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 RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party may immediately appeal, under the *Cohen* collateral order or *Perlman* doctrines, a district court discovery order to disclose materials when the order rejected a claim of First Amendment privilege.

2. Whether a party claiming privilege to avoid disclosing documents in discovery need not make a prima facie showing that the privilege applies merely because the privilege it claims is based on the First Amendment.

LIST OF PARTIES TO THE PROCEEDING

The list of respondents at pages ii-iii of the petition for a writ of certiorari is incomplete. The complete list of respondents is as follows:

3 Girls Enterprises, Inc.; Fred Aguirre; James Anliker; Ronald Bartley; Samantha Baylard; Kenneth Becker; Debra Berg; Rollie Berry; Hadley Bower; Larry O. Bower; William Boyd; Marvin Bryant; Shonna S. Butler; Wayne Byram; Scott Campbell; Max Candiotty; Charles Cockrell, Jr.; Jonathan Charles Conlin; Matthew Cook; S. Garrett Cook; Priscilla Craft; Brent Crawford; Barbara Cumbo; Clinton J. Davis; Brent Donaldson; Ben Dozier; Lesley Duke; Kelly Dutton; Roy Edson; Ellison and Sons Trucking Co. LLC; Samuel Ely; Dennis Flaherty; Ruby Fowler; Richard Galauski; Michael Gauthreaux; Herb Glaser; Tia Gomez; James Graham; Don Hall; Heartland Landscape Group, LLC; Robert Hicks; W.E. Hicks; Sam Hotchkiss; Jeff Jenkins; Jim's Trucking, Inc.; Charles D. Jones; Gary Kohut; Joann Korleski; Kennedy G. Kraatz; Dawn Lalor; Lisa Ann Lee; Phyllis Lerner; Robert G. Locklier; Dennis Mann; Craig Massey; Lisa McBride; Tamara Miller; Dixcee Millsap; Kristy Deann Mott; Elizabeth Murphy; Melissa D. Murray; Jean W. Neese; Gerald Panto, Jr.; Charles Parrish; Patrick Exterminating, Inc.; Christopher Payne; Edgar Paz; Ronna Posen; Mara Redstone; Carl Rittenhouse; Bobby Roberson; Roy-Car, M.T.S., Inc.; Steven Rubin; Mark Rushing; Rushing Enterprises, Inc.; Jan Rutherford; Steven R. Rutherford; William Rutherford; Victor Ruybalid; Raphael Sagalyn; Mark Scrivner; J.E. Smith, III; Tony Snable; Snake City Enterprises, Ltd.; Jacob Steed; John Taylor; Team Trucking; John Telles; TEMCO, Inc.; Sara Terry; Marlene Thomas; Jeri T.

Tschinderle; Luanna Tschinderle; Joseph Tucker; Universal Transportation & Logistics LLC; Viking Marine Enterprise, Inc.; W.E. Hicks, Inc. (d/b/a Trees Unlimited); Kim Wagner; Michael A. Warner; J.C. Wash; Cecil R. Wilkins; Zachary Wilson; Wonderland Miracle Carnival Company, Inc.; Mark Wyatt; Evy Young; William Younger; and Alex Zalkin.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, corporate plaintiffs-respondents 3 Girls Enterprises, Inc.; Ellison and Sons Trucking Co. LLC; Heartland Landscape Group, LLC; Jim's Trucking, Inc.; Patrick Exterminating, Inc.; Roy-Car, M.T.S., Inc.; Rushing Enterprises, Inc.; Snake City Enterprises, Ltd.; Team Trucking; TEMCO, Inc.; Universal Transportation & Logistics LLC; Viking Marine Enterprise, Inc.; W.E. Hicks, Inc. (d/b/a Trees Unlimited); and Wonderland Miracle Carnival Company, Inc. state the following:

3 Girls Enterprises, Inc. is a private for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

Ellison and Sons Trucking Co. LLC is a private Georgia for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

Heartland Landscape Group, LLC is an Oklahoma limited liability company. It has no parent companies, and no publicly held company holds an ownership interest in the company.

Jim's Trucking, Inc. is a private Arizona for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

Patrick Exterminating, Inc. is a private for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

Roy-Car, M.T.S., Inc. is a private Delaware for-profit corporation. It has no parent companies, and

no publicly held company holds an ownership interest in the corporation.

Rushing Enterprises, Inc. is a private Nebraska for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

Snake City Enterprises, Ltd. is a private Oklahoma for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

Team Trucking is a private Alabama company. It has no parent companies, and no publicly held company holds an ownership interest in the company.

TEMCO, Inc. is a private for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

Universal Transportation & Logistics LLC is a private Florida for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

Viking Marine Enterprise, Inc. is a private New Jersey for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

W.E. Hicks, Inc. (d/b/a Trees Unlimited) is a private Georgia for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

Wonderland Miracle Carnival Company, Inc. is a private Kansas for-profit corporation. It has no parent companies, and no publicly held company holds an ownership interest in the corporation.

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INTRODUCTION

This petition arises out of a discovery dispute in an ongoing case that will go to trial in 2012. The dispute here is *not* about whether a First Amendment privilege applies to discovery orders requiring disclosure of trade groups' internal communications. The Tenth Circuit concluded that it does. *See* App.[1] 14 ("we conclude that the First Amendment privilege applies to the district court's discovery order"). And petitioners do not challenge that conclusion.

