claims under its mandamus power, App. 27-29, but denied relief under the extraordinary mandamus standard of review requiring Petitioners to demonstrate a clear and indisputable entitlement to the writ. App. 40. Petitioners' subsequent requests for a stay of the production orders were denied.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Review To Make Clear That The Collateral Order Doctrine Applies To First Amendment Claims.

The Tenth Circuit held that this Court's decision in *Mohawk* compelled it to reject collateral order jurisdiction, App. 16-21, even though *Mohawk* actually left open the question of the proper treatment of the First Amendment privilege. Other lower courts have expressed uncertainty over the meaning of *Mohawk* on the issue. This Court should grant review to clarify the meaning of *Mohawk* and establish that the collateral order doctrine applies to First Amendment claims.

A. This Court Should Grant Review To Clarify The Meaning Of *Mohawk*.

In *Mohawk*, this Court held that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine. 130 S. Ct. at 606-09. This Court declined the invitation of the United States, participating as an amicus, to address the application of the collateral order doctrine to discovery orders implicating other kinds of governmental privileges. *Id.* at 609 n.4 ("[T]he United States contends that collateral order appeals should be available for rulings involving certain governmental privileges 'in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique

importance to governmental functions.' We express no view on that issue.") (citation omitted).

Lower courts have expressed uncertainty as to the meaning of *Mohawk* for the First Amendment privilege. The Ninth Circuit recognized that it is a close question "whether *Mohawk* should be extended to the First Amendment privilege." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir.), *cert. dismissed*, 130 S. Ct. 2432 (2010); *see also In re Anonymous Online Speakers*, ___ F.3d ___, No. 09-71265, 2011 WL 61635 at *3 n.1 (9th Cir. Jan. 7, 2011). *Perry* cited four reasons why *Mohawk* is distinguishable:

- *Mohawk* did not involve a constitutional right.
- "[T]he 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."
- The institutional costs of collateral review are lower than in *Mohawk* because the First Amendment privilege is "rarely invoked."
- In *Mohawk*, this Court "expressly reserved whether the collateral order doctrine applies in connection with other privileges."

Perry, 591 F.3d at 1155-56.

In addition, the privileges are different. As this Court explained, the attorney-client privilege is broad and has few exceptions. *Mohawk*, 130 S. Ct. at 607. Courts are not "systematically underenforcing the privilege." *Id*. at 607 n.2. Future litigants can trust the privilege. In contrast, the guidance for the First Amendment privilege is so sparse that courts sometimes flagrantly disregard it. *See*, *e.g.*, *Nat'l Org. for Marriage v. McKee*, 723 F. Supp. 2d 236, 239-42 (D. Me. May 23, 2010) (requiring disclosure of membership identity, despite evidence that disclosure might result in harassment).

The lack of guidance is dramatically evident here. All three federal courts that reviewed this case provided completely different legal tests for the First Amendment privilege. App. 9-14, 29-39, 49-67, 85-113. The Court should grant review to clarify the meaning of *Mohawk* for the First Amendment privilege.

B. The Tenth Circuit Wrongly Imposed Strict Mandamus Requirements On The First Amendment.

The better view is that *Mohawk* does not exclude the First Amendment privilege from appellate jurisdiction under the collateral order doctrine. This Court's decisions recognizing the importance of First Amendment rights demonstrate that they should not be relegated solely to writs of mandamus as a vehicle for appellate review. The mandamus standard of

review is deferential to the lower court and compels upholding that court's judgment unless the decision represents "more than what we would typically consider to be an abuse of discretion." App. 28-29. In contrast, the proper standard of review for First Amendment violations is a searching, independent appellate review. Thus, *certiorari* is warranted because the Tenth Circuit applied the wrong standard of review, and its decision conflicts with prior decisions of this Court.

Under this Court's precedent, appellate courts must apply a *non-deferential* standard of review to First Amendment claims. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[A]n appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' ") (citations omitted); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 108 (1990) (reviewing constitutional legal question *de novo*).

It is axiomatic that federal courts have an unflagging duty to protect First Amendment rights. *See generally Zwickler v. Koota*, 389 U.S. 241, 245-49, 251-52 (1967). The standard of review is part of that protection:

> The fact that such activity is constitutionally protected, however, imposes a special obligation

> on this Court to examine critically the basis on which liability was imposed.

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982). In fact, this Court has applied a searching standard of review to the First Amendment privilege itself. *See NAACP*, 357 U.S. at 460-61 (applying the "closest scrutiny" to any "state action which *may have* the effect of curtailing the freedom to associate. . . .") (emphasis added).

