No. 19-1010

IN THE
Supreme Court of the United States

ACTAVIS HOLDCO, 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* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI—The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of approximately 20,000 attorneys involved in the defense of parties in civil litigation. DRI's mission includes promoting appreciation of the role of defense lawyers in the civil justice system, addressing substantive and procedural issues germane to defense lawyers and their clients, improving the civil justice system, and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the certiorari and merits stages in carefully selected Supreme Court appeals presenting questions that are important to civil defense attorneys, their clients, and the conduct of civil litigation.

This case is of significant interest to DRI members and their clients, many of which have been or currently are involved in the defense of large-scale MDL cases. DRI and its members have seen firsthand how mounting discovery costs and associated pressures can coerce settlements without consideration for actual liability. The case management order adopted by the district court will

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1. In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI—The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than DRI, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. In accordance with Supreme Court Rule 37.2, counsel of record for all parties received notice at least ten days prior to the due date of the intention to file this brief and have provided written consent to the filing of this *amicus curiae* brief.

only worsen these problems, placing parties such as Petitioners in the untenable position of choosing between paying a large settlement when liability has not been established or undergoing an extremely expensive discovery process that will require them to reveal swaths of proprietary, confidential, and competitively sensitive information. DRI urges this Court to hold judges presiding over multidistrict litigation accountable for fairly and accurately enforcing the Federal Rules of Civil Procedure. Doing so will mitigate some of the economic burdens facing defendants in these cases and will ultimately better effectuate the Rules' goal of promoting mutual cooperation in discovery. Perhaps most importantly, discovery orders like the one entered here threaten to deprive litigants of their intellectual property without just compensation or due process of law. DRI members and their clients have a significant interest in ensuring the protection of intellectual property, and for this reason also would ask the Court to grant Petitioners relief.

SUMMARY OF THE ARGUMENT

This case is not a garden-variety discovery dispute. Rather, the Court is presented with a clear abuse of judicial power in a context (multidistrict litigation) that is especially fertile ground for such abuses. Petitioners and DRI's fellow *amici* have provided this Court with numerous compelling reasons in support of reversing the Third Circuit's denial of mandamus relief. DRI has identified three additional reasons why this Court should grant certiorari.

First, the district court's "produce first, review later" order not only contradicts the text of Rule 26, but also inverts a basic presumption undergirding the federal civil discovery system. The Federal Rules presume all litigants will act in good faith, trusting parties to first review their own documents and in good faith produce responsive documents to the other side. If evidence is put forth showing that a party has obstructed discovery or otherwise failed to cooperate, then sanctions may be imposed. However, the Rules do not support the assumption the district court made here: that parties in Petitioners' position cannot be trusted to conduct a pre-production relevance review in good faith and should therefore be required to turn over everything they have. Civil discovery was designed to be a largely self-regulating process with judicial intervention only as necessary. The Rules neither contemplate nor authorize the presumption that litigants will be obstructionist if permitted to review their own documents for responsiveness before production.

Second, the discovery order compounds the significant pressures facing defendants involved in MDLs. MDLs already operate in a sort of "no man's land" due to their unique structure. Since certain components of the Federal Rules of Civil Procedure are difficult to apply in MDL cases, such as procedures for dismissal or summary judgment, judges routinely improvise. This judicial improvisation often goes unchecked, causing dynamic spillover to situations where, as here, the Rules unequivocally speak to the correct procedure. Judges presiding over MDLs have an extraordinary amount of power, and their decisions are rarely subject to judicial review. Most MDLs end

in settlement, and indeed many MDL judges (including the district court here) view promotion of settlement as their goal. Because defendants usually give in to the enormous settlement pressures, there are frequently few, if any, dispositive orders entered in MDLs. Instead, most orders are interlocutory, meaning that mandamus is the only avenue for relief. The discovery order entered here, and the Third Circuit's subsequent denial of mandamus, is a perfect case study of the ways in which these issues interact to oppress defendants. If the Court does not reverse, the highly organized "repeat players" in the MDL plaintiffs' bar will be able to argue that the Court endorses the "produce first, review later" approach adopted here, opening the floodgates to such coercive discovery orders in other MDLs.