Rather, as it comes to this Court, the issue is about petitioners' inability to invoke that privilege because of their own failure to put sufficient evidence into the record. Four federal judges agreed that petitioners did not meet their prima facie burden of establishing the factual predicate for the privilege – "a reasonable probability of chill on an association right." App. 32 (internal quotation marks omitted). In requiring petitioners to meet that burden, the Tenth Circuit correctly followed Supreme Court precedent and the established precedent of other circuits. *See* App. 30-31 (citing *NAACP v. Alabama*, 357 U.S. 449, 463 (1958); *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989) ("*NOW*"); *In re First Nat'l Bank*, 701 F.2d 115, 118 (10th Cir. 1983); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980)).

Unable to meet that well-settled burden, petitioners instead protest that the burden should not exist. They urge the courts to recognize an *automatic*

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[1] References to "App. __" are to the appendix accompanying the certiorari petition; references to "Resp. App. __a" are to the appendix accompanying this brief.

presumption of privilege whenever the First Amendment is involved. They also seek to obtain that presumption in an appeal prior to final judgment, once again because the First Amendment is involved. In support of their requests, petitioners repeatedly invoke the First Amendment's special importance as a basis for making these procedural end-runs. The basic thrust of petitioners' position, however, has no merit.

The sanctity of the First Amendment is not in dispute. First Amendment protections are already "'embodied in the substantive laws.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 n.7 (1986) (quoting *Calder v. Jones*, 465 U.S. 783, 790-91 (1984)). In the context of privilege, courts apply "the closest scrutiny" to discovery requests that might chill First Amendment activity. *NAACP*, 357 U.S. at 460-61. That scrutiny involves a careful balancing of interests to address First Amendment concerns. *See id.* at 463.

But "[t]o reintroduce those concerns" at a procedural stage "would be a form of double counting." *Calder*, 465 U.S. at 790. The Supreme Court and lower courts have therefore repeatedly refused to create special procedural exceptions for cases involving First Amendment claims. *See*, *e.g.*, *Anderson*, 477 U.S. at 256 n.7 (no special rules apply for summary judgment); *Calder*, 465 U.S. at 790-91 (or for personal jurisdiction); *Zanders v. Swanson*, 573 F.3d 591, 593-95 (8th Cir. 2009) (or standing); *Moss v. United States Secret Serv.*, 572 F.3d 962, 969-72 (9th Cir. 2009) (or at the motion to dismiss stage); *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 327-28 (3d Cir. 1999) (or with respect to the burden to litigate).

Here, petitioners seek an exemption from two well-established procedural tenets: the general rule against interlocutory review of pretrial discovery orders and the settled requirement of a prima facie showing for a party raising a privilege claim – even one involving a First Amendment claim. Petitioners' request for an exemption from the normal rules of litigation has no merit. Because this petition raises a fact-bound application of settled law in an interlocutory posture in which petitioners can raise the very same arguments after final judgment, the petition should be denied.

STATEMENT OF THE CASE

This case arises from consumers' inability to purchase motor fuel (gas or diesel) at retail in the same manner that fuel companies purchase it at wholesale – adjusted for heat expansion. When the temperature of motor fuel increases, it expands and contains less energy per gallon. For this reason, fuel sellers adjust every gallon to a standard 60 degrees Fahrenheit when they sell fuel to each other at wholesale. But when selling the exact same fuel to consumers, retailers do not disclose – or adjust for – heat expansion. The result is that consumers get cheated out of a small portion of the energy they buy when purchasing fuel at greater than 60 degrees.

In Canada, where motor fuel routinely is sold at temperatures colder than 60 degrees Fahrenheit, retailers installed temperature-adjusting equipment so that consumers would not benefit from the higher energy content of fuel they purchased at colder temperatures. That development occurred on an industry-wide basis in the 1990s. Not long after that development, retailers and wholesalers of motor fuel in the United States engaged in litigation

over whether motor fuel sold at wholesale must be temperature-adjusted. For motor fuel sales made at wholesale in the United States, temperature adjustment ensures that retailers will obtain the same energy content for the fuel they buy regardless of the actual temperature at the time of purchase.

Plaintiffs-respondents are a class of consumers who have purchased motor fuel from retailers on a non-temperature-adjusted basis. Respondents assert causes of action under state deceptive trade practices acts and common law (breach of contract, duty of good faith and fair dealing, and civil conspiracy). In the course of the litigation, respondents propounded discovery requests on the retailers and on non-party trade associations seeking information about their activities related to the sale of motor fuel on a temperature-adjusted basis. Respondents sought materials related to systems for automatic temperature compensation ("ATC"), which would enable retailers automatically to sell fuel to consumers on a temperature-adjusted basis. Respondents believe that the trade associations (petitioners here) engaged in a misinformation campaign about ATC to discourage its adoption by standards-setting bodies and the States. Accordingly, respondents requested trade association documents, including communications, related to ATC.

Petitioners resisted production of the documents for three years and withheld all internal communications that discussed ATC. They filed motion after motion to delay the production of those documents, and they argued that the First Amendment creates an automatic presumption of privilege for documents about "lobbying," which they define broadly to include any communication within an association –

or forwarded among numerous other associations – regarding ATC.[2] In a hearing before the magistrate judge on respondents' motions to compel, petitioners' counsel stated: "any internal communication that comments upon the subject of the lobbying, we would say is privileged." Hearing Tr. 99 (May 13, 2009) [ECF 1587-1]. Even just "[o]ne member communicating to another member giving his opinion on temperature compensation is an internal communication privilege." *Id.* at 100. The magistrate judge granted in part and denied in part respondents' motions to compel document requests and petitioners' motions to quash the subpoenas issued to them as non-parties. *See* App. 73-74.

