No. 19-1010

IN THE

Supreme Court of the United States

ACTAVIS HOLDCO US, INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF PETITIONERS

JONATHAN M. REDGRAVE
Counsel of Record
GARETH T. EVANS
REDGRAVE LLP
14555 Avion Parkway,
Suite 275
Chantilly, VA 20151
(703) 592-1155
jredgrave@redgravellp.com

Counsel for Amicus Curiae

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INTERESTS OF THE *AMICUS*[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged with the Civil Rules Advisory Committee, advocating for reforming the Federal Rules of Civil Procedure to: (1) promote balance in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ's members are frequent litigants, often seeking discovery as well as responding to discovery requests. LCJ advocates for procedural rules that are fair and efficient for everyone, regardless of their position in any particular lawsuit.

Specifically, LCJ was directly involved in the rulemaking process that developed the 2015 rule amendments, which are centrally implicated in the Petition for Writ of Certiorari. LCJ participated in the 2010 Duke Conference, submitted empirical evidence in support of changes to the discovery rules and other materials such as White Papers, and participated in all public hearings

1. No party to this case and no party's counsel authored LCJ's *amicus* brief in whole or in part. No party and no party's counsel contributed money intended to fund the preparation or submission of this brief, and no person other than LCJ contributed money intended to fund its preparation and submission. LCJ has provided notice of its intention to file this brief to counsel for all parties in accordance with Rule 37.2(a), and counsel of record for all parties have provided written consent to LCJ's filing of this brief.

and Rules Advisory Committee meetings related to the formulation, drafting, and vetting of the 2015 rule amendments.

LCJ has an interest in this case because the district court's discovery order and the Third Circuit's decision denying the Petition for Writ of Mandamus are inconsistent with both the text and the intent of the current federal rules as written and explained by the Advisory Committee on Civil Rules and adopted by this Court.

SUMMARY OF THE ARGUMENT

The Court should grant the Petition for Writ of Certiorari to provide guidance on three important issues about which there are conflicts and confusion in federal jurisprudence: (1) that Rule 26(b)(1) establishes relevance as the outer boundary of permissible discovery, and courts may not compel the production of irrelevant information; (2) that the 2015 amendments to Rule 26(b)(1) abrogated this Court's articulation of the permissible scope of discovery in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), which was based upon the then-current rule; and (3) that mandamus is an appropriate and necessary remedy where a court acts beyond the scope of the rules that enable its authority.

Rule 26(b)(1) sets relevance as the outer limit of the scope of discovery. Yet the district court's discovery order, upheld by a divided Third Circuit panel through its denial of Petitioners' Petition for Writ of Mandamus, requires the defendants to produce any documents that hit "search terms" *without* any review for relevance or responsiveness. In doing so, the district court knowingly

mandated the production of large volumes of sensitive, irrelevant material, exceeding the court's authority under Rule 26(b)(1).

The Court should grant review because ordering parties to produce irrelevant material, without being able to first review for relevance or responsiveness, is clear error as it disregards the fundamental boundary in Rule 26(b)(1) that discovery is limited to relevant material. This Court's guidance is needed because the scope of discovery as defined by Rule 26(b)(1) impacts all civil litigation in federal courts, regardless of subject matter or size, and lower courts have become increasingly divided on the rule's meaning. Unlike the Third Circuit in this case, the Fifth, Eighth, Ninth, Tenth and Eleventh Circuits have all found mandamus to be an appropriate remedy where a district court ordered discovery of irrelevant information. This conflict of authority is even more pronounced at the district court level, with numerous decisions properly prohibiting discovery of irrelevant material and numerous decisions erroneously ordering such discovery.

The Court should further grant review to clarify that Rule 26(b)(1), as amended in 2015, defines the permissible scope of discovery, and therefore the Court's *Oppenheimer* articulation, based on the now-deleted phrase "reasonably calculated to lead to the discovery of admissible evidence," is no longer applicable and is inconsistent with the proper scope of discovery.

