

No. 26-2390

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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IN RE: UBER TECHNOLOGIES, INC.,

UBER TECHNOLOGIES, INC., RAISER-CA, LLC,  
*Defendants-Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA, SAN FRANCISCO,  
*Respondent,*

Plaintiffs in All Cases Consolidated, Transferred, or Filed in MDL  
No. 3084, *In re: Uber Technologies, Inc., Passenger Sexual Assault  
Litigation,*  
*Real Parties in Interest.*

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ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES  
DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA  
CASE No. 3:23-MD-03084-CRB  
HONORABLE CHARLES R. BREYER

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**BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA AND AMERICAN  
TORT REFORM ASSOCIATION IN SUPPORT OF UBER  
TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-CA,  
LLC'S PETITION FOR WRIT OF MANDAMUS**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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*Instructions for this form: <http://www.ca9.uscourts.gov/forms/form34instructions.pdf>*

**9th Cir. Case Number(s)**

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**Signature** s/Robert E. Dunn     **Date** April 21, 2026

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The attorney-client privilege ensures that communications between clients and their attorneys remain confidential, thus fostering full and frank disclosure. The privilege is especially important to American businesses, which rely on counsel to help navigate myriad compliance and regulatory issues. The petition for a writ of mandamus should be granted to protect this privilege for three reasons. *First*, the District Court’s decision limits the ability of litigants to contract around the default waiver rule in Federal Rule of Evidence 502 (“Rule 502”). *Second*, the fact that the petition arises from an important evidentiary ruling in multidistrict litigation weighs heavily in favor of granting mandamus relief. *Third*, the District Court erred to the extent that it based its waiver holding on Petitioner’s alleged lack of diligence or other equitable considerations.

I. Historically, the “strict responsibility rule” penalized inadvertent disclosures by holding that *any* disclosure effected a waiver of the privilege. This rule increased litigation costs, burdened courts, and chilled full and frank discussions between clients and counsel. These costs were exacerbated in the modern e-discovery

context, which often, as here, involves review and production of millions of pages of documents. In 2008, Congress replaced the “strict responsibility” regime with Rule 502. That Rule allows parties to contract around the default rule and adopt a no-waiver agreement, reducing litigation costs and promoting efficient information exchange. The no-waiver agreement under Rule 502(d) allows parties to claw back privileged documents regardless of the disclosing party’s inadvertence or reasonableness. The District Court’s order cannot be reconciled with Rule 502(d) or the pretrial order issued in this case.

**II.** This petition arises in the context of a multidistrict litigation, which weighs heavily in favor of issuing a writ. Absent mandamus relief, the District Court’s erroneous evidentiary ruling may infect hundreds or even thousands of individual trials following remand to the various transferor courts. Forcing Petitioner to wait until after final judgment in each individual trial to appeal the MDL court’s evidentiary ruling would destroy the very efficiencies that multidistrict litigation is designed to promote, because it could lead

to multiple retrials and conflicting outcomes. Given the MDL context, this Court should grant the petition and correct the error now.

**III.** The District Court erred in not reviewing the merits of the privilege claims and instead resting on the magistrate judge’s finding that Uber Technologies, Inc. (“Uber”) was not reasonably diligent. But the reasonableness of Uber’s actions is not part of the analysis under Rule 502(d) or the pretrial orders. Under the pretrial order, the parties are allowed to claw back privileged documents regardless of the inadvertence or reasonableness of the disclosing party. By incorporating a reasonableness standard, the District Court improperly conflated Rule 502(d) with Rule 502(b).

The Chamber thus urges this Court to GRANT mandamus and REVERSE the District Court.

## **ARGUMENT**

### **I. CONGRESS ADDED RULE 502 TO THE FEDERAL RULES OF EVIDENCE TO ABROGATE THE HISTORICAL “STRICT RESPONSIBILITY” RULE FOR PRIVILEGE WAIVER.**

The attorney-client privilege is critical to American businesses. Broad rules of waiver, such as the historical rule of “strict responsibility,” strip litigants of the privilege whenever a document is

inadvertently produced, no matter the reason. Today, the risk of inadvertent disclosure under such a regime is acute, as e-discovery has become the norm and productions often involve millions or tens of millions of pages. In 2008, Congress addressed these challenges by adding Rule 502, which replaced the “strict responsibility” rule with a reasonableness analysis and allows parties to contract for a no-waiver rule. When properly interpreted and enforced, Rule 502 protects the attorney-client privilege and reduces the burden of complex litigation.