The district court set aside the magistrate judge's ruling. *See* App. 75-119. The court first concluded that it was "unclear whether [the magistrate judge] applied a presumptive privilege." App. 92. To the extent the magistrate judge's order could be construed that way, the district court noted that "it appears to be the only case which has done so." App. 95-96. The court then observed that petitioners "produced no evidence" that "disclosure would have a chilling effect on membership" to support their claim that disclosure of discovery materials would infringe their First Amendment rights. App. 104. The only "evidence" in the record was an unsworn statement by a vice president of one of the trade associations, the National Association of Truckstop Operators ("NATSO"), during a hearing in front of the magis-

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[2] Although petitioners seek to protect documents about "lobbying," the Tenth Circuit noted that petitioners' challenge was based on the First Amendment right of association, not the right to petition the government. App. 7.

trate judge.[3] The court also noted that petitioners "presented no evidence" on their claim that respondents would "gain undue advantage in the ongoing public policy debate on ATC for retail motor fuel." App. 105-06. The court concluded that, "on this record, [petitioners] have not shown an objectively reasonable probability that compelled disclosure of internal trade association communications with regard to legislati[on] and lobbying on ATC for retail motor fuel would chill associational rights." App. 107.

The district court then ruled that, even if petitioners had made the requisite showing of a First Amendment claim, respondents "have shown that the balance of factors weighs in favor of disclosure." App. 107-08. The court went through the factors assessing respondents' need for the information and weighed it against petitioners' First Amendment interests with respect to internal trade association legislative and lobbying activities regarding ATC.

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[3] Petitioners claim (at 8) that they submitted four declarations averring that production of the documents requested would disrupt associational activity. But those declarations "stated that producing the requested information would cause undue burden on association resources"; they did not show "an objectively reasonable probability" that the compelled disclosure "would chill associational rights." App. 106-07. Petitioners also attempted to supplement the record with additional declarations, after an adverse ruling from the district court. The Tenth Circuit denied petitioners' untimely attempt to add the declarations in the last round of briefing. The court rejected petitioners' proffered reasons for their delay in providing evidence of a chilling effect on their First Amendment rights. App. 39-40; *see also* App. 42 (Kelly, J., concurring) ("no persuasive reason suggests" petitioners could not have submitted the evidence earlier); *cf. United States v. Walden*, 625 F.3d 961, 965 (6th Cir. 2010) (rejection of additional filings not an abuse of discretion where party did not establish good cause for granting relief from waiver).

App. 108-13. The court further concluded that, with respect to "lobbying and legislative communications between trade associations" regarding ATC, petitioners had "not shown an objectively reasonable probability" that disclosure of such communications "would chill their First Amendment rights." App. 116. Finally, the court ruled that petitioners "did not demonstrate that disclosure of publically available information would chill their associational rights." App. 118.

The Tenth Circuit affirmed. App. 1-42. The court of appeals noted that the case presented an issue of first impression, because "no court has directly considered" application of the First Amendment privilege "to a case like ours, where a court compels disclosure of trade groups' and their members' strategic pre-lobbying communications in a lawsuit between private parties." App. 13. The court concluded that "the First Amendment privilege applies" to such a case. App. 14. But the court rejected petitioners' request for an *automatic* presumption of privilege. Instead, the court cited precedent and required a prima facie showing from the party claiming the privilege. The court held that, for petitioners to claim a First Amendment privilege that would cloak all of their associations' communications in secrecy, they must put forth some evidence that unshrouding those communications would chill their First Amendment-related activities. App. 29-30.

The Tenth Circuit characterized the statement by the NATSO vice president as "minimal," "ambiguous," "equivocal," and generally not directed to the relevant inquiry. App. 35, 38. The court stressed that "we do not purport, in this opinion, to create a bright-line rule delineating the minimum proof

necessary to satisfy the prima facie burden." App. 38. But the court nonetheless concluded that petitioners had not made the requisite factual showing "to establish a prima facie case of First Amendment chill." App. 39.

After this Court denied petitioners' motion for an emergency stay of judgment, petitioners finally produced the documents at issue. They did so under the cover of a protective order.[4] Those materials reflect extensive continuing lobbying efforts by petitioners during the pendency of this litigation, as well as information germane and relevant to respondents' claims.

REASONS FOR DENYING THE PETITION

I. THE TENTH CIRCUIT CORRECTLY APPLIED SUPREME COURT PRECEDENT ON THE COLLATERAL ORDER DOCTRINE

The Tenth Circuit correctly held that the *Cohen*[5] collateral order doctrine does not apply to First Amendment privilege claims, so petitioners' appeal of the discovery order is not appropriate prior to final judgment. In doing so, it applied and extended the principles enunciated by this Court in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). There is no conflict between the Tenth Circuit's decision and *Mohawk*, much less a conflict between the court below and any other circuit on the application of *Mohawk* to First Amendment claims. Certiorari is therefore unwarranted.

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[4] *See* Order Supplementing Protective Order (Nov. 12, 2008) [ECF 627] (extending provisions of the protective order to non-party discovery).

