

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 Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

—————◆—————
**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

—————◆—————
WILLIAM TONG
Attorney General of Connecticut
*CLARE KINDALL
Solicitor General
W. JOSEPH NIELSEN
ROBERT J. DEICHERT
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
165 Capitol Avenue
Hartford, CT 06106
(860) 808-5261
Clare.Kindall@ct.gov

*Counsel for State of Connecticut and
Liaison Counsel for Respondent States*

**Counsel of Record*

(Additional Counsel On Inside Cover And On Signature Pages)

ROBERTA D. LIEBENBERG
JEFFREY S. ISTVAN
FINE, KAPLAN AND BLACK, R.P.C.
One South Broad Street, 23rd Floor
Philadelphia, PA 19107
(215) 567-6565
rliebenberg@finekaplan.com
Lead Counsel for the End-Payer Plaintiffs

DIANNE M. NAST
NASTLAW LLC
1101 Market Street, Suite 2801
Philadelphia, PA 19107
(215) 923-9300
dnast@nastlaw.com
Lead Counsel for the Direct Purchaser Plaintiffs

JONATHAN W. CUNEO
CUNEO, GILBERT & LADUCA LLP
4725 Wisconsin Avenue, NW, Suite 200
Washington D.C. 20016
(202) 789-3960
jonc@cuneolaw.com
Lead Counsel for Indirect Reseller Plaintiffs

WILLIAM J. BLECHMAN
KENNY NACHWALTER P.A.
1441 Brickell Avenue, Suite 1100
Miami, FL 33131
(305) 373-1000
wblechman@knpa.com
*Counsel for the Kroger Direct Action Plaintiffs
and Liaison Counsel for Direct Action Plaintiffs*

QUESTION PRESENTED

This petition arises out of the district court's case management of antitrust litigation in which defendants—more than 35 generic pharmaceutical manufacturers and 18 individual executives—allegedly conspired in the marketing and sales of approximately 200 generic drugs in violation of Section 1 of the Sherman Act.

Petitioners seek this Court's review of a pretrial discovery dispute over a relevance objection. Petitioners challenge a subparagraph of the district court's pretrial discovery order regarding production from key document custodians identified by the parties as most likely to have relevant documents. Based on the specific factual allegations of the antitrust conspiracy and prior discovery experience in the case, the district court required a search term relevance screen for the key custodian document production, using search terms agreed to by the parties. The district court also required a privilege review for the produced documents and ordered the entire production to be provided under a confidential protective order, outside attorneys' eyes only, for 120 days, with a claw-back process.

Because the district court rejected petitioners' demand for an additional screening for relevance prior to production, petitioners sought and were denied a writ of mandamus by the Third Circuit.

The question presented is whether, on these facts, the court of appeals abused its discretion in denying a writ of mandamus to countermand a district court's pretrial order governing discovery under Federal Rule of Civil Procedure 26.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIESiii

INTRODUCTION 1

STATEMENT OF THE CASE..... 4

I. SCOPE OF THE CLAIMS AND SCOPE OF
DISCOVERY..... 4

II. THE DIFFICULTY IN DETERMINING
RELEVANCE IN ISOLATION 7

III. PETITIONERS’ DEMONSTRATED FAILURE
TO PROPERLY DETERMINE
RELEVANCE..... 12

IV. THE ORDERS BELOW 15

REASONS FOR DENYING THE PETITION 20

I. THE THIRD CIRCUIT’S DECISION IS
CONSISTENT WITH THE JURISPRUDENCE
OF THE OTHER CIRCUITS AND THIS
COURT..... 21

 A. There is No Circuit Split..... 24

 B. The Orders Below Do Not Conflict With
 This Court’s Jurisprudence..... 26

II. THE THIRD CIRCUIT PROPERLY DENIED
THE WRIT OF MANDAMUS. 28

 A. A Writ of Mandamus is a “Drastic and
 Extraordinary Remedy.” 28

 B. Petitioners Cannot Demonstrate a “Clear
 and Indisputable” Right to Relief. 30

 C. Ample Caselaw Supports the District
 Court’s Order 33

CONCLUSION..... 37

TABLE OF AUTHORITIES

Cases

<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)...	23
<i>Carrillo v. Schneider Logistics, Inc.</i> , 2012 WL 4791614 (C.D. Cal. October 5, 2012).....	34
<i>Cheney v. U.S. Dist. Ct. for D.C.</i> , 542 U.S. 367 (2004)	28, 36
<i>Consumer Fin. Prot. Bureau v. Navient Corp.</i> , 2018 WL 6729794 (M.D. Pa. December 21, 2018).	33-34
<i>Crawford-El v. Britton</i> , 523 U.S. 574 (1998)...	22, 29
<i>Department of Commerce v. New York</i> , 139 S. Ct. 2551 (2019)	29
<i>Dzik v. Bayer Corp.</i> , 846 F.3d 211 (7 th Cir. 2017)	22-23
<i>Ex parte Fahey</i> , 332 U.S. 258 (1947)	28, 36
<i>Freeman v. Wyeth</i> , 764 F.3d 806 (8 th Cir. 2014)....	23
<i>Hartley Pen Co. v. U.S. District Court</i> , 287 F.2d 324 (9 th Cir. 1961), <i>cert. denied</i> , <i>Hartley Pen Co. v.</i> <i>Mathes</i> , 375 U.S. 945 (1963)	25
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979).	22, 26-27, 29
<i>In re Asbestos Prods. Liab. Litig. (No. VI)</i> , 718 F.3d 236, 243 (3 ^d Cir. 2013).....	23

<i>In re Ford Motor Co.</i> , 345 F.3d 1315 (11 th Cir. 2003)	24-25
<i>In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.</i> , 496 F.3d 863 (8 th Cir. 2007) .	22
<i>In re Lombardi</i> , 741 F.3d 888 (8 th Cir. 2014), <i>cert. denied</i> , <i>Zink v. Lombardi</i> , 572 U.S. 1047 (2014)	25
<i>In re Phenylpropanolamine (PPA) Prod. Liab. Litigation</i> , 460 F3d 1217 (9 th Cir. 2006)	23
<i>In re Reyes</i> , 814 F.2d 168 (5 th Cir. 1987), <i>cert. denied</i> , <i>Griffin and Brand of McAllen, Inc. v. Reyes</i> , 487 U.S. 1235 (1988)	25
<i>In re: Testosterone Replacement Therapy Products Liability Litigation</i> , 301 F.Supp.3d 917 (N.D. Ill. 2018).....	34
<i>Irth Solutions, LLC v. Windstream Communications LLC</i> , 2017 WL 3276021 (S.D. Ohio August 2, 2017).....	34-35
<i>Kerr v. U.S. District Court for N. District of California</i> , 426 U.S. 394 (1976)	28, 29, 30, 36
<i>Littlefield v. NutriBullet, L.L.C.</i> , 2017 WL 10439692 (C.D. Cal. December 20, 2017)	34
<i>Mohawk Indus., Inc. v. Carpenter</i> , 558 U.S. 100 (2009)	28-29
<i>Oppenheimer Fund, Inc. v. Sanders</i> , 437 U.S. 340 (1978)	27, 30