Third, the discovery order implicates the Fifth Amendment's Takings Clause and Due Process Clause. Because of the huge volume of documents at issue and the nature of the proposed search terms, the order will compel production of invaluable intellectual property. In fact, because the search terms will include all drugs identified by plaintiffs in their claims, the order may even require production of "crown jewel" trade secrets, such as pharmaceutical formulae. "Confidential business information has long been recognized as property." *Carpenter v. United States*, 484 U.S. 19, 26 (1987). Compelling Petitioners to produce their intellectual property without allowing them an opportunity to object *before* production takes their property without just compensation and denies them due process of law. The post-deprivation "clawback" remedy is wholly inadequate, since intellectual property loses a

significant amount of its value with each disclosure (i.e., after production). At any rate, the absence of a pre-deprivation remedy alone is sufficient to invalidate the order. It is a "root requirement that an individual be given an opportunity for a hearing *before he is deprived* of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis added). No such "valid governmental interest" exists here, nor did the district court make any attempt to articulate one.

A writ of mandamus should be issued "upon a finding of exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 390, (2004) (internal quotation marks and citations omitted). Though the Court need not apply *Cheney* to exercise certiorari jurisdiction, *see* Petitioners' Reply Brief in Support of Application for Stay, at 9, it would be hard-pressed to find a better example of an order meeting this standard. Accordingly, the Court should grant review.

ARGUMENT

I. The District Court's Discovery Order Inverts the Presumption of Good Faith Underlying the Federal Civil Discovery System.

The discovery order not only contradicts the plain text of the Federal Rules of Civil Procedure, but it also inverts an essential premise embedded in the

federal civil discovery system: litigants are presumed to act in good faith and cooperate with one another. Of course, this presumption is not irrebuttable, and courts may impose sanctions properly where they have found abuse of the discovery process. *See* Fed. R. Civ. P. 37 (authorizing sanctions for failure to cooperate in discovery or obey discovery orders). Nowhere do the Rules authorize imposing discovery sanctions without any finding of bad faith or refusal to cooperate. Yet the district court did just this, sanctioning the Petitioners preemptively by requiring them to produce millions of documents without reviewing for relevance. The order upends the presumption of mutual cooperation undergirding the Rules, "amounting to a judicial usurpation of power" that must be corrected via mandamus relief. *Cheney*, 542 U.S. at 390 (internal quotation marks omitted).

"[T]he Federal Rules of Civil Procedure encourage and in many respects assume cooperation during discovery." *The Case for Cooperation*, 10 Sedona Conf. J. 339, 355 (2009). This assumption is borne out in the Advisory Committee Notes to Rule 26. In discussing the 1983 amendment to Rule 26, for example, the notes explain that Rule 26(g)'s certification requirement was adopted to ensure that "primary responsibility for conducting discovery [can] continue to rest with the litigants." Fed. R. Civ. P. 26 advisory committee's notes (1983). Thus, "Rule 26(g) imposes an *affirmative duty* to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37." *Id.* (emphasis added). Similarly, when addressing the 2000 amendment to subsection (b)(1), the notes emphasize the "hope[] that reasonable lawyers can

cooperate to manage discovery without the need for judicial intervention." Fed. R. Civ. P. 26 advisory committee's notes (2000). According to the Advisory Committee, then, the Rules have been amended to promote a self-regulating, cooperative system. This is the hallmark of federal civil discovery. *See The Case for Cooperation*, 10 Sedona Conf. J. at 345 ("The Federal Rules of Civil Procedure do not explicitly require counsel to cooperate in discovery, but the duty is implicit in the structure and spirit of the Rules.").

Appellate and district courts alike have also recognized that the presumption of good faith is crucial to the smooth operation of civil discovery in an adversarial system. *See, e.g.*, *Grange Mut. Cas. Co. v. Mack*, 270 F. App'x 372, 378 (6th Cir. 2008) ("Our civil legal system hinges on voluntary discovery."); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 684 (3d Cir. 1988) ("[O]ur system of discovery relies on the cooperation and integrity of attorneys operating within the guidelines provided by the Federal Rules of Civil Procedure and the provisions of any protective order."); *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010) ("Discovery is intended to be a self-regulating process that depends on the reasonableness and cooperation of counsel."). As these decisions recognize, good faith and cooperation are not merely abstract, aspirational concepts; they are *necessary* for civil discovery to function properly. Indeed, the Sedona Conference has called cooperation "an essential element of the logic underlying [the Federal Rules]." *The Case for Cooperation*, 10 Sedona Conf. J. at 345.

The district court's order inverts this "essential element of the [Rules'] logic." *See id.* It forbids Petitioners from "withhold[ing] prior to production any documents based on relevance or responsiveness." App. 33a. This "produce first, review later" logic presumes *bad faith*, implying that litigants in Petitioners' position cannot be trusted to conduct a review for responsiveness fairly and without undue delay. Such a presumption cannot be squared with the "affirmative duty" of good faith that the Rules impose. Fed. R. Civ. P. 26 advisory committee's notes (1983). Nor can it be squared with the text of the Rules, under which a party seeking sanctions must rebut the presumption of cooperation by submitting "a certification that the movant has in good faith conferred or attempted to confer with the party failing to act." Fed. R. Civ. P. 37(d)(1)(B).