[5] *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

A. The Tenth Circuit Correctly Applied *Mohawk*

The Tenth Circuit correctly applied *Mohawk* to determine that claims of First Amendment privilege, as a class, are not entitled to disruptive, interlocutory review. In *Mohawk*, the Court held that disclosure orders adverse to the attorney-client privilege do not qualify for interlocutory review. This Court's guidance in *Mohawk* was clear: in "applying [the] collateral order doctrine, we have stressed that it must never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." 130 S. Ct. at 605 (internal quotation marks omitted).

The same is true of disclosure orders that potentially impinge the First Amendment. As the *Mohawk* Court 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." *Id.* at 606. The same test applies even when constitutional rights are at stake. *See Flanagan v. United States*, 465 U.S. 259, 264-67 (1984).

Here, there is no such peril. As with the attorney-client privilege, "deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations." *Mohawk*, 130 S. Ct. at 607. At the time of the communications, the prospect of potential disclosure during some possible future lawsuit is too remote to have a perceptible effect. *Cf. id.* ("[o]ne reason for the lack of a discernible chill is that, in deciding how freely to speak, [the individuals in the conversation] are unlikely to focus

on the remote prospect of an erroneous disclosure order").

Disclosure of communications during litigation is even less likely to affect conversations within associations than conversations between attorney and client. Unlike the attorney-client privilege, the First Amendment privilege is not absolute. As even petitioners admit, the First Amendment privilege is subject to a balancing test of competing interests. Pet. 36. Therefore, to the extent that communicants have any awareness of the potential for future disclosures, they already account for the possibility that a court will require them to disclose. *See Mohawk*, 130 S. Ct. at 607.

Finally, alternative safeguards exist to protect any First Amendment rights at stake. The documents in this case are subject to a protective order that serves "to limit the spillover effects of disclosing sensitive information." *Id.* at 608. In addition, if petitioners are adamant about obtaining immediate review, they may do so through other mechanisms – such as defying the disclosure order and accepting sanctions. *See id.*

B. The Tenth Circuit's Decision Did Not Alter The Standard Of Review For First Amendment Rights

Petitioners argue that, because of "the importance of First Amendment rights," those rights "should not be relegated solely to writs of mandamus as a vehicle for appellate review." Pet. 12. But petitioners mischaracterize the issue. The Tenth Circuit's decision did not change the standard of review for First Amendment rights; it simply specified the appropriate timing for that review – after final judgment. At that proper time, the "closest scrutiny" would apply.

NAACP, 357 U.S. at 460-61.[6] For this reason, the notion that the Tenth Circuit's mandamus review "conflicts" with Supreme Court decisions applying searching, independent review is contrived. None of the cases cited by petitioners involves mandamus jurisdiction or instructs courts to apply *de novo* review to First Amendment claims despite mandamus jurisdiction. Indeed, this notion is simply a way of recasting the question whether the *Cohen* collateral order doctrine applies to First Amendment privilege claims. As discussed above, that question does not warrant certiorari.

C. The Tenth Circuit's Decision Did Not Contravene The Purpose Of The Collateral Order Doctrine

1. Petitioners argue that the Tenth Circuit ignored the purpose of the collateral order doctrine announced by this Court – to protect rights too important to be denied review. They claim that the Tenth Circuit's decision is inconsistent with Fifth and Seventh Circuit decisions applying the collateral order doctrine to First Amendment rights as well as Supreme Court decisions applying the collateral order doctrine to "lesser rights." Pet. 17.

But petitioners mistake the purpose of the collateral order doctrine and cite authority that is too far afield. The rule against interlocutory appeals exists to prevent "piecemeal, prejudgment appeals . . . [that] undermine[] efficient judicial administration and encroach[] upon the prerogatives of district court judges." *Mohawk*, 130 S. Ct. at 605 (internal quota-

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[6] Indeed, elsewhere in their brief, petitioners recognize (at 17) that the effect of the Tenth Circuit's decision was to delay close scrutiny rather than eliminate it.

tion marks omitted). The collateral order doctrine provides an exception to that rule for certain interests – not simply because those interests are important but because those interests cannot be effectively reviewed later in the litigation process. *See id.* at 606 ("The 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.").

Petitioners' citations to Fifth and Seventh Circuit cases about press access to the courtroom or courtroom information are therefore inapposite. Their citation of Supreme Court cases addressing a miscellany of other rights is even more irrelevant. This case is not about the importance of the First Amendment. It is about the applicability of the collateral order doctrine to First Amendment privilege claims. The most relevant authority on that topic is *Mohawk*. But petitioners are unable to find any conflict between the Tenth Circuit's decision and *Mohawk*, or between the Tenth Circuit's decision and the decisions of other courts on that precise issue in the aftermath of *Mohawk*. The platitudes they repeat about the importance of the First Amendment cannot substitute for a legal rule on which the courts below conflict.

2. Petitioners argue that the First Amendment discovery privilege is sufficiently important for immediate review, that the need for review is great because most cases in the United States settle and settlement would preclude review, and that the loss of First Amendment freedoms "for even minimal periods of time" constitutes irreparable injury. Pet.

15-18 (internal quotation marks omitted). Those arguments are unpersuasive.

If the privilege is truly that important to petitioners, they are not without recourse – they may stand in contempt of court and force review in that way. *See*, *e.g.*, *NAACP*, 357 U.S. at 451; *see also* App. 19-20. Likewise, if a party chooses to settle the case rather than litigate the privilege issue, that is their choice; it is not the Court's place to reach out and review an issue that may soon become moot. (Indeed, the Court routinely passes up opportunities to review otherwise cert-worthy but now-moot issues. *See*, *e.g.*, *United States v. Varca*, 896 F.2d 900 (5th Cir.), *cert. denied*, 498 U.S. 878 (1990).) Finally, the notion of irreparable injury is undercut by the fact that the Court denied the previously filed stay petition and the materials have already been disclosed under the safe haven of the district court's protective order.

