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

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States of America ("Chamber"), the Pharmaceutical Research and Manufacturers of America ("PhRMA"), the National Association of Manufacturers ("NAM"), and American Tort Reform Association ("ATRA") respectfully move for leave to file a brief as *amici curiae* in support of Petitioner in the above-captioned case. *Amici* tender their proposed brief with this motion.

Counsel for *amici* provided notice and sought consent from the parties. Petitioners have provided consent. Initially, Respondents consented as well, but then withdrew their consent because counsel for *amici* may represent a defendant in connection with a new complaint filed by a subset of Respondents in the Eastern District of Pennsylvania, C.A. No. 2:19-cv-06011, which was served on February 4, 2020. C.A. No. 2:19-cv-06011 has been assigned to an existing multidistrict litigation (MDL 2724), which is the district court litigation that was subject of a mandamus petition in the Third Circuit. In turn, the Third Circuit's denial of the mandamus petition is the subject of the petition for certiorari in this case.

Respondents refuse to consent to the filing of the proposed *amicus* brief until it is determined whether counsel for *amici* will represent the defendant in the newly filed action. In addition, Respondents take the position that Rule 37.6 of the Rules of this Court requires the disclosure of that representation. The defendant in question is not a party before this Court, however, so no such disclosure is required under the rules. *See* Supreme Court Rule 37.6 (requiring an *amicus curiae* to "indicate whether counsel for a party

authored the brief in whole or in part . . . .”). Nor was the defendant a party before the Third Circuit in the mandamus action. The defendant has not participated in the drafting of the proposed *amicus* brief nor furnished any consideration for the brief.

Amici bring relevant perspective that they respectfully submit will aid the Court in its resolution of the petition for certiorari.

The Chamber of Commerce of the United States of America is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation’s business community.

The Chamber and its members have actively pursued enforcement of Rule 26’s relevance and proportionality requirements and the judicial management of abusive discovery requests. *See* U.S. Chamber Inst. for Legal Reform, Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure, at 1–7 (Nov. 7, 2013) (addressing the proposed amendment to Rule 26). The Petition before this Court raises issues relating to Rule 26 that are of great concern to the Chamber.

PhRMA is a nonprofit association representing the country’s leading research-based pharmaceutical and

biotechnology companies.[1] PhRMA's mission is to advocate public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA's members are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested more than $900 billion in the search for new treatments and cures, including an estimated $79.6 billion in 2018 alone.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

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[1] A complete list of PhRMA members is available at http://www.phrma.org/about/members (last visited February 27, 2020).

The massive—and growing—burden of civil discovery deeply concerns *amici* and their members. In this case, the Special Master and District Court ignored the discovery limitations of the Federal Rules of Civil Procedure and ordered the defendants to turn over *all* documents, relevant or not, matching a list of broad search terms. *Amici* have a substantial interest in safeguarding their members' ability to maintain the confidentiality of their files except as required for the just and speedy resolution of litigation on its merits. *Amici* believe that the interests of justice are undermined by unnecessarily burdensome discovery that creates undue pressure to settle without regard to a case's merit.

Amici respectfully submit that this the attached brief setting forth its views will be helpful to the Court in its consideration of these important issues and requests that the Court grant leave to file the brief tendered with this motion.

Respectfully submitted,
February 28, 2020

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. Counsel for the Petitioners consent to the filing of this brief. Counsel for the Respondents do not.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a nonprofit association representing the country's leading research-based pharmaceutical and biotechnology companies.[2] PhRMA's mission is to advocate public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA's members are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested more than $900 billion in the search for new treatments and cures, including an estimated $79.6 billion in 2018 alone.

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municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

The massive—and growing—burden of civil discovery deeply concerns the *amici* and their members. In this case, the Special Master and District Court ignored the discovery limitations of the Federal Rules of Civil Procedure and ordered the defendants to turn over *all* documents, relevant or not, matching a list of broad search terms. *Amici* have a substantial interest in safeguarding their members' ability to maintain the confidentiality of their files except as required for the just and speedy resolution of litigation on its merits. *Amici* believe that the interests of justice are undermined by unnecessarily burdensome discovery that creates undue pressure to settle without regard to a case's merit.

