Appealing Compelled Disclosures in Discovery That Threaten First Amendment Rights

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INTRODUCTION

Last year, the Supreme Court held in *Americans for Prosperity Foundation v. Bonta* that a California anti-fraud policy compelling charities to disclose the identities of their major donors violated the First Amendment.[1] That holding stems from the 1958 case *NAACP v. Alabama* where the Court held that a discovery order compelling the NAACP to disclose the names of its members violated the First Amendment right of free association because of the members' justifiable fear of retaliation.[2]

In the over sixty years since *NAACP v. Alabama*, the Court has only decided a handful of cases about how compelled disclosures of sensitive information can deter free association and thus violate the First Amendment. Those cases all concerned disclosures compelled by statutory or regulatory regimes. None addressed the context where the issue was first recognized, and where it still arises most often: civil discovery. Consequently, the doctrine was muddled before *Americans for Prosperity*, and that decision does little to clarify it. The three opinions that make up the fractured majority in *Americans for Prosperity* disagree about what standard of scrutiny applies to First Amendment associational challenges to compelled disclosures. They do not clearly explain how courts should weigh the relevant features of a compelled disclosure: the nature of the disclosed information, the governmental interest in the

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1. 141 S. Ct. 2373, 2382, 2389 (2021).
2. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

disclosure, the tailoring of the disclosure to the governmental interest, the degree of threatened harm to the disclosing party, and the risk of (and protections against) further disclosures. And they say nothing about how or whether this confused analysis applies to compelled disclosures in civil discovery, the original context of *NAACP v. Alabama*.

This article does not offer answers to these open questions. Instead, it offers an explanation for why they remain unanswered, a prediction about their importance going forward, and a proposal for how to get answers in the future—all based on the observation that the most common context for compelled-disclosure issues to arise, civil discovery orders, is the least likely to give rise to an appeal. The explanation for why these questions remain unanswered after sixty years is that appellate courts have had too few opportunities to consider which compelled disclosures violate the First Amendment. The prediction is that after *Americans for Prosperity* more litigants will argue that compelled disclosures in discovery violate their First Amendment rights. And the proposal is that courts should use the collateral order doctrine to permit immediate appeals of discovery orders compelling disclosures that threaten First Amendment rights.

In Part I, this article presents the history of the First Amendment compelled-disclosure doctrine, starting with *NAACP v. Alabama*. It explains how, although most compelled-disclosure cases are about broad statutory disclosure requirements, individual compelled disclosures in civil discovery can threaten First Amendment rights. And it explores how privacy and First Amendment values intersect with discovery policy. In Part II, this article identifies the questions that courts dealing with discovery disputes will face after *Americans for Prosperity*, both open doctrinal questions and case-specific factual questions. And it explains that they will go unanswered—to the detriment of both the development of the law and individual litigants' rights—because discovery orders are not usually appealable. In Part III, this article argues that the collateral order doctrine should be used to permit immediate appeals of discovery orders compelling disclosures that threaten First Amendment rights. And it explains why other routes to appeal will not adequately resolve the open doctrinal questions or protect First Amendment associational rights.

I. COMPELLED DISCLOSURES IN DISCOVERY THREATEN FIRST AMENDMENT RIGHTS.

A. Compelled disclosures can chill First Amendment conduct.

In *NAACP v. Alabama*, the U.S. Supreme Court held that a discovery

order compelling disclosures of group affiliations violated the First Amendment right to free association. In that 1958 case, Alabama brought suit against the National Association for the Advancement of Colored People (a nonprofit political organization whose purposes are, as the Court put it, "indicated by its name") for allegedly not complying with a state statute requiring corporations to file certain papers to qualify to do business there.[3] During litigation, Alabama sought and obtained a discovery order compelling the local NAACP chapter to produce, among other things, a list identifying all of its members.[4]

The NAACP feared that disclosing the names of its rank-and-file members would subject them to violent and economic reprisals.[5] Therefore, the NAACP refused to comply with that compelled disclosure, was held in contempt, and appealed.[6] When the appeal eventually reached the Supreme Court, it held that disclosing the names of individual members would be a substantial restraint on their exercise of the freedom of association.[7] The Court held that the First Amendment protects a right to associate based on the "close nexus between the freedoms of speech and assembly."[8] The Court explained that the right to associate was crucial to, and was protected when in the service of, any sort of advocacy or belief, including "political, economic, religious or cultural matters."[9]

The Court then weighed Alabama's interest in the disclosure it sought against the deterrent effect that the disclosure would have on the members' exercise of their First Amendment rights.[10] Notably, because the case pre-dated the Court's development of the levels-of-scrutiny approach, it did not articulate a level of scrutiny to apply when assessing the constitutionality of compelled disclosures that threaten associational rights.[11] But the Court did find that Alabama's interest in determining the extent and nature of the chapter's in-state corporate activities was not "sufficient to justify the deterrent effect" of the disclosure, given the NAACP's showing of real threats of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of

3. *Id.* at 451–52.
4. *Id.* at 453.
5. *Id.* at 462–63.
6. *Id.* at 453–54.
7. *Id.* at 466.
8. *Id.* at 460.
9. *Id.* at 460–61.
10. *Id.* at 462–63.
11. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2391 (2021) (Alito, J., concurring).

public hostility."[12] Accordingly, the Court ruled that the discovery order violated the members' right to associate.[13]

After *NAACP v. Alabama*, the Court employed similar weighing-of-the-interests approaches to hold that other required disclosures of group affiliations violated First Amendment associational rights in contexts besides civil discovery. In 1960, in *Bates v. City of Little Rock*, the Court held that certain municipalities could not constitutionally require organizations to submit membership lists to city officials.[14] In 1963, in *Gibson v. Florida Legislative Investigation Committee*, the Court held that a state legislative committee could not compel the president of a political association to produce its membership records.[15] And in 1971, in *Baird v. State Bar of Arizona*, the Court held that a state bar applicant could not be compelled to answer a question asking whether she had ever been a member of the Communist Party.[16]

The Court crystallized its weighing-of-the-interests approach and dubbed it "exacting scrutiny" in *Buckley v. Valeo*, a 1976 case challenging provisions of the Federal Election Campaign Act that compelled disclosures of (and imposed limits on) political contributions.[17] As the Court described it, exacting scrutiny requires: first, a "sufficiently important governmental interest" (more than a "mere showing of *some* legitimate governmental interest");[18] and second, "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."[19]

Buckley also made explicit a point that was implicit in *NAACP v. Alabama* (and largely taken for granted in cases following it): associational rights are constitutionally protected "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure."[20] That is to say, when assessing the potential chilling effect of a compelled disclosure on First Amendment rights, judges must consider not only (or even primarily) the

12. *Patterson*, 357 U.S. at 461–63.

13. *Id.* at 465–66.

14. 361 U.S. 516, 527 (1960).

15. 372 U.S. 539, 557–58 (1963).

16. 401 U.S. 1, 8 (1971); *see also* Roberts v. Pollard, 393 U.S. 14 (1968) (summarily affirming a three-judge court enjoining Arkansas from forcing disclosure of the names of Republican donors).

17. 424 U.S. 1, 64–68 (1976); *see also* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2376 (2021).

18. *Buckley*, 424 U.S. at 16, 64 (emphasis added); *see* Doe v. Reed, 561 U.S. 186, 196 (2010).