The Tenth Circuit's decision is inconsistent with this Court's precedent and warrants review. In effect, the Tenth Circuit applied the lowest level of scrutiny when it should have applied the highest. By reviewing the District Court order according to the extraordinarily deferential standard of review, the Tenth Circuit provided minimal review of petitioners' First Amendment rights. App. 27-29, 39. That deference was particularly unwarranted here where it was the Magistrate Judge, *not the District Court*, who heard the evidence.

C. The Tenth Circuit Inverted The Purpose Of The Collateral Order Doctrine.

The Tenth Circuit's decision warrants review for the further reason that it ignored the purpose of the collateral order doctrine as articulated by this Court: to protect rights that are "too important to be denied review." *Cohen*, 337 U.S. at 546. As *Mohawk* explained, "the decisive consideration [in applying the collateral order doctrine] is whether delaying review

until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" 130 S. Ct. at 605 (citing *Will v. Hallock*, 546 U.S. 345, 352-53 (2006)); *see also Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 172 (5th Cir. 2009) ("[R]ecent Supreme Court decisions increasingly look to importance as a general and overarching consideration in the collateral order inquiry.").

1. The First Amendment Discovery Privilege Is Important.

The First Amendment discovery privilege is of the utmost importance. The freedom of association is among our most fundamental constitutional rights:

> [F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.

NAACP, 357 U.S. at 460. Moreover, this Court has consistently held that it is the *lack* of privacy that undermines the willingness of parties to speak. *See Gibson v. Florida Legislative Investigation Comm'n*, 372 U.S. 539, 555-57 (1963) (describing the "deterrent and 'chilling' effect" of disclosure of associational information).

Thus, it should go without saying that these First Amendment privacy rights are "weightier than the

societal interests advanced by the ordinary operation of final judgment principles." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994). Nevertheless, the Tenth Circuit decided that a post-trial remedy is sufficient to protect the First Amendment privilege – even if it means disclosure of Petitioners' petitioning strategy in the meantime:

> While we readily acknowledge that no perfect remedy can be obtained once a party discloses information *which it has a right and a desire to keep private*, the absence of a perfect remedy does not justify a less-than-strict adherence to the final judgment rule.

App. 18 (emphasis added).

The need for review in this case is even greater in light of the fact that most cases settle before trial, often precisely because the costs of litigation are too great. *See*, *e.g.*, Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES, Aug. 8, 2008 (citing estimates that 80% to 92% of cases settle). Hence, in the vast majority of cases, the aggrieved party will never have the opportunity to pursue the post-trial remedy to which the Tenth Circuit referred, and this Court will never have the chance to review the lower courts' treatment of the First Amendment privilege. The problem is especially acute in this MDL proceeding, because each lawsuit will eventually be transferred back to district courts across the country, making consolidated appellate review impossible. This case thus presents a valuable

opportunity to vindicate fundamental constitutional principles.

In contrast to the Tenth Circuit, other circuits continue to apply the collateral order doctrine to First Amendment rights (or to similar rights). *See In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 174 (5th Cir. 2011) (newspaper's appeal of court closure order); *U.S. v. Blagojevich*, 612 F.3d 558, 560 (7th Cir. 2010) (newspapers' appeal of court decision to conceal jurors' identity).

The Tenth Circuit's decision thus creates a circuit conflict and an inconsistency with this Court's jurisprudence, as this Court has applied the doctrine to protect a variety of lesser rights. *See Cohen*, 337 U.S. at 543-45 (right to enforce security deposit requirements for prosecution of action); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-15 (1996) (right to avoid an "abstention-based remand order") (unanimous decision); *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 11-13 (1983) (right to enforcement of arbitration agreement and to overturn *Colorado River* abstention).

2. The Tenth Circuit's Decision To Delay Review Seriously Damages The First Amendment Privilege.

Of course, as *Mohawk* explained, "[t]he crucial question . . . is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify

the cost of allowing immediate appeal of the entire class of relevant orders." 130 S. Ct. at 606.

But this only accentuates the need for collateral order review. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) (citations omitted). Here, the "irreparable harm" is that the disclosure chills speech. *See Gibson*, 372 U.S. at 555-57. This Court should not permit this effect to continue as the parties wait for a trial, particularly when the relevant political debate is ongoing. App. 41-42, 56-57.

For the attorney-client privilege, this Court held that "postjudgment appeals generally suffice" to protect the privilege. *Mohawk*, 130 S. Ct. at 606. But the attorney-client privilege is a judicial creation within the authority of the courts to superintend. In contrast, the First Amendment privilege originates in the Constitution. The First Amendment freedoms of association and speech enjoy a special, even preferred, place in American society and "need breathing space to survive." *See Gibson*, 372 U.S. at 544 (citations omitted). Thus, the Tenth Circuit's decision is contrary to this Court's First Amendment jurisprudence and an improper reading of *Mohawk*.