SUMMARY OF THE ARGUMENT

This Court does not get many opportunities to address discovery issues. But discovery—particularly discovery of electronic material—is critical to both plaintiffs and defendants. This petition, although arising in a mandamus posture, offers the Court the chance to address an exceptionally important issue for civil litigants and to provide critical guidance for District Courts.

Rule 26 of the Federal Rules of Civil Procedure provides that district courts "*must* limit" discovery to relevant material. Fed. R. Civ. P. 26(b)(2)(C)(iii) (emphasis added). Despite that mandatory duty, the District Court in this case explicitly *prohibited* the

defendants from conducting *any* relevance review at all before production. "There is no dispute," that the court's extremely broad discovery order "compels the production of a volume of non-responsive and irrelevant documents" in derogation of its duty. Dec. 6, 2019 Order ("Order") at 3 n.1 (Phipps, J., dissenting).

Nevertheless, a divided panel of the Third Circuit refused to correct this flagrant error via mandamus, holding that the District Court committed no "clear abuse of discretion" or "clear error of law" by compelling Petitioners to produce millions of documents that the civil rules entitle them to withhold by proper objection under Rule 34(b)(2). *Id.* at 2. According to the panel majority, the discovery order's clawback procedure allowing Petitioners to seek return of confidential, irrelevant documents after their production sufficiently "protect[s] the produced information." *Id.* On a petition for rehearing en banc, eight of the remaining active judges of the Third Circuit recused.

This Court's review is now warranted. The District Court's discovery order should not stand. As Judge Phipps's dissent explains, "[e]ven with th[e] clawback provision," that order "constitutes a serious and exceptional error that should be corrected through a writ of mandamus." *Id.* at 3 n.1. The District Court's order "contravenes th[e] fundamental principle" of civil discovery that "[a] party has the option of objecting to the production of documents on responsiveness and relevance grounds *before* producing them." *Id.* For all litigants but especially businesses with millions of potentially discoverable,

confidential, electronic documents, "[t]he sequence of events in discovery is important." *Id.*

It is well established that to force a litigant to turn over otherwise private documents, a party must invoke the judicial powers of the Court under Rule 26 to compel production. But just as a court cannot compel an invasive physical or mental examination without satisfying the good-cause requirement of Rule 35, *see Schlagenhauf v. Holder*, 379 U.S. 104 (1964), "nothing in the civil rules permits a court to compel production of non-responsive and irrelevant documents at *any* time, much less before the producing party has had an opportunity to screen those documents." *Id.* (emphasis added). Since "that is exactly what the discovery order in this case does," this Court should grant certiorari and exercise its supervisory power over the lower courts to restore the fundamental structure of federal civil discovery.

This case presents a pure question of law important to all civil litigation in federal court: Whether, absent discovery misconduct, the Federal Rules always entitle litigants a meaningful opportunity for relevance review before production. As a result, this Court can grant certiorari and cleanly reverse the Third Circuit's denial of mandamus without addressing the propriety of the proposed search terms or the appropriate amount of time for pre-production document review. The Court need not wade into any fact-bound discovery issues, which remain committed to the District Court's sound discretion. In granting mandamus, an appellate court's function is "to determine the appropriate criteria and then leave their application to the trial judge on remand," and not "to actually control the

decision of the trial court." *Platt v. Minn. Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964) (internal quotation marks and citations omitted).

Petitioners and *amici* accordingly ask only that this Court correct the Third Circuit's clear legal error and order the District Court to *exercise* its discretion, as required, to select an appropriate period for pre-production relevance review. Indeed, one of the "traditional use[s]" of the writ of mandamus has been "to compel [an inferior court] to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Here, the District Court completely denied Petitioners their clear and indisputable right to lodge pre-production relevancy objections. That categorical denial was not a fact-dependent exercise of judicial discretion to manage discovery under Rule 26. On the contrary, the District Court grossly exceeded its authority to order discovery, which is limited to relevant material.

The Third Circuit likewise explicitly refused to decide whether the District Court's discovery order violated the requirements of Rule 26, instead emphasizing the District Court's "wide latitude in controlling discovery." Order at 2 ("[E]ven if the District Court's order constituted an abuse of discretion (*which we do not decide*) . . . "). In doing so, the Third Circuit shirked its duty to ensure that the district courts under its supervision are properly enforcing the mandate of the Federal Rules. This Court should correct that fundamental error now before the District Court's novel inverted approach to discovery metastasizes.