19. *Buckley*, 424 U.S. at 64 (cleaned up).

20. *Id.* at 65; *see* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

risk of official governmental consequences but also the risk of consequences (physical, economic, and other) from the public at large—including both the party to whom the disclosure is made and anyone else who may learn the information.

Applying this exacting scrutiny standard, the Court in *Buckley* upheld the requirement to disclose contributions to political campaigns. The Court recognized three governmental interests that were "sufficiently important to outweigh the possibility of infring[ing]" First Amendment rights: providing information to voters about who was sponsoring candidates, deterring and minimizing the appearance of corruption, and gathering information to detect violations of contribution limits.[21] The Court found the necessary "substantial relation" between those interests and the required disclosures because the disclosures were the "least restrictive means of curbing the evils of campaign ignorance and corruption."[22] And it recognized that an exception to the disclosure requirements could be carved out if a particular group could show a reasonable probability that its members or donors would be subject to real negative consequences.[23]

Buckley set the standard for assessing the constitutionality of some compelled disclosures, but it left open important questions. For one, it was unclear whether the holding about compelled disclosures and associational rights was limited to election law. For another, *Buckley* could have been clearer about what the "substantial relation" requirement actually required in terms of fit between the governmental interest and the compelled disclosure, and how assessing the degree of that fit related to the burden on First Amendment rights.[24]

In both *NAACP v. Alabama* and *Buckley*, the challenged disclosures would have revealed political affiliations and the threatened First Amendment conduct was political participation. But the First Amendment danger from compelled disclosures is not limited to the political arena. Other compelled disclosures, besides political affiliations, can threaten First Amendment rights. And other First Amendment conduct, besides political participation, can be threatened by compelled disclosures.

The kinds of disclosures that can threaten First Amendment rights are not limited to the names of members in political groups. When *Buckley*

21. *Buckley*, 424 U.S. at 66–68.

22. *Id.* at 64, 68.

23. *Id.* at 74.

24. *Compare* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383–84 (2021), *with id.* at 2394–96 (Sotomayor, J., dissenting).

held that disclosing the names of *donors* could threaten associational rights, it expanded on *NAACP v. Alabama*'s holding that disclosing the names of *members* could do so.[25] And subsequent cases have recognized that disclosing the *substance* of internal campaign communications can as well. In *Perry v. Schwarzenegger*, for example, the Ninth Circuit held that the compelled disclosure of internal campaign strategy communications among proponents of a state ballot proposition to ban gay marriage "*can* have [a deterrent] effect on the exercise of protected activities."[26] The Ninth Circuit found that compelled disclosure of private communications could deter First Amendment conduct "by chilling participation and by muting the internal exchange of ideas" in political campaigns.[27] And in *AFL & CIO v. FEC*, the D.C. Circuit held that compelling a labor union and political party to disclose "detailed descriptions of training programs, member mobilization campaigns, polling data, and state-by-state strategies" could intrude "on the 'privacy of association and belief guaranteed by the First Amendment,' as well as seriously interfere[] with internal group operations and effectiveness."[28]

Likewise, the kind of First Amendment conduct that can be deterred by compelled disclosures is not limited to political participation. Other rights guaranteed under the First Amendment can be threatened by the prospect of compelled disclosures. For example, in *Whole Woman's Health v. Smith*, the Fifth Circuit held that the compelled disclosure of internal documents from a religious organization could cause both "free exercise and establishment clause problems" because it would not only interfere with the organization's "decision-making processes on a matter of intense doctrinal concern but also expose[] those processes to an opponent and . . . induce similar ongoing intrusions against religious bodies' self-government."[29]

And the kinds of conduct protected by the First Amendment associational right may be even broader. So far, cases have dealt with fairly clear affiliations like memberships in, donations to, and communications within identifiable political, religious, or advocacy organizations. But looser affiliations or connections could also have associational implications—and chilling them could be a First Amendment harm. For example, online activity—such as social media posts or online messages—could indicate a less formal affiliation or

25. *See Buckley*, 424 U.S. at 1.
26. 591 F.3d 1147, 1162 (9th Cir. 2010) (emphasis added).
27. *Id.* at 1163.
28. 333 F.3d 168, 176–78 (D.C. Cir. 2003) (quoting *Buckley*, 424 U.S. at 64).
29. 896 F.3d 362, 373–74 (5th Cir. 2018).

sympathy with political, religious, or other movements. Some of the First Amendment reasons the Court has recognized for protecting the identities of political organizations' affiliates could also apply to these looser affiliations.

In short, compelled disclosures can threaten a variety of First Amendment rights. And the right to free association initially recognized in *NAACP v. Alabama* protects a variety of sensitive information from disclosure, although the scope of the protection remains unclear.

B. The protections available in discovery do not always safeguard First Amendment rights.

The discovery process enables parties in litigation to obtain information from each other and from nonparties.[30] The extensive discovery mechanisms available in federal court were a major innovation of the Federal Rules of Civil Procedure.[31] The rules governing discovery—Rules 26 through 37—define the scope of discovery, the parties' discovery duties, the available methods of discovery, and the procedures that trial courts employ to shape discovery and resolve discovery disputes.[32]

Discovery orders are trial court orders that control the discovery process. In almost every case, the judge will enter a case management order under Rule 16 setting the general scope and ground rules for discovery, the deadlines, any alterations to the default numbers of interrogatories or depositions, etc.[33] If all goes well, the parties then conduct discovery—exchanging demands and responses, scheduling and holding depositions, etc.—without the judge's further participation. If the parties have disagreements about discovery, they file motions with the judge seeking a decision and another discovery order.

In each case, different discovery issues arise, usually about which information can be obtained (the scope of discovery) and the means by which it can be obtained (the number of interrogatories, the length of

30. FED. R. CIV. P. 26–37.

31. *See* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2002 (3d ed. 2010) ("Rules 26 to 37 took [the] features of existing discovery regimes farther than had been true of any previous package of discovery provisions and created an unprecedented combination of discovery opportunities."); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 6 (1983) [hereinafter Marcus, *Myth and Reality*] ("The Federal Rules of Civil Procedure were designed to effect a revolution in litigation by broadening the availability of discovery.").

32. FED. R. CIV. P. 26–37.

33. FED. R. CIV. P. 16.

depositions, etc.). When the parties disagree about what should be disclosed, the party seeking the information can file a motion to compel discovery, asking the judge to require the other side to make the disclosure. The party opposing the discovery can both argue against the disclosure and file a motion for a protective order, asking the judge to limit how it may be used if it is disclosed.

Accordingly, judges managing civil discovery have two tools to mitigate the risk of First Amendment harms from compelled disclosures. They can stop the disclosure from happening in the first place, by declaring that the sought-after information is outside the scope of discovery. Or they can permit the discovery, but limit what the opposing party does with the information by issuing a protective order. Discovery orders compelling disclosures that arguably threaten First Amendment rights are usually a combination of the two: permitting some discovery but limiting what information must be disclosed and how it may be used.