It is not surprising then that, in 2000, this Court denied certiorari on a similar question regarding the applicability of the collateral order doctrine to First Amendment claims. *See Ambort v. United States*, 528 U.S. 1190 (2000) (refusing to consider the question whether "the Court of Appeals [should] have exercised jurisdiction under the 'collateral order' exception, allowing petitioners to present the First Amendment claim that they have a 'right not to be tried'"[7]). In that case, the Tenth Circuit had concluded that the petitioners' First Amendment rights were adequately protected by appeal after any adverse final judgment. But the petitioners cited *Cohen* and argued that the Court should exercise

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[7] *See* Petition for Writ of Certiorari at i, *Ambort v. United States*, No. 99-1231 (U.S. filed Jan. 21, 1999) ("*Ambort* Pet."), 1999 WL 33641150.

jurisdiction "because of the important First . . . Amendment issues" implicated. *Ambort* Pet. at i, 8. The Court declined review and should do so here, too. *See South Park Indep. Sch. Dist. v. United States*, 453 U.S. 1301, 1303-04 (1981) (Powell, J., Circuit Justice) (certiorari is not a reasonable probability where the "issues presented by applicants are almost identical to those presented three years ago, when the Court voted to deny certiorari").

II. THE PETITION PRESENTS NO MEANINGFUL CONFLICT WITH *PERLMAN*

This case is a poor vehicle for reviewing the applicability of the *Perlman*[8] doctrine because any supposed conflict is inconsequential to the outcome of the case and because the Tenth Circuit conducted a proper *Perlman* analysis.

A. Any Supposed Conflict Is Without Consequence

Petitioners argue that the Tenth Circuit created a deep circuit split because it held that the *Perlman* doctrine applies only to criminal grand jury proceedings. As a preliminary matter, that contention misreads the Tenth Circuit's opinion. The Tenth Circuit did not declare a bright-line rule that the *Perlman* doctrine would never be applicable in a civil case. It said only that it was not aware of a case extending *Perlman* beyond criminal grand jury proceedings and it "decline[d] to do so here." App. 24.

Furthermore, the Tenth Circuit *did* go on to consider the applicability of the *Perlman* doctrine to this civil case and – as an alternative ground for its conclusion – found that the doctrine's requirements simply were not met here. App. 24-25. Therefore,

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[8] *See Perlman v. United States*, 247 U.S. 7 (1918).

any conflict over *Perlman*'s applicability to civil cases would not matter to the outcome of this case and is unworthy of certiorari. *See Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied where resolution of conflict would not change result).

B. The Tenth Circuit Correctly Applied The *Perlman* Doctrine

The Tenth Circuit correctly determined that petitioners "may not invoke *Perlman* as a basis for appellate jurisdiction." App. 25.

The *Perlman* doctrine is a *limited* exception to the rule against interlocutory review. It provides relief where the party asserting the privilege is "powerless to avert the mischief of the [disclosure] order." *Perlman*, 247 U.S. at 13. A long line of cases reinforces this principle, as even the cases cited by petitioners demonstrate.[9]

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[9] *See In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1211 (D.C. Cir. 2004) (document custodian "unequivocally stated its intention to [produce the documents] upon court order"); *United States v. AT&T Co.*, 642 F.2d 1285, 1296 (D.C. Cir. 1980) (party asserting privilege "was not the object of the document demand and could therefore not possibly refuse disclosure and undergo a contempt citation as a means to appeal"); *FDIC v. Ogden Corp.*, 202 F.3d 454, 459 (1st Cir. 2000) (privilege-holder, "although a party to the case, has no way of testing the order by allowing itself to be held in contempt"); *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 575 (2d Cir. 2005) (document custodian "has demonstrated that he is more than willing to comply with the subpoena without any additional prompting"); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 103 (3d Cir. 1982) (document custodian "did not appeal, but produced the subpoenaed materials when faced with a coercive contempt order"); *Conkling v. Turner*, 883 F.2d 431, 433 (5th Cir. 1989) (privilege-holder is "powerless to prevent compliance"); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1238 n.1 (5th Cir. 1982) ("[T]he person asserting the privilege may seek

That element of powerlessness is simply not present in this case. That is, "the non-party trade associations in this case have not shown how they are precluded from any further review." App. 24. There were discovery orders and subpoenas directed at both the non-party trade associations and the party-retailers. Because all involved the same First Amendment issues, all were subject to the same stay pending the non-party associations' Tenth Circuit appeal. *See* App. 24 n.10. The non-party associations thus were perfectly capable of vindicating any applicable privilege claim through the traditional means – standing in contempt and appealing the contempt order.

III. THE LEGAL STANDARD FOR SHOWING A FIRST AMENDMENT PRIVILEGE IS WELL-SETTLED, AND THE TENTH CIRCUIT'S JUDGMENT PRESENTS NO CONFLICT

The Tenth Circuit's substantive treatment of the First Amendment privilege in this case rested on well-settled precedent. Further review is unwarranted.