Additionally, the Court should grant review because the Third Circuit misapplied the conditions for granting a writ of mandamus set forth in *Cheney v. U.S. District Court*, 542 U.S. 367, 380-81 (2004). The majority's

conclusion that there was no "judicial usurpation of power" and "no showing that the order was the result of a 'clear abuse of discretion'" was in error because mandating the production of known irrelevant material exceeded the district court's authority under Rule 26(b)(1). App. 2a.[2] Courts' latitude in managing discovery cannot extend beyond the boundaries of the rules, which is exactly the type of circumstance warranting issuance of a writ under *Cheney*. This Court's guidance is needed, however, to eliminate circuit courts' disparate application of *Cheney*.

ARGUMENT

I. By establishing the permissible scope of discovery, Rule 26(b)(1) limits courts' discretion to order discovery beyond what is relevant and responsive.

If courts are not bound by the express limitations of the rules that govern civil procedure, then fairness and predictability cease to exist. In providing that the defendants "may not withhold prior to production any documents based on relevance or responsiveness," the discovery order in this case disregards the fundamental boundary in Rule 26(b)(1) that discovery is limited to relevant material. *See* App. 33a. As the Third Circuit panel dissent aptly stated, "nothing in the civil rules permits a court to compel production of non-responsive, irrelevant documents at any time, much less before the producing party has had an opportunity to screen these documents." App. 4a. The district court had no authority under the rules or otherwise to require such a production.

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2. Citations to "App." within this brief refer to the Appendix to Petitioners' Petition for Writ of Certiorari.

A. The rules limit discovery to matters relevant to any party's claim or defense.

Rule 26(b)(1) sets relevance as the outer limit of the scope of discovery. *See* Fed. R. Civ. P. 26(b)(1). The rule's language is plain and clear: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" *Id.* Rule 34, pursuant to which a party can seek production of documents, is bounded to requests "within the scope of Rule 26(b)." Fed. R. Civ. P. 34(a).

In *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 648–49 (10th Cir. 2008) (Gorsuch, J.), for example, the Tenth Circuit held that a district court did not abuse its discretion in declining to compel production of a pharmacist's entire personnel file because not all the material in the file was relevant and "the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied." *Id.* at 648-49 (quoting *Herbert v. Lando*, 441 U.S. 153, 177 (1979)). The court also affirmed the district court's rejection of requests for the pharmacist's entire email file and all communications with her employer, because rather than being narrowly tailored to seeking relevant information about disclosure of medical information, such requests "cast a much wider net, encompassing much information irrelevant to that stated purpose." *Id.* at 650.

A district court is not permitted to exceed its authority under the rules by expanding the scope of discovery where expedient—*e.g.*, because the case involves "high stakes." *See* App. 29a. "Where the subject concerns the enforcement of the rules which by law it is the duty of this

court to formulate and put in force, mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked." *LaBuy v. Howes Leather Company*, 352 U.S. 249, 256 (1957) (internal quotes omitted).

This Court's decision in *LaBuy v. Howes Leather Co.* is instructive. There, a district court referred antitrust actions for trial before a special master over the parties' objections, reasoning that "the cases were very complicated and complex, that they would take considerable time to try, and that his calendar was congested." *Id.*, 352 U.S. at 254 (internal quotes omitted). The Court affirmed a writ barring the referrals because they were an "abuse of the [district court's] power under Rule 53(b)." *Id.* at 256. In short, expediency cannot substitute for legal authority.

For the same reasons, it was inappropriate for the district court here to order the production of irrelevant information simply because the case involves high stakes and large volumes of electronically stored information. No law or rule provides that electronically stored information is subject to a broader scope of discovery. Indeed, the Rules were amended in 2006 to "confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents." *See* Rule 34 advisory committee's notes (2006). Accordingly, a court may not simply bypass the rules when it comes to electronic discovery.