**A. The “strict responsibility” approach to waiver imposes significant costs on litigants and courts.**

1. The attorney-client privilege is the oldest privilege at common law. *See Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577). “[R]ooted in the imperative need for confidence and trust,” *Trammel v. United States*, 445 U.S. 40, 51 (1980), the privilege plays a vital role in “the proper functioning of our adversary system of justice,” *United States v. Zolin*, 491 U.S. 554, 562 (1989). The privilege recognizes that a lawyer must “know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out,”

*Trammel*, 445 U.S. at 51, implicating the ethical obligation to provide “candid advice” to clients, Model Rules of Prof’l Conduct R. 2.1 (Am. Bar Ass’n 2025). The privilege thus facilitates “full and frank communication between attorneys and their clients,” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), by encouraging clients to “make full disclosure to their attorneys,” *Fisher v. United States*, 425 U.S. 391, 403 (1976). The privilege ultimately “promote[s] broader public interests in the observance of law and administration of justice.” *Upjohn*, 449 U.S. at 389.

The policy goals of frank disclosure, well-informed advice, and legal compliance are especially important in the corporate context. *See id.* at 392. In fact, “corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law,” because complex regulations do not make “compliance with the law . . . an instinctive matter.” *Id.* (citation modified). The attorney-client privilege encourages corporate officers to seek legal advice by shielding these communications from disclosure. *See Tom Spahn, Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts?*, 16 *Stan. J.L. Bus. & Fin.* 288, 302 (2011). This advice-seeking benefits

more than just the corporation and its investors: the justice system and society likewise benefit when corporations receive and follow sound legal advice. *See id.* at 309. Conversely, society would be harmed by a rule discouraging corporations from disclosing negative information to their attorneys or discouraging attorneys from communicating unwelcome advice. Waiver of attorney-client privilege over sensitive communications is thus a serious concern.

A century ago, the “traditional approach” to waiver was one of “strict responsibility.” *See* Ido Baum, *The Accidental Lawyer: A Law and Economics Perspective on Inadvertent Waiver*, 3 St. Mary’s J. on Legal Malpractice & Ethics 112, 128 n.51 (2013). “[A]ny accidental disclosure” was “considered a waiver of the privilege.” *Id.* at 128. Under this approach, as under any “strict liability regime,” “activity levels will be restricted; the free exchange of information between the client and the lawyer will be limited as if it were an environmentally hazardous activity, such as operation of a nuclear power plant.” *Id.* at 129 & n.57 (citing Richard Posner, *Economic Analysis of Law* 228 (8th ed. 2011); Steven Shavell, *Foundations of Economic Analysis of Tort Law* 196 (2004)). The possibility of inadvertent waiver leads

clients to shy away from disclosing “damaging information,” thereby precluding lawyers from providing “fully informed legal advice.” *Fisher*, 425 U.S. at 403.

Courts and academics alike have long recognized that these broad waiver rules were bad policy for several reasons: they increased litigation costs, increased the burden on courts, and undermined confidence in the privilege. See Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1608–16 (1986); accord *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 310 (N.D. Cal. 1987); *Allen v. W. Point-Pepperell Inc.*, 848 F. Supp. 423, 429 (S.D.N.Y. 1994).

2. “The risk of waiver can lead to the expenditure of extraordinary amounts of energy (and money) to avoid waiver, particularly in discovery.” Marcus, *supra*, at 1609. In *Transamerica Computer Co. v. International Business Machines Corp.*, 573 F.2d 646 (9th Cir. 1978), for instance, the court had ordered IBM to produce seventeen million pages of material within ninety days. Marcus, *supra*, at 1609–10.

IBM thereupon mounted what the Ninth Circuit called a ‘herculean effort’ to cull privileged items from this mass of material . . . . Having located seemingly privileged documents, [hired] reviewers would alert a lawyer, who would make an initial examination. If the document seemed privileged, it would be passed along to another lawyer who would determine whether it was wholly or partly privileged, in which case a partly masked copy had to be made and returned to the original location of the document. Finally, IBM stationed a lawyer . . . in the document production room to try to catch any privileged documents that had slipped through.

*Id.* at 1610 (footnotes omitted). Despite these “herculean” efforts, IBM inadvertently produced 1,138 privileged documents. *Transamerica*, 573 F.2d at 650. As this example illustrates, the risk of waiver compels companies to invest enormous resources to protect the privilege—even though such efforts cannot prevent disclosure of every privileged communication. See Wesley M. Ayres, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 Pac. L. J. 59, 76 (1986).