When judges employ the first tool, declaring that the sought-after information is outside the scope of discovery, they usually do so by finding that it is covered by an "associational privilege" or "First Amendment privilege." Federal Rule of Civil Procedure 26 provides that only "nonprivileged matter" is potentially subject to discovery.[34] Thus, litigants can avoid making disclosures in discovery if they can show that the requested information is covered by a privilege.[35] Familiar privileges include attorney-client privilege, doctor-patient privilege, etc.[36] Some courts have explicitly recognized a privilege based on the potential threat to First Amendment rights.[37] This privilege can exempt parties from responding to discovery that would violate the freedom of association and threaten First Amendment rights, as first recognized in *NAACP v. Alabama*.[38]

For example, in *Black Panther Party v. Smith*, the D.C. Circuit applied a test balancing "one party's First Amendment interests against another

34. FED. R. CIV. P. 26(b)(1); *see also* FED. R. EVID. 501 (Privilege in General).

35. FED. R. CIV. P. 26(b)(5)(A) (requiring parties claiming a privilege to claim it and provide sufficient information "that, without revealing information itself privileged or protected, will enable other parties to assess the claim").

36. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5472 (1st ed. 1986).

37. Not all courts refer to these privileges by name—some simply refer to the protection recognized in *NAACP v. Alabama*, which amounts to the same thing. *See, e.g.*, Marrese v. Am. Acad. of Orthopaedic Surgeons, 706 F.2d 1488, 1494 (7th Cir. 1983) (recognizing a pseudo-privilege under the First Amendment and Rule 26 that increases the required showing to obtain a disclosure of such sensitive information), *rev'd on other grounds*, 470 U.S. 373 (1985).

38. *See* Marian K. Riedy & Kim Sperduto, *Revisiting the Anonymous Speaker Privilege*, 14 N.C. J.L. & TECH. 249, 283–89 (2012).

party's need for disclosure" in a case where the Black Panther Party had refused to respond to interrogatories from the United States.[39] In *New York State National Organization for Women v. Terry*, the Second Circuit considered whether orders requiring Operation Rescue (an anti-abortion activist organization) to produce information about employment, assets, and income would violate its associational rights—although the court found it would not, because Operation Rescue had not met even the "light" burden of "making out a prima facie case of harm" from the disclosures.[40] And, in *Adolph Coors Co. v. Movement Against Racism*—a libel case where the Coors beer company sued a political organization for presenting slide shows implying it was associated with "ultra-right wing" causes—the Eleventh Circuit held that limited discovery regarding the dates and locations of the slide shows was permissible because the information sought was so general that it would not exacerbate any actual threat to the associational right.[41]

Different courts articulate the standard for the First Amendment associational privilege differently, based on differing interpretations and applications of *NAACP v. Alabama* and *Buckley*.[42] Given the chance, they will likely revise their standards in light of *Americans for Prosperity*. But, considering how inconclusive that decision was, it is not likely to clarify the standard much.

The second tool judges can use to protect First Amendment associational rights in discovery is permitting the discovery (i.e., compelling the disclosure) but also issuing a protective order under Rule 26(c), limiting how the disclosed information is used. Rule 26(c) gives judges broad powers to limit who conducts discovery, to whom the discovered information is revealed, and how it is used within and outside the litigation.[43] Common limits imposed include requiring the discovering party to keep the information confidential, limiting disclosure to "attorneys' eyes only," and sealing discovered information from the discovering party until the judge orders its disclosure.[44] The efficacy of a protective order depends on both the efficacy of the limits imposed (since sometimes even disclosure to the opposing party is harmful) and the

39. 661 F.2d 1243, 1264–69 (D.C. Cir. 1981), *vacated sub nom.* Moore v. Black Panther Party, 458 U.S. 1118 (1982).

40. 886 F.2d 1339, 1355 (2d Cir. 1989).

41. 777 F.2d 1538, 1539, 1542 (11th Cir. 1985).

42. Riedy & Sperduto, *supra* note 38, at 283–88.

43. FED. R. CIV. P. 26(c).

44. *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2035 (3d ed. 2010) (describing uses of protective orders).

likelihood of a further disclosure (either to the party when it should be "attorneys' eyes only" or more broadly) despite the limits imposed.[45]

In 1984, in *Seattle Times Co. v. Rhinehart*, the Supreme Court examined whether using a protective order would itself violate the First Amendment because it barred the discovering party from publishing discovered information.[46] *Seattle Times* was a libel case. Keith Milton Rhinehart and some of his followers sued the Seattle Times newspaper for a series of articles it had published about his religious organization, known as the "Aquarian Foundation."[47] When the Seattle Times sought discovery regarding the Foundation's membership and finances, the Foundation opposed the discovery and sought a protective order to prevent the Seattle Times from publishing any information it obtained.[48] The trial court permitted the discovery but also issued the protective order, and both parties appealed in state court and then to the U.S. Supreme Court.[49] The Court held that a protective order barring a newspaper from publishing information gained through discovery did not violate the First Amendment.[50]

The U.S. Supreme Court did not actually consider whether the underlying discovery order compelling disclosure of the Foundation's sensitive information violated the members' First Amendment associational rights.[51] The Washington State Supreme Court had already held that their associational rights were sufficiently protected by the

45. *See* Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 739–40 (2006).

46. 467 U.S. 20, 22 (1984).

47. The Supreme Court described the articles in question:

> The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla State Penitentiary. The articles stated that he had treated 1,100 inmates to a 6-hour-long show, during which he gave away between $35,000 and $50,000 in cash and prizes. One article described a "chorus line of girls [who] shed their gowns and bikinis and sang . . . ." The two articles that appeared in 1979 referred to a purported connection between Rhinehart and Lou Ferrigno, star of the popular television program, "The Incredible Hulk."

Id. at 22–23 (internal citation omitted).

48. *Id.* at 25.

49. *Id.* at 25, 27–29.

50. *Id.* at 37.

51. *Id.* at 28 n.10.

protective order.[52] That court had reasoned that their associational rights would not be chilled because the protective order barring publication of the discovered information would prevent any of the reprisals and consequences of the type the Court had recognized in *NAACP v. Alabama*.[53]

Therefore, the U.S. Supreme Court considered only whether the protective order barring publication of the information obtained in discovery violated the newspaper's First Amendment free speech rights. The Court recognized that "it is, of course, clear that information obtained through civil discovery" is protected by the First Amendment.[54] But the Court declined to treat protective orders barring publicizing discovered information as a prior restraint on speech subject to the high bar of strict scrutiny.[55] The Court did not apply strict scrutiny because "court control over . . . discovered information does not raise the same specter of government censorship that such control might suggest in other situations," given that litigants have "no First Amendment right of *access*" to the information uncovered in discovery and that the public interest is minimal, since discovery is traditionally not public.[56] Accordingly, it held that the protective order did not violate the First Amendment because the newspaper's limited First Amendment interest in making the discovered information public was outweighed by the government's substantial interest in "preventing this sort of abuse of its [discovery] process."[57]

But the *Seattle Times* Court was unclear about what kind of scrutiny it applied, and to what.[58] It quoted the scrutiny standard from *Procunier v. Martinez*—a case about whether prison regulations restricting the imprisoned people's correspondence violated the First Amendment—which made it "necessary to consider whether the practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression and whether the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of

52. *Id.*

53. Rhinehart v. Seattle Times Co., 654 P.2d 673, 690 (Wash. 1982) (en banc).

54. *Seattle Times*, 467 U.S. at 31.

55. *Id.* at 33. To survive strict scrutiny, a prior restraint on speech must further a "compelling [governmental] interest," and must be "narrowly tailored" to achieve that interest. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015).

