

No. 08-678

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IN THE  
**Supreme Court of the United States**

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MOHAWK INDUSTRIES, INC.,

*Petitioner,*

—v.—

NORMAN CARPENTER,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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**BRIEF OF FORMER ARTICLE III JUDGES  
AND LAW PROFESSORS AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENT**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* listed in Appendix A are former Article III judges and law professors who teach and write about evidentiary privileges and/or trial and appellate procedure within the federal system. *Amici* come together in this case because of their shared recognition of the important role played by the final judgment rule in promoting efficient litigation, preserving scarce judicial resources, and protecting the proper institutional prerogatives of the Article III district courts and courts of appeals. *Amici* all agree that, for the reasons set forth below, extending the collateral order doctrine to this case would be both unnecessary and unwise.

## SUMMARY OF ARGUMENT

By any standard, the job of the federal circuit judge is more difficult today than it was 5, 10, or 25 years ago. Data maintained by the Administrative Office of the U.S. Courts demonstrate the increasing numerical caseload of the thirteen Article III courts of appeals over these periods, even as the number of congressionally authorized judgeships has remained almost static, and the real-dollar value of judicial budgets—including salaries—has decreased. All the

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<sup>1</sup> The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. *Amici* wish to thank Meghann Ostertag, Notre Dame Law School Class of 2009, for her research assistance.

while, the average time-to-decision in the courts of appeals has increased, underscoring the extent to which these changes have had a quantifiable effect.

But the data tell only part of the story. The same period has also witnessed a subtle but profound change in the substantive nature of some classes of appellate review, especially as most of the circuit courts have come to serve as courts of first impression in immigration appeals—a body of cases comprising as much as 40% of some circuits’ annual dockets. It is impossible to quantify the uptick in difficulty of the typical appeal, but anecdotal evidence suggests that this concern is more than just a short-term aberration.

The pressures created by both the size and nature of contemporary appellate dockets are only heightened to the extent that the courts of appeals generally lack control over their jurisdiction, and are thus in danger of being overwhelmed. As a result, and as commentators and judges alike have documented, circuit courts have increasingly resorted to other, less obvious means for dealing with their overcrowded dockets, including an increase in the number of cases decided without oral argument, an increasing resort to staff attorneys and other court personnel for assistance in decisionmaking, and an increase in the number of unpublished dispositions—even in cases that appear to be creating new law.

The final judgment rule codified in 28 U.S.C. § 1291 has been an important bulwark against these added pressures. More than just a tool for increasing the efficiency of litigation, the final judgment rule serves as an important statutory barrier to what might otherwise be a deluge of interlocutory

appeals—appeals that would unduly burden the courts of appeals, undermine the case-management authority of the district courts, and inevitably tilt most civil litigation toward the party with greater financial resources.

Of course, both Congress and this Court have recognized that there will be circumstances in which an appeal after final judgment is inadequate to protect the interests of the aggrieved party, and where the case for interlocutory appeal is stronger than that for denying it. But this is not such a case. Assuming the unavailability of other means of obtaining appellate review, data suggest that there are several hundred district court decisions each year rejecting the application of the attorney-client privilege that would become immediately appealable if Petitioner’s argument were adopted.

Moreover, there are virtually no principled bases of distinction between the district court decision in this case and thousands of district court decisions every year in which the applicability of evidentiary privileges is rejected. Thus, application of the collateral order doctrine to this case risks converting the exception into the rule, thereby dramatically increasing the workload of already overburdened appellate courts while fundamentally inverting the institutional role of the trial and appellate courts in the federal judicial system. The decision below should be affirmed.

## ARGUMENT

### I. THE BURDEN ON THE ARTICLE III COURTS OF APPEALS HAS INCREASED SIGNIFICANTLY IN RECENT YEARS

In a 1976 address to the American Bar Association, then-Justice Rehnquist reflected on the dangers that increasing workloads posed for appellate judges:

The person who actually decides an appeal is an appellate judge—the person who supervises the processing of such appeals to decision, though he be called an appellate judge, is really more of an administrator. Instead of personally delving into and casting a vote on, say, ten cases, he takes part in supervising law clerks who delve into twenty or thirty cases, he approves what the law clerks have done in half or two-thirds of that number, and personally delves into and decides the remainder.

So long as the clerks and judges are capable, and they generally are, there is no denial of justice in this system. But the appellate judge who is one of its supervisors plays a different role than the appellate judge of a generation ago.

The great hallmark of judges, to my mind, has always been the idea that whatever goes out over a judge's signature, while not necessarily composed in its entirety by him, has at least been fully considered and understood by him. Any significant increase in this trend of converting judges into administrators would jeopardize that principle of judging.