<i>Progressive Cas. Ins. Co. v. Delaney</i> , 2014 WL 3563467 (D. Nev. July 18, 2014)	34
<i>Rajala v. McGuire Woods, LLP.</i> , 2013 WL 50200 (D. Kan. January 3, 2013)	34
<i>Republic of Argentina v. NML Capital Co., Ltd.</i> , 573 U.S. 134 (2014)	27
<i>Sanderson v. Winner</i> , 507 F.2d 477 (10 th Cir. 1974), <i>cert. denied, Nissan Motor Corporation in U.S.A.</i> <i>v. Sanderson</i> , 421 U.S. 914 (1975)	25
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 (1964)	27
<i>Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers</i> , 357 U.S. 197 (1958)	33
<i>Tulip Computers Int'l B.V. v. Dell Computer Corp.</i> , 2002 WL 818061 (D. Del. April 30, 2002)	34
<i>United States v. Clarke</i> , 573 U.S. 248 (2014)..	22, 29
<i>UPMC v. Highmark, Inc.</i> , 2013 WL 12141530 (W.D. Pa. January 22, 2013)	34
<i>Williams v. Taser Int'l, Inc.</i> , 2007 WL 1630875 (N.D. Ga. June 4, 2007)	34
<i>Wingnut Films, Ltd. v. Katja Motion Pictures Corp.</i> , 2007 WL 2758571 (C.D. Cal. September 18, 2007)	34

Statutes

Sherman Antitrust Act of 1890, amended by the Clayton Act in 1914, codified at 15 U.S.C. §§1, *et seq.*..... 1, 4

Rules

Federal Rule of Civil Procedure Rule 26.....passim

Federal Rule of Civil Procedure Rule 26(b)passim

Federal Rule of Civil Procedure Rule 34..... 33

Advisory Committee’s Notes to 1970 Amendment to Federal Rule of Civil Procedure 26..... 30

Advisory Committee’s Notes to 2006 Amendment to Federal Rule of Civil Procedure 26..... 34, 35

Advisory Committee’s Notes to 2015 Amendment to Federal Rule of Civil Procedure 26..... 22, 30-31

Supreme Court Rule 14.1(a)..... 33

Other Authorities

Martin R. Lueck & Patrick M. Arenz, *Rule 502(d) & Compelled Quick-Peek Productions*, 10 Sedona Conference Journal 229 (2009) 32

The Sedona Conference Commentary on Protection of Privileged ESI, 17 Sedona Conference Journal 95 (2016) 32

INTRODUCTION

Petitioners seek to have this Court wade into a pretrial discovery dispute in a complex, federal antitrust litigation brought by 54 states, territories and commonwealths (collectively, “States”), combined in a multidistrict litigation (MDL) with numerous private plaintiff class and direct actions (collectively, “private plaintiffs”). A list of all State entities and private plaintiffs is provided in Respondents’ Appendix (Resp.App.) A1-A4.

In dozens of lawsuits exposing a web of conspiracies and relationships, the respondents have sued more than 35 generic pharmaceutical manufacturers and 18 individual executives for violating Section 1 of the Sherman Act and numerous state laws in their marketing and sales of approximately 200 generic drugs. Petitioners’ collusive price-fixing and market allocation is alleged to have been extensive and devastating for consumers and all purchasers. Where market forces should have lowered generic prescription drug prices for millions of Americans, petitioners allegedly ensured—through a widespread conspiracy—that competition was suppressed, and generic drug prices increased or remained higher than they would have been with open competition.

Petitioners sought a writ of mandamus—appropriate only in extraordinary circumstances where there is an indisputable right to relief—to vacate part of a pretrial discovery order. When that was denied by the Third Circuit, petitioners petitioned this Court, seeking the adoption of a blanket rule under which no court, absent a specific finding of misconduct, may order the production of documents identified by two relevance screens,

unless the producing party is also given the unilateral and subjective right to undertake a third screen to decide relevance for itself. Nothing in the Federal Rules of Civil Procedure requires such a result.

The district court's discovery order in this case was justified based on the record. This litigation is four years old, yet until recently petitioners had produced very few documents in discovery. In early 2019, the States produced documents to the private plaintiffs that the States had received from petitioners during the States' prelitigation investigations. In ordering that production, the district court established a procedure whereby petitioners could "claw back" certain documents within thirty days of production. Using that procedure, several of the petitioners sought to claw back more than 150,000 documents, mostly on the ground that the documents were not relevant. But the vast majority of the documents petitioners sought to claw back on relevance grounds were, in fact, highly relevant and when challenged, petitioners withdrew approximately two-thirds of their claw-back requests.

The district court moved discovery forward by entering a case management order. Concerned by the previous problems with petitioners' relevance determinations, respondents requested complete production of all documents in the custody of the most important document custodians—individuals the parties agreed possessed relevant material. The district court denied respondents' request for complete productions from the custodial files. Instead, adopting the special master's recommendation, the court ordered the petitioners to produce documents from a set of key individuals

that the parties agreed were likely to have relevant information. The court required that the documents from those key individuals be further screened by search terms that were either agreed to by the parties or which the special masters found were likely to identify relevant documents. The district court further protected petitioners by limiting the production to “outside counsel eyes only” for 120 days, permitting a privilege review, and imposing a claw-back process.

Petitioners objected. They maintained that the two relevance screens—agreed custodians and agreed search terms—coupled with a privileged review, strict confidentiality, and a claw-back process, were not sufficient. Petitioners demanded a further relevance screen, in which they could unilaterally and subjectively decide whether each document was relevant, despite their demonstrated failure to accurately determine relevance.

The district court properly exercised its broad discretion in declining to give petitioners that third relevance screen, finding specifically that they had failed to show that it was appropriate in this MDL. But the court assured petitioners that it would continue to provide oversight and address any issues with the production should they arise. Petitioners’ Appendix (Pet.App.) 25a. On review, the Third Circuit, in a separate exercise of discretion, properly determined that petitioners had not met the extraordinarily high standards for mandamus review of a pretrial discovery order.

The Third Circuit’s denial of mandamus presents no conflict with decisions of this Court or other federal appellate courts. The question whether the district court’s order was within its discretion is

entirely fact-bound, specifically tailored to the unique circumstances of this case. Because this case satisfies none of the criteria for certiorari review—much less to review the denial of mandamus relief—this Court should deny the petition.

STATEMENT OF THE CASE

I. SCOPE OF THE CLAIMS AND SCOPE OF DISCOVERY

These dozens of cases, consolidated for pretrial and discovery purposes, involve allegations against more than 35 generic pharmaceutical manufacturers and 18 high-ranking sales, pricing, and C-suite executives for serious violations of Section 1 of the Sherman Act and various state laws in their marketing and sale of approximately 200 generic drugs. The generic drugs at issue run the gamut of drug types (tablets, capsules, suspensions, creams, gels, ointments, etc.) and classes (statins, ace inhibitors, beta blockers, antibiotics, antidepressants, contraceptives, non-steroidal anti-inflammatories, etc.) that treat a wide range of diseases and conditions, from basic everyday antibiotics to medications for diabetes, cancer, epilepsy, multiple sclerosis, high blood pressure, arthritis, high cholesterol, acid reflux, human immunodeficiency virus (HIV) infection, and attention deficit hyperactivity disorder (ADHD), among others.¹ Discovery is assisted by “three highly-qualified Special Masters,” with extensive experience in complex discovery, including “a

¹ The list of 200 drugs currently at issue in the cases pending in the MDL is in the Appendix. Resp.App. A5-A9.

specialist in electronically stored information.”
Pet.App. 18a.²

The MDL complaints describe a longstanding, overarching conspiracy among generic drug manufacturers to minimize competition by “playing nice in the sandbox” and allocating markets through a set of rules that are generally referred to as “fair share.” *See, e.g., Connecticut v. Teva Pharmaceuticals USA, Inc.* (the States’ “Teva Case”), Amended Complaint, Resp.App. A32-A49 ¶¶115-161. The conspiracy’s goal was to keep prices high by minimizing the price erosion that normally would be expected in a market that contains generic products, as well as coordinating supra-competitive price increases. *Id.*

Petitioners’ agreements are not limited to any one generic drug market. Rather, they impact decisions made by these manufacturers across many products. Resp.App. A43-A45 ¶¶148-150. In addition to the broad agreement regarding market share, the complaints describe dozens of narrower agreements among multiple combinations of competitors to substantially increase prices on specific drugs, sometimes by orders of magnitude. *See, e.g.,* Resp.App. A59-A60 ¶¶626-627 (Fluconazole – 1,570%; Methotrexate – 1,800%; Nadolol – 1,400%; Oxybutynin Chloride – 1,500%).