56. *Seattle Times*, 467 U.S. at 32 (emphasis added).

57. *Id.* at 35–36. Justices Brennan and Marshall concurred in the result, writing separately to emphasize that discovery orders are subject to First Amendment review. *Id.* at 37–38 (Brennan, J., concurring).

58. Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1797–1800 (2014) [hereinafter Benham, *Dirty Secrets*] (describing three possible interpretations of the standard applied in *Seattle Times*).

the particular governmental interest involved."[59] In subsequent cases, the Court has called this hybrid standard "heightened scrutiny."[60]

It is also not clear to what, exactly, the *Seattle Times* Court applied this standard: to Rule 26(c), which authorizes courts to enter protective orders,[61] or to the particular protective order at issue in the case. If the Court applied the standard to Rule 26(c) itself—i.e., to the general practice of entering protective orders—then it must have held that the Rule passed scrutiny, meaning that all protective orders that met that Rule's "good cause" standard do not violate the First Amendment.[62] But if the Court applied the standard to the particular protective order at issue, then it must have held that protective orders are subject to First Amendment scrutiny, which this one survived.[63] There is good reason to believe the latter,[64] but the Court has never declared as much explicitly.

C. Assessing the constitutionality of discovery orders implicates key questions about First Amendment values and the purposes of discovery.

Seattle Times and *NAACP v. Alabama* are like mirror images of one another: one about the First Amendment rights of one litigant *to disclose* discovered information, the other about the First Amendment rights of the other litigant *not to disclose* information. Taken together, they highlight that assessing the constitutionality of discovery orders (which often combine compelled disclosures with protective orders) requires considering the First Amendment rights of both parties. And they implicate ongoing policy debates about disclosure, privacy, and the First Amendment. In both judicial opinions and the academic literature, those debates have centered largely on the propriety of court *restrictions* on speech: are protective orders and sealing orders that limit the use of information obtained in litigation unconstitutional prior restraints on

59. *Seattle Times*, 467 U.S. at 32 (cleaned up) (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

60. Benham, *Dirty Secrets*, *supra* note 58, at 1795, 1802–04 (citing Sorrell v. IMS Health Inc., 564 U.S. 552, 568–69 (2011)).

61. The protective order in *Seattle Times* was entered under a Washington state civil procedure rule substantially identical to Federal Rule of Civil Procedure 26(c). *See Seattle Times*, 467 U.S. at 29.

62. *See* Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 MO. L. REV. 211, 244–46 (2021) [hereinafter Benham, *Court Confidentiality*] (explaining that the Court must have seen *some* role for the First Amendment in analyzing the propriety of a protective order, and concluding that it must, at least, require that the order be supported by good cause).

63. *See id.*; Benham, *Dirty Secrets*, *supra* note 58, at 1811–16.

64. Benham, *Dirty Secrets*, *supra* note 58, at 1811–16.

speech, and are they socially desirable?[65] But these same concerns also inform any inquiry into the constitutionality of court *compelled* speech, as discussed below.

To begin, how one understands the proper application of the First Amendment to discovery depends on how one views the purpose and scope of discovery.[66] One view is that discovery is primarily a tool for resolving private disputes,[67] an act of "legislative grace" whose scope and contours are shaped by the courts and legislatures toward that end.[68] According to this view, articulated by Professor Richard Marcus in an influential law review article and essentially adopted by the Supreme Court in *Seattle Times*, there is no harm in using protective orders to limit how discovered information is used outside of litigation because the whole purpose of discovery is for the information to be used in litigation.[69] Free speech concerns are largely irrelevant. Protective orders do not typically run afoul of the First Amendment, because there is "no First Amendment right of *access* to information made available only for purposes of" litigation, meaning that an order limiting the *use* of discovered information to that purpose is permissible.[70] (The balance comes out somewhat differently for sealing orders because, even according to this view, court proceedings are traditionally public, unlike discovery, and there is a First Amendment right of access to them.)

The other view is that discovery does more, or should do more, than facilitate resolution of private disputes through litigation; it serves a public purpose of unearthing and bringing to light otherwise confidential

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65. *See id.* at 1782 nn.4–5 ("Some courts hold that the First Amendment is essentially irrelevant in the protective-order analysis. Others apply a significant level of First Amendment scrutiny to the same orders.") (first citing Cipollone v. Liggett Grp., Inc., 785 F.2d 1108, 1114 (3d Cir. 1986), which held the Supreme Court "appears to exclude any first amendment analysis from the decision about whether a court should issue a protective order," then citing *In re* Requests for Investigation of Att'y E., 78 P.3d 300, 310 (Colo. 2003), which held the First Amendment requires "intermediate" scrutiny of protective orders).

66. These privacy and First Amendment considerations are in addition to, but not unrelated to, the procedural justice norms and values served by discovery rules: accuracy, efficiency, and participation. *See* Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS L. REV. 1317, 1323–26, 1328–34 (2019); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 237, 244–60 (2004).

67. *See* Marcus, *Myth and Reality*, *supra* note 31, at 7.

68. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984) ("As the Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit.").

69. Marcus, *Myth and Reality*, *supra* note 31, at 7; *Seattle Times*, 467 U.S. at 32; Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 468–70 (1991) [hereinafter Marcus, *Discovery*].

70. *Seattle Times*, 467 U.S. at 32 (emphasis added).

information.[71] Some litigants use discovery not only to resolve a particular dispute but also (sometimes primarily) to uncover confidential information and make it public. According to this "sunshine" view of discovery, that use is a beneficial feature, not a bug, of litigation and discovery. It enables the societally beneficial dissemination of information. This "sunshine" view is concerned that excessive use of protective and sealing orders to preserve the confidentiality of discovered information can prevent the public from "learning about grave dangers or information central to self-governance [like] pedophile priests, deadly tires, dangerous drugs, and the government's role in spying on its own citizens."[72] Such concerns are particularly acute when litigants agree to protective and sealing orders, hiding information from the public to facilitate their own dispute-resolution.[73] And even when litigants do not agree to it, too much confidentiality can be harmful.[74]Excessive protective and sealing orders can undermine this function and prevent information from coming to light. And, when they limit the communicative conduct of litigants (like the newspaper in *Seattle Times*), they implicate the First Amendment.[75]

Importantly, the calibration of discovery—which disclosures are compelled and how they can be used—can affect not only parties' behavior during litigtion, but also their *ex ante* conduct.[76] If parties anticipate that they will be compelled to disclose information and that it could be made public—and if they worry about the consequences of those disclosures—then they will alter their conduct accordingly. The more likely the disclosure, and the more dire the consequences, the less likely a party will be to engage in the conduct in the first place.[77] If the likelihood of public disclosure is high, then so is the deterrence. If the likelihood of public disclosure is low, then the deterrence is also lessened. Indeed, for some defendants, possible public disclosure may be a greater deterrent than the threat of being sued in the first place.[78] For example, without the threat of public disclosure, a powerful, serial sexual harasser could continue to harass without fear of reputational harm; even if he were sued

71. *See* Benham, *Dirty Secrets*, *supra* note 58, at 1807–08; Benham, *Court Confidentiality*, *supra* note 62, at 235–41.

72. Benham, *Dirty Secrets*, *supra* note 58, at 1782.

73. *See* Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1252–53 (2020).

