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

REPLY TO BRIEF IN OPPOSITION

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The Rule 29.6 Statement included in the petition for a writ of certiorari, as updated by the brief in opposition for respondents, remains accurate.

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The case management order (CMO) at issue here states—in language so damning respondents never quote it—that petitioners "may not withhold prior to production any documents based on relevance or responsiveness." App. 8a. That unequivocal language both defies Rule 26(b) and belies respondents' claim that the obligation to produce irrelevant documents is merely the order's "incidental[]" effect. Opp. 24.

Rule 26(b)(1) is explicit: discovery is limited to nonprivileged matter "relevant to any party's claim or defense." Rule 26(b)(2)(C)(iii) is equally explicit: district courts "must limit" the "extent of discovery" to "the scope permitted by Rule 26(b)(1)." Both the CMO and the Third Circuit's ruling upholding it flout these Rules. Respondents' quotation of Rule 26 "in relevant part" (Opp. 21) entirely omits Rule 26(b)(2), which imparts a *duty*—not "discretion" (Opp. 3)—to enforce the relevance requirement. That omission is tantamount to confessing error.

The Third Circuit's endorsement of this flagrant Rules violation is not limited to "the unique circumstances of this case." Opp. 4. Rather, the court relied on district courts' "wide latitude in controlling discovery" and "broad" discretion "to compel the production of documents"—factors present in *every* case. App. 3a. And whether district courts are adjudicating antitrust claims, MDL proceedings, or other cases, their discretion does not authorize them to "disregard [the Rules'] plainly expressed limitations." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 121 (1964).

The Third Circuit's refusal to enforce Rule 26(b) breaks squarely from five circuits' decisions granting mandamus to rein in district court orders permitting

discovery of irrelevant material. Respondents try to distinguish those decisions as cases where the discovery proponents "*sought* irrelevant material." Opp. 21. That is equally true here. At respondents' urging, the CMO's sweeping text bars withholding "any" irrelevant documents. Irrelevant materials will not just slip in through a window inadvertently left open. They will come in through the front door, at the CMO's express direction.

Respondents say Rule 26(b)'s requirement is satisfied by use of "agreed custodians," "search terms," and post-production "claw-backs." Opp. 3. But those tools are not a *substitute* for relevance review. Using only agreed custodians and search terms produces vastly overinclusive results, and the Rules allow clawbacks to remedy *inadvertent* productions of *privileged* material, not *court-ordered* productions of *irrelevant* material. Pet. 31–32. As Judge Phipps's dissent explained, "nothing in the civil rules permits a court to compel production of non-responsive and irrelevant documents," and courts may not circumvent that limitation by allowing "the review and potential return of the documents" afterwards. App. 4a, 5a.

Finally, respondents manufacture grounds for the CMO in the conduct of a few petitioners earlier in discovery. But neither court below even *hinted* that any petitioner has "demonstrated [a] failure to accurately determine relevance" (Opp. 3), much less that the CMO had to do with remedying alleged misconduct.

In sum, this case is not simply a "pretrial discovery dispute over a relevance objection." Opp. i. The CMO "constitutes a serious and exceptional error" (App. 4a (Phipps., J.)) that upends "the accepted and usual course of judicial proceedings." S. Ct. R. 10(a).

Amicus briefs from Fortune 500 companies, the Electronic Discovery Institute's president, and leading trade and bar associations attest that the decision below is manifestly erroneous and urgently warrants review. This Court should grant certiorari and confirm that Rule 26(b) is not a suggestion to be honored when district courts think it "appropriate" (App. 17a), but rather a mandate to be "firmly applied" in every case. *Herbert* v. *Lando*, 441 U.S. 153, 177 (1979).

I. The CMO is not "tailored" to any "unique circumstances."

A. The decision below is not case-specific.

The CMO is a meat cleaver, not a scalpel, and the Third Circuit cited no case-specific reasons for sustaining it. It cited district courts' "wide latitude" over "discovery" and "broad" discretion "to compel the production of documents" (App. 2a, 3a)—points common to every case. It stated that using agreed-upon "custodians" and "search terms" will adequately "narrow" the production (App. 3a)—a point common to every case involving electronic discovery. And it cited the CMO's confidentiality and "claw back" provisions (*ibid.*)—which are at best mitigating measures, not justifications for compelling the production of irrelevant documents.

None of this reasoning is "fact-bound" or "unique" to this case. If not reversed, the disclose-first-dispute-relevance-later approach will fuel a disturbing trend confirmed by respondents' own cases (Opp. 33–34) and multiple national amici.