II. This Court Should Grant Review To Establish That *Perlman* Jurisdiction Applies To Civil Cases.

This Court has recognized another type of immediately appealable order in the so-called *Perlman*

doctrine: "a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992) (citing *Perlman v. United States*, 247 U.S. 7, 13 (1918)). *Perlman* also applies to a situation, like the instant one, where a *nonparty* asserts a privilege over documents in a party's possession. *See*, *e.g.*, *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1211 n.4 (D.C. Cir. 2004).

Here, with virtually no explanation, the Tenth Circuit limited the *Perlman* doctrine to "criminal grand jury proceedings" without considering the nearly unanimous practice to the contrary. App. 24. The Tenth Circuit's decision creates a deep circuit conflict and warrants this Court's review.

A. The Opinion Conflicts With The D.C., First, Second, Third, Fifth, And Eleventh Circuits.

The Tenth Circuit's judgment cannot be reconciled with decisions in the D.C., First, Second, Third, Fifth, and Eleventh Circuits, which have all relied on *Perlman* jurisdiction in civil cases. *See In re Sealed Case*, 381 F.3d at 1209-11; *United States v. AT&T*, 642 F.2d 1285, 1296 (D.C. Cir. 1980); *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 459-60 (1st Cir. 2000); *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 575-76 (2d

Cir. 2005); *Wm. T. Thompson Co. v. General Nutrition Corp., Inc.*, 671 F.2d 100, 103 (3d Cir. 1982); *Conkling v. Turner*, 883 F.2d 431, 433-34 (5th Cir. 1989); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1238 n.1 (5th Cir. 1982); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1465-66 (11th Cir. 1984); *In re Int'l Horizons, Inc.*, 689 F.2d 996, 1001-02 (11th Cir. 1982).

Moreover, this Court has implied that the doctrine applies in civil cases. *See Church of Scientology*, 506 U.S. at 18 n.11 (discussing *Perlman* in the context of a civil case). In fact, *Perlman* itself was an appeal from a civil case, even if it addressed documents for use in a future criminal proceeding. *See Perlman*, 247 U.S. at 11-13; *cf. Weldon v. U.S.*, 196 F.2d 874, 875 (9th Cir. 1952) ("Obviously, these were civil proceedings – in effect, civil actions to recover personal property and to enjoin an allegedly wrongful use thereof."). Petitioners have not found any other opinion that categorically rejects the application of *Perlman* to civil cases.[1]

Perlman jurisdiction is more important now than ever, in light of this Court's efforts to rein in the collateral order doctrine. *See Mohawk*, 130 S. Ct. at 605. As this Court explained, the law needs "'safety

[1] The Ninth Circuit had previously reserved the question of whether *Perlman* applies to civil litigation. *See In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Litig.*, 821 F.2d 1422, 1424 (9th Cir. 1987).

valve[s]' for promptly correcting serious errors." *Id*. at 607-08 (citing *Digital Equipment*, 511 U.S. at 883). *Perlman* fits that role perfectly because it applies only in those rare cases where a party (or nonparty) asserts a privilege over documents in another person's possession. Hence, this Court should grant review to address the circuit conflict created by the Tenth Circuit's decision.

B. This Court Should Reverse The Tenth Circuit's Limits On This Court's Decision In *Perlman*.

This case demonstrates why *Perlman* is so important in protecting associational privacy rights. Specifically, some of the defendants expressed a willingness to produce the associational documents in their possession rather than suffer contempt, leaving the nonparty associations powerless to protect their First Amendment rights on appeal, absent *Perlman* jurisdiction. Moreover, this situation arose because of an inherent feature of associational rights. Members of an association will inevitably have varying degrees of loyalty. An association's First Amendment rights should not turn on the hope that *all* of its members will be willing to risk contempt.

Indeed, such a result would be unthinkable in cases involving harassment upon disclosure of identity information. *See NAACP*, 357 U.S. at 462. If the members themselves were the target of the disclosure requests, courts would not allow the privacy rights of

the group to turn on the willingness of every member to suffer contempt.

Moreover, the Tenth Circuit's distinction between civil and criminal cases trivializes the importance of the constitutional rights at issue here. As independent businessman Steve Lopes explained in his sworn declaration, small Mom-and-Pop operations can effectively petition the government only if they combine their voices:

> I am a principal in a small family owned independent petroleum business. . . . My company has been a member of a state trade association for over 40 years. I have found that it is an effective advocate for small business. . . . Independent petroleum marketers . . . is an essential voice for us at all levels of government. Unlike other associations, this association does not have a large staff and is more and more dependent on the efforts of its membership. . . .

In light of the importance of First Amendment associational rights, Petitioners urge this Court to address the circuit split created by the Tenth Circuit.