74. *See* Benham, *Court Confidentiality*, *supra* note 62, at 241.

75. Benham, *Dirty Secrets*, *supra* note 58, at 1804.

76. Sergio J. Campos & Cheng Li, *Discovery Disclosure and Deterrence*, 71 VAND. L. REV. 1993, 1996 (2018); Benham, *Court Confidentiality*, *supra* note 62.

77. *See* Campos & Li, *supra* note 76, at 2003.

78. *Id.* at 2004.

by and settled with numerous victims, protective and sealing orders could prevent anyone from knowing. The threat of possible disclosure serves a desirable purpose and deters unlawful behavior.[79] But the threat of disclosure can also deter lawful, socially beneficial behavior. For example, parties rely on protective and sealing orders to shield trade secrets from being made public. If they had not believed those protections would be there, they might not have developed the trade-secret-protected product in the first place (leaving the public worse off in a world without, for example Coca-Cola).[80] Or, as the Court recognized in *NAACP v. Alabama*, if people fear negative consequences for socially desirable behavior—like fearing violent retaliation for supporting a civil-rights organization in the Jim Crow South—then the threat of disclosure will deter them from that behavior.

Thus, the social desirability of compelled disclosures and protective orders in discovery does not only depend on the purpose of discovery in litigation. It also depends on the relative values of transparency and disclosure, on the one hand, and privacy and secrecy, on the other.[81] And there are First Amendment considerations on both sides of that balance.[82] On one side, the socially beneficial effects of bringing hidden information to light, the *ex ante* effect of deterring unlawful or undesirable behavior, and the First Amendment right to speak freely weigh in favor of compelling disclosures and against using protective orders. On the other side, the socially harmful effects of disclosing confidential information, the *ex ante* effect of deterring desirable behavior, and the First Amendment right to free association weigh against compelling disclosures and in favor of using protective orders.

II. APPELLATE DECISIONS ARE NEEDED TO RESOLVE QUESTIONS ABOUT WHEN COMPELLED DISCLOSURES IN DISCOVERY VIOLATE THE FIRST AMENDMENT.

A. Recent Supreme Court First Amendment decisions pose new questions.

Since 1984, when *Seattle Times* upheld the constitutionality of using a protective order to limit one party's First Amendment rights in order to

79. *Id.*

80. *See* Benham, *Dirty Secrets*, *supra* note 58, at 1825; Marcus, *Discovery*, *supra* note 69, at 496.

81. *See* Frederick Schauer, *Anonymity and Authority*, 27 J.L. & POL. 597, 597–98 (2011).

82. *Id.* at 597–99.

mitigate the threat to the other party's associational rights from compelled disclosures, the Supreme Court has grown more protective of individual First Amendment rights. And it has demonstrated a willingness to reconsider, and overturn, its precedents about when government interests justify infringing on First Amendment rights.

Perhaps the most obvious example of the Court recently reconsidering the balance between governmental interests and First Amendment rights is the 2018 case *Janus v. American Federation of State, County, & Municipal Employees, Council 31*,[83] overruling the 1977 case *Abood v. Detroit Board of Education*.[84] In *Abood*, the Court had held that the First Amendment was not violated by a statute requiring non-union government employees to pay dues to public-sector unions as long as the dues did not directly support political speech, even if the statute did compel them to indirectly support and to be associated with speech with which they disagreed.[85] *Abood* had reasoned that the government interest in promoting labor peace and avoiding free-riding outweighed the infringement on First Amendment rights.[86] But in *Janus*, the Court overruled *Abood*.[87] The Court reconsidered the balance and found that those asserted governmental interests were outweighed by the First Amendment rights of the non-union employees not to be compelled to pay dues supporting speech with which they did not agree.[88]

Just last year, in *Mahanoy Area School District v. B.L. ex rel. Levy*, the Court considered whether a public school could punish a high-school student for off-campus, vulgar speech criticizing school activities.[89] Extrapolating from the foundational *Tinker* case—which held that a school could not punish a student for non-disruptive, peaceful political speech on school property[90]—the Court weighed the school's (i.e., the government's) interests in regulating student speech against the student's First Amendment rights.[91] And—putting an end to a pro-school trend in post-*Tinker* student-speech cases[92]—the Court held that the school's

83. 138 S. Ct. 2448 (2018).
84. 431 U.S. 209 (1977).
85. *Id.* at 235–36.
86. *Id.* at 224.
87. *Janus*, 138 S. Ct. at 2478.
88. *Id.* at 2466–67.
89. 141 S. Ct. 2038 (2021).
90. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
91. *Mahoney*, 141 S. Ct. at 2046–48.
92. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding it did not violate First Amendment to penalize student for lewd and indecent speech given at school); Hazelwood Sch.

punishment of the student violated the First Amendment.[93] The Court reasoned that the student's First Amendment rights outweighed the school's lesser interest in regulating off-campus speech, given the lack of any actual on-campus disruption and the potential overreach of permitting schools to regulate all student speech.[94]

Although *Janus* and *Mahanoy* are not about compelled disclosures, they illustrate the trend in Supreme Court jurisprudence against governmental interference and in favor of individual speech rights. And, in *Americans for Prosperity Foundation*, the Court did return its attention to the question of when compelled disclosures threaten First Amendment associational rights.[95] *Americans for Prosperity* confronted—but did not resolve—some open questions about compelled disclosures from *Buckley* and *Seattle Times*, and raised some new ones. It illustrated the current Court's willingness to rethink, and expand the protections of, its older freedom-of-association holdings, and it increased the likelihood of future challenges to compelled disclosures based on First Amendment associational rights.[96]

Americans for Prosperity considered whether a California anti-fraud policy violated First Amendment associational rights because it compelled charities to disclose to the state the names and addresses of large donors.[97] The policy required charities doing business in California to provide the state Attorney General's Office copies of a federal tax form, Internal Revenue Service Form 990.[98] That form lists, among other things, "the names and addresses of donors who have contributed more than $5,000 in a particular tax year (or, in some cases, who have given more than 2%of an organization's total contributions)."[99] Two charities brought suit,

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Dist. v. Kuhlmeier, 484 U.S. 260, 273–76 (1988) (holding it did not violate First Amendment for principal to delete pages from student newspaper); Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding it did not violate First Amendment to confiscate a student's banner promoting illegal drug use on school outing).

93. *Mahanoy*, 141 S. Ct. at 2046–48.

94. *Id.* at 2047–48.

95. 141 S. Ct. 2373 (2021).

96. *See* Lloyd Mayer, *Justices Open the Door Wider for Donor Info Law Challenges*, LAW360 (July 2, 2021, 4:24 PM), https://www.law360.com/articles/1400104/justices-open-the-door-wider-for-donor-info-law-challenges [https://perma.cc/SQQ9-J9KR]; Amanda H. Nussbaum & Richard M. Corn, *The Impact of* Americans for Prosperity Foundation v. Bonta *on Donor Disclosure Laws*, NAT'L L. REV. (July 30, 2021), https://www.natlawreview.com/article/impact-americans-prosperity-foundation-v-bonta-donor-disclosure-laws [https://perma.cc/283R-WLW6] (observing that *Americans for Prosperity* will "likely make it easier for future plaintiffs (even outside of the nonprofit context) to challenge disclosure requirements").