B. Antitrust claims and multi-district litigation are not exempt from Rule 26(b).

Respondents say it is necessary to upend bedrock relevance principles because, without extra "context," parties cannot tell whether documents are relevant to antitrust claims, and because these are MDL proceedings. Opp. 23, 22. Rule 26 contains no exception for either situation.

According to respondents: "In an antitrust conspiracy case of this scope," petitioners "may simply lack the information necessary to assess whether given materials are relevant." Opp. 23. This is an argument for amending Rule 26, not ignoring it. Respondents point to nothing that distinguishes this case from others where antitrust plaintiffs claim that seemingly innocuous communications furthered a conspiracy. Indeed, plaintiffs in myriad areas—such as employment discrimination and insider trading—could claim that the relevance of emails is hard to discern without "context." The drafters of Rule 26 were fully aware of the need for "context," but deliberately permitted parties to withhold irrelevant documents.

The notion that district courts have "more than the usual discretion" in MDL cases (Opp. 22–23) is foreclosed by Congress's mandate that MDL rulings "not [be] inconsistent with * * * *the Federal Rules of Civil Procedure*." 28 U.S.C. 1407(f) (emphasis added); see *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 496–497 (1933). Courts cannot "unsettle the straightforward language" of § 1407(f) and Rule 26(b), which is "mandatory" and thus "impervious to judicial discretion." *Lexecon* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40, 35 (1998). "MDLs are not some kind of judicial border country," where the Rules are

"hortatory." *In re: Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020). "[A]n MDL court must find efficiencies within the Civil Rules, rather than in violation of them." *Id.* at 845.

C. So-called "relevance screens" and "claw-backs" do not satisfy Rule 26.

1. Respondents state that petitioners' documents will undergo "two relevance screens—agreed custodians and agreed search terms." *E.g.*, Opp. 3. These screens "will produce *relevant* documents," they say, and "[n]othing in the Federal Rules requires" a "third" and "unreviewable" relevance screen. Opp. 26, 2, 25. Respondents are doubly mistaken.

First, petitioners are not requesting a "third" relevance review, only their Rules-given right to *one* such review. Without that review, producing all custodial documents containing keywords will be vastly "'over-inclusive,'" resulting in "'large numbers of irrelevant documents.'" Pet. 30 (quoting cases). In a Commerce Department study of keyword searches, "the median precision of all searches was 26.7%"—meaning "73.3% of the material tagged" was "irrelevant." Twelve Companies Amicus Br. 6. The CMO's use of custodians and search terms for "screening" therefore fails to exclude documents that respondents are not entitled to discover—i.e., to *limit* discovery to its required scope.

Respondents' assertion that screens "produce *relevant* documents" (Opp. 25) is thus woefully incomplete. In their view, if a net lands *some* fish that may legally be caught, illegal fish, no matter how many, are "incidental[]." Opp. 24. That approach violates the Rules. In 2015, this Court deleted from Rule 26(b) the phrase "reasonably calculated to lead to the discovery of admissible evidence," citing its "misuse" to

"define the scope of discovery." Pet. 20–21. Tellingly, the district court here invoked that very phrase. App. 25a.

Second, ordinary pre-production relevance review is not "unreviewable." Opp. 26. If respondents believe petitioners have withheld relevant material, they can move "to compel disclosure" under Rule 37(a)(3)(B)(iv). If the motion is granted, "failure to obey" the resulting order will be sanctionable under Rule 37(b)(2)(A).

2. Respondents oddly suggest that any "reference" to Rule 34 is not "'fairly included' in the Question Presented." Opp. 33. Yet the first paragraph of the Question Presented quotes Rule 34 (Pet. i), which is simply the procedural mechanism for enforcing Rule 26(b). The mandatory duty imposed by Rule 26(b)(2)(C)(iii), moreover, is independent of Rule 34 objections: "On motion *or on its own*, the court *must limit* the frequency or extent of discovery * * * if it determines that * * * the proposed discovery is outside the scope permitted by Rule 26(b)(1)." (Emphasis added.) However "flexible" Rule 34 may be (Opp. 33), courts have no flexibility to jettison the relevance requirement.

3. Nor are clawbacks proper relevance "screens." Respondents' own cases confirm that the Rules permit clawbacks to remedy only inadvertent "privilege waiver[s]" (Opp. 34), not court-ordered productions of irrelevant material. Pet. 31–32. As Judge Phipps explained, courts cannot justify "compel[ling] production of non-responsive, irrelevant documents simply by establishing a period of time afterwards for the[ir] review and potential return." App. 4a.