ARGUMENT

I. The Decision Below Contravenes The Sound Judicial Policy Embodied In Rule 26 That Cases Should Be Resolved On Their Merits.

When a district court orders massive document production without any opportunity to screen for relevance, the producing party faces strong and improper pressure to settle. This pressure arises from both the costs of production itself and the potential harm from disclosing irrelevant but sensitive information. A protective order restricting access to unscreened documents does not ameliorate these harms that arise from ignoring the mandatory requirements of Rule 26(b)(1) and 34(b)(2).

Moreover, the District Court's novel clawback procedure simply compounds this problem by introducing a new and potentially collateral clawback proceeding, which will impose additional unnecessary costs on the litigants and the courts. Thus, while the District Court may have believed that ignoring the process ordained by Rules 26 and 34 would expedite the litigation process, the opposite is more likely to occur both in this case and in any other case adopting this unwarranted process.

Technology has only exacerbated the problems inherent in complex civil discovery. The amount of information created and retained on electronic storage media has grown exponentially due to technological changes, cloud computing, and the declining cost of storage. All of this information is potentially recoverable, with its volume alone creating a massive

increase in the burden of searching for and producing relevant documents in litigation. And yet, experienced trial lawyers recognize the gulf between the documents produced in litigation and the far smaller universe of documents that ever become part of the trial record.

Even with pre-production relevance review, discovery is "expensive," and that expense can "force parties to settle underlying disputes." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268–69 (2004) (Breyer, J., dissenting) (advocating the use of the Court's supervisory powers to impose limits on discovery). Such disputes "use up domestic judicial resources and crowd our dockets." *Id*. at 269.

Against this backdrop, this Court recently promulgated amendments to Rule 26 to cabin the growing costs and other burdens associated with the discovery process. As The Chief Justice explained, "[t]he amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery." 2015 Year End Report on the Federal Judiciary, at 7 (Dec. 31. 2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf; *see also* Fed. R. Civ. P. 26 cmt. (2015 Amendment).

The amendments follow years of scholarship tracking rising discovery costs and the observation that the outcome of these cases is often based on these costs—as opposed to the cases' merits. *See, e.g.*,

Nicholas M. Pace & Laura Zakaras, RAND Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, at 17 (2012) (finding that median e-discovery cost is $1.8 million); Lawyers for Civil Justice, Civil Justice Reform Grp. & U.S. Chamber Inst. for Legal Reform, *Litigation Cost Survey of Major Companies* at 3-4 (2010), https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf (between 2006-2008, high end discovery costs were reported to be between $2.3 million and $9.7 million); Linzey Erickson, *Give us a Break: The (IN)Equity of Courts Imposing Severe Sanctions for Spoliation without a Finding of Bad Faith*, 60 Drake L. Rev. 887, 925 (2012) ("In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits.").

Running search terms on electronic files held by particular custodians is entirely appropriate as an initial screen for potentially relevant documents. Indeed, search terms are a critical tool for managing modern electronic discovery. Narrowly targeted search terms can help reduce discovery costs. But even precise search terms hardly guarantee that all the returns—the search "hits"—will be relevant. No matter how narrow the search terms, there will always remain a chance that the results will include irrelevant documents not subject to production under Rule 26(b)(1). As a result, the rule always requires an opportunity for pre-production review of all documents that include the search terms because such review is the only means by which irrelevant documents can be sorted out and removed from the

production. The District Court expressly and completely denied Petitioners that opportunity here.

In selecting search terms, district courts must balance the inevitable tension between underinclusive narrow terms that may miss relevant documents and overinclusive broad terms that catch everything discoverable but also turn up volumes of completely irrelevant documents not discoverable under Rule 26. Some of those irrelevant documents may also be confidential or otherwise sensitive, exacerbating the harm from unnecessary production. And as the size of an electronic production increases, so does the risk and associated harm from a leak, data breach, or other inadvertent disclosure. When assessing the tradeoffs in a particular case between the need for relevant evidence and speedy adjudication on the one hand, and the burdens and risks of overbroad discovery on the other, district courts undoubtedly have significant discretion to decide the appropriate *amount of time* for pre-production document review. All else being equal, narrowly targeted search terms may require less time for review than broad terms. But Rule 26 leaves no discretion for district courts to eliminate pre-production review entirely.[3]

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[3] Some district courts have relied on Rule 37 to order production of documents beyond the scope of Rule 26 *as a discovery sanction*. Whether such sanctions are a permissible exercise of the District Court's authority under Rule 37 is not at issue in this case. The order at issue here is the District Court's Case Management Order governing production from all parties, not a sanctions order.