97. *Ams. for Prosperity*, 141 S. Ct. at 2379.

98. *Id*. at 2380.

99. *Id.*

alleging that this compelled disclosure violated their First Amendment rights, and those of their donors, because it "would make their donors less likely to contribute and would subject them to the risk of reprisals."[100] The Supreme Court agreed and struck down the requirement as violative of the First Amendment.[101]

Although a six-justice majority agreed that the policy violated the donors' First Amendment associational rights, they did not agree on why. Chief Justice Roberts' lead opinion held that any compelled disclosure had to be "narrowly tailored" to the governmental interest it served—meaning that it could not sweep more broadly than necessary, though it need not be the "least restrictive" means of serving that interest.[102] For Roberts, that narrow-tailoring requirement was part of the "substantial relation" requirement from *Buckley*.[103] He would have held that *Buckley*'s exacting scrutiny standard—including a narrow-tailoring requirement—applied to all First Amendment challenges to compelled disclosure, even outside the election-law context.[104] But only two justices (Justices Barrett and Kavanaugh) joined Roberts' opinion in full.[105]

In a concurrence, Justice Alito, joined by Justice Gorsuch, agreed with the portion of Roberts' opinion holding that "narrow tailoring and consideration of alternative means of obtaining the sought-after information" were required, and that the California policy failed those requirements.[106] But they did not agree that exacting scrutiny necessarily applied to compelled disclosures outside the election-law context, leaving open the possibility that the even higher requirements of strict scrutiny would apply.[107] And Justice Thomas wrote his own concurrence saying just that, that strict scrutiny should always apply to compelled-disclosure claims.[108]

In sum, the fractured majority only agreed that something *at least* as strict as exacting scrutiny with a narrow-tailoring requirement was appropriate. And they agreed that the California policy failed that test. According to the majority, California's broad disclosure requirement,

100. *Id.*

101. *Id.* at 2389.

102. *Id.* at 2384, 2389.

103. *Id.* at 2383–84.

104. *Id.*

105. *Id.* at 2376–78.

106. *Id.* at 2391–92 (Alito, J., concurring).

107. *Id.*

108. Notably, once Justice Thomas had applied strict scrutiny, he would have invalidated the law only as applied to the challengers in the case, not struck it down as facially invalid in every possible application. *Id.* at 2390–91 (Thomas, J., concurring).

which applied to all charities, was not narrowly tailored to the governmental interest in preventing fraud because California rarely, if ever, used the disclosures to investigate fraud and California had other means of obtaining such information like issuing subpoenas to charities it was considering investigating.[109] The lead opinion also observed that the charities had demonstrated a real fear of harm from public disclosure of their donors' identities[110] and that California had failed to keep the disclosed information confidential (despite an obligation to do so, and despite assurances of renewed policies to do so in the future).[111] However, as the dissent pointed out, because the majority struck down the entire policy, as applied to *any* charity, its version of the exacting scrutiny standard apparently did not require any initial showing of a true threat to First Amendment associational rights.[112]

The dissent by Justice Sotomayor, joined by Justices Breyer and Kagan, actually agreed with Roberts that exacting scrutiny was the correct standard for compelled disclosures, but it disagreed with his application and understanding of it.[113] First, Sotomayor disagreed about whether affected parties must show an actual burden on their associational rights to trigger exacting scrutiny. Whereas the majority held that compelled disclosures must *always* bear a substantial relation to a governmental interest, she would have only required a substantial-relation showing *after* the affected parties had demonstrated that the potential threats and reprisals were sufficient to constitute an "actual First Amendment burden."[114] For that reason, the dissent would not have struck down the entire California policy based only on the burdens shown by the two plaintiffs in the case.[115]

Sotomayor's dissent also disagreed with the majority's implementation of the exacting scrutiny standard, particularly with how it interpreted the requirement of a "substantial relation" between the governmental interest and the compelled disclosure. Whereas Justice Roberts held that the substantial-relation requirement always requires narrow tailoring (albeit, not necessarily the least restrictive means), the dissent would have imposed a more flexible "means-end tailoring" that varied how close the relationship had to be between the governmental

109. *See id.* at 2385–87.
110. *Id.* at 2386.
111. *Id.* at 2381.
112. *Id.* at 2396 (Sotomayor, J., dissenting).
113. *Id.*
114. *Id.* at 2392, 2396–98.
115. *Id.* at 2398–99.

interest and the compelled disclosure, depending on "the actual burden imposed" on First Amendment rights (after having assessed what that actual burden is).[116]

Although it has been clear, at least since *NAACP v. Alabama*, that orders compelling disclosures in civil discovery can abridge First Amendment rights, more recent developments, particularly the new holdings in *Americans for Prosperity*, raise a number of questions about how and when they do so. There are open legal questions about which standard judges should apply to compelled disclosures in discovery and how they should apply it. And, no matter which standard they apply, each case challenging a compelled disclosure will involve case-specific factual questions.

1. Open Legal Questions

Americans for Prosperity does not explain whether its approach to compelled disclosures applies in civil discovery or, if it does, how. Chief Justice Roberts' lead opinion declares that its exacting scrutiny standard applies to all compelled disclosure cases, but it does not mention disclosures in discovery.[117] Nor do the concurring opinions, which advocate for applying a different standard to all compelled disclosure cases (i.e., Justice Thomas) or leaving the door open to vary the standard depending on the kind of compelled disclosure (i.e., Justice Alito).[118] Although *Americans for Prosperity* is derived from *NAACP v. Alabama*'s holding about a discovery order and its standard should presumably apply to compelled disclosures in discovery,[119] the Court has not actually provided any guidance on the issue.

Nor does *Americans for Prosperity* provide any guidance as to the question left open by *Seattle Times*: whether First Amendment scrutiny applies to the practice of entering discovery orders writ large, or to the individual discovery order at issue in the case.[120] *Americans for Prosperity* struck down the whole California policy, not just the policy as-applied to the plaintiffs' charities.[121] Judges will need to contend with arguments that, if *Americans for Prosperity* does apply to discovery orders, it must be applied to all compelled-disclosure/protective-order orders, not to the

116. *Id.* at 2396–99.
117. *Id.* at 2383–85 (majority opinion).
118. *Id.* at 2389–91 (Thomas, J., concurring); *id.* at 2391–92 (Alito, J., concurring).
119. *See supra* Section I.C.
120. *See* Benham, *Dirty Secrets*, *supra* note 58, at 1797–1800, 1810.
121. *Ams. for Prosperity*, 141 S. Ct. at 2389.

individual order in the particular case.

Once courts decide to apply the *Americans for Prosperity* approach to civil discovery disputes, they will need to figure out what that approach is—which is also an open question. As described above, *Americans for Prosperity* was a fractured opinion. Of the six justices who held that the compelled disclosures violated the First Amendment, three did so applying exacting scrutiny, one did so applying strict scrutiny, and two declined to say which applied.[122] And the three dissenting justices, who would have applied exacting scrutiny, understood it very differently from those in the majority.[123] Parties opposing discovery will argue that strict scrutiny should apply (agreeing with Justice Thomas). Parties seeking discovery will argue that only exacting scrutiny applies (agreeing with Chief Justice Roberts and the dissenting opinion). And, then, whichever standard judges apply, they will still need to decide *how* that standard works, which remains an open question (especially when applied to discovery orders).