² The MDL is being conducted in parallel with federal and state investigations. The ongoing federal investigation has resulted, thus far, in criminal charges against three generic drug companies and four executives, three of whom have pleaded guilty. One of the companies recently agreed to pay a \$195 million criminal penalty for its conduct—the largest ever imposed in a purely domestic antitrust case.

The complaints outline dozens of relationships and thousands of phone calls between competitors—often shortly before price increases, bids and other key market events and decision points—revealing webs of inter-related conspiracies involving different people, companies and drugs. The key individuals (whose files will be searched pursuant to the district court’s order) spent much of their typical day maintaining their companies’ illegal agreements with competitors. The materials in their files will be highly relevant to respondents’ claims. *See, e.g.*, Resp.App. A41 ¶141 (Teva had long-standing relationships with certain competitors “which affected nearly every overlapping drug they sold”); Resp.App. A45 ¶151 (impact of illegal agreements goes well beyond individual product markets); Resp.App. A47 ¶156 (same).

As just one example, Defendant James Nesta, the Vice President of Sales for Mylan Pharmaceuticals, Inc. (“Mylan”), communicated directly with competitors to develop or facilitate conspiratorial relationships. *See, e.g.*, Resp.App. A46-A48 ¶¶155, 158, A57-A58 ¶583, A61 ¶637, A66 ¶852. *See also* States’ June 18, 2018 Consolidated Amended Complaint, Resp.App. A90 ¶¶333, 348. Nesta had frequent inter-competitor communications (often multiple times a day) over several years, including many thousands of telephone calls. Resp.App. A50 ¶172, A51 ¶175, A52 ¶¶177, 187, A66-A67 ¶1074. Those communications revealed patterns of communications around price increases and other strategic market decisions. For example, Nesta often spoke with competitors on the day before price increases became effective. *See, e.g.*, Resp.App. A50-A52 ¶¶172-177, A64-A66 ¶¶847-851. Because the conspiracy permeated nearly everything Nesta did, highly relevant documents

relating to competitor agreements or communications will be found throughout Nesta's custodial files, even if their relevance might not be immediately apparent to a document reviewer based on the face of the document or in isolation.

Petitioners knew that what they were doing was illegal and often took steps to cover up the conspiracy. Among other things, they destroyed documents and coordinated with each other to obstruct ongoing investigations of their conduct. Resp.App. A48 ¶¶159-160, A67-A70 ¶¶1123-1134. In their internal communications, they often used code words and veiled or intentionally opaque language to avoid directly documenting their communications with competitors. A seemingly innocuous or inscrutable email, examined by itself, might not appear on its face to be relevant, but in context is integral to the anti-competitive scheme.

II. THE DIFFICULTY IN DETERMINING RELEVANCE IN ISOLATION

This is not a simple commercial contract case, where parties might be more suited to review their own documents and filter for relevance before production. As a result of their years-long investigation, the States developed tools, such as an extensive phone-record database, to better understand and place documents and communications into the larger context of what was happening in the industry at any given time. *See, e.g.*, Resp.App. A33-A34 ¶120, AA34-A35 ¶122, A50 ¶172, A51 ¶175, A52 ¶¶177, 187, A65 ¶848, A67 ¶1074. The States' investigation revealed how difficult it can be to determine whether a particular document, viewed in isolation, is relevant to the allegations of conspiracy. Only with access to and an

understanding of the full factual context does the importance of certain seemingly benign documents become apparent. For example:

- In June 2014, Heritage Pharmaceuticals, Inc. (“Heritage”) implemented a 200% price increase for Glyburide. Resp.App. A90 ¶349. In advance of this price increase, Heritage employees spoke to competitors, including Aurobindo Pharma USA, Inc. (“Aurobindo”), who agreed to support the increase. *Id.*, ¶¶342-343, 352. After Heritage increased its price, a large distributor solicited bids from Teva and Aurobindo to obtain lower pricing. Resp.App. A91 ¶356. In response, on July 25, 2014, Heritage President Jason Malek sent a text message to his subordinate, Neal O’Mara, stating: “Tell [Tim Gustafson of Aurobindo] to stay away from [the wholesaler].” *Id.* ¶357. Mr. O’Mara then called Mr. Gustafson and they spoke for more than 13 minutes. *Id.* During that call, Mr. O’Mara apparently directed that Aurobindo should not provide a bid to ABC. After the call, Mr. O’Mara sent a text message to Mr. Malek that simply said: “**Done.**” *Id.*³
- A June 12, 2014 Facebook message from Tracy Sullivan of Lannett Company, Inc. (“Lannett”) to Nisha Patel of Teva stated “I was hoping to touch base with you about some industry news. What is your cell phone? Or could you give me a call when you have a minute....” Resp.App. A53 ¶498. This message was sent at 11:16am. At 11:30am, Patel called Sullivan and they spoke for 7 minutes. During that conversation,

³ Mr. Malek and another Heritage executive have pled guilty to fixing prices and allocating markets for Glyburide.

Sullivan informed Patel that Lannett would be entering the market for Baclofen (in which Teva was a participant) shortly. In a follow-up message through Facebook Messenger later that afternoon, Sullivan confirmed: **“Definitely Mid-July. I’ll touch base with you in a few weeks.”** *Id.* True to her word, Sullivan called Patel on July 1, 2014 and left a voicemail. Patel promptly returned the call, and the two spoke for almost 7 minutes. *Id.*, A54 ¶499. On July 11, 2014, as Teva was evaluating whether to try and take on additional Baclofen business, Patel stated to a Teva colleague: “[n]ot sure if it helps your review, but there is another entrant coming to market (Lannett). I’m not sure about their share targets, but I know it’s probably soon.” *Id.*, ¶500. That same day, Patel sent a text message to Sullivan asking **“Around?”** Sullivan immediately called Patel and left a voicemail. Patel called Sullivan back promptly, and they spoke for more than 3 minutes. After speaking, Patel sent another text message to Sullivan, stating: **“Thank you!!”** Sullivan confirmed: **“No prob!”** *Id.*

- Mayne Pharma Inc. (“Mayne”) entered the market for Doxycycline Delayed Release (“Doxy DR”) in February 2014. Resp.App. A84 ¶218. Throughout 2014, Heritage and Mayne had direct communications when Mayne pursued Heritage Doxy DR customers. *See generally id.*, A84-A89 ¶¶218-241. In November 2014, for example, Mayne bid for business with two large customers, McKesson and Econdisc. *Id.*, A87 ¶228. Soon after, Ann Sather of Heritage and Gloria Schmid of Mayne spoke, and Ms. Sather told Ms. Schmid that Heritage might be willing

to walk away from Econdisc if Mayne would withdraw its offer to McKesson. *Id.*, A87-A88 ¶230. Immediately after speaking with Ms. Schmid, Ms. Sather sent an email to Heritage President Jason Malek with the subject line **“spoke with Gloria”** and the message **“Can discuss anytime.”** *Id.*, A88 ¶231. Over the next few weeks, Ms. Sather continued to speak with Ms. Schmid and reached an agreement to allocate customers. When Econdisc requested bids for Doxy DR in January 2015, Heritage made sure to bid higher than Mayne, which fulfilled its part of the agreement to “walk” away from Econdisc. *Id.*, A89 ¶238.

Viewed in isolation, these communications—“Done,” “Around?,” “Thank you!”, “No prob!”, “spoke with Gloria,” and “can discuss anytime”—appear innocuous or meaningless. Even less oblique statements like “Definitely Mid-July. I’ll touch base with you in a few weeks” might not, without appropriate context, seem non-responsive. Yet these documents are important and relevant pieces of the larger conspiracy puzzle. When these disparate and seemingly innocuous documents are paired with other evidence, their relevance is readily apparent.