B. The 2000 and 2015 rule amendments demonstrate that compelled discovery may never go beyond relevant material.

Demonstrating that the scope of discovery may never extend beyond relevant material, the 2000 and 2015 rule amendments addressed the misconception that the scope of discovery could extend beyond relevance if the requested discovery was "reasonably calculated to lead to the discovery of admissible evidence." The Committee Notes to the 2000 amendments observed that such misuse of the "reasonably calculated" phrase in Rule 26 to define the scope of discovery "might swallow any other limitation on the scope of discovery." *See* Rule 26 advisory committee's notes (2000).

The 2000 amendments sought to prevent such misuse by adding the word "Relevant" to the sentence that continued with "information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Committee Notes commented, "[a]ccordingly, this sentence has been amended to clarify that information must be relevant to be discoverable[.]" *See* Rule 26 advisory committee's notes (2000). Nevertheless, the "reasonably calculated" phrase continued to be misconstrued as expanding the scope of discovery beyond relevance. *See* Rule 26 advisory committee's notes (2015) ("The phrase has been used by some, incorrectly, to define the scope of discovery."); *see also* Comm. on Rules of Practice and Procedure, Report of Judicial Conf. to Chief Justice, app. B-10 (Sept. 2014) ("The phrase was never intended to have that purpose."); David G. Campbell, *New Rules, New Opportunities*, Judicature, Winter 2015, at 22 (same).[3]

3. Judge Campbell served as Chair of the Civil Rules Advisory Committee from 2011 to 2015.

Consequently, the 2015 amendments eliminated the "reasonably calculated" language entirely. *See* Rule 26 advisory committee's notes (2015) ("The 'reasonably calculated' phrase has continued to create problems, however, and is removed by these amendments."); *see also* Gregory L. Waterworth, *Proportional Discovery's Anticipated Impact and Unanticipated Obstacle*, 47 U. Balt. L. Rev. 139, 152 (2017) ("The new Rule 26(b)(1) removed any past provisions that could arguably expand or redefine the scope of discovery leaving only two considerations: relevance to claims and defenses and proportionality.").

The 2015 amendments not only clarified that the scope of discovery includes only relevant information, they also incorporated the concept of proportionality to limit discovery where the costs and burdens of producing relevant information outweigh the need for that information. "The intent of the change is to make proportionality unavoidable. It will now be part of the scope of discovery. Information must be relevant and proportional to be discoverable." Campbell, *supra*, at 22. Under Rule 26(b)(1), the district court's discovery order mandating production of irrelevant information and ignoring proportionality is improper.

A holding from this Court requiring that district courts recognize, respect, and enforce the rule-based relevance boundary for discovery is fundamental for the application of the rules in all types of civil cases. Just as it is important not to allow fishing expeditions into corporate file drawers and computer servers, it is equally important that individuals are not subjected to boundless compelled discovery—for example into personal computing devices,

social media accounts, and other personal data—simply because it would be "easier" or "faster" to grant an opponent broad access in lieu of a relevance review by counsel.

C. The rules contemplate that responding parties, not the court or requesting parties, determine how to fulfill their production obligations.

The rules require each party to fulfill its discovery obligations without the court or opposing counsel dictating the methodology it uses. *See* Rule 26(a) (mandatory initial disclosures); Rule 34(b)(2) (parties directed to respond to requests for documents or ESI); *Diepenhorst v. City of Battle Creek*, 2006 WL 1851243, at *3 (W.D. Mich. June 30, 2006) (the "discovery process is designed to be extrajudicial, and relies upon the responding party to search his records to produce the requested data.").

Rule 34 does not specify the methodology by which the responding party shall produce the requested information. "There are many options available to a responding party in evaluating and selecting how best to meet its preservation and discovery obligations, and it should be permitted to elect how best to allocate its resources and incur the costs required to comply with its obligations." *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 121-22 (2018); *see also Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 427 (D.N.J. 2009) ("The Sedona Principles wisely state that it is, in fact, the producing party who is [in] the best position to determine the method by which they will collect documents . . . absent

an agreement or timely objection, the choice is clearly within the producing party's sound discretion.").