Americans for Prosperity also raises new questions about how the existence of a protective order affects the First Amendment analysis. In *Seattle Times*, the parties did not contest, and so the U.S. Supreme Court did not review, the Washington Supreme Court's conclusion that the protective order would sufficiently protect the Aquarians' associational rights.[124] But after *Americans for Prosperity*, it is unclear whether such assurances of confidentiality, even backed by a court order, are sufficient. Chief Justice Roberts explained that "[w]hile assurances of confidentiality may reduce the burden of disclosure . . . they do not eliminate it," and observed in a footnote that California's "assurances of confidentiality" were "not worth much," given its history of leaking of such information.[125] The dissent accuses Roberts' opinion of failing to consider how likely a further disclosure is, or how any First Amendment burden may be mitigated by efforts to keep the disclosed information confidential.[126] Thus, it remains an open question how efforts to preserve confidentiality—including protective orders—mitigate the First Amendment burden (as Roberts says they "may"), or if courts can consider them at all.

122. *Id.* at 2383 (applying exacting scrutiny); *id.* at 2390 (Thomas, J., concurring) (applying strict scrutiny); *id.* at 2391–92 (Alito, J., concurring) (declining to establish a standard).

123. *Id.* at 2396–2405 (Sotomayor, J., dissenting).

124. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984).

125. *Ams. for Prosperity*, 141 S. Ct. at 2388 & n.*.

126. *Id.* at 2392 (Sotomayor, J., dissenting).

2. Case-specific Questions about Application of Law to Facts

In any dispute about a compelled-disclosure discovery order—regardless of which version of which level of scrutiny the judge applies—case-specific questions will arise about how that standard applies to the facts of the dispute. The Federal Rules of Civil Procedure authorize a variety of disclosure and protection mechanisms, empowering judges to shape discovery to particular cases. As explained above, *Seattle Times* seems to leave open whether it applied First Amendment scrutiny to the discovery *rules* writ large or to the individual discovery *order* in that particular case, and *Americans for Prosperity* did not resolve that confusion. To be sure, even after *Americans for Prosperity*, courts are highly unlikely to strike down entirely the rules authorizing judges to compel disclosures and issue protective orders.[127] Instead, courts will likely ask whether particular orders violate the First Amendment (as the Court found in *NAACP v. Alabama*). Deciding if they do will raise case-specific factual questions. Judges will need to evaluate the specific discovery order—both what disclosures it permits and what protections it affords—in the context of the specific case. They will need to consider the governmental interest in the disclosure, the relation of that interest to the disclosure, and likely the burden on the disclosing party.

Judges will need to consider the governmental interest in the specific disclosure sought in the case. This is not the same as the general governmental interest in fair and efficient litigation, which *Seattle Times* suggests is sufficient to warrant the existence of the discovery procedures in the first place.[128] Rather, the strength of the governmental interest will depend on the individual litigants' need for the information to proceed with the litigation. In each case, assessing the governmental interest will require looking into the importance of the information to the particular litigation, and the individual parties' needs for the information.

Judges will also need to consider the "fit" between that governmental interest and the disclosure that it compels. If they apply exacting scrutiny, that will require "narrow tailoring" of the disclosure to the governmental interest; if they apply strict scrutiny, that will require the even closer fit of being the "least restrictive" means.[129] This consideration will require

127. *See Seattle Times*, 467 U.S. at 34–35 (describing value of discovery rules and efficacy of protective orders); Benham, *Dirty Secrets*, *supra* note 58, at 1810–11 (arguing that *Seattle Times* requires a case-specific assessment of the particular order).

128. *Seattle Times*, 467 U.S. at 34.

129. The *Americans for Prosperity* dissent's flexible "means-end tailoring" standard would

assessing how necessary the information is to support a claim or defense, and how likely it is to do so. It will also require considering alternative means of achieving those goals, including other means of obtaining the same or substitute information, or other ways to prove the elements of a claim or defense.

Conversely, judges will also need to consider the burden on the opposing party's First Amendment rights: how much of a threat the disclosure actually poses. In *NAACP v. Alabama*, the NAACP made a showing that its members would fear serious retaliation, including physical and economic harm.[130] In *Seattle Times*, the Aquarians demonstrated reputational and free-exercise harms that would flow from exposing the confidential discovered information.[131] In *Americans for Prosperity*, the charities also pointed to economic and reputational repercussions from exposing their donors' identities.[132] To be sure, the dissent in *Americans for Prosperity* accuses the lead opinion of eliminating any consideration of the burden before applying its narrow tailoring requirement.[133] But that approach would not be workable for assessing discovery orders. Judges deciding discovery disputes cannot simply accept unsupported claims that compelled disclosures burden First Amendment rights. Doing so would potentially subject every disclosure in discovery to a First Amendment "substantial relation" analysis (over and above the normal relevance and proportionality requirements for discovery), requiring every disclosure to be either narrowly tailored or the least restrictive means of obtaining the needed information. That would drastically diminish the reach of discovery, since the discovery rules require only that the information sought be nonprivileged, "relevant to any party's claim or defense and proportional to the needs of the case, considering" the importance and availability of the information, its importance to the case, and the burdens of providing it.[134] Therefore, even if judges did follow the *Americans for Prosperity* majority and always required some kind of substantial-relation fit, they would still need to first assess the likelihood and severity of possible repercussions from the disclosure. And, as discussed above, that inquiry will have to include assessing how effectively any protective order will mitigate the threat (as

require at least a fact-specific inquiry, since it would vary the level of tailoring required based on the "actual burden imposed." 141 S. Ct. at 2396 (Sotomayor, J., dissenting).

130. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

131. *Seattle Times*, 467 U.S. at 28.

132. *Ams. for Prosperity*, 141 S. Ct. at 2388.

133. *Id.* at 2394 (Sotomayor, J., dissenting).

134. FED. R. CIV. P. 26(b)(1).

the Washington State Supreme Court did in *Seattle Times*).

B. Appellate decisions are needed to answer these questions, but most discovery orders are not immediately appealable.

Americans for Prosperity and recent trends in the Supreme Court's approach to First Amendment issues have raised new questions about which compelled disclosures are barred by the First Amendment, what standards to apply, and how to apply them.[135] When these legal and factual questions arise in discovery, district courts will need guidance from appellate decisions. But discovery orders are mostly not immediately appealable, and thus they mostly go unappealed. If orders compelling disclosures that threaten First Amendment rights go unappealed, it will harm both the development of the law and individual litigants' First Amendment rights.

1. Most discovery orders are not appealable.

When it comes to appeals, the "general rule [is] that appellate review must await final judgment."[136] That "final-judgment rule" is embodied in 28 U.S.C. § 1291, which grants federal courts of appeal jurisdiction to hear appeals from the "final decisions of the district courts."[137] Although Congress[138] and the courts[139] have created exceptions permitting earlier appeals in certain cases, the idea of the final-judgment rule—that an appeal may only be had from the decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"[140]—remains the starting point for deciding whether an order is appealable.[141]

The strictness of the final-judgment rule is mitigated somewhat by the fact that the eventual appeal from the final judgment permits an appellant

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135. *See supra* Section II.A.

136. Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 716 (2019).

137. 28 U.S.C. § 1291.