The fact that the order was styled as a "Case Management Order" rather than a sanction does not change its substance. The district court's discovery order is decidedly punitive. It requires Petitioners to produce millions of documents (many of which contain sensitive, confidential, or proprietary information) without regard to relevance or responsiveness. To "protect" Petitioners' sensitive documents, the order authorizes them to "claw back" documents *after* production. As Petitioners argue in their brief, though, this is a completely "unprecedented" use of the "clawback" remedy, which has only been adopted in Rule 26(b)(5)(B) to "provide[] post-disclosure remedies for inadvertently produced documents" that are privileged or protected work product. Petition for Writ of Certiorari, at 2, 10 (citing Fed. R. Civ. P. 26(b)(5)(B)). Consistent with the principles of

cooperation and good faith underlying the Rules, Rule 26(b)(5)(B) recognizes that parties will try to get things right but may make mistakes, and it allows them to correct those mistakes. The district court's "clawback" provision, on the other hand, implies that parties will *not* try to comply with the Rules and cannot be trusted to review their own documents. It thus authorizes punishing parties preemptively for violations that have not yet occurred.

As Judge Phipps reasoned in his dissent from the Third Circuit's denial of mandamus relief, "[t]he sequence of events in discovery is important." App. 4a. Though Judge Phipps was referring to the need for relevance review before production, his logic holds equally true in the sanctions context. The Rules presume good faith and for that reason authorize sanctions only when the presumption of good faith has been rebutted. The district court presumed bad faith, anticipatorily punishing Petitioners when they had committed no discovery abuses. The Third Circuit's decision to deny mandamus relief in the face of this clear judicial overreaching should be reversed.

II. The Discovery Order Compounds the Risks Facing Defendants in MDLs.

The district court's order would be problematic enough were it entered in a "typical" lawsuit. But its ramifications are compounded by the fact that it was entered in an MDL—a type of litigation that is often described as a "black hole." Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 La. L. Rev. 399, 400 (2014). MDLs have presented enormous economic and logistical difficulties for DRI's members

and clients. If the discovery order in this case is permitted to stand, these difficulties will increase exponentially.

The MDL statute authorizes transfer of "civil actions involving one or more common questions of fact" to a selected district "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Though the MDL statute was clearly intended to serve as a simplifying mechanism, "many have expressed concerns that MDL proceedings have become the Wild West of aggregation law." Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 Conn. L. Rev. 769, 773 (2019). Such concerns are not unfounded.

Perhaps the most significant issue facing MDL litigants is the lack of clear, uniform procedural rules. The Federal Rules "no longer provide practical presumptive procedures in MDL cases," which differ in format from standard lawsuits or class actions. Lawyers for Civil Justice, *Request for Rulemaking to the Advisory Committee on Civil Rules* 1 (Aug. 10, 2017), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_mdl_cases_8-10-17.pdf. Without the full benefit of the Rules, "judges and parties are improvising." *Id.* Judges assigned to proceed over a mass-tort MDL "have developed disparate approaches—some effective, some not so effective—to dispose of the cases without the benefit of rules or a set of best practices." Duke Law Center for Judicial Studies, *MDL Standards and Best Practices* xii (Sept. 11, 2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-

REVISED.pdf. Judges' resort to improvisation and *ad hoc* solutions, however, can undermine the very consistency that the MDL statute was intended to promote.

The dearth of clear guidelines and rules creates a significant risk of judicial overreaching, as occurred here. In a large MDL, one district judge exercises authority over thousands of cases. Such "[c]consolidation of power in a single federal judge," while it offers some advantages, "ratchets up considerably the risk and consequences of legal error." Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1646 (2011). "A single judge's thinking exerts a disproportionate influence on the evolution of the law." *Id.* Where that judge makes a decision that is clearly erroneous or an abuse of discretion, the impacts of that decision are felt not just in one individual case, but in all the hundreds or thousands of cases comprising the MDL.