The district court's discovery order, by contrast, ignores the authority of the rules and turns the ordinary process of civil discovery on its head. As the Third Circuit dissent observed, "sequence is important in civil discovery. A party has the option of objecting to the production of documents on responsiveness and relevance grounds *before* producing them." App. 5a (emphasis in original). Rather than allowing the requesting party to seek particular categories of relevant information and permitting the responding party to search for and produce it, the district court's order requires defendants to produce everything that hits on search terms, without review for relevance or responsiveness. This process finds no support in the federal rules.

Although search terms are commonly used as an initial step in searching a document population, they have significant limitations such that they are rarely used without further attorney review of the search results. "While keyword searches have long been recognized as appropriate and helpful for [electronically stored information] search and retrieval, there are well-known limitations and risks associated with them." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260, (D. Md. 2008). "[S]imple keyword searches end up being both over- and under-inclusive in light of the inherent malleability and ambiguity of spoken and written English (as well as all other languages)." *The Sedona Conference Best Practices Commentary on the Use of Search Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 201 (2008). To avoid

the issue of under-inclusiveness, requesting parties—as here—often seek to impose very broad search terms, which exacerbate the problem of over-inclusiveness. *See Moore v. Publicis Groupe*, 287 F.R.D. 182, 191 (S.D.N.Y. 2012) ("Another problem with keywords is that they often are over-inclusive, that is, they find responsive documents but also large numbers of irrelevant documents.").

Consequently, search terms, no matter how carefully conceived, inevitably yield many false positives, and require attorney review to eliminate irrelevant documents before production. Indeed, here, Petitioners have estimated that the search terms will yield millions of irrelevant documents, which the district court's order requires them to produce without further review. *See* Petition for Writ of Certiorari, at 28.

D. The Court's guidance is needed to resolve the conflicting interpretations of the rules in the lower courts.

While the Court has established through the Rules Enabling Act process that discovery is limited to relevant material, this Court's guidance is needed because the lower courts are divided on enforcing the rules as written and intended. Unlike the Third Circuit in this case, the Fifth, Eighth, Ninth, Tenth and Eleventh Circuits have all found mandamus to be an appropriate remedy where a district court ordered discovery of irrelevant information. *See In re Reyes,* 814 F.2d 168, 169-70 (5th Cir. 1987); *In re Lombardi*, 741 F.3d 888, 895 (8th Cir. 2014); *Hartley Pen Co. v. United States Dist. Ct.*, 287 F.2d 324, 330-31 (9th Cir. 1961); *Sanderson v. Winer*, 507 F.2d 477, 479-80 (10th Cir. 1974); *In re Ford Motor Co.*, 345 F.3d 1315, 1316-17 (11th Cir. 2003).

This conflict in authority is even more prevalent at the district court level. Many decisions have correctly denied compelled production of irrelevant material and upheld the producing party's right to review the documents for relevance. *See, e.g., NuVasive, Inc. v. Alphatec Holdings, Inc.*, 2019 WL 4934477, at *2 (S.D. Cal. Oct. 7, 2019) (proposed ESI protocol was "contrary to the ordinary progress of civil discovery in the federal courts" because it permitted the requesting party rather than the responding party to dictate terms of the search); *Winfield v. City of New York*, 2018 WL 2148435, at *4-8 (S.D.N.Y. May 10, 2018) (rejecting argument that Federal Rule of Evidence 502 or any other authority empowers a district court to order a "quick peek" procedure against the producing party's wishes[4]); *FlowRider Surf, Ltd. v. Pac. Surf Designs, Inc.*, 2016 WL 6522807, at *7-8 (S.D. Cal. Nov. 3, 2016) (rejecting effort to compel production of all search term hits without relevance review); *Bancpass, Inc. v. Highway Toll Admin., LLC*, 2016 WL 4031417, *2-3 (W.D. Tex. July 26, 2016) (rejecting attempt to compel production of all documents hitting on search terms); *Gardner v. Cont'l Cas. Co.*, 2016 WL 155002, at *2-3 (D. Conn. Jan. 13, 2016) (rejecting as "untenable" plaintiffs' request to