The ruling below has major implications for every civil case that proceeds to discovery. A system where

"production comes first, followed by objections" and "clawback[s]" (*ibid.*) breaks "from the accepted and usual course of judicial proceedings." S. Ct. R. 10(a). If Rule 26(b) permits inverting the relevance process, that far-reaching ruling should come from this Court.

D. The CMO was not based on petitioners' conduct.

Unable to defend the reasoning of the courts below, respondents concoct a rationale of their own—alleged discovery misconduct by five of 75 defendants. Respondents spend pages chronicling allegations concerning earlier "clawbacks" (Opp. 12–14, 31–32)—allegations not credited by either court below.

There was no misconduct. After the district court ordered the States to produce millions of documents collected in their investigations, it gave petitioners just 30 days to "claw back" irrelevant documents. Many petitioners submitted no clawback requests. A few made, and later withdrew, certain clawback requests. But there was nothing nefarious about this. Midway through many of the clawback periods, a new complaint added more than 100 products to the case. The withdrawals of many clawback requests thus reflected that many documents were newly relevant, and the withdrawal of others simply reflected a desire to avoid litigating costly document-by-document disputes—not a concession of relevance. *Every single dispute was resolved without judicial intervention*. Thus, respondents' claims do not justify prohibiting any petitioner, let alone all of them, from "determining relevance." Opp. 14.

Most telling of all, respondents made these claims below, and neither court mentioned them. Respondents say the district court was "[c]oncerned" about

"previous problems with petitioners' relevance determinations." Opp. 2. But to support this tale, they cite only the court's statement that "petitioners had 'not shown that reviewing information for relevance before production * * * is appropriate in this litigation.'" Opp. 31–32 (quoting App. 24a) (respondents' ellipses). That is not an expression of "concern," much less a misconduct finding.

Finally, these clawback disputes involved just five defendants (three defendants if affiliates are grouped together). Even if credited, they cannot justify depriving dozens of other companies of their rights. *Compagnie des Bauxites de Guinee* v. *Ins. Co. of N.A.*, 651 F.2d 877, 886 (3d Cir. 1981) ("[Sanctions imposed for] other insurers' failure to produce the requested documents should not apply to these three companies [that complied.]"), *aff'd*, 456 U.S. 694 (1982).

II. The decision below cannot be squared with this Court's precedents.

The decision below flouts this Court's longstanding insistence that Rule 26(b)'s relevance requirement "be firmly applied." *Lando*, 441 U.S. at 177. That teaching has even greater force after this Court's recent amendments to the rule. Pet. 20–22.

Respondents dismiss *Lando* as a defamation case that "expressly disavowed any view on relevancy." Opp. 27. Yet the Court relied on Rule 26(b) in refusing to bar discovery into newspapers' editorial processes. Observing that the Rules must "'be construed to secure the just, speedy, and inexpensive determination of every action,'" the Court stated: "To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to

restrict discovery" to avoid "'undue burden or expense.'" 441 U.S. at 177 (citations omitted). That is not "disavow[ing] any view on relevancy." Opp. 27.

Respondents also avoid the *reason* why "class certification rules, not discovery rules, governed identification of plaintiff class members" (Opp. 27) in *Oppenheimer Fund, Inc.* v. *Sanders*: Because the "attempt to obtain the class members' names and addresses cannot be forced into the concept of 'relevancy,'" it was outside "the scope of legitimate discovery" under "Rule 26(b)(1)." 437 U.S. 340, 352, 354 (1978).

Likewise, in enforcing Rule 35's limits on examinations, *Schlagenhauf* emphasized Rule 26(b), noting that the Rules, while "liberally construed," "should not be expanded by disregarding plainly expressed limitations." 379 U.S. at 121. And in *Republic of Argentina* v. *NML Capital Co., Ltd.*, the Court permitted the discovery sought precisely because it was "relevant," refusing to craft atextual exceptions to Rule 26(b). 573 U.S. 134, 139 (2014).

Citing the Advisory Committee Notes to the *1970* Rules, respondents say relevance is construed "more loosely" at "the discovery stage" (*Kerr* v. *U.S. Dist. Ct.*, 436 U.S. 394, 399 (1976))—and that this "ha[s] never changed." Opp. 30. But this Court has long prohibited courts from ignoring the Rules' "plainly expressed limitations." *Schlagenhauf*, 379 U.S. at 121. And if respondents—including 49 States, the District of Columbia, and four territories—think this Court's 2000 and 2015 amendments made no change to Rule 26(b), that is a powerful reason to grant certiorari.