Justice William H. Rehnquist, Remarks at the Annual Dinner of the American Bar Association (Aug. 9, 1976), *quoted in* Carolyn Dineen King, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 958 (1991). *See generally* PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL (1976) (documenting the changing nature of the contemporaneous appellate workload and its impact). Justice Rehnquist's warning, though, has gone unheeded. Instead, by any standard, the job of the federal circuit judge far more closely resembles that of an administrator today than it did in 1976 (or even 1986 or 1996).

**a. The Workload of Article III Appellate Judges Has Increased Significantly in the Past Decade**

According to the Administrative Office of the U.S. Courts, filings in the 12 regional U.S. courts of appeals increased 11.7% between FY1999 and FY2008. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 13, *available at* <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf> [hereinafter 2008 JUDICIAL BUSINESS].<sup>2</sup> Much of this upsurge included a 27.2% jump between FY2000 and FY2005, even though district court filings during the same period decreased by 3.4%. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2005 ANNUAL REPORT OF THE DIRECTOR 13–16, *available at* <http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf> [hereinafter 2005 JUDICIAL BUSINESS]; *see also* Richard A. Pos-

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<sup>2</sup> The Administrative Office maintains filing data by fiscal year, rather than calendar year.

ner, *Demand and Supply Trends in Federal and State Courts Over the Last Half Century*, 8 J. APP. PRAC. & PROCESS 133, 133–34 (2006) (noting the discrepancy between the increasing size of appellate dockets and the static nature of trial-court dockets). *See generally* THOMAS E. BAKER, FED. JUDICIAL CTR., A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS § 1.04, at 8–12 (2d ed. 2009).

As the absolute volume of appeals per year has increased, the number of authorized judgeships has remained virtually fixed since 1990 at 167. *See id.* at 13.<sup>3</sup> As a result, there are seven extant “judicial emergencies” in the courts of appeals,<sup>4</sup> and there has also been a marked increase in inter-circuit assignments requested of (and approved by) the Chief Justice.<sup>5</sup>

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<sup>3</sup> The data exclude the U.S. Court of Appeals for the Federal Circuit. The D.C. Circuit lost one judgeship pursuant to the Court Security Improvement Act of 2007, but the Ninth Circuit gained a judgeship as of January 1, 2009, returning the overall total to 167—or 179 including the Federal Circuit. *See* 2008 JUDICIAL BUSINESS, *supra*, at 38.

<sup>4</sup> A “judicial emergency” exists for “any vacancy where adjusted filings (i.e., filings excluding reinstated cases and weighting pro se appeals as one-third of a case) per panel are in excess of 700, or any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel.” 2008 JUDICIAL BUSINESS, *supra*, at 38.

<sup>5</sup> For example, in FY2007, Chief Justice Roberts authorized 116 inter-circuit assignments. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 11, available at <http://www.uscourts.gov/library/annualreports/2007/2007%20FINAL%20REPORT.pdf>. That figure represents a 41.5% increase over the 82 such assignments requested of—and approved by—Chief Justice Rehnquist for FY2000. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ACTIVITIES OF THE

The annual volume of *pending* appeals has also increased—from 42,224 in FY1999 to 53,071 in FY2008, a 25.7% rise. *See* 2008 JUDICIAL BUSINESS, *supra*, at 13. Thus, and unsurprisingly, the median time-to-decision in the courts of appeals increased more than 20%—from 10.5 months in 2003 to 12.7 months in 2008—with no let-up in sight. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2008, *available at* <http://www.uscourts.gov/cgi-bin/cmsa2008.pl>.<sup>6</sup>

**b. In Some Areas, the Substantive Nature of the Courts of Appeals' Workload Has Also Become More Complex**

But the data tell only part of the story. The same period has also witnessed a subtle but profound change in the substantive nature of some classes of appellate review. In petitions for review in immigration cases, for example (a category that com-

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ADMINISTRATIVE OFFICE OF THE U.S. COURTS: 2000 ANNUAL REPORT OF THE DIRECTOR 12, *available at* <http://www.uscourts.gov/library/dir rpt00/2000.pdf>.

<sup>6</sup> During the same time period, the real-dollar value of judicial budgets—including salaries—has decreased, leading to repeated calls from both Chief Justice Rehnquist and Chief Justice Roberts for congressional action to alleviate some of the financial pressures on the judiciary. *See, e.g.*, WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2–3 (2005), *available at* <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf>; JOHN G. ROBERTS JR., 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–9 (2008), *available at* <http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf>; *see also* Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 662–65 (2006) (noting the effects of economic constraints on the functioning of the courts of appeals).

prises as much as 40% of some circuits' dockets),<sup>7</sup> recent years have seen a documented upsurge in both the volume and the complexity of individual cases. *See generally* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court?: An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 14 (2007).