4. A "quick peek" is "[a]n initial production whereby documents and/or electronically stored information are made available for review or inspection before being reviewed for responsiveness, relevance, privilege, confidentiality, or privacy." *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition*, 21 Sedona Conf. J. 263, 359 (forthcoming 2020). The Federal Rules "do[] not authorize a court to require parties to engage in 'quick peek' and 'make available' productions and should not be used directly or indirectly to do so." *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 1, 137 (2016).

compel defendant to turn over all documents hitting on search terms without relevance review, because "[a]s every law school student and law school graduate knows, when performing a computer search on WESTLAW and/or LEXIS, not every case responsive to a search command will prove to be relevant to the legal issues for which the research was performed."); *Chen-Oster v. Goldman, Sachs & Co.*, 2014 WL 716521, at *1 (S.D.N.Y. Feb. 18, 2014) (rejecting plaintiffs' contention that "defendants are obligated to produce all documents returned by the search without exercising further judgment with respect to responsiveness"); *Wilson v. Rockline Indus., Inc.*, 2009 WL 10707835, at *1 (W.D. Ark. Oct. 22, 2009) (rejecting party's request that the plaintiff be compelled to turn over all documents hitting on search terms, because "[i]n our system of law, we allow the party responding to discovery to filter his own documents and produce only those which are relevant to the litigation. In the absence of some showing that relevant information is being withheld—and here there is none—there is no basis to make the responding party produce all information. Indeed, to do so would make a mockery of F.R.C.P. 26(b)(1).").

Other district courts, however, have erroneously ordered production of documents without review for relevance, resulting in compelled production of irrelevant material. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Navient Corp.*, 2018 WL 6729794, at *2 (M.D. Pa. Dec. 21, 2018) (compelling plaintiff to produce all documents hitting search terms); *Fairholme Funds, Inc. v. United States*, 134 Fed. Cl. 680, 686-88 (2017) (compelling a "quick peek" procedure under Rule 502(d) over the defendant's objection); *UPMC v. Highmark Inc.*, 2013 WL 12141530, at *2 (W.D. Pa. Jan. 22, 2013) (compelling production of all

documents relating to a particular individual); *Carrillo v. Schneider Logistics, Inc.*, 2012 WL 4791614, at *10-11 (C.D. Cal. Oct. 5, 2012) (ordering producing party to retain an outside vendor to collect documents from its servers and holding that "no documents identified by the vendor may be withheld on relevance grounds"); *Williams v. Taser Int'l, Inc.*, 2007 WL 1630875, at *6 (N.D. Ga. June 4, 2007) (ordering party to produce all "presumptively responsive documents" that hit on particular search terms, subject only to privilege review).

Accordingly, this case provides an opportunity for the Court to re-establish the authority of the federal rules while resolving the conflict in the Circuits and district courts regarding whether courts may compel the production of irrelevant information without prior review for relevance and responsiveness.

II. The Court's guidance is needed to confirm that the Court's adoption of the 2015 federal rule amendments abrogates the articulation of the scope of discovery in *Oppenheimer Fund, Inc. v. Sanders*.

The Court's guidance is needed to correct many lower courts' continued misunderstanding that requests seeking irrelevant information may nonetheless be within the scope of discovery if they are "reasonably calculated to lead" to admissible evidence. In its order denying a stay pending appellate review, the district court justified its discovery order by stating it would continue to "ensure that the discovery process proceeds in an orderly, proportional fashion that is reasonably calculated to lead to the discovery of relevant information." App. 25a. This statement confirms that the discovery order was likewise based on the same erroneous foundation.