Understanding the full context of individual documents is especially important here, because petitioners took affirmative steps to conceal their wrongdoing by using code words and avoiding putting incriminating statements into writing (especially on work email accounts). For example:

- In May 2014, a large customer of Taro Pharmaceuticals USA, Inc. (“Taro”) received a bid and gave Taro an opportunity to bid to retain the business. In response, a senior

contracting executive at Taro sent an internal email stating: “FS ok, will protect.” A senior managed care executive at Taro responded: “explain FS (Fair Share)?” Defendant Ara Aprahamian of Taro, who was recently indicted by the DOJ for his involvement in the conspiracy, responded “No emails please. Phone call . . . let’s discuss.” Resp.App. A48 ¶159.

- In May 2014, Patel of Teva declined to bid on a customer for two drugs, stating “unable to bid (strategic reasons, for internal purposes).” Patel and her co-conspirators at Teva used the term “strategic” as code for an understanding in place with a competitor. Resp.App. A63-A64 ¶781.
- In January 2013, a Sandoz executive sent an internal email noting that Sandoz should be “cautious” on Levothyroxine and Nadolol due to information that he had “heard from a customer.” Resp.App. A56 ¶548. This was untrue—the Sandoz executive had learned the information from a competitor, not a “customer.” *Id.*, ¶549. Concealing the true source of information was a convention frequently employed by Sandoz executives to avoid documenting their covert communications with competitors. Being “cautious” on these products meant that Sandoz did not want to try to take business away from its competitors by offering lower prices. *Id.*, ¶548.

Due to the extensive, intricate nature of the conspiracy allegations in this case, broad discovery of the key actors in the conspiracy—the officers and

employees calling and coordinating with their competitors to ensure prices stayed high—is essential to the fair adjudication of these complaints.

III. PETITIONERS’ DEMONSTRATED FAILURE TO PROPERLY DETERMINE RELEVANCE

The pervasive and sometimes opaque nature of petitioners’ conduct necessitates contextual discovery of the key actors in the conspiracy. Yet as noted above, some of the relevancy determinations in this case are difficult at best and often impossible without context. Prior discovery experience with petitioners in this case proves the point.

In early 2019, pursuant to Pretrial Order No. 70 (“PTO 70”) (Resp.App. A92-A102), the States produced to other parties in the MDL documents the States had received from petitioners during the States’ pre-litigation investigations. In ordering that production, the district court established a procedure whereby petitioners could “claw back” certain categories of documents. Several of the petitioners sought to claw back more than 150,000 documents, mostly on relevance grounds. But the vast majority of those documents were in fact relevant. When challenged, petitioners withdrew approximately two-thirds of their claw back requests.

Specifically, the States produced approximately 250,000 Teva documents into the MDL. Resp.App. A144-A145.⁴ Teva sought to “claw

⁴ When producing documents for the States’ investigation, Teva (as well as other companies) produced full custodial files, rather than engaging in a broader search and reviewing individual documents for “relevance.” Resp.App. A139.

back” approximately 100,000 documents, or 40% of the collection, claiming those documents were all “unrelated to any MDL pleading, and do not concern the drugs at issue in the MDL.” *Id.* But even a quick review revealed this was not true. Many of the documents Teva sought to claw back on relevance grounds were highly relevant and showed precisely the types of collusive behavior that are central to the claims in this MDL. Included among Teva’s proposed claw-backed materials were:

- Documents showing that Teva conceded business to competitors for “strategic” reasons (as discussed above);
- Documents discussing “fair share” and “playing nice in the sandbox,” both euphemisms for petitioners’ conspiracy;
- Documents showing that Teva had advance knowledge of a competitor’s price increase regarding a drug at issue in the MDL before it became effective;
- Documents specifically quoted in the States’ Teva Complaint; and
- Documents relating to many other price increases that are directly at issue in the MDL.

In making its claw-back request, Teva claimed that it had taken “a *very broad view of relevance* and has only requested to claw back documents that *squarely fall* within the categories set forth in PTO 70.” Resp.App. A145. Yet when challenged about the propriety of its claw backs, Teva quickly relented – ultimately withdrawing nearly 90% of its claw-back requests. *Id.*

Petitioners' problems with determining relevance were not limited to Teva. Taro also sought to claw back thousands of relevant documents, including, for example, a document directly quoted in the States' Teva Complaint, emails discussing Taro's fair share for various drugs, documents directly related to a decision to follow a price increase alleged to be collusive in the States' Teva complaint, and documents directly related to Taro's entry into the market for a drug at issue in the MDL, which was also alleged to be the subject of collusion. Resp.App. A115, A146-A147.

Actavis, Sun and Upsher-Smith likewise sought to claw back numerous relevant documents. Resp.App. A146-A147. In all, these five companies sought to claw back more than 150,000 documents.⁵ When challenged, they withdrew approximately two-thirds of their requests.

It was only because the States already had obtained and reviewed those documents during their investigation that the respondents were aware of these relevant documents. The PTO 70 claw-back experience informed the district court when it crafted the process for documents to be produced in the MDL.

⁵ In the reply brief in support of their application for stay, petitioners contend that the claw-back disputes involved only three of 37 corporate defendants. Stay Reply Brief 11. Their math is incorrect, and their argument misses the point. Nine defendants sought to claw back documents under PTO 70, and five of the nine sought return of relevant documents. The experience illustrated to the district court and Third Circuit the difficulty of determining relevance without context as five of the nine defendants failed to properly assess relevance.

IV. THE ORDERS BELOW

After denying motions to dismiss, the district court ordered the parties to negotiate a case management order, in a process overseen by a special master. Because of the nature of the antitrust conspiracy and petitioners' earlier demonstrated failures to determine relevance on their own, respondents sought production of all documents from certain custodians that the parties agreed possessed relevant information. Pet.App. 42a. The PTO 70 claw-back experience was extensively briefed and argued. *See* Resp.App. A103-A125, A126-A165, A191-A195. Petitioners offered excuses for their behavior, but ultimately did not dispute that they had sought to claw back tens of thousands of relevant documents from discovery in this case. Resp.App. A191-195.

Nonetheless, the district court denied respondents' request for full productions from the custodial files. Instead, adopting the special master's compromise recommendation, the court established a two-tier relevancy screening process for documents from the files of key custodians.⁶ First, the parties would negotiate and agree on a set of key individuals who were likely to possess relevant information. Then, the court required that the documents from those key individuals be further screened by search terms that were either agreed to by the parties or which the special masters found were likely to identify relevant documents. Case

⁶ *Amici*, like petitioners, mischaracterize the ruling as not providing for any relevance screening. *See* Chamber *Amicus* brief 3-4.

Management Order, Pretrial Order No. 105 (“PTO 105” or “CMO”) (Pet.App. 8a-10a ¶3(b)).

Since entry of the CMO, the parties have agreed both on the list of witnesses who possess relevant documents and on the list of search terms that will find such documents among those witnesses’ files. Under the CMO, after the agreed search terms are applied to the agreed files, petitioners may review the “hit” documents and withhold any that are privileged. They are not to withhold any other documents identified by the two objective relevance screens based on their own further, subjective assessment of relevance. Pet.App. 7a-8a ¶3(b).⁷ Documents disclosed pursuant to this provision may be reviewed only by outside counsel for 120 days, during which time petitioners may make confidentiality designations and seek to claw back certain materials. *Id.* A comprehensive Protective Order, as well as the claw-back procedure, are in place to safeguard confidential trade secrets.⁸

⁷ Concomitantly, petitioners also are not required to review documents that are *not* identified by the two relevance screens even though some relevant documents will be missed by the custodial and search term relevance screens. *See, e.g.*, Resp.App. A178 (“There will certainly be a number of custodians who had relevant and, indeed, highly relevant documents that the Plaintiffs would be willing to forgo discovery on in order to focus on the limited set of key individuals and getting a real deep dive into their documents. Because they are the key individuals responsible for engaging in the collusion or in the price increases that were at issue in the complaints.”).