III. This Court Should Grant Review To Make Clear The Showing Required To Protect First Amendment Privileges To Discovery Orders.

Regardless of this Court's ruling on the jurisdictional issues, this Court should review the Tenth

Circuit's rejection of any First Amendment scrutiny of the discovery order at issue. The risk to the First Amendment was obvious because the discovery order required Petitioners to turn over their confidential petitioning documents directly to their political opponents. Yet the Tenth Circuit held that the First Amendment was not even implicated. Specifically, the Tenth Circuit rejected the approach of the majority of courts (including this Court) recognizing that such a discovery order has a self-evident chilling effect. In fact, the Tenth Circuit is the first circuit to ever hold that an evidentiary showing *beyond* what petitioners provided is a *prerequisite* to First Amendment scrutiny in the civil discovery context. Neither this Court nor other circuits have ever imposed such a requirement.

This Court's review is urgently warranted. In fact, this case presents the very specter of Orwellian threats to privacy that Justice Alito foresaw in *Doe v. Reed*, which involved disclosure merely of membership identity information:

> The implications of accepting such an argument are breathtaking. Were we to accept respondents' asserted informational interest, the State would be free to require petition signers to *disclose all kinds* of demographic *information*. . . . Requiring such disclosures, however, runs headfirst into a half century of our case law, which firmly establishes that individuals have a right to *privacy of belief and association*. *See Rumsfeld* . . . ; *Brown* . . . ; *Buckley* . . . ; *DeGregory* . . . ; *Gibson* . . . ;

> *NAACP*. . . . Indeed, the State's informational interest paints . . . a chilling picture of the role of government in our lives. . . .

130 S. Ct. 2811, 2824-25 (2010) (Alito, J., concurring) (emphasis added). Justice Alito's citation to so many landmark Supreme Court cases underscores the importance of the First Amendment's protection of privacy of *belief* as well as privacy of association.

In some of these same cases, this Court previously recognized a categorical, rebuttable presumption of chill that triggers the duty to weigh the interests involved. This Court did so when the government blatantly sought disclosure of core private political speech. Indeed, any governmental action burdening core political speech triggers a level of constitutional protection that is "well-nigh insurmountable." *Meyer v. Grant*, 486 U.S. 414, 425 (1988). In light of the Plaintiffs' *facially overbroad* requests for the same category of *core private political speech*, the Tenth Circuit should have done the same.

A. The Tenth Circuit's Decision Conflicts With *DeGregory* And *Sweezy*.

Instead of proceeding to weigh the interests involved, the Tenth Circuit mandated a burdensome evidentiary showing of chill in *all* First Amendment privilege cases: "[T]he party claiming a privilege *always* bears the initial burden of establishing the factual predicate for the privilege." App. 29 (emphasis added).

This conflicts with this Court's prior decisions. This Court has twice found that compelling disclosure of core expressive associational activities *presumptively* infringes on the First Amendment, without a preliminary evidentiary showing of chill. *See DeGregory v. Att'y Gen. of N.H.*, 383 U.S. 825, 828 (1966) ("The substantiality of appellant's First Amendment claim can best be seen by considering what he was asked to do. . . . The Attorney General further sought to have him disclose information relating to his political associations . . . , the meetings he attended, and the views expressed and ideas advocated. . . ."); *Sweezy v. New Hampshire*, 354 U.S. 234, 249-50 (1957) (plurality opinion) ("Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters."). Moreover, soon after *DeGregory*, this Court also affirmed an explicit presumption of chill by a three-judge District Court, where there was "no evidence of record" to support such finding. *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968).

Nor is this type of presumption unique to the First Amendment privilege. In 1947, when this Court first recognized the work product privilege, it *presumed* that destroying this privacy would "inevitably" damage the practice of law. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947). In *Hickman*, this Court did not require evidence of a chilling effect on the attorney's work before recognizing that privilege. *See id*. at

510-11. Instead, it logically deduced that "[t]he effect on the legal profession would be demoralizing." *Id*. at 511.

The Tenth Circuit's insistence that a party claiming a First Amendment privilege must "always" make a preliminary showing of chill puts it directly at odds with *DeGregory* and *Sweezy* and warrants plenary review on *certiorari*.

The speech at issue is important. It concerns the sale of retail fuel, which impacts virtually all consumers and the entire energy industry, an industry that contributes more than $1 trillion to the national economy or 7.5% of the U.S. gross domestic product and generates over nine million jobs. Speech about this issue is thus just as vital to our democracy as speech by fringe political parties, as in *DeGregory* and *Sweezy*. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) ("[T]hose whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups."); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011) (explaining that "vital expression" often "results from an economic motive").