Unfortunately, the district court's reliance on the "reasonably calculated to lead to the discovery of relevant information" standard reflects a common misunderstanding about the present-day scope of discovery that persists in the lower courts and is ripe for clarification. This misunderstanding is often based on a rote application of language in the Court's decision in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), without any appreciation for the Court's decision to amend the scope of discovery through the 2015 amendments and the fact that *Oppenheimer* was premised on the language of the prior and now superseded version of the rule. While some lower courts recognize that the *Oppenheimer Fund* discussion of the scope of discovery has been superseded, others continue to rely on it to justify an expansive understanding of the scope of discovery that is directly at odds with the plain language of the current rules.

The Court should put an end to this confusion and inconsistency by making clear that the scope of discovery is defined by Rule 26: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1).

The Court's opinion in *Oppenheimer* recognized that the scope of discovery was defined by the version of Rule 26(b)(1) then in effect, which included the clause "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Oppenheimer Fund*, 437 U.S. at 350-51. The Court went on to state that "[t]he key phrase in this definition—'relevant to the subject matter involved

in the pending action'—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Id.*

The version of Rule 26 that the Court interpreted in *Oppenheimer* is no longer in effect, and since the 2015 amendments omitted "relevant to the subject matter" and "lead to relevant information," the language that *Oppenheimer* relied on in expanding the scope of discovery beyond relevance is not part of the current rule. *See* Rule 26(b)(1).

The Circuits have differed in their treatment of the *Oppenheimer* standard after the 2015 amendments, with some recognizing that the amendments narrowed the scope of discovery, while others continue to cite *Oppenheimer* to support an expansive reading of the scope of discovery as extending to any matter that "could reasonably lead to" any other matter bearing on a case. *Compare In re Williams-Sonoma, Inc.*, 947 F.3d 535, 539 (9th Cir. 2020) ("Rule 26(b)(1) was amended to its current form after 1978 when *Oppenheimer* was decided . . . Now, the 'subject matter' reference has been eliminated from the rule, and the matter sought must be 'relevant to any party's claim or defense.' Rule 26(b)(1). That change, however, was intended to restrict, not broaden, the scope of discovery") *with Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 281 (5th Cir. 2019) (citing *Oppenheimer* for the proposition that "[r]elevance 'encompass[es] any matter that bears on, or that could reasonably lead to other matter that could bear on, any issue that is or may be in the case'") *and Bush v. Dickerson*, 2017 WL 3122012, at *4 (6th Cir. May 3, 2017) ("It is well established that the scope of discovery

is 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'") (quoting *Oppenheimer*).

Many courts and commentators have correctly noted that because *Oppenheimer*'s holding was based on a superseded version of Rule 26, reliance on it and its progeny for the proposition that the scope of discovery extends beyond relevant information is improper. *See, e.g.*, Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 Fed. Cts. L. Rev. 19, 64–65 (2015) ("Counsel should be mindful that the changes in the civil rules in 2015 will preclude blind reliance on prior authority. For example, the scope of discovery will not be defined, if it ever was, by the language that '[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence,' and the case law that relies on that phrase to define the scope of discovery will simply become inapplicable"); *Lopez v. Mercantile Adjustment Bureau, LLC*, 2019 WL 2118787, at *3 (D.N.J. May 15, 2019) (rejecting argument that a party was "entitled to discovery outside the confines of the class definition pleaded in the Complaint" and noting that the cases that party cited, including *Oppenheimer*, "rely on an earlier and more expansive version of Rule 26(b)(1)"); *San Diego Unified Port Dist. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 2017 WL 3877731, at *1 (S.D. Cal. Sept. 5, 2017) ("In light of the fact that Rule 26(b)(1) now limits discovery to information relevant to 'claims and defenses and proportional to the needs of the case,' the *Oppenheimer Fund* definition, like the version