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immediate review since he cannot compel the third party to risk a contempt citation."); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984) (per curiam) (privilege-holders "were in the position of being outside third parties claiming a privilege over material ordered produced by another party"); *In re Int'l Horizons, Inc.*, 689 F.2d 996, 1001-02 (11th Cir. 1982) (privilege-holder "claims a privilege of non-disclosure relating to materials that *another party* has been directed to produce").

A. The Tenth Circuit's Decision Comports With Supreme Court Authority

The Tenth Circuit's decision is in line with *NAACP v. Alabama* – the paramount case recognizing the First Amendment associational privilege – and steers clear of any conflict with other cases.

1. The Tenth Circuit's decision is faithful to *NAACP v. Alabama*

The Tenth Circuit's decision was modest in scope. It simply held that, where a party asserts that it can withhold all of an association's internal communications (as well as communications dispersed to dozens of other like-minded organizations), that party must come forward with some factual predicate for that privilege. The associational privilege derives from this Court's decision in *NAACP v. Alabama*, where the Court held that the NAACP did not have to produce its membership lists in response to a subpoena from the Alabama Attorney General. In determining that the subpoena was likely to act as a restraint on the NAACP members' rights of association, the Court noted:

> Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce

> members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

357 U.S. at 462-63; *see also Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960) ("There was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm. There was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw.").

Following this Court's precedent, the courts of appeals have required a proponent of the First Amendment privilege to provide some prima facie evidence that its associational rights are burdened. *See*, *e.g.*, *NOW*, 886 F.2d at 1355. To be sure, the evidence need not rise to the level of harassment and hostility seen in *NAACP*. But it must exist. Here, there is none – both courts below faulted petitioners for a failure of proof in not presenting evidence that their associational rights would be chilled. *See* App. 39, 104. And there is nothing to balance under the "balancing test" sought by petitioners if there is no evidence of a burden on associational rights.

2. The Tenth Circuit's decision does not conflict with *DeGregory* or *Sweezy*

The cases that petitioners identify do not conflict with the Tenth Circuit's judgment. In *DeGregory v. Attorney General*, 383 U.S. 825 (1966), the Court recognized an associational privilege only after scru-

tinizing its factual basis. The Court referenced other cases establishing the damage from similar disclosures and noted that, "[o]n the basis of our prior cases, appellant had every reason to anticipate that the details of his political associations to which he might testify would be reported in a pamphlet purporting to describe the nature of subversion in New Hampshire." *Id.* at 828. The Court held that such exposure "is objectionable and damaging in the extreme to one whose associations and political views do not command majority approval." *Id*. at 829.

The Court's decision in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), is a pre-*NAACP* plurality opinion, decided under the Due Process Clause, and not binding precedent. Even so, the Court in *Sweezy* similarly referenced another case discussing the damage incurred from public disclosure of certain associational affiliations. *See id.* at 247-48. Petitioners here have pointed to nothing suggesting that a fuel retailer with membership in a commercial trade association would face similar damage.

Even if *DeGregory* or *Sweezy* would permit a court to presume a burden on First Amendment rights in limited circumstances, petitioners have done nothing to demonstrate that the discovery sought in this case is at all comparable to that sought in *DeGregory* or *Sweezy*. Those cases involved McCarthy-era government investigations of individuals affiliated with minority political groups. Even if a presumption of privilege is appropriate in those circumstances, petitioners offer no justification for extending such a privilege here, where their discussions allegedly advanced a conspiracy to deprive consumers of fair treatment in the purchase of motor fuel.

Indeed, nothing in *DeGregory* or *Sweezy requires* a court to presume a First Amendment privilege whenever a party asserts it. So the relevant question is whether petitioners *in this case* can claim a First Amendment privilege to withhold all of their internal communications and then dispense with any effort to establish the factual predicate for that privilege.

3. The Tenth Circuit's decision does not conflict with *Citizens United*

Petitioners' argument that the Tenth Circuit's decision conflicts with *Citizens United v. FEC*, 130 S. Ct. 876 (2010), has no merit. Petitioners erroneously allege that the Tenth Circuit "refus[ed] to extend the presumption in *DeGregory* beyond the 'private individual'" in a manner that "runs afoul of *Citizens United*." Pet. 30. The Tenth Circuit explicitly stated that "the First Amendment privilege applies to the district court's discovery order" here, and it made no distinction between individuals and associations. App. 14.

4. The Tenth Circuit's decision does not conflict with *Arizona* or *Davis*

The Tenth Circuit's decision does not conflict with other campaign finance cases either, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), and *Davis v. FEC*, 554 U.S. 724 (2008). Both of those cases involve state campaign reform statutes that were found to burden political speech. Whatever their merit, they do not involve a First Amendment privilege claim, where the case law holds that (as with other privileges) the privilege-holder must establish the factual predicate for the privilege. In any event, neither *Arizona* nor *Davis requires* a court to presume a chilling effect; they show only that in a

particular context – campaign finance reform – the chilling effect was apparent on its face. They say nothing about the fuel retailer context.

If anything, the Supreme Court's campaign finance jurisprudence supports the notion that disclosures related to political influence (contributions or lobbying) do not transgress the First Amendment – at least not without a more specific showing. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court upheld the federal requirement that contributions to political candidates be publicly disclosed. *Id.* at 82-84. It rejected a facial attack on the disclosure requirement because it found that the requirement served legitimate government interests. *Id.* at 76. It declined to carve out an exemption from the requirement for minor parties because the record was insufficient to justify a blanket exemption. *Id.* at 74. And it left open the possibility that a minor party could produce sufficient evidence to obtain an exemption from the disclosure requirement but only with a factual showing of a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* The Court has taken a similar approach – of requiring a prima facie showing of harm in order to avoid disclosure – in subsequent cases. *See*, *e.g.*, *Citizens United*, 130 S. Ct. at 916 (upholding disclosure requirements where "there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression").