In particular, the Board of Immigration Appeals' adoption of "streamlining," where it affirms decisions by immigration judges without opinion, has shifted much of the burden in these cases directly to the courts of appeals. *See, e.g., Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005) (Posner, J.) ("This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."); *see also Immigration Litigation Reduction: Hearing Before the S. Comm. on the*

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<sup>7</sup> As a study by the then-Clerk of the Ninth Circuit demonstrated, immigration appeals comprised 41% of the Ninth Circuit's docket for FY2005, and 35% of the Second Circuit's. *See* Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287, 295 tbl.6 (2006) (citing 2008 JUDICIAL BUSINESS, *supra*, at 97–100 tbl.B-3); *see also* Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV. 547 (2007).

*Judiciary*, 109th Cong., 2d Sess. 16 (2006) (statement of Hon. John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit) (explaining that, as a result of streamlining, “the Court of Appeals becomes the first effective review of the immigration judge’s decision”).

It is impossible to quantify the uptick in difficulty of the typical appeal, but anecdotal evidence suggests that the changing substantive nature of federal appellate decisionmaking is more than just a short-term aberration limited to immigration cases. Indeed, one possible source of such evidence is the documented increase in the length of contemporary appellate opinions. *See, e.g.*, William M. Richman, *Much Ado About the Tip of the Iceberg*, 62 WASH. & LEE L. REV. 1723, 1726 (2005) [hereinafter Richman, *Tip of the Iceberg*].

### **c. The Courts of Appeals Generally Lack Control Over Their Jurisdiction**

The pressures created by both the quantity and quality of contemporary federal appeals are only heightened to the extent that the courts of appeals generally lack control over their jurisdiction—and are thus unable directly to control the size of their dockets. The vast majority of the courts of appeals’ jurisdiction comes from 28 U.S.C. § 1291, pursuant to which appeals from final district court decisions are as of right. *See* 28 U.S.C. § 1291 (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court.”). Similarly, the circuit courts’ jurisdiction over virtually all petitions for review of administrative action is mandatory, *see*,

*e.g.*, 28 U.S.C. §§ 1296, 2342, and the same goes for appeals of district-court orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions,” under 28 U.S.C. § 1292(a)(1).

Indeed, the only common basis for appellate jurisdiction over which the courts of appeals have any control is the power to accept interlocutory appeals certified by the district court under 28 U.S.C. § 1292(b).<sup>8</sup> Although § 1292(b) is an important means through which parties can obtain interlocutory appellate review (as discussed in more detail below), it provides the basis for jurisdiction in only a tiny fraction of the circuit courts’ overall caseload.<sup>9</sup>

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<sup>8</sup> Parties may also seek interlocutory review, in extraordinary cases, by petitioning the court of appeals for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). Mandamus is not technically a basis for appellate jurisdiction, of course, but is rather an original action in aid of appellate jurisdiction. *See Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943) (“The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”).

<sup>9</sup> Under FED. R. CIV. P. 23(f), appellate courts also have discretion to permit interlocutory appeals of class certification orders in class-action lawsuits. *See Vallario v. Vandehey*, 554 F.3d 1259, 1262 (10th Cir. 2009); *see also* 28 U.S.C. § 1292(e) (empowering the Supreme Court to “prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals” not otherwise provided for in § 1292); 28 U.S.C. § 2072(c) (empowering the Supreme Court to “define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title”).

Unlike § 1292(b), though, Rule 23(f) appeals are limited to a specific type of district court order in a specific type of case. *See*

**d. As a Result, the Courts of Appeals Have Increasingly Resorted to Alternative Means of Alleviating the Pressures on Their Dockets**

As a result, and as judges and academic commentators alike have documented, circuit courts have increasingly resorted to other, less obvious means for dealing with their overcrowded dockets. As Judge Richard Posner has observed, these measures have included an increase in the number of cases decided without oral argument, an increasing resort to staff attorneys and other court personnel for assistance at various stages of the decisionmaking process, and an increase in the number of unpublished dispositions—even in cases that appear to be creating new law. *See* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 160–75 (1996).

Reflecting on then-Justice Rehnquist’s 1976 speech to the ABA, Judge Carolyn Dineen King—the former Chief Judge of the Fifth Circuit and the Chair of the Executive Committee of the Judicial Conference of the United States from 2002 to 2005—was even more direct:

[O]ur efforts in a substantial number of the cases on our docket consists of directly supervising law clerks or indirectly supervising staff attorneys who delve into those cases and of

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*also, e.g., id.* § 158(d)(2)(A) (conferring discretion upon the courts of appeals to entertain appeals of certain issues certified by the relevant district court or bankruptcy appellate panel); *id.* § 1453(c) (conferring a time-limited discretion upon the courts of appeals to entertain appeals of district court orders granting or denying remands of class actions removed under the Class Action Fairness Act of 2005).

approving what they have done. We have not become administrators because any of us is lazy; all the judges on my court work very hard, much harder, in my view, than almost all of our peers in law practice. We have not done so because we wanted to; most of us would be more comfortable, that is, less worried about the accuracy and quality of our decisions, if we did more of the spade work ourselves. The simple fact is that we have been compelled to become administrators of an ever-larger team of lawyers by reason of the sheer volume of our caseload and the decision of Congress . . . to limit the number of judges on our court.

Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 679 (2006). And some jurists have suggested that this trend has produced a corresponding decline in the quality of appellate decisionmaking. See Stephen Reinhardt, *A Plea to Save the Federal Courts—Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 (“Those who believe we are doing the same quality work that we did in the past are simply fooling themselves.”).

Academic assessments have reached similar conclusions. In a 1996 study, Professors Richman and Reynolds documented how, as a result of these measures, and “despite their statutory and historical role as courts of appeal, the circuit courts have become certiorari courts,” William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275 (1996) (footnote omitted), forced to allocate resources based on the perceived importance of individual appeals. According



to their analysis, the appellate courts have thus created two tracks for resolving appeals. In one track, which comprises about 20% of the courts' caseload, the judges apply the "traditional" model of appellate decisionmaking; in the other, comprising the remaining 80% of appeals, "most of the work . . . is done by a large corps of staff attorneys, typically recent law graduates, assigned to the court at large rather than any particular judge." Richman, *Tip of the Iceberg, supra*, at 1725 (footnote omitted). "Typically, the judges' input amounts to a 'conference,' lasting a few hours, in which a panel approves the staff attorneys' draft opinions in as many as fifty cases." *Id.*

Even in the specific context of unpublished appellate opinions, a 2001 study by Professors Merritt and Brudney underscored the incentives that increasing docket sizes created—at least prior to the adoption of new FED. R. APP. P. 32.1—to produce non-precedential opinions. *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001) (providing a case study of the difference between published and unpublished opinions in petitions for review of NLRB decisions resolving unfair labor practice claims). *See generally* Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics, and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 21 (2005) (discussing Judge Richard Arnold's opposition to unpublished opinions, and explaining how "alternatives to traditional appellate decisionmaking can dilute the judiciary's accountability to the present and the future").

In short, and as Professor Baker has summarized, “we now take for granted what were once characterized as ‘emergency’ procedures. We have lowered our expectations for appellate procedure. We have defined down our appellate values.” Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume,”* 8 J. APP. PRAC. & PROCESS 101, 114 (2005). To be sure, there is substantial and widespread disagreement over the proper means through which to relieve the pressures on contemporary appellate courts. Nonetheless, one point seems clear: anything that increases the already overloaded dockets of the courts of appeals will only heighten the burden on individual appellate judges, and provide further incentives to resort to unconventional—and perhaps inappropriate—measures for the resolution of individual appeals.

## **II. BOTH CONGRESS AND THIS COURT HAVE CAREFULLY BALANCED THE INSTITUTIONAL ROLE OF THE COURTS OF APPEALS WITH THE NEED FOR INTERLOCUTORY APPEALS IN PARTICULAR CLASSES OF CASES**

### **a. Congress Created the Final Judgment Rule Both To Avoid Piecemeal Litigation and To Preserve the Proper Roles of the Trial and Appellate Courts Within the Federal System**

Throughout the history of the federal judiciary, a consistent bulwark against unnecessary pressure on appellate dockets has been the final judgment rule, codified at 28 U.S.C. § 1291. *See, e.g., Kerr v. United States Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (“[P]articularly 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.”). To that end, “[i]t has been Congress’ determination since the Judiciary Act of 1789 that as a general rule ‘appellate review should be postponed . . . until after final judgment has been rendered by the trial court.’ ” *Id.* (quoting *Will v. United States*, 389 U.S. 90, 96 (1967)).

More than just a tool for increasing the efficiency of litigation, the final judgment rule serves as an important statutory barrier to what might otherwise be a deluge of interlocutory appeals—appeals that would unduly burden the courts of appeals, undermine the case-management authority of the district courts, and inevitably tilt civil litigation toward the party with greater financial resources. As Justice Marshall explained, the final judgment rule

emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of “[avoiding] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.” The rule also serves the important purpose of promoting efficient judicial administration.

*Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (alteration in original; citations omitted); see also *Richardson-Merrell, Inc. v. Koller*,

472 U.S. 424, 430 (1985) (“In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by ‘piecemeal appellate review of trial court decisions which do not terminate the litigation.’” (citation omitted)).

And while protecting the dockets of appellate courts and avoiding piecemeal litigation are two of the important functions served by the final judgment rule, this Court has always been clear that the rule is no less important in protecting the authority and prerogative of the trial courts. As the Court explained in *Richardson-Merrell*, “[i]mplicit in § 1291 is Congress’ judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings.” 472 U.S. at 436.