⁸ Although petitioners allege that there have been leaks of commercially sensitive documents, the only two leaks of which respondents are aware related specifically to unredacted versions of the States’ Complaints (not document productions),

Dissatisfied, petitioners filed a motion to stay discovery while they sought a writ of mandamus from the Third Circuit to vacate ¶3(b) of the CMO and institute a third relevance screen, allowing petitioners to unilaterally determine relevance with no input from respondents and no review by either the special master or the district court.

In a comprehensive decision, the district court denied the motion for stay. Pet.App. 16a-25a. Citing Federal Rule of Civil Procedure 26, the district court found “no dispute that these custodial files are likely to contain relevant information. Importantly, the agreed custodial files are not produced wholesale; instead, the files are to be searched for specific terms. *These search terms provide the initial screen for relevance.*” Pet.App. 21a (emphasis supplied).⁹

The district court emphasized that “[t]he agreed custodial files are by their terms those likely to have relevant information, [but] the files will be searched for specific relevant terms, and [petitioners] have the opportunity to claw back confidential information.” Pet.App. 22a. These provisions, “[i]n the context of this litigation, where the relevance of the documents must be determined in part by context,” will “best serve the purpose of

which did not contain any competitively sensitive information. *Cf.* Pet. 34 n.8. Although petitioners have repeatedly tried to blame the States, in particular, Connecticut, for the leaks, the district court disagreed, finding “no evidence whatsoever that the Connecticut AG has acted unethically or contravened this Court’s orders.” Resp.App. A202.

⁹ Petitioners contend that the district court cited and applied the pre-2015 version of Rule 26 in its decision denying a stay. Pet. 14, 22 n.2. That is simply incorrect. *See* Pet.App. 21a-22a (block quote of post-2015 Rule 26(b)).

the Federal Rules to secure a just determination of the merits of the parties' claims and defenses." *Id.*

Relying on its long and detailed experience with the multidistrict proceedings, and the briefing and oral argument related to the CMO, the district court found that petitioners had failed to show "that reviewing information for relevance before production, instead of through the claw-back procedures established in PTO 70 and incorporated in the CMO, is appropriate in this litigation, *where the determination of whether information is potentially relevant requires the context of the information within the files.*" Pet.App. 23a-24a (emphasis added).

The district court emphasized that "the particular nature of the antitrust allegations in the MDL mean that an understanding of the context of particular documents may be critical, which could be impeded by the withholding or redaction of responsive documents or document families." Pet.App. 23a. The district court and the special master both noted that they would continue to address issues that arose during the discovery process. *Id.*, 25a, 44a.

Petitioners then sought mandamus relief from ¶3(b) of the discovery order in the Third Circuit. In opposition, respondents submitted hundreds of pages of briefing and exhibits, most of it under seal in order to comply with the district court's order and Petitioners' confidentiality designations. On that voluminous record, the Third Circuit held that petitioners had failed to satisfy the extraordinarily high standards necessary for mandamus on a discovery dispute in the middle of MDL litigation, and denied the petition. Pet.App. 1a-

5a. The accompanying motion to stay was denied as moot. *Id.*

Specifically, the Third Circuit held that petitioners were not entitled to a writ of mandamus because they had not “established a ‘clear and indisputable’ right to relief,” “a clear abuse of discretion,” “a judicial usurpation of power,” or “a clear error of law”; nor that the order would “cause great injury” or a “grave injustice.” Pet.App. 2a, 4a. The Court stressed that a trial court “has wide latitude in controlling discovery” and is empowered under Rule 26 “to compel the production of documents within broad parameters.” *Id.*, 3a. In the words of the court:

the discovery is being produced from custodians identified as possessing potentially relevant information, and search terms aimed at identifying relevant information that will be applied are likely to narrow the information produced, [and] district courts have, in some circumstances, ordered the production of documents without a manual relevance review.

Id. (citations omitted).

Rejecting the dissent’s characterization of the district court’s order and prior orders by other courts allowing document productions based on search terms as “outliers” and “tantamount to ‘search warrants,’” the Third Circuit held that “the District Court provided avenues: (a) to allow the Petitioners to review for privilege before production and (b) to protect the produced information by way of an ‘outside counsel eyes only designation’ for a period of 120 days, during which Petitioners may claw back

trade secrets, unrelated business information, and unrelated personal or embarrassing information.” Pet.App. 3a. Petitioners sought rehearing *en banc*, which the Third Circuit denied without any noted dissent. They also sought a stay pending this petition for a writ of certiorari, which was denied.

Petitioners’ motion to stay before this Court was denied on March 6, 2020.

REASONS FOR DENYING THE PETITION

Petitioners seek this Court’s review of the denial of a mandamus petition arising from a pretrial discovery dispute over procedures to identify documents for production. Their petition does not merit review.

Because in this case “the determination of whether information is potentially relevant requires the context of the information within the files,” (Pet.App. 24a), the district court—which has wide discretion on such matters—established a process that employs certain objective relevance screens, followed by a claw-back procedure that allows all parties, the special master and the court (rather than defendants alone) to participate in assembling a corpus of relevant documents that will allow this MDL to advance fairly and efficiently while protecting all parties’ rights. Given petitioners’ demonstrated inability to accurately assess relevance, and the successful use of the same claw-back procedure in an earlier phase of this litigation, the district court’s order is perfectly tailored to this case. The challenged CMO provision is the result of informed, incremental, careful case management. It is entitled to broad deference, as is the Third Circuit’s denial of mandamus.

There is no circuit split. To the contrary, the decisions upon which petitioners rely concerned discovery requests that *sought* irrelevant material, rather than the *process* by which relevant materials are identified and produced. Those decisions thus bear no resemblance to the detailed case management order here.

Moreover, there is no conflict with any decision of this Court. None of the four cases cited by petitioners involved relevance objections under Rule 26, and none remotely speaks to the issue here.

Finally, this case is even less worthy of review because it comes to the Court on the denial of a writ of mandamus. That writ is properly granted only in extraordinary cases where the right to relief is “clear and indisputable.” Petitioners cannot make that showing because none of this Court’s decisions speaks to the issue presented here, nor do the Rules specify any particular procedure for determining relevance.

I. THE THIRD CIRCUIT’S DECISION IS CONSISTENT WITH THE JURISPRUDENCE OF THE OTHER CIRCUITS AND THIS COURT.

Federal Rule of Civil Procedure 26(b) provides, in relevant part:

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, considering the importance of the issues at stake in the action, the amount in

controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

District courts are provided broad discretion to fashion the scope and process for discovery production. *United States v. Clarke*, 573 U.S. 248, 255-256 (2014) (affirming district court's broad discretion in addressing "matters of case management, discovery and trial practice"); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion"); *Herbert v. Lando*, 441 U.S. 153, 177 (1979) ("deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials"). The district court's "responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery." *Advisory Committee's Notes to 2015 Amendment to Federal Rule of Civil Procedure 26*.

Courts managing multidistrict litigation are provided with even more than the usual discretion. "[A]dministering cases in multidistrict litigation is different from administering cases on a routine docket." *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2007) (internal citations omitted). "District courts handling complex, multidistrict litigation

must be given wide latitude with regard to case management in order to achieve efficiency.” *Dzik v. Bayer Corp.*, 846 F.3d 211, 216 (7th Cir. 2017) (citation omitted; internal quotation marks omitted). *See also Freeman v. Wyeth*, 764 F.3d 806, 809 (8th Cir. 2014) (“MDL courts must be given greater discretion to organize, coordinate and adjudicate its proceedings”); *In re Asbestos Prods. Liab. Litig. (No. VI)*, 718 F.3d 236, 243, 246-248 (3^d Cir. 2013) (“parties’ compliance with case management orders is essential” in MDL dockets); *In re Phenylpropanolamine (PPA) Prod. Liab. Litigation*, 460 F.3d 1217, 1231 (9th Cir. 2006) (MDL judge must have “discretion to manage [multiplicity of actions] that is commensurate with the task”).