5. The Tenth Circuit's decision does not conflict with any other Supreme Court authority

Finally, petitioners make a potpourri of additional arguments that are off-point and not germane to whether the decision below raises cert-worthy issues.

First, petitioners analogize the discovery order to viewpoint-specific statutes that have discriminatory intent. They suggest that the district court discovery order, "[f]or all practical purposes," "discriminates by targeting certain content, speakers, or points of view." Pet. 27. The analogy is inapt. The court's discovery order was not targeting speech for regulation. It was facilitating the sharing of relevant information "reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P. 26(b)(1), in a narrow context safeguarded by a protective order. The court's ruling with respect to the showing necessary to prevent disclosure of materials would have been equally applicable to any party's discovery requests including, for example, *defendants'* subpoena to a third-party trade association for internal communications.

Petitioners cite *Hickman v. Taylor*, 329 U.S. 495 (1947), for the idea that the party claiming a privilege need not set forth a factual basis for harm. But it is well-established that a party claiming work-product privilege must establish the factual predicate for the privilege – that the material is work product, prepared in anticipation of litigation. *See*, *e.g.*, *In re Grand Jury Proceedings*, 616 F.3d 1172, 1185 (10th Cir. 2010) ("the party asserting work product privilege has the burden of showing the applicability of the doctrine") (internal quotation marks and alteration omitted). Harm or "chill" may not be an element

of a work-product privilege claim but, as *NAACP* and other cases show, it is an element of a First Amendment privilege claim. *See NAACP*, 357 U.S. at 462-63; *NOW*, 886 F.2d at 1355; *First Nat'l Bank*, 701 F.2d at 118; *Citizens State Bank*, 612 F.2d at 1094.

Petitioners argue that a presumption of First Amendment harm is buttressed by Supreme Court cases holding that the First Amendment guarantees privacy and prohibits compelled speech. Petitioners cite *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), for support. But *Tornillo* is about compelling newspapers to print *someone else's speech*. And *Dale* concerns compelling associations to include certain people as members. The discovery order here compels neither action from petitioners and therefore does not implicate issues of compelled speech or expressive association.

B. The Tenth Circuit's Decision Does Not Conflict With Decisions Of Other Circuits

Petitioners argue that the Tenth Circuit's decision conflicts with the decisions of other courts of appeals. There is no such conflict – either with respect to whether a prima facie burden exists or with respect to the quantum of proof necessary to fulfill that burden.

1. There is no conflict on whether a prima facie burden exists

The Tenth Circuit's approach accords with the approach of every other circuit that petitioners identify. Each concurs that the party claiming a First Amendment privilege carries a prima facie burden to demonstrate the privilege's factual predicate.

a. The D.C. Circuit: *FEC v. Machinists* and *AFL-CIO v. FEC*

The D.C. Circuit's decision in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), is not on point and raises no conflict with the decision below. There, the D.C. Circuit held that the FEC did not have subject-matter jurisdiction to conduct an investigation of a draft-candidate group. In its opinion, the court offered dicta about the potential chilling effect of such an investigation on political rights. Such dicta cannot be the basis for a circuit split.

This is particularly true when the D.C. Circuit has spoken with greater clarity in a more recent case. In *United States v. Judicial Watch, Inc.*, 371 F.3d 824 (D.C. Cir. 2004) (not cited by petitioners), the D.C. Circuit demanded – just as the Tenth Circuit did here – that the party claiming a First Amendment privilege "produce[] sufficient evidence to support its allegation that enforcement of the summons will chill its members' speech." *Id.* at 833. Absent such evidence, the D.C. Circuit held, an organization's donor list was not protected. The D.C. Circuit is therefore clearly in agreement with the Tenth Circuit.

That agreement is further evidenced by *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003). In that case, organizations claiming a First Amendment privilege submitted affidavits that explained to the D.C. Circuit how the disclosure of materials to their political opponents would interfere with their internal organization, such as "how to organize [themselves], conduct [their] affairs, and select [their] leaders, as well as their selection of a message and the best means to promote that message." *Id.* at 177 (internal quotation marks and ellipses omitted). Here, by contrast:

> [A]ppellants in this case fail[ed] to explain how their main contention on this point – that the information sought as part of this litigation will give the plaintiffs an unfair advantage in the policy debate over the implementation of ATC – will hinder their associational rights (e.g., lobbying efforts, ability to communicate among themselves regarding legislative policy, or maintenance of members within the trade associations). Instead, the appellants appear[ed] simply to argue that a chill can be "inferred" in this case without describing how the disclosure of information would degrade their ability to associate.

App. 33-34. In other words, petitioners failed to do what the organizations did in *AFL-CIO*: provide evidence about how revealing information in this litigation would interfere with protected activities.

b. The Second Circuit: *NOW v. Terry*

In *NOW v. Terry*, the Second Circuit held that, "before the burden shifts to [the non-moving party] to demonstrate the necessary compelling interest in having discovery, [the moving party] must at least articulate some resulting encroachment on their liberties" – in other words, it must make out "a *prima facie* case" of how the "discovery requests would interfere with their First Amendment activities." 886 F.2d at 1355. The Second Circuit therefore clearly follows the same approach as the Tenth Circuit.

c. The Ninth Circuit: *Perry v. Schwarzenegger*

In *Perry v. Schwarzenegger*, the Ninth Circuit held that a "party asserting the [First Amendment] privilege must demonstrate a prima facie showing of arguable first amendment infringement." 591 F.3d at

1140 (internal quotation marks and alteration omitted). Once the party makes "the necessary *prima facie* showing, the evidentiary burden will then shift." *Id.* (internal quotation marks omitted). Thus, the Ninth Circuit too is in agreement with the Tenth Circuit.