of Rule 26(b)(1) that preceded the 2015 amendments, is now relegated only to historical significance."); *In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) (J. Campbell) (holding that "just as a statute could effectively overrule cases applying a former legal standard, the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1). The test going forward is whether evidence is 'relevant to any party's claim or defense,' not whether it is 'reasonably calculated to lead to admissible evidence.'"); *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, 209 F. Supp. 3d 810, 823 (W.D. Pa. 2016) ("The [*Oppenheimer*] Court's definition of 'relevant to the subject matter involved in the pending action,' therefore, has no application to the text of amended Rule 26(b)(1), and it would be inappropriate to continue to cite to *Oppenheimer* for the purpose of construing the scope of discovery under amended Rule 26(b)(1)").

But other district courts continue to cite *Oppenheimer* for the proposition that the scope of discovery extends to information that "could lead to" relevant information. *See Waterworth*, *supra*, at 158 ("Despite the likely abrogation of the *Oppenheimer* standard, many courts continue to cite to it when defining relevance . . . the continued use of old case law to define relevance is creating a hurdle in realizing the full impact of the new scope of discovery"); *Pal v. Cipolla et al.*, 2020 WL 564230, at *7 (D. Conn. Feb. 5, 2020) (citing *Oppenheimer* and cases relying on it for the proposition that "'[r]elevance' under Federal Rule of Civil Procedure 26(b)(1) has been construed broadly to include any matters that bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case"); *Mueller v. Hawaii Dep't. of Public Safety et al.*, 2020 WL 557519, at *4 (D. Haw. Feb. 4, 2020);

Arellano v. Haskins, 2020 WL 248753, at *2 (E.D. Cal. Jan. 16, 2020); *Lee v. UL LLC*, 2019 WL 1915808, at *1 (E.D. Wis. Apr. 30, 2019).

Accordingly, this case presents an opportunity to enforce the proper scope of discovery as set forth in the Court's 2015 rule amendments by clarifying that *Oppenheimer*'s decades-old articulation of the scope of discovery under the 1970's rule is no longer applicable.

III. Mandamus is an appropriate remedy where a court has acted beyond the scope of the rules that enable its authority.

A. The requirements for issuance of a writ of mandamus set forth in *Cheney* were satisfied here.

The Third Circuit's dissent correctly stated that the district court's discovery order "constitutes a serious and exceptional error that should be corrected through a writ of mandamus." App. 4a. The majority, in holding the requirements of mandamus were not satisfied, misapplied the requirements set forth in *Cheney v. U.S. District Court*, 542 U.S. 367 (2004). In *Cheney*, the Court stated that "only exceptional circumstances amounting to a judicial 'usurpation of power'" or a "clear abuse of discretion" justify mandamus. *Id.* at 380.

The district court's discovery order plainly exceeded its authority under the federal rules and satisfies the *Cheney* standard. The Court in *Cheney* stated that "courts have not confined themselves to an arbitrary and technical definition of 'jurisdiction.'" *Cheney*, 542 U.S. at 380. In

Will v. United States, for example, the Court observed that mandamus has been invoked "where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court." 389 U.S. at 96; *see also LaBuy*, 352 U.S. at 256.

A district court's inherent authority does not permit it to issue an order that is inconsistent with the rules. *See Carlisle v. United States*, 517 U.S. 416, 425–26 (1996) (whatever the scope of a court's inherent authority, "it does not include the power to develop rules that circumvent or conflict with" the federal rules); *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 1002 (7th Cir. 1989) ("[I]nherent authority, however, may not be exercised in a manner inconsistent with the Federal Rules of Civil Procedure . . . That is, where the rules directly mandate a specific procedure to the exclusion of others, inherent authority is proscribed").