Moreover, the discovery requests at issue are similar to those in *DeGregory* and *Sweezy*. In *DeGregory* and *Sweezy*, the government sought the disclosure of private political thought between associations and their members. *DeGregory*, 383 U.S. at

828 ("The Attorney General further sought to have him disclose information relating to his political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings."); *Sweezy*, 354 U.S. at 243 ("[T]he Attorney General asked, and petitioner refused to answer, questions concerning the Progressive Party, and its predecessor, the Progressive Citizens of America."). The Tenth Circuit failed to apply First Amendment scrutiny to a discovery request that just as openly sought private political thought between associations and their members.

Statutes requiring disclosures like these inevitably trigger First Amendment scrutiny. *See*, *e.g.*, *Doe v. Reed*, 130 S. Ct. at 2818 (listing cases). The review is especially strict when the disclosure requirement discriminates by targeting certain content, speakers, or points of view. *See*, *e.g.*, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386-96 (1992). For all practical purposes, the same thing is happening here. There is no question that Plaintiffs are targeting certain content, speakers, and points of view for disclosure. By enforcing those discovery requests, the judiciary is according legal force to the same discriminatory intent. The constitutional framework erected by this Court for analyzing disclosure statutes is analogous to *DeGregory* and *Sweezy*'s use of a First Amendment presumption, and it compels the use of the same strict scrutiny for discovery orders.

The use of a presumption in *DeGregory* and *Sweezy* is also buttressed by a long line of Supreme

Court decisions holding that the First Amendment guarantees privacy for its own sake – not necessarily because it might deter other First Amendment activity. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."); *Watchtower Bible and Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-67 (2002) (upholding facial challenge to city ordinance based, in part, on First Amendment right to "anonymity"); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("[C]ompelled disclosure, in itself, can seriously infringe on privacy of association. . . ."); *cf. Sweezy*, 354 U.S. at 266 ("In the political realm . . . thought and action are presumptively immune from inquisition by political authority.") (Frankfurter, J., concurring).

The presumption is also supported by decisions from this Court prohibiting "compelled speech." The First Amendment protects the right not to speak because "a speaker has the autonomy to choose the content of his own message." *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). The government violates the First Amendment when it fails to respect a party's "choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of California*, 475 U.S. 1, 16 (1986) (plurality opinion).

In this line of cases, this Court explained why "compelled speech" inevitably chills speech. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257

(1974). In *Tornillo*, the Court considered a Florida statute requiring newspapers to publish "replies" by politicians to some editorials. In striking down the law, the Court explained how that would dissuade newspapers from joining the public debate:

> [E]ditors *might well* conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access *inescapably* 'dampens the vigor and limits the variety of public debate.'

Id. at 257 (emphasis added & citations omitted); *see also Pac. Gas*, 475 U.S. at 10 ("The statute [in *Tornillo*] purported to advance free discussion, but its effect was to deter . . . speaking out in the first instance: by forcing [disclosure of] opponents' views, the statute penalized . . . expression.").

The effect of "compelled disclosure" is the same here. The Tenth Circuit has forced Petitioners to allow their political opponents to listen in on their private speech, thus violating their "choice of what not to say." *Id*. at 16. Giving Plaintiffs that access is impermissible. *Cf. Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of *expressive association*. . . .") (emphasis added). Of course parties will self-censor if a court imposes this penalty on their speech.

B. The Tenth Circuit's Decision Conflicts With *Citizens United*.

The Tenth Circuit's rejection of a *DeGregory* and *Sweezy* presumption also raises the specter of discrimination in violation of *Citizens United v. FEC*, 130 S. Ct. 876, 898-901 (2010). Specifically, before rejecting the use of a presumption, the Tenth Circuit subtly acknowledged *DeGregory*'s use of a presumption. *See* App. 12 (explaining that *DeGregory* "reasoned" that the requested disclosure was "objectionable and damaging"). But, in doing so, the Tenth Circuit carefully noted that *DeGregory* used this presumption to protect the First Amendment rights of a "private individual" against official interrogation:

> In *DeGregory* . . . the Supreme Court considered the right of a *private individual* to refuse to answer questions from New Hampshire's attorney general regarding the *individual's* affiliation with communist groups. . . . The *individual* refused to answer the questions and was held in contempt in state court. . . . The Supreme Court reversed. . . .

Id. (emphasis added).

The Tenth Circuit's refusal to extend the presumption in *DeGregory* beyond the "private individual" runs afoul of *Citizens United v. FEC*, 130 S. Ct. 876 (2010), in which this Court rejected any discrimination in First Amendment rights based on speaker identity. *See id*. at 898-901. Specifically, this Court "rejected the argument that political speech of corporations or

other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id*. at 900 (citations omitted).