Beyond simply wasting resources, the imposition of draconian discovery costs to protect privilege encourages parties to “use discovery as a weapon to achieve unfair results.” George Shephard, *Failed Experiment: Twombly, Iqbal, and Why Broad Pretrial Discovery*

*Should Be Further Eliminated*, 49 Ind. L. Rev. 465, 467 (2016).

Plaintiffs file “frivolous suits” in the hope of achieving “lucrative settlements” by driving up the defendants’ litigation costs. *Id.* The needless increase in litigation costs may be beneficial to lawyers, but it is a burden on parties and deadweight loss to society.

3. Resolving disputes about privilege can be time-consuming for courts regardless of waiver rules. “But broad rules of waiver add substantially to the effort required by these claims of privilege because they force the parties to fight about things they would otherwise not dispute.” Marcus, *supra*, at 1614–15 (footnote omitted). “Beyond that, broad waiver doctrines will tempt parties to press claims of waiver even where chances of success are small, owing to the potential windfall that success would bring.” *Id.* at 1615 (footnote omitted). Courts are thus forced to resolve thorny disputes that drain judicial resources and prolong litigation.

Worst of all, broad waiver doctrines “undermine confidence in the privilege by invading initially privileged communications.” *Id.* If any production can unexpectedly result in waiver, clients will be reluctant to disclose potentially damaging information to their

attorneys, for fear that this privileged communication will be inadvertently produced. The “strict responsibility” regime thus discouraged the full and frank conversations that the privilege is designed to protect. As a result, “[l]itigation costs . . . rise and judicial efficiency . . . fall[s] as attorneys attempt to advise clients after receiving only partial information.” Spahn, *supra*, at 291.

A law-and-economics analysis likewise suggests that under broad waiver rules, “a rational client will settle for less accurate legal advice,” stopping at the point where “the net gains from the legal advice are at their maximum.” Baum, *supra*, at 140. This is because, “[w]hile [a higher] amount of information . . . yields more accurate, and thus more valuable, legal advice, it wipes out a bigger portion of the client’s value from the legal advice because the client must spend more on care.” *Id.* Consequently, “the amount of information communicated to the lawyer will not be the optimal amount when precautions costs are taken into account.” *Id.* The decrease in information is the direct result of broad waiver rules that “promote overexpenditure to avoid a waiver.” Marcus, *supra*, at 1613.

In short, although the attorney-client privilege “promote[s] broader public interests in the observance of law and administration of justice,” *Upjohn*, 449 U.S. at 389, broad waiver rules force litigants to consider whether they are rationally obliged to “settle for less accurate legal advice.” Baum, *supra*, at 140. Such an incentive does not serve the “administration of justice.” *Upjohn*, 449 U.S. at 389.

**B. In 2008, Congress abrogated the rule of “strict responsibility” through the new Rule 502, which allows privileged documents to be clawed back.**

The risk of waiver has been heightened by the proliferation of e-discovery, where attorneys must potentially review millions of documents on tight schedules. “Given the scope of modern discovery and the realities of contemporary litigation, . . . some privileged material is likely to pass through even the most tightly woven screen.” See Robert P. Mosteller et al., *McCormick on Evidence* § 93 (9th ed. 2025). With dozens of attorneys each reviewing thousands of documents per day, a minimum amount of mistaken privilege decisions becomes inevitable, even where the attorneys exercise appropriate care in their review. For the attorney-client privilege to function in the modern era of e-discovery, protection against inadvertent waiver

is necessary, since “the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.” *Upjohn*, 449 U.S. at 393; *see also id.* (“An uncertain [attorney-client] privilege . . . is little better than no privilege at all.”).

In 2008, to address the drawbacks of the “strict responsibility” regime and protect the privilege, Congress added Rule 502. As the Senate Judiciary Committee explained, the new rule served “to limit the consequences of inadvertent disclosure, thereby relieving litigants of the burden that a single mistake during the discovery process can cost them the protection of a privilege.” S. Rep. No. 110-264, at 3 (2008). In the words of the advisory committee, the rule responded to

the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product ha[d] become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.

Fed. R. Evid. 502 advisory committee’s note.

Rule 502 provides both a default rule that protects against inadvertent disclosure and a mechanism for parties to contract around

the default rule and provide even greater protections. The default rule provides:

When made in a federal proceeding or to a federal office or agency, the disclosure [of privilege material] does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error[.]

*Id.* 502(b).