This Court has recognized that “context” and “setting” are crucial to assessing whether a given document is relevant in an antitrust case. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). In an antitrust conspiracy case of this scope, even when acting in good faith, recipients of a document request may simply lack the information necessary to assess whether given materials are relevant. This Court has recognized that where—as here—an antitrust complaint survives a motion to dismiss, an “extensive scope of discovery” is necessary to establish the “setting suggesting” (and ultimately establishing) that the conduct at issue was unlawful. *Id.*, at 557, 559.

The district court properly exercised its broad discretion by fashioning a document production process informed by factual allegations and prior discovery experience in this case. In upholding that discovery order, the Third Circuit acted in a manner consistent with other circuits and with this court’s jurisprudence.

A. There is No Circuit Split.

Petitioners' claim that the Third Circuit's unpublished denial of mandamus conflicts with other appellate court decisions does not survive even cursory scrutiny. *Cf.* Pet. 23-26. In each of the cases relied upon by petitioners, the circuit court concluded that the propounded discovery *sought* irrelevant material. That is not what occurred here.

Here, the parties have agreed on custodians and search terms to identify relevant documents. The only dispute is whether the possibility that some irrelevant documents will *incidentally* be produced—subject to the district court's extensive protective procedures—constitutes such a flagrant violation of the Federal Rules that the extraordinary remedy of mandamus is warranted. None of the cases petitioners identify involves a remotely similar situation.

The difference between petitioners' cases and this case is not the courts' interpretation of the law, nor is it their application of the law to similar sets of facts. *Cf.* Pet. 22; Chamber *Amicus* brief 5. *The difference is the facts.* Each appellate court applied the same mandamus standard to a different set of facts. On the facts in petitioners' cited cases, the courts found that mandamus was warranted. On the facts of this case, applying the same standard, the Third Circuit correctly found that it was not.

A straightforward review of the cases demonstrates that petitioners' claim of a circuit split is erroneous. In *In re Ford Motor Co.*, the district court ordered production of certain databases without ruling on the defendant's objections or explaining its ruling. 345 F.3d 1315, 1317 (11th Cir. 2003). The Eleventh Circuit emphasized that the

district court—in obvious and stark contrast to the district court here—“established no protocols for the search” and “did not even designate search terms to restrict the search.” *Id.*

In *In re Reyes*, the district court had permitted immigration status discovery in a federal statutory wage case. The circuit court granted mandamus because the information was “completely irrelevant to the case before it,” and “the discovery could place in jeopardy unrelated personal status matters.” 814 F.2d 168, 170-171 (5th Cir. 1987). Similarly, in *Sanderson v. Winner*, 507 F.2d 477 (10th Cir. 1974), the Tenth Circuit held simply that discovery of the plaintiff’s financial capacity and attorney fee arrangements was not relevant.

In *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014), the Eighth Circuit held that the name of the administering doctor, pharmacist or laboratory for lethal injection was not relevant to a habeas Eighth Amendment or ex post facto challenge. The key factor was that “the discovery ordered by the district court is not relevant to any claim that should survive a motion to dismiss.” *Id.*, at 895. Last, petitioners rely on *Hartley Pen Co. v. U.S. District Court*, 287 F.2d 324 (9th Cir. 1961). There, the Ninth Circuit granted mandamus where the party seeking trade secrets from the other party had not met its burden of establishing that the trade secrets were relevant. *Id.*, at 328.

Each of these cases involved discrete questions about orders requiring the production of *irrelevant* documents. None of these cases addresses whether a discovery process that all parties agree will produce *relevant* documents demands an appellate court’s extraordinary intrusion into the

management of discovery in a complex multidistrict matter. None of these cases holds that a third, unilateral and unreviewable relevance review by the producing party is required. There simply is no circuit split.

B. The Orders Below Do Not Conflict With This Court’s Jurisprudence.

Petitioners also assert that under this Court’s precedents, unilateral manual relevancy screening by the producing party is always required, regardless of the history or context of the case or the protections afforded by the district court’s orders. Pet. 18-19. Petitioners contend that the Third Circuit’s denial of mandamus is so out of bounds that it requires the invocation of this Court’s supervisory authority. *Id.* Petitioners’ argument lacks merit and falls far short of satisfying the stringent requirements for mandamus relief.

Petitioners cite four of this Court’s cases, none of which addresses circumstances at all similar to this case. In none of these cases did this Court consider relevance objections under Rule 26; indeed, three of the four cases do not discuss Rule 26 at all. None of these cases was decided after the 2015 Amendment to Rule 26, on which petitioners place so much importance. Instead, in each of petitioners’ cited cases, this Court decided discrete discovery questions that have nothing in common with this case.

In *Herbert v. Lando*, this Court held that the First Amendment did not bar discovery of a newspaper’s editorial process where actual malice was required as an element in a “public figure” defamation claim. The *Lando* Court affirmed the

“broad and liberal” treatment of discovery rules “to effect their purpose of adequately informing” civil litigants, even when faced with a constitutional protection. 441 U.S. 153, 177 (1979). In *dicta*, the Court noted that in balancing the freedom of the press vis-à-vis the burden of defending defamation suits, the courts should consider Rule 1, which prioritizes speedy and inexpensive determination of every action. *Id.* Although petitioners repeatedly cite *Lando* as “holding” that relevance “should be firmly applied,” the *Lando* Court limited its holding to the constitutional question and expressly disavowed any view on relevancy. *Id.*, at 177 n.27 (finding it “inappropriate to review [the district court’s] rulings on relevancy.”). *Cf.*, e.g., Pet. 18, 29.

Other cases on which petitioners rely are even less on point. In *Republic of Argentina v. NML Capital Co., Ltd.*, 573 U.S. 134, 140 (2014), this Court addressed whether the Foreign Sovereign Immunities Act specifies a different rule for purposes of a third-party subpoena, when the judgment debtor is a foreign state. In *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964), this Court affirmed the broad and liberal treatment of discovery, and clarified that under Rule 35, mental or physical examinations of a party should not be routinely ordered when those conditions have not been placed into question. And in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 342 (1978), this Court held that class certification rules, not discovery rules, governed identification of plaintiff class members.

These four cases do not even address whether, let alone establish that, a case management order that specifies a process to gather and produce materials responsive to relevant requests violates

the Federal Rules. They do not even suggest, much less hold, that the producing party must be entitled to unilaterally withhold materials identified under that process. Although petitioners seek to portray the district court's and Third Circuit's decisions as aberrant, that portrayal lacks any legal or factual grounding.

II. THE THIRD CIRCUIT PROPERLY DENIED THE WRIT OF MANDAMUS.

Certiorari is all the more unwarranted here because the case is before the Court on the denial of a writ of mandamus. That writ is granted only in extraordinary circumstances, and this Court's review is exceedingly narrow. Petitioners do not satisfy even the ordinary certiorari criteria, let alone the additional hurdle of showing that mandamus was improperly denied.

A. A Writ of Mandamus is a “Drastic and Extraordinary Remedy.”

A writ of mandamus is “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’” *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947)). To warrant reversal through mandamus, an order must “amount to a judicial usurpation of power,” petitioners must establish a “clear and indisputable right to relief,” and the order must be a clear abuse of discretion. *Cheney*, 542 U.S. at 371, 395. *See also Kerr v. U.S. District Court for N. District of California*, 426 U.S. 394, 403 (1976). This Court generally declines to review pretrial discovery orders and has held that even the denial of the application of attorney-client privilege is not typically subject to interlocutory review. *See*

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108 (2009). Petitioners’ efforts to elevate case management and relevance objections to the level of mandamus are unavailing.