There is also, crucially, very limited opportunity for appellate review. While this is due to several factors, two are particularly important to DRI members and their clients. First, "[s]ettlement is the fate of almost all cases that are part of an MDL." Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. Rev. 109, 128 (2015). Not only do defendants face significant settlement pressures due to the high cost and exposure risk of MDL litigation, but also many judges presiding over MDL cases "view their role as 'getting the parties to a claims process'—a

settlement—as quickly as possible. Confronted with such a judge, *the client can no longer hope to prevail simply because it has done nothing wrong*." Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 Litigation 43, 45 (1998) (emphasis added). This disheartening reality means that defendants in MDLs are often expected to pay a large sum as a settlement; the only real issues are how large the sum will be and how the settlement will be structured. *Cf. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (internal quotation marks and citations omitted) ("Even in the mine-run case, a class action can result in potentially ruinous liability. A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims.").

The second factor limiting appellate review relates to the prevalence of MDL settlements. Because most cases will end in settlement, all but a fraction of orders entered in MDLs are interlocutory and "reviewable only through an extraordinary writ of mandamus or subsequent dismissal." Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. Rev. 71, 85 (2015). Inability to obtain regular appellate review allows errors to go uncorrected and enables MDL judges to operate with near-impunity. *See id.* at 73 ("[T]he transferee judges who use innovative procedures to usher these cases toward settlement are rarely subject to appellate scrutiny or legislative oversight."); Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. at 1647 ("[T]he absence of guaranteed appellate review over

MDL cases has increasingly significant consequences.").

The district court's entry of the discovery order and the Third Circuit's subsequent denial of mandamus relief exemplify the foregoing concerns. The order directly contradicts the text of the Federal Rules, as well as the policies behind civil discovery. It was proposed in part because the Special Master found that "extensive and broad-ranging discovery" was "essential for any meaningful settlement discussions, since cases like this are usually ultimately settled." App. 29a. And because the order was interlocutory, Petitioners were required to seek mandamus relief. Yet despite the district court's "clear abuse of discretion," *see Cheney*, 542 U.S. at 390, a divided panel of the Third Circuit declined to grant relief—completely foreclosing Petitioners' ability to obtain review of the discovery order unless this Court grants their Petition. If review is denied, Petitioners will be forced to choose between two unacceptable options: proceeding with the oppressive discovery ordered by the district court or settling where no liability has been established.

Review should be granted by this Court to impose limits on the coercive power of discovery in the MDL context. Because all other avenues of appellate review are foreclosed, plaintiff's attorneys will view a denial of mandamus relief as a tacit endorsement of the district court's order. In turn, plaintiff's attorneys will begin demanding that MDL defendants produce documents without reviewing for relevance or responsiveness. Again, these concerns are not unfounded. "[T]he MDL plaintiffs' bar is highly

structured around a small number of very active repeat-player attorneys, many of whom can be said to 'specialize' in more than one type of MDL proceeding." Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. Tort L. 141, 171 (2012); *see also* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67, 80 (2017) (noting that "plaintiffs' leadership is rife with repeat players"). These repeat players form a highly organized "network," which "not only brings in other repeat players but also pulls single-shot attorneys into relationships they may not otherwise have had." Williams, Lee, & Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. Tort L. at 151. From experience, DRI members and their clients can attest that these networks share work product, tactical insights, discovery, and expert witness information. Economic efficiencies and strategic advantages follow as a matter of course. The discovery order here presents a perfect opportunity for this highly organized network of "repeat players" to seek similar far-reaching discovery orders in other MDL cases in hopes of coercing a more favorable settlement. This Court should course-correct and prevent MDLs from truly becoming "black holes."

III. The District Court's Order Implicates Serious Constitutional Concerns.

Finally, the discovery order requiring Petitioners to produce millions of documents without reviewing for "relevance or responsiveness," *see* App. 33(a), risks depriving Petitioners of their property without just compensation or due process of law in

violation of the Fifth Amendment. *See* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). Compelled production of intellectual property without compensation constitutes a taking, and Petitioners have no adequate pre- or post-deprivation remedy against this forced disclosure. The order's constitutional deficiencies require mandamus relief.

As this Court has observed, "[c]onfidential business information has long been recognized as property." *Carpenter*, 484 U.S. at 26 (first citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–04 (1984); then citing *Dirks v. S.E.C.*, 463 U.S. 646, 653 n.10 (1983); and then citing *Bd. of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250–51 (1905)); *see also United States v. O'Hagen*, 521 U.S. 642, 654 (1997) ("A company's confidential information . . . qualifies as property to which the company has a right of exclusive use."). Because of the volume of documents at issue and breadth of the search terms, the discovery order will compel production of invaluable intellectual property, which likely will include "crown jewel" trade secrets, such as pharmaceutical formulae. Even if Respondents' proposed broad search terms are narrowed, Petitioners will still be forced to produce some amount of proprietary documents that are unrelated to any issue in the underlying litigation. Even more concerning, Petitioners may be required to produce documents containing proprietary or confidential data belonging to third parties that do business with Petitioners, such as outside consultants. These third

parties would have no reason to suspect that their proprietary information could be disclosed in a lawsuit where they are nonparties and the information is entirely irrelevant to the claims at issue.