Given that an association has the same First Amendment rights as a "private individual," the Tenth Circuit should have likewise applied *DeGregory*'s presumption to Plaintiffs' requests for disclosure of the Defendants' "political associations . . . , meetings . . . , and the views expressed and ideas advocated at any such gatherings." *DeGregory*, 383 U.S. at 828. Again, the Tenth Circuit applied the wrong test putting it squarely in conflict with this Court and other circuits, which recognize the presumptive chilling effect from facially overbroad discovery of private associational communications.

C. The Tenth Circuit's Decision Is In Tension With *Arizona* And *Davis*.

The Tenth Circuit's rejection of a presumptive privilege is also in tension with this Court's recent decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) and *Arizona*'s predecessor, *Davis v. FEC*, 554 U.S. 724, 744 (2008). In *Arizona*, this Court held that a state campaign reform statute violated the First Amendment by burdening political speech. *See generally Arizona*, 131 S. Ct. at 2816-29. In doing so, *Arizona* emphatically held "[a]s in *Davis*, we do not need empirical evidence to determine that the law at issue

is burdensome." *Id*. at 2823. In fact, *Davis* had required "no evidence of a burden whatsoever" to strike down a federal campaign reform statute. *Id*.

To reach these conclusions in *Arizona*, this Court looked to the design of the statute to find that the burden it imposed was "evident and inherent." *Id*. (citations omitted); *see also Talley v. California*, 362 U.S. 60, 64 (1960) (concluding *from face of ordinance that* "[t]here can be no doubt that such an identification requirement would tend to restrict . . . freedom of expression."). The same is true here. Because the discovery, *on its face*, so blatantly sought First Amendment material, the burden it imposed on private political speech is just as "evident and inherent" as with the *Arizona* campaign funding scheme.

Moreover the justification for a presumption is stronger here. Unlike a statute, a discovery request is not a careful legislative decision from a coequal branch of government. It is merely a court-enforced demand by a private party. The disclosure demand in private, civil litigation can be motivated by narrow self-interest. Indeed, here, where Plaintiffs challenge the judgments of legislators and regulators, their interests arguably conflict with the public interest. Yet, in the context of campaign finance legislation, no evidence is necessary to trigger exacting scrutiny, *Arizona*, 131 S. Ct. at 2823, while, in the context of civil discovery, the Tenth Circuit "always" requires the speaker to make an evidentiary showing. App. 29. The Court should resolve that tension regarding the application of basic First Amendment rights.

D. The Tenth Circuit's Decision Conflicts With The D.C. Circuit's Decision In *FEC v. Machinists*.

The Tenth Circuit's decision is also in tension with *FEC v. Machinists*, which evaluated the jurisdiction of the Federal Election Commission to issue a "sweeping" subpoena to obtain information about corporate political activity and association. *See FEC v. Machinists*, 655 F.2d 380, 387-88 (D.C. Cir. 1981). Before answering the jurisdictional question, the D.C. Circuit held that it was required to apply "heightened" review or "careful judicial scrutiny." *Id*. The "most important" reason for invoking strict scrutiny was *the face of the subpoena itself*. *Id*. at 388; *see also id*. at 388 n.17.

While *Machinists* primarily dealt with the scope of the FEC's jurisdiction, its holding was grounded in the First Amendment and conflicts with the Tenth Circuit. Whereas the Tenth Circuit disregarded the facial overbreadth of the discovery, the D.C. Circuit relied on the face of the discovery requests to trigger a substantive review:

> The . . . most important reason for *heightened* judicial concern over the absence of jurisdiction is the delicate *nature of the materials demanded in this broad subpoena*. As already described, the subject matter of these materials represents *the very heart of the organism which the first amendment was intended to nurture and protect: political*

> *expression and association* concerning federal elections and officeholding.

Id. at 388 (emphasis added).

IV. Even If A Further Evidentiary Predicate Was Required, A Circuit Split Exists On The Quantum Of Proof Necessary To Trigger First Amendment Protection.

Even if an initial evidentiary showing was required, this Court should review the Tenth Circuit's arbitrary limits on the type and amount of evidence necessary to trigger First Amendment protection. The Tenth Circuit required sworn testimony from more than one witness – although it declined to say how many witnesses were necessary. App. 36-38. This decision puts the Tenth Circuit in conflict with the Second, Ninth, and D.C. Circuits. Moreover, this precedent has the potential to curtail the First Amendment rights of all associations involved in litigation and participating in the discovery process.

This Court's recent decisions have left open a parallel question regarding the quantum of proof necessary to show that statutory disclosures violate the First Amendment. *Compare Doe v. Reed*, 130 S. Ct. at 2822-23 (Alito, J., concurring) (arguing for a low evidentiary burden to demonstrate a chilling effect from *statutory* disclosure requirements regarding ballot initiative campaigns) *with id*. at 2828-29 (Sotomayor, J., concurring) (arguing that, because ballot initiatives are "inherently public," future

as-applied challenges to the disclosure requirements "will bear a heavy burden"). This Court should settle the question in the civil discovery context. Given the confused and uneven application of the First Amendment privilege among the circuits, this Court's guidance is urgently needed.