To obtain a grant of mandamus at this level of review, petitioners would need to overcome two separate, broad layers of discretion. First, this Court has recognized that district courts have broad discretion in managing discovery, especially in a multidistrict setting. *See, e.g., Department of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019) (upholding extra-record discovery order in administrative appeal as “ultimately justified”); *Clarke*, 573 U.S. at 255-256; *Crawford-El*, 523 U.S. at 598; *Lando*, 441 U.S. at 177.

Second, this Court has emphasized that “it is important to remember” that circuit court denials of mandamus are “in large part a matter of discretion” that are entitled to deference by this Court on review, and that there are good reasons why this Court has treated “mandamus within the federal court system as an extraordinary remedy.” *Kerr*, 426 U.S. at 402-403. “Particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation.” *Id.*, at 403. “[S]ince the Judiciary Act of 1789,” Congress has determined that appellate review should generally wait until after final judgment and “[a] judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.” *Id.*

B. Petitioners Cannot Demonstrate a “Clear and Indisputable” Right to Relief.

Petitioners do not have a “clear and indisputable” right, under all the circumstances, to determine which documents are produced in discovery. Contrary to the repeated assertions of petitioners and their *amici*, Rule 26(b) does not require any particular procedure for determining relevance and does *not* grant the producing party the unlimited or unilateral right to determine relevance. As the Third Circuit recognized, neither the text of Rule 26(b) nor decisions applying the Rule forbid a district court from exercising its broad discretion to frame the contours of discovery based on the particular facts of the case before it. Pet.App. 2a-4a.

Nor has this Court dictated how district courts should determine relevance. Rather, this Court has construed relevance “broadly.” *Oppenheimer Fund, Inc.*, 437 U.S. at 351. The Rules have long recognized that “[s]ince decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required” at this stage of the case. *Advisory Committee’s Notes to 1970 Amendment to Federal Rule of Civil Procedure 26*. Consistent with that understanding, this Court has affirmed that “the question of relevancy is to be more loosely construed at the discovery stage than at the trial.” *Kerr*, 426 U.S. at 399 (internal citations omitted; internal quotation marks omitted).

Those principles have never changed—the commentary to the 2015 Amendments to Rule 26 expressly directs that although the Rule’s language allows only discovery “of any matter relevant to any

party's claim or defense," that includes a variety of materials. Discovery is not "foreclosed by the [2015] amendments," and relevance in the discovery context includes "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness," as well as discovery that may "support amendment of the pleadings to add a new claim or defense." *Advisory Committee's Notes to 2015 Amendment to Federal Rule of Civil Procedure 26*.

Indeed, petitioners acknowledge that the district court could have entered the challenged order if petitioners had engaged in "discovery misconduct," and they place heavy emphasis on the absence of a formal finding. Pet. 12. Even if prior evidence of discovery misconduct were required (and it is not), the experience of the prior claw-back process obviated the need and opportunity for such a finding. The record in this case established that petitioners sought to claw back more than 150,000 documents, mostly on relevancy grounds. When challenged, petitioners withdrew approximately two-thirds of their claw-back requests rather than defend them in front of the district court, thereby avoiding a formal finding of wrongful conduct.

When it came time to brief and argue the CMO, respondents pointed to petitioners' claw-back experience as evidence of the kinds of documents that could be removed from the case if petitioners made their own relevance determinations. Resp.App. A103-A165, A191-A195. Petitioners were given the opportunity to rebut that argument. After hearing both sides, the district court found specifically that petitioners had "not shown that reviewing information for relevance before

production . . . is appropriate in this litigation.” Pet.App. 24a. As discussed above, this was an informed and appropriate application of the district court’s discretion.

In an effort to make the district court’s order appear unusual, petitioners repeatedly represent that the Sedona Conference has advised that Federal Rule of Evidence “502[]does 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.” Pet. 10 (quoting *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 95, 137 (2016)); see also Pet. 32 (same). But those representations do not survive scrutiny.

The 2016 commentary that petitioners cite is heavily reliant upon an earlier, more detailed, Sedona Conference analysis. See *Sedona Conference Commentary*, 17 Sedona Conf. J. at 137 & n.69, relying upon Martin R. Lueck & Patrick M. Arenz, *Rule 502(d) & Compelled Quick-Peek Productions*, 10 Sedona Conf. J. 229 (2009) (“2009 Commentary”). The *2009 Commentary* explicitly recognizes that even where privileged materials—entitled to greater protection than potentially irrelevant materials—are at issue, courts not only can but should compel production of “files without a *privilege* review” where, as here, “parties are repeatedly refusing to produce relevant documents” and therefore have “forfeited their right to review their documents.” *2009 Commentary*, 10 Sedona Conf. J. at 235 (emphasis added). That logic applies with even greater force here, where the district court allowed a privilege screen and two relevance screens, and the only issue is petitioners’ desire for a *third*, unilateral relevance screen.

Petitioners' analysis primarily focuses on Rule 26(b), but petitioners and their *amici* also reference Rule 34. *See* Pet. 6, 9, 16, 17, 31; *see also* Twelve Companies *Amicus* brief 20-23. Rule 34 does not change the analysis. Rule 34(a) substantively incorporates the scope of discovery set forth in Rule 26(b). To the extent petitioners challenge the procedure the district court adopted as inconsistent with Rule 34, this Court has made clear both that "Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation" and that "[t]he propriety of the use to which it is put depends upon the circumstances of a given case." *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 206 (1958). For the reasons discussed above, the district court's "accommodation of the Rule" to the policies and purposes of discovery rules were amply justified under the unique circumstances of this case. *See id.* In any event, the petition's Question Presented refers only to Fed. R. Civ. Pro. 26(b), *see* Pet. i; any additional issue regarding Rule 34 is not "fairly included" in the Question Presented. *See* Supreme Court Rule 14.1(a).

C. Ample Caselaw Supports the District Court's Order.

There is nothing extraordinary or unusual about the district court's CMO. Petitioners simply cannot argue that they have an "indisputable right to relief" when, since the 2015 Amendments to Rule 26, other courts have ordered the production of documents containing specific search terms without a manual review for relevance. *See, e.g., Consumer Fin. Prot. Bureau v. Navient Corp.*, 2018 WL 6729794, *2 (M.D. Pa. Dec. 21, 2018) (court ordered production of all non-privileged documents

mentioning “Navient” or “Pioneer” without additional review for relevance and with no showing of misconduct); *Littlefield v. NutriBullet, L.L.C.*, 2017 WL 10439692, *4 (C.D. Cal. December 20, 2017) (“Plaintiffs shall submit a set of keywords. . . Defendant shall . . . produce all resulting hits except those protected from disclosure by a privilege. Defendant may not withhold documents from the production based on relevance.”).

These recent cases are in line with prior cases ordering production of documents that contain specific search terms, or even full custodial files. *See, e.g., Progressive Cas. Ins. Co. v. Delaney*, 2014 WL 3563467, *12 (D. Nev. July 18, 2014); *UPMC v. Highmark, Inc.*, 2013 WL 12141530, *2 (W.D. Pa. January 22, 2013); *Carrillo v. Schneider Logistics, Inc.*, 2012 WL 4791614, *11 (C.D. Cal. October 5, 2012); *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, 2007 WL 2758571, *19 (C.D. Cal. September 18, 2007); *Williams v. Taser Int’l, Inc.*, 2007 WL 1630875, *6 (N.D. Ga. June 4, 2007); *Tulip Computers Int’l B.V. v. Dell Computer Corp.*, 2002 WL 818061, *7 (D. Del. April 30, 2002).