Given that Petitioners (and the third parties) have an undisputed property interest in their intellectual property, the question becomes whether the discovery order constitutes a "taking" of this property interest. It does. "[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property" is "the right to exclude others." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). "With respect to a trade secret, the right to exclude others is central to the very definition of the property interest." *Ruckelshaus*, 467 U.S. at 1011. The value of intellectual property is based upon continued *secrecy*, and every disclosure dilutes that value. This Court has therefore recognized that when trade secrets are disclosed to others, the owner has been divested of his property. *See id.* The fact that such disclosure has been ordered by a court makes no difference; courts can operate as state actors for purposes of the Takings Clause. *See Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1334 (1994) (Scalia and O'Connor, JJ., dissenting from denial of certiorari) ("No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation."); *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) ("[T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation [of property] by a State, no less through its courts than through its legislature . . . ."). By compelling

Petitioners to disclose irrelevant documents containing intellectual property, the discovery order infringes on the owners' right to exclude others and takes property without compensation or remedy.

The absence of any adequate remedy for Petitioners' property deprivation also raises due process concerns. This Court has "establish[ed] the general rule that individuals must receive notice and an opportunity to be heard *before* the Government deprives them of property." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993) (emphasis added). While the Court "tolerate[s] some exceptions to the general rule requiring predeprivation notice and hearing," these exceptions are reserved for "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Id.* at 53 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)). The discovery order does not afford Petitioners either type of hearing opportunity, running headlong into the Due Process Clause.

The order does not give Petitioners any opportunity for a pre-deprivation hearing. Petitioners are required to produce all documents containing the requisite search terms and may only withhold on grounds of privilege. *See* App. 33a. Therefore, any objections Petitioners have to producing irrelevant, proprietary documents cannot be heard before the documents are produced. In other words, they have no ability to object before they are deprived of their interest in maintaining the secrecy of their intellectual property, trade secrets, or other confidential business information.

In the absence of an opportunity for a pre-deprivation hearing, Petitioners must be afforded a post-deprivation hearing, *and* the "governmental interest" must be sufficiently "extraordinary" to justify the denial of a pre-deprivation remedy. Neither circumstance is present here. The only post-deprivation protection given to Petitioners is the 120-day "clawback" provision: "[D]ocuments are stamped 'Outside Counsel Eyes Only' for 120 days, with requests to claw back made within 120 days of production." App. 21a. This is not an adequate remedy because it cannot undo the dilution in value that takes place with the initial production of trade secrets and confidential business information. The bell cannot be un-rung. Once documents leave Petitioners' control, their value as intellectual property is diluted, and there is a greater risk of further dissemination. Indeed, despite the "Outside Counsel Eyes Only" designation, Petitioners have noted that "[t]his case has already seen multiple leaks of sealed filings and confidential materials." Petition for Writ of Certiorari, at 34 n.8.

Finally, even if the post-deprivation remedy *were* adequate, the absence of a pre-deprivation remedy in these circumstances is enough to render the discovery order constitutionally infirm. "In situations where the State *feasibly* can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (emphasis added). Here, the pre-deprivation remedy—allowing Petitioners to withhold non-responsive, confidential documents—is not only feasible, but is required by the

Federal Rules of Civil Procedure. The district court provided no colorable justification for departing from the Rules in such a stark fashion. In fact, it put the burden on *Petitioners* to show why the post-deprivation remedy was inadequate, reasoning that "Defendants have not shown that reviewing information for relevance before production, instead of through the claw back procedures . . . is appropriate in this litigation." App. 24a. This is certainly inconsistent with the strictures of due process, under which the government bears responsibility for justifying the procedural safeguards available to protect the property interest. The district court's application of the Federal Rules also conflicts with the Rules Enabling Act, which provides that rules of procedure "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C.§ 2072(b); *cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.").

In sum, the district court's discovery order will require production of Petitioners' confidential, proprietary, and competitively sensitive data, and may even sweep in proprietary data belonging to unsuspecting third parties. Many of these documents will be irrelevant and, under the ordinary meaning of Rule 26, should not have been produced in the first place. Petitioners will not be compensated for loss of the exclusive use of their property, nor do they have any adequate pre- or post-deprivation remedy. Mandamus relief should issue to correct this clear

"judicial usurpation of power." *See Cheney*, 542 U.S. at 390.

CONCLUSION

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

Respectfully submitted,

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