A. The Tenth Circuit's Decision Conflicts With The Second Circuit's Decision In *N.O.W. v. Terry*.

The Tenth Circuit disclaimed creating a "bright-line rule" for evaluating the quantum of evidence needed to demonstrate an unacceptable chill on First Amendment freedoms. But the Tenth Circuit effectively imposed just such a rule. The Court of Appeals manifestly implied that the evidence must (1) consist of sworn testimony, (2) come from multiple sources, and (3) be as weighty as evidence of enough "harassment and intimidation" to make people reluctant to associate with the group. App. 34-39.

This decision conflicts with that of the Second Circuit, which took the opposite approach by emphasizing that the initial burden is "light":

> A party resisting discovery need not make a showing of harm or other coercion; but before the burden shifts to plaintiffs to demonstrate the necessary compelling interest in having discovery, defendants must at least *articulate some resulting encroachment on their liberties*. Mindful 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 (2d Cir. 1989) (hereinafter *N.O.W.*) (emphasis added and citations omitted); *see also Dole v. Serv. Employees Union*, 950 F.2d 1456, 1460 (9th Cir. 1991) (union "certainly satisf[ied]" the preliminary evidentiary requirement by presenting two *unsworn* letters from members saying that they "could no longer attend meetings"). Thus, the evidence Petitioners presented to the Magistrate Judge beyond the facial overbreadth of the discovery requests themselves, including their briefing, which explained in detail "the resulting encroachment on their liberties," would have been sufficient to trigger First Amendment scrutiny under *N.O.W*. Thus, the Tenth Circuit evidentiary hurdle is squarely at odds with the Second Circuit.

Likewise, this Court's seminal *NAACP* case recognized that, because these rights are so fundamental, any government action that merely has the "practical effect" of "discouraging" their exercise triggers the duty to balance the First Amendment rights against the interests potentially served by disclosure:

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. Thus in

> *Douds*, the Court stressed that the legislation there challenged, which *on its face* sought to regulate labor unions and to secure stability in interstate commerce, would have the *practical effect* 'of *discouraging*' the exercise of constitutionally protected political rights, . . . and it upheld that statute only after concluding that the reasons advanced for its enactment were constitutionally sufficient to justify its *possible deterrent effect* upon such freedoms.

NAACP, 357 U.S. at 461 (citing *American Communications Ass'n v. Douds*, 339 U.S. 382, 393 (1950)) (emphasis added).

B. The Tenth Circuit's Decision Conflicts With The D.C. Circuit's Decision In *AFL-CIO v. FEC*.

In some of the classic First Amendment privilege cases, the party claiming the privilege was able to persuade the judiciary that its members would suffer retaliation if their identities were disclosed. *See*, *e.g.*, *NAACP*, 357 U.S. at 462-63. Petitioners' claim of chill was much broader. Quite apart from any risk of direct retaliation for disclosure of who they were, Petitioners argued that compelling them to reveal their political strategy to their political opponents automatically gave those opponents an "unfair advantage" in "fostering" their beliefs. *Cf*. *id*. (holding that the lack of privacy would injure the NAACP's First Amendment rights because it would hinder its ability to "foster" its beliefs).

The Tenth Circuit rejected that contention *as a matter of law* – because the compelled disclosure would not necessarily "degrade their ability to associate." App. 34. That, of course, was not the point; the point was that it would degrade their ability to engage in collective political expression on a level playing field – *and that point was never engaged by the Tenth Circuit*.

The Tenth Circuit's decision thus conflicts with this Court's precedent. In contrast to the Tenth Circuit's approach, this Court has embraced a much broader concept of First Amendment chill. *See McIntyre*, 514 U.S. at 341-42; *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 192 (1999).

The Tenth Circuit's decision also conflicts with cases such as *AFL-CIO v. FEC*, which held that ordering disclosure of political secrets to political opponents – by itself – triggers harm cognizable under the First Amendment:

> Although we do not suggest that any Commission action that places a political association at a disadvantage relative to its opponents violates the First Amendment, where, as here, the Commission *compels public disclosure* of an association's confidential internal materials, it *intrudes on the 'privacy of association and belief* guaranteed by the First Amendment,' *Buckley*, 424 U.S. at 64, 96 S. Ct. at 656, as well as seriously *interferes with internal group operations and effectiveness*.