The district court’s authority to “police the prejudgment tactics of litigants” is implicated all the more where discovery orders are at issue, since both this Court’s jurisprudence and the Federal Rules of Civil Procedure have recognized that, as Justice Powell put it, “[t]he district court before which a case is being litigated is in a far better position than a court of appeals to supervise and control discovery and to impose sanctions for its abuse.” *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081, 1087–88 (1979) (Powell, J., dissenting from the denial of certiorari).

**b. Congress Also Has Recognized the Need for Limiting Exceptions to the Final Judgment Rule**

Of course, Congress has recognized that there will be circumstances in which an appeal after final judgment is inadequate to protect the interests of the aggrieved party, and in which the case for allowing an interlocutory appeal is stronger than that for denying it. The classic example is codified in 28 U.S.C. § 1292(a), which authorizes appeals of interlocutory district court orders that (1) relate to injunctions; (2) appoint receivers or refuse orders to wind up receiverships; and (3) determine rights and liabilities of parties in admiralty cases in which appeals from final decrees are allowed. *See* 28 U.S.C. § 1292(a).

Concerned that § 1292(a) was an inadequate exception to § 1291's more general bar on interlocutory appeals, Congress in 1958 empowered district courts in certain circumstances to certify additional issues for immediate interlocutory appeal under 28 U.S.C. § 1292(b). Specifically, the section authorizes certification of an otherwise unappealable order "[w]hen a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).<sup>10</sup> The court of appeals has the discretion

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<sup>10</sup> For an early discussion of the origins and application of § 1292(b) from one of its champions, see Charles Alan Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199 (1959). *See generally* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975).

to accept or decline the certificate, but this Court has broadly construed the scope of the circuit court's jurisdiction should it permit the appeal. *See, e.g., Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (“[A]ppellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court.”).<sup>11</sup>

In extraordinary cases in which the district court declines certification (or in which certification is rejected by the court of appeals), petitions for writs of mandamus remain available under the All Writs Act, 28 U.S.C. § 1651(a). *See Cheney v. United States Dist. Court*, 542 U.S. 367, 380–81 (2004). Although these two mechanisms for obtaining review of the district court differ in significant ways, both share one common thread: a threshold determination that appeal after final judgment will be fundamentally inadequate to protect the rights of the aggrieved party, *i.e.*, that the alleged injury created by the order under review will be effectively unredressable after further proceedings, and a judgment in the particular case that the costs of appeal (for both the parties and the courts) are sufficiently outweighed by the need for prompt review.

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<sup>11</sup> There are also a modest number of statutes that provide for interlocutory appeals in specifically delineated cases, such as the Federal Arbitration Act, which allows an appeal from “an order . . . refusing a stay of any action under section 3 [of the Act].” 9 U.S.C. § 16(a)(1)(A); *see Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1900 (2009). In addition, district courts have discretion under the Federal Rules of Civil Procedure to “direct entry of a final judgment as to one or more, but fewer than all, claims or parties . . . if the court expressly determines that there is no just reason for delay.” FED. R. CIV. P. 54(b); *see also* BAKER, *supra*, § 3.05, at 47–49 (discussing the relationship between Rule 54(b) and interlocutory appeals).

**c. This Court Has Crafted the Collateral Order Doctrine As a Carefully Circumscribed Construction of § 1291**

The collateral order doctrine is a variation on this theme. Formally articulated by this Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the doctrine’s origins can be traced to an even earlier series of decisions adopting creative constructions of “finality.” *See generally* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 557–63 (1932) (describing the malleability of “finality” in case law during the first part of the century). Thus, *Cohen* was an important step in the development of a more coherent rationale for the final judgment rule’s allowance of appeals in particular classes of cases. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (“The collateral order doctrine is best understood not as an exception to the ‘final decision’ rule laid down by Congress in § 1291, but as a ‘practical construction’ of it.” (citation omitted)); *see also* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662–63 (“The need for [interlocutory appeals] must have seemed more pressing with the adoption of procedural rules that lengthened the pretrial process and made it less likely that cases would ever come to trial. One can thus see the collateral order doctrine as a result of the Rules’ creating new stages of pretrial process without changing the final judgment rule.”).

As this Court would later explain, the class of immediately appealable district court orders was limited to those that “conclusively determine the disputed question, resolve an important issue com-

pletely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Cohen*, 337 U.S. at 546 (“This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”). *See generally* BAKER, *supra*, § 3.03, at 42–45 (categorizing the criteria this Court has applied in considering the scope of the collateral order doctrine).