Rule 502(d), which authorizes parties to contract around the default rule, provides: “A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court[.]” *Id.* 502(d). This Rule allows parties to stipulate against waiver, which reduces the costs of disclosure and helps avoid dragging courts into waiver-based toothpick wars. *See* Marcus, *supra*, at 1615; *see also* Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. Davis L. Rev. 1249, 1262 (2020) (explaining the benefit of protective orders that “protect legitimately

private information while also promoting the efficient exchange of information and an expanded bargaining range for settlement”).

Properly interpreted and enforced, Rule 502 assures businesses that they can safely provide sensitive information to their attorney without the risk that this information will be inadvertently produced and used against them.

## **II. THE MULTIDISTRICT-LITIGATION CONTEXT WEIGHS HEAVILY IN FAVOR OF GRANTING MANDAMUS RELIEF.**

Petitioner here availed itself of Rule 502(d), and the District Court confirmed that “the production of any privileged . . . information in this case shall not be deemed a waiver or impairment of any claim of privilege.” A184. And it provided procedures for the parties to “claw back” any privileged documents they had produced, without requiring any showing of inadvertence or diligence. A185–86. Despite these assurances, the District Court ruled that Petitioner’s production of privileged documents following re-review forever waived the privilege. The fact that this evidentiary ruling arises in the context of multidistrict litigation weighs strongly in favor of granting the mandamus petition and correcting this error before it infects countless trials following remand to the transferor courts.

1. Multidistrict litigation is designed to increase efficiency, reduce litigation costs, and prevent inconsistent pretrial rulings by centralizing before a single judge hundreds or thousands of lawsuits pending in multiple districts that involve common questions of fact. *See* 28 U.S.C. § 1407; *In re Phenylpropanolamine (PPA) Prods. Liability Litig.*, 460 F.3d 1217, 1229–30 (9th Cir. 2006) (discussing generally benefits of multidistrict litigation). Once the pretrial proceedings are complete, each case is remanded back to the original district court from which it was transferred to proceed to trial. 28 U.S.C. § 1407(a); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998).

An erroneous evidentiary ruling by an MDL court would thus infect hundreds (or perhaps thousands) of trials across the country. And because a party cannot take a direct appeal from an evidentiary order (or appeal under the collateral order doctrine, *see Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009)), a party prejudiced by such a ruling must wait for the conclusion of *each* individual trial following remand to the transferor court to take an appeal. *See Kalama v. Matson Navigation Co., Inc.*, 875 F.3d 297, 304 (6th Cir.

2018) (holding that orders from MDL transferee court outside Sixth Circuit were reviewable only after case reached final judgment in transferor court in Sixth Circuit); D. Herr, *Multidistrict Litig. Manual* § 9:21, p. 312 (2014) (“If [cases] are then remanded by the Panel to the districts where they were filed, they would become appealable only when the proceedings on remand were complete, and then to the circuit court having jurisdiction over the court.”).

At that point, multiple courts of appeals would be asked to weigh in, which could result in conflicting decisions. If even one appellate court reverses the MDL court’s evidentiary ruling, any trial conducted in that circuit that resulted in judgment against the aggrieved party would likely have to be redone. And if multiple courts of appeals reject the MDL court’s decision, the number of retrials could be substantial. The enormity of the potential downstream consequences flowing from a single erroneous evidentiary ruling threatens to undo the very benefits multidistrict litigation was designed to promote. It is thus “clearly more efficient to provide for review by one appellate court in one proceeding rather than leaving open the possibility that the [transferee judge’s] decisions could be reconsidered

by each of the transferor courts and reviewed by [multiple] courts of appeal.” *In re Food Lion, Inc., Fair Labor Standards Act “Effective Scheduling Litigation,”* 73 F.3d 528, 532-33 (4th Cir. 1996).

2. Mandamus is the only viable way to resolve these evidentiary issues efficiently before the cases are remanded to the transferor courts. This Court uses the five factors set forth in *Bauman v. United States District Court*, 557 F.2d 650, 654–55 (9th Cir. 1977), to determine whether to issue a writ of mandamus. Exercising mandamus to resolve thorny evidentiary issues in the context of multidistrict litigation is fully consistent with *Bauman*. The first factor—whether the party seeking the writ has other adequate means of obtaining relief, *see Bauman*, 557 F.2d at 654—weighs in favor of granting petitions in MDL proceedings because direct appeals from dozens (or hundreds or thousands) of final judgments entered by transferor courts would not provide “adequate” relief. In the normal case, the tradeoff is between appellate review in a single mandamus proceeding or in a single appeal after final judgment. But in the context of multidistrict litigation, the tradeoff is between a single mandamus action and dozens (or hundreds or thousands) of appeals after

final judgment. In short, the alternative to mandamus is not adequate—it is oppressive.