By declining to even consider the lawfulness of the District Court's discovery order, the Third Circuit gave a green light for other district courts to adopt a similar discovery procedure. That procedure would incentivize requesting parties to propose search terms designed to dig up potentially embarrassing or sensitive, as well as relevant, information. The effort required to resolve these terms and manage a novel clawback procedure would be a waste of judicial resources that this Court should foreclose by granting certiorari and reversing the decision below.

II. The Third Circuit's Flawed Decision Warrants The Exercise Of This Court's Supervisory Power.

The District Court's discovery order clearly vitiates the right to object on relevance grounds under Rule 34(b)(2) and violates Rule 26, which limits the "scope of discovery" to matters that are both "relevant to any party's claim or defense" and "proportional to the needs of the case." Fed. R. Civ. P. 26(b), 34(b)(2).[4] These requirements are not optional—Rule 26 is clear that "the court *must limit* the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the proposed discovery is outside the scope permitted by Rule 26(b)(1)," i.e., any

[4] Notably, Rule 26 grants discretion to the District Court to further *limit* the scope of discovery, but a court is without power to expand the scope beyond what is authorized in the rules. *See* Fed. R. Civ. P. 26(b) (defining scope of discovery "[u]nless otherwise limited by court order").

discovery that is not relevant and proportional. Fed. R. Civ. P. 26(b)(2)(C)(iii) (emphasis added).

Indeed, as Judge Phipps pointed out in his dissent, "nothing in the civil rules permits a court to compel production of non-responsive and irrelevant documents at any time, much less before the producing party has had an opportunity to screen those documents" and "a court does not spontaneously gain authority to compel production of non-responsive, irrelevant documents simply by establishing a period of time afterwards for the review and potential return of the documents produced." Order at 3 (Phipps, J., dissenting). Given the District Court's clear violation of Rules 26 and 34 in ordering discovery beyond the authority granted by those rules, the "Court of Appeals should have corrected the error of the district judge by granting the petition for mandamus." *Cf. Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479–80 (1962) (recognizing that mandamus is not optional for certain egregious errors); *see also Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 391 (2004) (acknowledging cases where "the Court of Appeals abused its discretion by failing to issue the writ").

It is no answer to say, as the Third Circuit did in its order denying mandamus, that "district courts have, in some circumstances, ordered the production of documents without a manual relevance review." Order at 2. The fact that other district courts have violated the clear requirements of the Rules make it all the more imperative for the court to exercise its supervisory power, not less.

Certiorari is appropriate to correct the Third Circuit's error. In multiple cases, this Court has

granted certiorari to consider decisions denying mandamus petitions seeking to enforce limits on discovery. And in those cases, the Court went on to vacate the decisions denying mandamus.

In *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), this Court granted a writ of certiorari to review the Seventh Circuit's denial of the petitioner's mandamus petition, which had sought to enforce the "good cause" limitation that Federal Rule of Civil Procedure 35 places on the use of physical and mental examinations in civil discovery. Addressing the mandamus posture of the case, this Court reasoned that while mandamus would not be an appropriate remedy for a "court's determination that 'good cause' has been shown for an examination . . . absent, of course, a clear abuse of discretion," mandamus was appropriate to correct "a substantial allegation of usurpation of power in ordering any examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context." *Id.* at 239. The Court therefore vacated the decision of the Seventh Circuit denying mandamus and remanded for further proceedings.

Similarly, in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for Southern District of Iowa*, 482 U.S. 522 (1987), this Court granted certiorari to review the Eighth Circuit's denial of a mandamus petition that sought to enforce the process prescribed by the Hague Evidence Convention as the exclusive procedure for seeking discovery subject to that treaty. *Id.* at 527–28. Recognizing that "[j]udicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of

discovery requests," this Court vacated the decision denying mandamus and remanded to the Eighth Circuit. *Id.* at 546.