III. The decision below creates a split with five circuits' mandamus decisions.

Five circuits have granted mandamus to reverse discovery orders requiring production of irrelevant material. Pet. 23-28. Respondents say these cases are distinguishable because, here, "irrelevant documents" will only "*incidentally* be produced." Opp. 24. Not so.

There is no dispute that respondents advocated the CMO's sweeping prohibition on withholding "any documents based on relevance or responsiveness." App. 8a. And "[t]here is no dispute that the order compels the production of a volume of non-responsive and irrelevant documents." App. 4a. Having supported this order, respondents cannot be heard to say they have not "*sought* irrelevant material." Opp. 24.

Respondents note (Opp. 25) that in *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003)—where the district court similarly ordered discovery of proprietary databases without allowing Ford to withhold irrelevant material—the plaintiff did not "designate search terms to restrict the search." But that simply compounded the error; it was the lack of "an opportunity to object" that drove the court's decision. *Ibid.*

Respondents' only other answer is that each circuit addressed discrete "facts" and "orders requiring the production of *irrelevant* documents." *Ibid.* But the CMO bars withholding "any documents based on relevance." App. 8a. It is far broader than the orders in *Reyes* (immigration status), *Sanderson* (financial condition), *Lombardi* (death penalty protocol), *Hartley Pen* (trade secret), and *Ford* (two databases). Respondents' factual distinctions are irrelevant to these circuits' holdings that Rule 26(b) "forbid[s] discovery of irrelevant information." *In re Lombardi*, 741 F.3d

888, 895 (8th Cir. 2014); accord *In re Reyes*, 814 F.2d 168, 171 (5th Cir. 1987); *Hartley Pen Co*. v. *U.S. Dist. Ct.*, 287 F.2d 324, 328 (9th Cir. 1961); *Sanderson* v. *Winner*, 507 F.2d 477, 479 (10th Cir. 1974).

IV. This case's mandamus posture is no basis for denying review.

Respondents spend ten pages belaboring the mandamus standard. Opp. 28–37. But this Court has not hesitated to correct legal errors arising on mandamus. In reversing a mandamus denial in *TC Heartland LLC* v. *Kraft Foods Group Brands LLC*, for example, the Court overruled decades of circuit precedent misinterpreting the venue statute, mentioning the "mandamus" posture only in the case's history. 137 S. Ct. 1514, 1520 (2017). Likewise, in *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, the Court reversed a mandamus denial, holding simply that the circuit court "erred" in concluding "that the [Hague] Evidence Convention does not apply." 482 U.S. 522, 547 (1987).

In any event, a court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law" (*Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990)), and the above-cited circuit decisions confirm that the CMO constitutes a "clear abuse of discretion" warranting mandamus. *Cheney* v. *U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004); see *Ford*, 345 F.3d at 1316 (finding "a clear abuse of discretion"); *Reyes*, 814 F.2d at 170 (court exceeded "a lawful exercise of its prescribed jurisdiction"); *Sanderson*, 507 F.2d at 479 ("judicial 'usurpation of power'"); *Lombardi*, 741 F.3d at 893; *Hartley Pen*, 287 F.2d at 331. Indeed, if the Rules violation here is not "clear and

indisputable" (*Cheney*, 542 U.S. at 381), we do not know what is.

Respondents blithely suggest review can await "final judgment." Opp. 29. But these disclosures will *not* be reviewable then, as irrelevant information by definition will be irrelevant to that judgment. See also 16 Wright & Miller, Federal Practice & Procedure § 3935.3 (3d ed.); U.S. Chamber Amicus Br. 16. And once the discovery horse is out of the barn, it cannot be put back.[1] Countless trade secrets, business information, and private material—all irrelevant to this litigation—will be in the hands of petitioners' customers and competitors. Beyond the admitted leaks of sealed material (Opp. 16 n.8), "attorneys cannot unlearn what has been disclosed to them in discovery." *Chase Manhattan Bank, N.A.* v. *Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992).

The CMO reflects "a serious and exceptional error that should be corrected through a writ of mandamus." App. 4a (Phipps., J.). Given respondents' inability to mount a coherent defense, the Court should summarily reverse. At a minimum, the petition presents "a substantial allegation of usurpation of power" warranting review. *Schlagenhauf*, 379 U.S. at 111.

CONCLUSION

Certiorari should be granted.

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[1] The CMO's production deadline is now November 16, 2020, Dkt. No. 1363 at 4, No. 2:16-md-2724-CMR (E.D. Pa. Apr. 27, 2020), and new complaints continue to be filed, requiring new deadlines. App. 8a.

Respectfully submitted,

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