Here, the Third Circuit incorrectly found that there was "no showing that the District Court's order was the result of a 'clear abuse of discretion.'" App. 2a. To the contrary, the discovery order was a clear abuse of discretion because it expressly exceeded the court's authority under Rule 26(b)(1). *See Cheney*, 542 U.S. at 380; *see also U.S. v. Wexler*, 31 F.3d 117, 128 (3d Cir. 1994) (mandamus appropriate to remedy "a clear error of law"); 55 C.J.S. *Mandamus* § 90 (2020) ("A court's clear failure to analyze or apply the law correctly . . . is an abuse of discretion subject to correction by mandamus, as the court does not have discretion in determining what the law is").

B. The Court's guidance is needed regarding the standard for issuance of a writ of mandamus.

The Court has recognized that the traditional use of the writ of mandamus applied where a lower court exceeded its jurisdiction. *See, e.g.*, *Cheney*, 542 U.S. at 380. The Court has also held, however, that a "clear abuse of discretion" even of non-jurisdictional magnitude justifies mandamus relief, without defining what constitutes such a clear abuse of discretion. *See Cheney*, 542 U.S. at 380; *see also LaBuy*, 352 U.S. at 256 ("Where the subject concerns the enforcement of the rules which by law it is the duty of this court to formulate and put in force, mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked.") (internal quotes omitted).

In the absence of further guidance from this Court, Circuits have adopted inconsistent standards, which are often vague and unhelpful, governing what sorts of errors qualify for mandamus relief. The Second Circuit has suggested that any abuse of discretion may qualify for mandamus relief, so long as the error is sufficiently obvious. *See In re The City of New York*, 607 F.3d 923, 943 (2d Cir. 2010) (holding that mandamus is appropriate where a district court "renders a decision that cannot be located within the range of permissible decisions") (internal quotes omitted). The Ninth Circuit has adopted a five-factor test to determine whether mandamus is appropriate: (1) whether the petitioner has no other means to obtain the desired relief; (2) whether the petitioner will be harmed in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is

an "oft-repeated" error or manifests a "disregard of the federal rules;" and (5) whether the district court's order raises new and important problems or issues of first impression. *See Bauman v. United States District Court,* 557 F.2d 650, 654-55 (9th Cir. 1977).

The Sixth, Eight, Tenth, and D.C. Circuits have expressly adopted the *Bauman* five-factor mandamus framework, or at least applied the test as "instructive." *See In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 303 (6th Cir. 1984); *In re Dalton*, 733 F.2d 710, 717 (10th Cir. 1984); *In re Bieter Co.*, 16 F.3d 929, 932 (8th Cir. 1994); *Nat'l Ass'n of Criminal Def. Lawyers, Inc. v. U.S. Dep't of Justice*, 182 F.3d 981, 986 (D.C. Cir. 1999). The *en banc* Fifth Circuit split ten to seven in holding that mandamus review is appropriate to correct a discretionary decision within the district court's jurisdiction. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304 (5th Cir. 2008).

Some Circuits reiterate that an error must be so serious that it "amounts to" a usurpation of power without clearly defining the distinguishing features of such errors. *See, e.g., Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995) (holding that for mandamus to be proper, "the order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous"). Other Circuits appear to articulate more stringent standards for mandamus relief. *See, e.g.*, *In re Catawba Indian Tribe of S.C.*, 973 F.2d 1133, 1136 n.2 (4th Cir. 1992) ("It might be argued that the use of the words 'clear abuse of discretion' represents a slight liberalization of the 'judicial usurpation of power' standard . . . We reject any such argument, however").

Accordingly, the Court should grant review so that it may clarify the requirements for a writ of mandamus to issue, particularly in situations where, as here, a court has acted beyond the scope of the rules that govern civil litigation.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

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Respectfully submitted,

JONATHAN M. REDGRAVE
Counsel of Record
GARETH T. EVANS
REDGRAVE LLP
14555 Avion Parkway,
Suite 275
Chantilly, VA 20151
(703) 592-1155
jredgrave@redgravellp.com

Counsel for Amicus Curiae