Together, these cases demonstrate that mandamus is a proper exercise of the Courts of Appeals' supervisory power to confine district courts from acting beyond the authority conferred by relevant discovery rules.[5] And when the Courts of Appeals neglect their responsibility to properly supervise the district courts in cases in which they act outside of their lawful authority, it is this Court's prerogative to enforce its own rules. *See Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964) ("We think it clear that where the subject concerns the enforcement of the rules which by law it is the duty of this court to formulate and put in force it may deal directly with the District Court.") (quoting *L.A. Brush Mfg. Corp. v. James*, 272 U.S. 701, 706 (1927) (brackets and ellipses omitted)); *Wilson v. Schnettler*, 365 U.S. 381, 387 (1961) (recognizing that this Court's "supervisory power over the federal rules . . . extends to policing their requirements and making certain that they are observed.") (internal quotation marks and brackets omitted).

Indeed, the Rules Enabling Act "confirms the supervisory authority that [this] Court has over lower

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[5] *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532. 1540 (2018) ("Supervisory mandamus refers to the authority of the Courts of Appeals to exercise supervisory control of the district courts through their discretionary power to issue writs of mandamus.") (internal quotation marks and citation omitted).

federal courts."[6] *Frazier v. Heebe*, 482 U.S. 641, 644–46 & n.4 (1987) (exercising the Court's supervisory power to ensure that local rules are consistent with "the principles of right and justice" and the "rules of practice and procedure prescribed by the Supreme Court") (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring)).

It is critical that this Court use its supervisory authority when confronted with flagrant disregard for the rules because a rule left unenforced is no rule at all. Rule 26's relevance requirement "is not a mere formality, but is a plainly expressed limitation on the use of that Rule." *Schlagenhauf*, 379 U.S. at 118. Indeed, *Schlagenhauf* reasoned that the good-cause requirement of Rule 35 must have independent force because the baseline relevance requirement is already imposed by Rule 26. *Id.* ("The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, *for the relevancy standard has already been imposed by Rule 26(b).*") (emphasis added). Thus, there can be no question that

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[6] This "Court also has a significant interest in supervising the administration of the judicial system." *Hollingsworth v. Perry*, 558 U.S. 183, 184, 196 (2010) (per curiam) (ordering that the broadcast of a federal trial be stayed pending a mandamus or certiorari petition because "the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting," and as "[c]ourts enforce the requirement of procedural regularity on others, [they] must follow those requirements themselves."). That interest is implicated by the decisions below, which ignore the orderly rules of procedure that are supposed to uniformly govern in every civil case.

mandamus is an appropriate remedy to correct a district court that has flagrantly refused to obey that limitation.

For all these reasons, "the requirement of Rule 26(b)(1) that the material sought in discovery [must] be 'relevant' should be firmly applied and the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]'" *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (quoting Fed. R. Civ. P. 26(b)). As Justice Stewart succinctly explained, "time-consuming and expensive pretrial discovery is burdensome enough, even when within the arguable bounds of Rule 26(b). But totally irrelevant pretrial discovery is intolerable." *Id.* at 202 (Stewart, J., dissenting).

Finally, the fact that the decision below is unpublished should not deter the Court from granting the petition. *See* Pet. at 37–38. Discovery orders cannot meaningfully be reviewed after a final District Court decision. And coerced settlements foreclose any review. Mandamus and the other extraordinary writs "are ideally suited to meet the need for occasional interlocutory review," including "to protect against the overwhelming burdens that can be imposed by unfettered discovery." 16 Wright & Miller, Federal Practice & Procedure § 3935.3 (3d ed.). As the Courts of Appeals have recognized, "the difficulty of obtaining effective review of discovery orders, the serious injury that sometimes results from such orders, and the often recurring nature of discovery issues support use of mandamus in exceptional cases." *In re Burlington Northern, Inc.*, 822 F. 2d 518, 522 (5th Cir. 1987); *see*

also Société Nationale Industrielle Aérospatiale, 482 U.S. at 527–28 ("[T]he Court of Appeals considered that the novelty and the importance of the question presented, and the likelihood of its recurrence, made consideration of the merits of the petition appropriate.").

In short, the District Court grossly exceeded its authority by ordering discovery beyond what is allowed under the Federal Rules. The Court of Appeals compounded the error by refusing to exercise its supervisory powers to confine the District Court to its lawful jurisdiction. This Court's review is therefore needed to ensure that its rules are not rendered a nullity through lack of enforcement.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,
February 28, 2020

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