333 F.3d at 177-78 (emphasis added).

C. The Tenth Circuit's Decision Conflicts With The Ninth Circuit's Decision In *Perry v. Schwarzenegger*.

The Tenth Circuit's decision also creates a circuit conflict with the Ninth Circuit regarding how strictly to evaluate evidence used to establish chill. The Tenth Circuit rejected proffered evidence that the Ninth Circuit would have deemed sufficient to establish the requisite chill. *See Perry*, 591 F.3d at 1163; *compare* Janson Declaration in *Perry*, App. 131-34, to Alfano Live Statement, App. 123-30. In fact, the Ninth Circuit held that the effect of the discovery order was "self-evident." *See Perry*, 591 F.3d at 1163; *see also Nat'l Org. for Marriage*, 723 F. Supp. 2d at 243 n.3 ("*Perry* concerned the disclosure of internal campaign strategy . . . a type of disclosure that arguably has more self-evident chilling effect, even when disclosed to an opposing party pursuant to a confidentiality order, than does the simple disclosure of donors' identities.").

Moreover, the Tenth Circuit rejected evidence from the trade associations demonstrating the cost, time, and burden of production – which Petitioners submitted as representative of the burdens on the First Amendment rights of both members and associations alike. Both this Court and the D.C. Circuit have indicated that this evidence would be sufficient. *See Arizona*, 131 S. Ct. at 2818-19 (explaining that statute that effectively imposed a financial "penalty" on speech deterred free speech); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29

(1995) ("[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."); *AFL-CIO*, 333 F.3d at 177 ("[F]unds are often essential if 'advocacy' is to be truly or optimally 'effective.' ") (citations omitted). This Court has previously emphasized that the government should not be imposing any costs on speech – free speech should be, quite literally, free. *See Tornillo*, 418 U.S. at 256 ("The . . . penalty resulting from the compelled printing of a reply is exacted in terms of the *cost* in printing and composing *time* and materials and in taking up space. . . .") (emphasis added).

Ultimately, the Tenth Circuit's fault-finding with the evidentiary record here betrays a deep divergence between its passive approach to protecting First Amendment rights and the Ninth Circuit and this Court's more vigorous defense of those rights. *Perry*, 591 F.3d at 1162 (all parties have a First Amendment right "to exchange ideas and formulate strategy and messages, and to do so *in private*.") (emphasis added).

The concurring opinion further undercuts the Tenth Circuit's criticisms of the live statement that the Magistrate Judge heard from Holly Alfano, vice president of government affairs for NATSO, a national trade association representing travel plaza and truckstop owners and operators. App. 40-43. The Magistrate Judge alone conducted the evidentiary hearing, which the District Judge did not attend. At the hearing, no one objected to the failure to swear Alfano in nor did anyone challenge her veracity. The

concurrence concluded that Petitioners' *supplemental* affidavits would have been sufficient to trigger the duty to conduct a First Amendment review. *But the live statement* fundamentally contained the *same* evidence as those supplemental affidavits deemed satisfactory:

Ms. Alfano's Testimony: *Insufficient* Evidence of Chill, According to CA10 Concurrence	**Petitioners' Declarations: *Sufficient* Evidence of Chill, According to CA10 Concurrence**
"I won't be able to effectively represent the interests of my members. So that's a huge burden." "[W]e have a right to gather those facts and present them in the best way we can. We're going to have a hard time doing that"	"I likely would have chosen not to speak or become involved in the political process had I known that my internal communications could be disclosed to the opponents in the public policy debate."
"I'm very reluctant to call any of my members and ask them questions *knowing that it's information that I have to provide to my adversaries*."	"If I *had known that my communications . . . could be subject to disclosure through discovery* . . . I would not have solicited or disseminated information to members as I did so freely here."

The validity of a discovery request under the First Amendment should not turn on subtle differences in the evidence like this. Instead, the First Amendment should provide clear guidelines, so that it can serve as an obvious bulwark against all types of governmental intrusion into private political thought and the formulation of private petitioning strategies. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 58-59 (1999) (plurality opinion) (requiring anti-loitering ordinance to provide "advance notice" of what it prohibits).

V. Petitioners' Failure To Obtain A Stay Did Not Moot Their Claims.

Finally, Petitioners would note that the denial of their request for a stay of production[2] did not moot their claims:

> When the Government has obtained such materials as a result of an unlawful summons, that interest is violated and a court can effectuate relief *by ordering the Government to return the records*. Moreover, . . . a taxpayer still suffers injury by the Government's continued possession of those materials, namely, the affront to the taxpayer's privacy.

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[2] Justice Sotomayor denied Petitioners' request for a stay without opinion.

Church of Scientology, 506 U.S. at 13. Needless to say, Petitioners continue to seek to vindicate their First Amendment rights, obtain the return of their petitioning documents back from their political opponents, and prevent the documents' misuse in the upcoming trials.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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