The second factor is whether “the petitioner will be damaged or prejudiced in a way not correctable on appeal.” *Bauman*, 557 F.2d at 654. This factor also weighs in favor of granting the petition. A writ of mandamus can correct an evidentiary ruling made by one court in one proceeding and bind dozens of subsequent individual trials, whereas appellate review upon final judgment for each individual trial would allow the privileged material to be used against the defendant, potentially produce inconsistent outcomes, and multiply the parties’ and judiciary’s efforts.

There are thus solid reasons for granting mandamus in any multidistrict litigation involving a thorny privilege ruling. Mandamus is especially warranted here because Petitioner has made a strong showing that the District Court’s order violates Rule 502(d)

and threatens to prejudice Petitioner’s defense by allowing Plaintiffs to use attorney-client privileged communications against it.<sup>1</sup>

**III. THE DISTRICT COURT ERRED IN NOT REVIEWING THE MERITS AND INCORPORATING A DILIGENCE REQUIREMENT INTO RULE 502(D).**

No judge has yet addressed the merits of Petitioner’s privilege arguments under Rule 502(d) regarding the 42 documents at issue. The Special Master first addressed those 42 documents, concluding that “Uber may not claw back those documents” based on “the same principles applied” by the Magistrate Judge. A36. These “principles”

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<sup>1</sup> The third, fourth, and fifth *Bauman* factors also align with granting the petition. The third factor is whether “[t]he district court’s order is clearly erroneous as a matter of law.” *Bauman*, 557 F.2d at 654–55. As explained in Part III, *infra*, the District Court clearly erred by conflating Rule 502(d) with Rule 502(b). The fourth factor is whether “[t]he district court’s order is an oft-repeated error, or manifests a persistent disregard of the federal rules.” *Id.* at 655. By granting the petition in the MDL context, this Court would be able to avoid the systemic patterns of judicial error that would otherwise ensue following remand to transferor courts. Lastly, the fifth *Bauman* factor is whether “[t]he district court’s order raises new and important problems, or issues of law of first impression.” *Id.* For the reasons given in Part I of this brief, protecting the attorney-client privilege between corporations and their attorneys, particularly in the context of MDLs, is important. *See also Brief for Petitioner* at 32, 43, *In re Uber Techs., Inc.*, No. 26-2390 (9th Cir. 2026) (analyzing *Bauman* factors in detail).

were announced in a single sentence in the Magistrate Judge’s minute entry: “Uber has waived the right to claw back documents that it originally designated as privileged and then de-designated as part of the privilege dispute resolution process overseen by [the Magistrate Judge].” A113. This decision appears to be based on the Magistrate Judge’s statements transcribed from a status conference, where the Magistrate Judge stated that “I’m not going to have that process redone”, that is, entertain Uber’s assertions of privilege over documents previously reviewed and disclosed by Uber, because “at the outset, that attention and care need[ed] to be taken to get—make the right calls.” A73.

The Magistrate Judge’s ruling thus appears to be based on an assessment of Uber’s diligence and the reasonableness of its processes. That assessment might be appropriate under Rule 502(b), which allows privileged documents to be clawed back only if they were produced inadvertently, but it is irrelevant under Rule 502(d). The Sedona Conf., *Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders*, 23 Sedona Conf. J. 1, 25 (2022) (A “Rule 502(b) analysis to determine whether a disclosure was or was not

inadvertent” is “one of the principal problems with 502(b) that 502(d) eliminates.”). Rule 502(d) allows the parties to adopt a no-waiver agreement regardless of reasonableness or inadvertence. *See Entrepreneur Media, LLC v. Meta Platforms, Inc.*, No. 25-cv-09579-VC, 2026 WL 751414, at \*1 (N.D. Cal. March 17, 2026) (rejecting plaintiff’s proposed language for Rule 502(d) order that “the Court retains discretion to consider the adequacy of a Producing Party’s privilege review procedures” because proposal would invite “Court’s after-the-fact assessment of the adequacy of the producing party’s privilege review procedures,” which “largely saps the 502(d) order of any value”). The parties adopted such an agreement here, and the district court erred in refusing to allow Uber to claw back privileged documents it disclosed after de-designating them.

Accordingly, this Court should grant the mandamus petition, correct the District Court’s erroneous application of Rule 502(d), and direct the District Court to resolve the merits of any challenges to Uber’s privilege designations for the 42 documents for which Uber claims privilege.

## CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court GRANT the petition for writ of mandamus and REVERSE the District Court's order.

Dated: April 21, 2026

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Respectfully submitted,

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