But the heart of the collateral order doctrine is not just the specific criteria that this Court identified in *Cohen* and its successors. Instead, it is a judgment about whether the court *ought* to permit an appeal before the case has come to its ultimate conclusion in the district court—whether the benefits of an immediate appeal outweigh the costs, in terms of both litigation and judicial resources. *See, e.g., Digital Equip. Corp.* 511 U.S. at 878–79 (“[T]he third *Cohen* question, whether a right is ‘adequately vindicable’ or ‘effectively reviewable,’ simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.”); *see also Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) (“The importance of the right asserted has always been a significant part of our collateral order doctrine.”). As Justice Souter recently explained,

In each case [in which the collateral order doctrine has been upheld], some particular



value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State’s dignitary interests, and mitigating the government’s advantage over the individual. That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is “effectively” unreviewable if review is to be left until later.

*Will v. Hallock*, 546 U.S. 345, 352–53 (2006); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945–46 (2009) (noting that district court decisions rejecting a qualified immunity defense are immediately appealable because “qualified immunity . . . is both a defense to liability and a limited ‘entitlement not to stand trial or face the other burdens of litigation’ ” (citation omitted)).

In other words, the collateral order doctrine necessarily presupposes that courts undertake a cost-benefit analysis—not with regard to the appealability of the particular order at issue, but with regard to the class of orders at issue and the impact that their appealability *vel non* may have on the “public interest.” *See, e.g., Digital Equip. Corp.*, 511 U.S. at 868 (“[We] have warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a ‘particular injustice’ averted, by a prompt appellate court decision.” (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988))) (alteration in original); *see also Richardson-Merrell*, 472 U.S. at 439 (“This Court . . . has expressly rejected efforts to

reduce the finality requirement of § 1291 to a case-by-case [appealability] determination.”); *Carroll v. United States*, 354 U.S. 394, 405 (1957) (“Appeal rights cannot depend on the facts of a particular case.”).<sup>12</sup>

These structural considerations help explain why this Court has so often emphasized the narrowness of the collateral order doctrine, the stringency of its requirements, and the need to police its boundaries carefully. *See, e.g., Will*, 546 U.S. at 350 (“[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope. . . . And we have meant what we have said; although the Court has been asked many times to expand the ‘small class’ of collaterally appealable orders, we have instead kept it narrow and selective in its membership.” (citation omitted)).

Thus, before deciding whether to extend the collateral order doctrine into new territory, this Court has always balanced—and must continue to weigh—the importance of the claimed right (and the potential deprivation that might occur without an interlocutory appeal) against the impact of a class-wide extension of appellate jurisdiction on both the workload of the courts of appeals and the case-management authority of the district courts during discovery.<sup>13</sup>

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<sup>12</sup> Focusing on the class of orders rather than the facts of the specific case is necessary in any collateral order case, since “[a]llowing appeals of right from non-final orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts, . . . a goal very much worth preserving.” *Coopers & Lybrand*, 437 U.S. at 476.

<sup>13</sup> A comparable consideration has surfaced in this Court’s jurisprudence respecting the existence of federal-question juris-

**III. EXTENDING THE COLLATERAL ORDER DOCTRINE TO DISCOVERY ORDERS DENYING THE APPLICATION OF EVIDENTIARY PRIVILEGES WOULD UPSET THAT DELICATE BALANCE**

**a. The Existence of Other Means for Obtaining Relief Undermines the Justification for Extension of the Collateral Order Doctrine**

Applying the considerations discussed above, it is clear that discovery orders finding waiver of the attorney-client privilege (or other comparable evidentiary protections) are not appropriately treated as categorically “final” under the collateral order doctrine. First, in factually appropriate cases, other means remain available for challenging district court decisions finding waivers of these privileges, including requests for certification under 28 U.S.C. § 1292(b), and/or petitions for writs of mandamus under 28 U.S.C. § 1651(a). *See, e.g., In re County of Erie*, 546 F.3d 222 (2d Cir. 2008) (granting a writ of mandamus to reverse a district court decision finding waiver of attorney-client privilege); *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc) (same); *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996) (accepting certification under § 1292(b) as to whether a promise to waive attorney-client privilege in one lawsuit waives the

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diction under 28 U.S.C. § 1331. As Justice Souter noted four years ago, “it is the rare state quiet title action that involves contested issues of federal law. Consequently, jurisdiction over actions like [the Petitioner’s] would not materially affect, or threaten to affect, the normal currents of litigation.” *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 319 (2005). In both sets of cases, this Court has been more open to modest extensions of federal jurisdiction than toward those extensions “threatening structural consequences.” *Id.*

right to claim the same privilege in a separate case). These means of obtaining review will not always be available, *see, e.g., Union County v. Piper Jaffray & Co.*, 525 F.3d 643, 647 (8th Cir. 2008) (explaining that § 1292(b) certification will not be appropriate in “typical attorney-client case[s]”), but that is precisely the point: it is only in novel or extraordinary cases that the ordinary discretion of district courts to manage discovery should be disturbed.<sup>14</sup>