Courts have used claw-back provisions in discovery orders, particularly to protect parties from inadvertent production of privileged or confidential materials. *See, e.g., Rajala v. McGuire Woods, LLP*, 2013 WL 50200, *1-*6 (D. Kan. January 3, 2013) (“Clawback arrangements are specifically discussed in the 2006 Advisory Committee Note to Federal Rule of Civil Procedure 26(f) as a way to reduce discovery costs and minimize the risk of privilege waiver.”). *See also In re: Testosterone Replacement Therapy Products Liability Litigation*, 301 F.Supp.3d 917, 924-928 (N.D. Ill. 2018); *Irth Solutions, LLC v. Windstream Communications*

LLC, 2017 WL 3276021, *9-*15 (S.D. Ohio August 2, 2017); *Advisory Committee's Notes to 2006 Amendment to Federal Rule of Civil Procedure 26*.

In these cases, the use of relevance screens and claw-back procedures was governed by their specific facts. Petitioners' and *amici's* bald assertion that if this Court denies certiorari, these procedures will become the norm in all future cases is unfounded and insufficient to meet the high bar for mandamus relief. *Cf.* DRI *Amicus* brief 4, 13. What is, and will continue to be, the norm is that district courts will fashion discovery plans to fit the cases in front of them.

Petitioners' repeated assertion that they will be forced to produce "millions" of irrelevant documents is simply not supported by the record. The challenged provision of the CMO concerns only a limited set of key custodians. Resp.App. A178. Many of these custodians are the key individuals responsible for engaging in the alleged collusion and price increases directly at issue in this litigation. Resp.App. A178-1-A181. These individual custodial files typically are not large. Resp.App. A179-A180. And although respondents continue to believe the best course would have been full production of these files, the district court exercised its discretion to fashion a discovery plan that balances respondents' need for relevant information with the burden to petitioners of producing that information, while at the same time recognizing petitioners' demonstrated problems with determining relevance.

In the era of e-discovery, no discovery plan is perfect. The decision to exclude the files of some custodians undoubtedly will leave relevant documents out of the case. And within the files that

are searched, even the best search terms are bound to miss some relevant documents. In this case, petitioners will get the benefit, and respondents will bear the risk, that relevant documents will be missed by these objective screens.

Petitioners' approach, by contrast, would tilt the discovery scale inappropriately toward petitioners by allowing them to (1) refrain from searching certain files at all, (2) refrain from reviewing un-"hit" documents in the files they do search, and (3) remove "hit" documents that they unilaterally deem "irrelevant," all without any possibility of judicial review.

The CMO is an appropriate and balanced exercise of the district court's discretion. It provides petitioners two relevance screens up front. It provides extensive safeguards for petitioners, including a strict protective order, the ability to remove privileged documents, and a claw-back process. In the unlikely event that these extensive safeguards somehow prove to be inadequate, the district court continues to monitor the case developments and modify its approach. Pet.App. 25a. *See Kerr*, 426 U.S. at 403-404. *See also Cheney*, 542 U.S. at 380-381; *Ex parte Fahey*, 332 U.S. at 260.

In sum, this case does not present any fundamental question about the requirements of Rule 26, nor does it present a conflict among the federal courts of appeals or with this Court's case law. Rather, it involves a highly fact-bound, case-specific inquiry into whether the district court in a multidistrict litigation properly employed its exceedingly broad discretion when it issued a case management order. The Third Circuit properly

exercised its own discretion to deny mandamus relief—further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM TONG
Attorney General of Connecticut

* CLARE KINDALL

Solicitor General

W. JOSEPH NIELSEN

ROBERT J. DEICHERT

Assistant Attorneys General

165 Capitol Avenue

Hartford, CT 06106

(860) 808-5261

Clare.Kindall@ct.gov

Counsel for State of Connecticut and Liaison

Counsel for Respondent States

* *Counsel of Record*

ROBERTA D. LIEBENBERG

JEFFREY S. ISTVAN

Fine, Kaplan and Black, R.P.C.

One South Broad Street, 23rd Floor

Philadelphia, PA 19107

(215) 567-6565

rliebenberg@finekaplan.com

Lead Counsel for the End-Payer Plaintiffs

DIANNE M. NAST
Nastlaw LLC
1101 Market Street, Suite 2801
Philadelphia, PA 19107
(215) 923-9300
dnast@nastlaw.com
Lead Counsel for the Direct Purchaser Plaintiffs

JONATHAN W. CUNEO
Cuneo, Gilbert & Laduca LLP
4725 Wisconsin Avenue, NW, Suite 200
Washington D.C. 20016
jonc@cuneolaw.com
Lead Counsel for Indirect Reseller Plaintiffs

WILLIAM J. BLECHMAN
Kenny Nachwalter P.A.
1441 Brickell Avenue, Suite 1100
Miami, FL 33131
(305) 373-1000
wblechman@knpa.com
*Counsel for the Kroger Direct Action Plaintiffs and
Liaison Counsel for Direct Action Plaintiff*

**COUNSEL FOR THE INDIVIDUAL
RESPONDENT STATES**

STEVEN T. MARSHALL
Attorney General of Alabama

KEVIN CLARKSON
Attorney General of Alaska

TALAUEGA ELESALO ALE
Attorney General of American Samoa

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

XAVIER BECERRA
Attorney General of California

PHILIP J. WEISER
Attorney General of Colorado

KATHLEEN JENNINGS
Attorney General of Delaware

KARL A. RACINE
Attorney General of District of Columbia

ASHLEY MOODY
Attorney General of Florida

CHRISTOPHER M. CARR
Attorney General of Georgia

LEEVIN TAITANO CAMACHO
Attorney General of Guam

CLARE E. CONNORS
Attorney General of Hawaii

LAWRENCE G. WASDEN
Attorney General of Idaho

KWAME RAOUL
Attorney General of Illinois

CURTIS T. HILL
Attorney General of Indiana

THOMAS J. MILLER
Attorney General of Iowa

DEREK SCHMIDT
Attorney General of Kansas

DANIEL CAMERON
Attorney General of Kentucky

JEFF LANDRY
Attorney General of Louisiana

AARON M. FREY
Attorney General of Maine

BRIAN E. FROSH
Attorney General of Maryland

MAURA HEALEY
Attorney General of Massachusetts

DANA NESSEL
Attorney General of Michigan

KEITH ELLISON
Attorney General of Minnesota

LYNN FITCH
Attorney General of Mississippi

ERIC S. SCHMITT
Attorney General of Missouri

TIMOTHY C. FOX
Attorney General of Montana

DOUGLAS J. PETERSON
Attorney General of Nebraska

AARON D. FORD
Attorney General of Nevada

GORDON J. MACDONALD
Attorney General of New Hampshire

GURBIR S. GREWAL
Attorney General of New Jersey

HECTOR BALDERAS
Attorney General of New Mexico

LETITIA JAMES
Attorney General of New York

JOSHUA H. STEIN
Attorney General of North Carolina

WAYNE STENEHJEM
Attorney General of North Dakota

EDWARD E. MANIBUSAN
Attorney General of Northern Mariana Islands

DAVE YOST
Attorney General of Ohio

MICHAEL J. HUNTER
Attorney General of Oklahoma

ELLEN F. ROSENBLUM
Attorney General of Oregon

JOSH SHAPIRO
Attorney General of Pennsylvania

DENNISE N. LONGO QUIÑONES
Attorney General of Puerto Rico

PETER F. NERONHA
Attorney General of Rhode Island

ALAN WILSON
Attorney General of South Carolina

JASON R. RAVNSBORG
Attorney General of South Dakota

HERBERT H. SLATERY III
Attorney General of Tennessee

SEAN D. REYES
Attorney General of Utah

THOMAS J. DONOVAN, JR.
Attorney General of Vermont

MARK R. HERRING
Attorney General of Virginia

ROBERT W. FERGUSON
Attorney General of Washington

PATRICK MORRISEY
Attorney General of West Virginia

JOSHUA L. KAUL
Attorney General of Wisconsin

BRIDGET HILL
Attorney General of Wyoming