2. No conflict exists on the quantum of proof required

Petitioners argue that, even if the Tenth Circuit were correct to require petitioners to make an initial evidentiary showing, the Court should grant review to resolve the quantum of proof necessary.

Petitioners note that the Supreme Court recently left open a parallel question about the quantum of proof necessary to show that *statutory* disclosures violate the First Amendment. That is a different issue, is not a basis for pointing to a conflict with the Tenth Circuit's decision, and is not a basis for certiorari because it is not presented in this case. *See Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam) (dismissing certiorari because petitioners sought "review of uncongenial findings not essential to the judgment and not binding upon them in future litigation").

Petitioners claim that the Tenth Circuit's decision conflicts with decisions by the Second, Ninth, and D.C. Circuits on the quantum of proof required because it "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." Pet. 35. But the Tenth Circuit did not set forth a test for the quantum of proof, much less a three-part test. *See* App. 38 ("To 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."). It noted simply that the district court did not err in concluding that the single unsworn statement in the record here was insufficient. *See id.*

Indeed, the decisions of the Second, Ninth, and D.C. Circuits do not set out a series of bright-line tests that differ from one another. Rather, they each require that the party claiming a privilege make a prime facie showing, and then they engage in a fact-specific determination of whether that prima facie showing has been satisfied. Such a fact-specific determination is not appropriate for certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (where the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally be denied).

In any event, just as no conflict exists over the quantum of proof required, there is no question that petitioners would have failed to meet the standard evidenced in each of the other court of appeals' opinions. The one unsworn statement that petitioners offered was simply insufficient to demonstrate a reasonable probability of chill. *See Perry*, 591 F.3d at 1143 (proponents of privilege introduced multiple sworn declarations explaining how disclosure would influence communication and participation in future ballot initiative campaigns); *AFL-CIO*, 333 F.3d at 177 (organizations submitted affidavits explaining how disclosure would interfere with organizations' affairs, selection of leaders, and promotion of message); *NOW*, 886 F.2d at 1355 (party resisting discovery must articulate "some resulting encroachment on their liberties"); *Citizens State Bank*, 612 F.2d at 1044 (prima facie burden met where party submitted

three uncontroverted declarations "detailing the adverse effects of the summons on . . . organizational and fundraising activities").[10]

There appears to be good reason for petitioners' inability to show a reasonable probability of chill – it simply does not exist. Facts revealed in discovery subsequent to the Tenth Circuit's opinion nullify any claim that disclosure of internal communications would chill First Amendment activity. For example, respondents served their first subpoena upon a non-party trade association in September 2008. That subpoena put such associations on notice that their communications may be revealed in discovery in this case. Nevertheless, months afterwards, Holly Alfano, Vice President of Government Affairs at NATSO, instructed her colleagues to "ramp up" their lobbying efforts. *See* Resp. App. 2a.[11] That communication occurred at approximately the same time that Alfano's organization joined in a motion to quash the

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[10] Petitioners argue that Judge Kelly's concurring opinion undercuts the Tenth Circuit panel's main opinion finding that petitioners did not satisfy their burden of proof, because Judge Kelly stated that petitioners' supplemental declarations would have been sufficient to trigger First Amendment review (and, petitioners assert, those declarations were in substance the same as the unsworn statement already in evidence). Those contentions are unpersuasive: although the supplemental declarations would have been sufficient for Judge Kelly, there is no indication that they would have been sufficient for the panel majority. And Judge Kelly said only that, if those declarations were in the record, "it would next be necessary to engage in an ad hoc balancing" (App. 42); he did not indicate whether the balance would have tipped in petitioners' favor.

[11] The e-mail reads: "We are all going to need to make plans to attend the upcoming regional meetings. We are really going to have to ramp up our participation at [the National Council of Weights and Measures]." Resp. App. 2a.

subpoenas (Apr. 13, 2009) and Alfano gave her unsworn statement in this case to the magistrate judge (May 2009). In other words, petitioners were lobbying vigorously – and "ramp[ing] up" those lobbying efforts – while simultaneously arguing to the magistrate judge that the requested discovery would somehow chill their lobbying efforts. The facts lay bare the inconsistency of petitioners' assertions.

The absence of any factual support for petitioners' assertions is all the more reason to permit the Tenth Circuit's enforcement of a prima facie burden to lie undisturbed. A chilling effect was not inherent here and should not be presumed. The rule is that a proponent of a privilege must demonstrate the factual predicate for the privilege, and this case presents no reason to disturb that well-settled rule.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[12] Even when the district court in this case assumed, for purposes of analysis, that petitioners met their burden and went on to apply the First Amendment balancing test, it concluded that petitioners' claim was still without merit because respondents "have demonstrated a compelling need for the information which outweighs any First Amendment interest in not disclosing it." App. 113. That showing provides an independent ground on which to rest the judgment below, which provides another reason why this case is an unsuitable vehicle for this Court's review.

Respectfully submitted,

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