Second, and relatedly, the question whether a party waived a particular evidentiary privilege is likely to be highly fact-specific. *See, e.g., XYZ Corp. v. United States (In re Keeper of the Records)*, 348 F.3d 16, 23 (1st Cir. 2003) (“Claims of implied waiver [of attorney-client privilege] must be evaluated in light of principles of logic and fairness. That evaluation demands a fastidious sifting of the facts and a careful weighing of the circumstances.” (citing 2 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE U.S. § 9:79, at 357 (2d ed. 1999))). Whereas both § 1292(b) and mandamus would allow for consideration of the very case-specific factual circumstances that might in the rare case warrant an interlocutory appeal,<sup>15</sup> a class-wide extension of appellate juris-

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<sup>14</sup> An order denying a claim of privilege may also be reviewable if the subject of the order is held in criminal contempt or is not a party to the underlying proceeding. *See generally United States v. Ryan*, 402 U.S. 530, 532–34 (1971); *Perlman v. United States*, 247 U.S. 7, 13 (1918). Such cases will—and should—be rare.

<sup>15</sup> In that regard, it is curious (if not telling) that Petitioner chose not to seek certiorari from this Court to review the Eleventh Circuit’s rejection of its petition for a writ of mandamus. *See Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1055 (11th Cir. 2008) (per curiam), *cert. granted*, 129 S. Ct. 1041 (2009).

diction would not. Moreover, the fact-intensive nature of the inquiry will also mean that privilege claims in many of these cases will be virtually inseparable from the merits, further undermining the basis for allowing a collateral order appeal. *See, e.g.*, Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 763–66 (2006).<sup>16</sup>

Thus, and as this Court noted in comparable circumstances 15 years ago, “the discretionary appeal provision (allowing courts to consider the merits of individual claims) would seem a better vehicle for vindicating serious [privilege] claims than the blunt, categorical instrument of § 1291 collateral order appeal.” *Digital Equip. Corp.*, 511 U.S. at 883; *see also id.* (“[T]he law is not without its safety valve to deal with cases where the [dispute] raises serious legal questions taking the case out of the ordinary run.”); *cf. Cheney*, 542 U.S. 367 (explaining why mandamus would be the appropriate basis for appellate jurisdiction because of the unique separation-of-powers issues raised by the district court’s sweeping discovery orders against the sitting Vice President).

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<sup>16</sup> As Robertson explains, in legal malpractice cases, “the court will not be able to decide whether privilege has been waived without examining the ‘nature and content’ of the plaintiff’s claim to determine whether the attorney’s conduct is truly at issue in the case.” Robertson, *supra*, at 766. Similarly, in cases involving exceptions to the attorney-client privilege (*e.g.*, the crime-fraud exception), “parties’ underlying claims are often based on the same alleged fraudulent conduct that could support an exception to the privilege.” *Id.* In both sets of cases, “the merits of the underlying action would again often be ‘intertwined’ with the privilege claim.” *Id.*

**b. Changes in Substantive Law Further Undermine the Justification for Extension of the Collateral Order Doctrine**

Separate from the other potential procedural vehicles through which interlocutory review could be obtained, it also bears noting that the federal judiciary and Congress have both devoted significant attention in recent years to waivers of the attorney-client privilege. This focus culminated in the 2007 proposal for new Rule 502 of the Federal Rules of Evidence, and Congress's ratification of that proposal in September 2008. *See* Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3538.<sup>17</sup> As the Advisory Committee explained, Rule 502 serves two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver.

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<sup>17</sup> Specifically, Rule 502(a) provides as follows:

When the disclosure [of information covered by the attorney-client privilege or work-product rule] is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

FED. R. EVID. 502(a).

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have 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 adv. note.

The recent addition of Rule 502 further undercuts the appropriateness of extending the collateral order doctrine to this case in at least two ways: First, it suggests that both the Advisory Committee and Congress have been particularly attentive to rectifying the underlying substantive concern implicated by orders like that which Petitioner here seeks to appeal.<sup>18</sup> Second, notwithstanding the significant attention devoted to the problem of district-court decisions finding waiver of the attorney-client privilege, the drafters of Rule 502 do not appear to have considered providing that such orders *would* be immediately appealable.<sup>19</sup>

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<sup>18</sup> Questions as to the scope of new Rule 502 might instead be particularly well-suited for interlocutory appeals under § 1292(b), given that provision's specific dedication to questions of law "as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

<sup>19</sup> As noted above, Congress *did* specifically provide for permissive interlocutory appeals of district court orders granting or denying remand of class actions removed to federal court under the Class Action Fairness Act of 2005. *See ante* at 10 n.9 (citing 28 U.S.C. § 1453(c)). If nothing else, this recent development suggests that Congress knows how to specifically so provide, when it chooses.

**c. In Any Event, the Costs of Extending the Collateral Order Doctrine to Discovery Orders Denying the Application of Evidentiary Privileges Clearly Outweigh the Benefits**

As explained above, though, even if other means of obtaining appellate review of orders such as the district court's order in this case were not available, and even if the changes in substantive law had not ameliorated the substantive issue raised by the Petitioner, the collateral order doctrine still should not apply. Instead, the question would become whether the benefit—providing the litigant with the opportunity to challenge a decision that might be effectively unreviewable after final judgment—outweighs the costs of providing an appeal as-of-right in all comparable cases.

At the outset, the number of attorney-client privilege claims that would be appealable under Petitioner's argument is particularly difficult to ascertain, but would likely be quite large. A search of Westlaw's "DCT" database for the second half of 2008 (July 1 through December 31), for example, reveals 498 cases discussing the attorney-client privilege, 234 of which included dispositions of privilege claims. Among those 234 dispositions, at least 104 included decisions that the privilege had been waived, that it did not apply, or that it applied to some communications but not others. In each of these instances, the arguments made by Petitioner here would have the same force, and extension of the collateral order doctrine to these facts would compel its extension to those, as well. Even though these figures are necessarily quite conservative—most district court decisions do not make it into



commercial databases, *see* Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 976 (2008) (“[B]etween 80% and 95% of ‘substantive’ district court opinions go unpublished . . . .”)—they suggest that the extension of the collateral order doctrine to these kinds of claims would add at least (and perhaps well over) several hundred attorney-client privilege appeals each year to already overcrowded appellate dockets.

Moreover, there are virtually no principled bases of distinction between the district court decision in this case and thousands of decisions every year in which district courts reject the applicability of *other* evidentiary privileges. Little, for example, separates the interests implicated by the attorney-client privilege from those implicated by the attorney work-product rule. *See, e.g., Montgomery County v. Microvote Corp.*, 175 F.3d 296, 300 (3d Cir. 1999) (calling for the same appealability treatment for “the attorney-client and work-product privileges”).

Only slightly more differentiates these law-practice-related privileges from other run-of-the-mill evidentiary protections designed to protect the confidentiality of communications, such as those between spouses, between patients and their doctors, or between penitents and their priests. The argument in each case is necessarily the same—that a district court order compelling disclosure of such privileged material simply cannot be remedied by a post-judgment appeal; the proverbial cat will be out of the bag.<sup>20</sup> As this Court’s decisions have implicitly

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<sup>20</sup> A similar argument would be available whenever a district court ordering disclosure rejects a claim of confidentiality based upon such grounds as trade secrecy or a confidentiality agreement.

recognized, *Cohen* is a “trans-substantive” rule, and is therefore difficult to reconcile with factual distinctions between substantively similar legal claims. Thus, the only plausible basis for treating the attorney-client privilege and the work product rule differently is because of their centrality to legal practice—not because they are normatively more important to the protected parties than the other well-recognized evidentiary privileges. *See, e.g.*, Benjamin H. Barton, *Do Judges Systematically Favor the Legal Profession?*, 59 ALA. L. REV. 453, 465–72 (2008) (suggesting that courts have often protected the attorney-client privilege more carefully for reasons unrelated to the privilege’s substance).<sup>21</sup>

These are all just pieces of a larger puzzle, but they underscore the central point—that judicially compelled disclosure of confidential information can come in many forms, and that as a result, this case makes for a singularly inappropriate extension of the collateral order doctrine, and would risk converting the exception into the rule. District courts would lose a substantial part of their discretion to control discovery and to otherwise provide for efficient case management, and, at the same time, the already overburdened appellate courts would see

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<sup>21</sup> Although the question is not squarely presented here, a decision allowing an appeal at this stage of a civil proceeding would virtually compel the allowance of an appeal in the analogous criminal context, when testimonial evidence given in secret is admitted despite a claim that it was given under a grant of immunity. *But see United States v. Poindexter*, 859 F.2d 216 (D.C. Cir. 1988) (per curiam) (rejecting a collateral order appeal where defendants claimed that their grand jury was tainted by testimony they gave to Congress under a statutory grant of immunity).

their caseloads increase dramatically, fundamentally inverting the institutional role of the trial and appellate courts in the federal judicial system. *See Firestone Tire & Rubber Co.*, 449 U.S. at 378 (“Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291.”).

### CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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## **APPENDIX**

**APPENDIX**

List of *Amici Curiae*\*

Janet Cooper Alexander  
Frederick I. Richman Professor of Law  
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Erwin Chemerinsky  
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\* Affiliations of *amici curiae* are listed for identification purposes only.

The Honorable Shirley M. Hufstedler  
Circuit Judge (1968–79)  
U.S. Court of Appeals for the Ninth Circuit

The Honorable Timothy K. Lewis  
District Judge (1991–92)  
U.S. District Court for the  
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Circuit Judge (1992–99)  
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The Honorable Abner J. Mikva  
Circuit Judge (1979–94)  
Chief Judge (1991–94)  
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Chief Judge (1986–91)  
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