138. *See, e.g.*, 28 U.S.C. § 1292(a)(1)–(3) (exceptions permitting appeals for interlocutory decisions on injunctions, appointing receivers, and in admiralty cases); 28 U.S.C. § 1292(b) (establishing a procedure for district courts to certify interlocutory questions for immediate appeal); FED. R. CIV. P. 23(f) (permitting appeals from class certification orders); FED. R. CIV. P. 54(b) (permitting appeals from partial final judgments).

139. *E.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949) (recognizing what is now known as the "collateral order doctrine").

140. Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

141. *See* Richard L. Heppner Jr., *Conceptualizing Appealability: Resisting the Supreme Court's Categorical Imperative*, 55 TULSA L. REV. 395, 422–23 (2020).

to challenge all the earlier rulings that led to the judgment, which are said to "merge" into the final judgment.[142] The opportunity to appeal an earlier order is not lost entirely, merely delayed. For that reason, the Supreme Court has said that the final-judgment rule ordinarily requires parties to "raise *all* claims of error in a single appeal following final judgment on the merits."[143] This necessary corollary to the final-judgment rule mitigates that rule's harsh effect and increases the likelihood that erroneous orders can eventually be appealed.[144]

The final-judgment rule and the merger doctrine serve important purposes. They strike a balance between two jurisprudential values: justice in individual cases and systemic efficiency. On the one hand, individual litigants want errors corrected quickly and delaying appeals until after the final judgment "will too often impose upon parties delay and expense that an interlocutory appeal, by quickly correcting a lower court error, might have spared them."[145] On the other hand, "too many interlocutory appeals will too often unnecessarily delay proceedings while a party appeals and loses. And delays can clog the appellate system, thereby slowing down the workings, and adding to the costs, of the judicial system seen as a whole."[146] Plus, some orders are best reviewed in light of the complete record—or may not need to be reviewed at all if the issue becomes moot or the affected party prevails—so avoiding immediate appeals can serve both individual justice and systemic efficiency interests.[147] The final-judgment rule reflects the conclusion of Congress and the courts that the balance usually weighs in favor of waiting until the end of a case to permit an appeal. As the Court has explained, it "preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory

142. *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3905.1 (2d ed. 1991).

143. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 429–30 (1985) (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981)) (emphasis added).

144. *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3905.1 (2d ed. 1991).

145. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1423 (2019) (Breyer, J., dissenting).

146. *Id.*; *see also* Cobbledick v. United States, 309 U.S. 323, 325 (1940) (explaining that the final judgment rule "avoid[s] 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" and concluding that "[t]o be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.").

147. Robertson, *supra* note 45, at 738.

appeals, and promotes the efficient administration of justice."[148]

Discovery orders are not final orders—at least not in the "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" sense.[149] Discovery orders do not end the litigation on the merits; they resolve preliminary disputes about how the parties can obtain and use information. The Supreme Court has, therefore, "generally denied review of pretrial discovery orders."[150] The Court has approvingly quoted commentators observing that "[t]he rule remains settled that most discovery rulings are not final."[151] And the federal courts of appeals have all held that discovery orders are not "normally," "generally," "ordinarily," (etc.) immediately appealable.[152]

The reason for this consensus is that courts agree that, for most discovery orders, the balance struck by the final-judgment rule weighs in

148. Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017). *See also* Cunningham v. Hamilton Cnty., 527 U.S. 198, 203–04 (1999) ("The final judgment rule serves several salutary purposes: 'It 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.") (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (cleaned up).

149. Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945); *see also* Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11 (1992) ("As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review."); Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y 83, 92 (2009) ("Although [consequential procedural decisions, including discovery] decisions constitute a substantial proportion of the district judge's work, they are usually not final decisions and therefore are only rarely reviewed by courts of appeals.").

150. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108 (2009) (quoting *Firestone Tire & Rubber Co.*, 449 U.S. at 377).

151. *Id.* at 108 (quoting 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3914.23 (2d ed. 1992)).

152. *See, e.g.*, Gill v. Gulfstream Park Racing Ass'n., Inc., 399 F.3d 391, 397 (1st Cir. 2005) ("Ordinarily"); Chevron Corp. v. Berlinger, 629 F.3d 297, 306 (2d Cir. 2011) ("ordinarily"); *In re* Ford Motor Co., 110 F.3d 954, 958 (3d Cir. 1997) ("As a general rule"); Nicholas v. Wyndham Int'l, Inc., 373 F.3d 537, 541 (4th Cir. 2004) ("typically"); Goodman v. Harris Cnty., 443 F.3d 464, 468 (5th Cir. 2006) ("As a general rule"); United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 462, 471 (6th Cir. 2006) ("generally"); Am. Bank v. City of Menasha, 627 F.3d 261, 263–64 (7th Cir. 2010) ("generally"); Sedlock *ex rel.* Sedlock v. Bic Corp., 926 F.2d 757, 758–59 (8th Cir. 1991) ("Generally"); Nascimento v. Dummer, 508 F.3d 905, 909 (9th Cir. 2007) ("not usually subject to immediate appeal"); United States v. Copar Pumice Co., 714 F.3d 1197, 1204 (10th Cir. 2013) ("Generally"); Drummond Co. v. Terrance P. Collingsworth, Conrad & Scherer, LLP, 816 F.3d 1319, 1322 (11th Cir. 2016) ("ordinarily"); *In re* Sealed Case, 141 F.3d 337, 339 (D.C. Cir. 1998) ("Ordinarily"); Amgen Inc. v. Hospira, Inc., 866 F.3d 1355, 1358 (Fed. Cir. 2017) ("Ordinarily").

favor of postponing any appeal until the end of the case.[153] On one side of the balance, the potential loss of efficiency from permitting immediate appeals from discovery orders is significant. Discovery disputes and discovery orders are very common. Permitting an immediate appeal from every disputed discovery order would overwhelm the courts and drag out cases.[154] It would multiply the opportunity for litigants to file meritless appeals to harass their opponents and drive up costs.[155] On the other side of the balance, the potential threat to fairness is usually not that significant. Discovery orders are routine and committed to the trial judge's discretion; the chance of a reversible error is normally not very high. Discovery orders are collateral and procedural; they are rarely about fundamental rights or the merits of the case. Even when a discovery order is erroneous, it usually does not cause irreparable harm. Indeed, many individual discovery issues drop out or become moot by the time the case reaches any appeal from a final judgment.[156] And if there is an error that does affect the validity of the final judgment, an appeal from that judgment is usually sufficient to fix it.[157]

2. The lack of appealability will leave the important First Amendment questions about compelled disclosures in discovery unanswered.

Even if it makes sense not to permit immediate appeals from most discovery orders,[158] they are needed from discovery orders compelling disclosures that threaten First Amendment rights. When difficult, undecided questions (like the First Amendment issues left open in *Americans for Prosperity*) arise, trial judges and litigants both benefit from obtaining guidance and binding precedent from the courts of appeal. The open legal questions can only be resolved by appellate decisions, including

153. *See Mohawk Indus.*, 558 U.S. at 106–07.

154. *See, e.g.*, Am. Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967) (explaining the need to avoid appellate courts' being overwhelmed with "appeals of housekeeping matters in the district courts").

155. See id.

156. *See, e.g.*, *id.*; Rodrique v. Cnty. of Sacramento, 835 F. App'x 206, 207–08 (9th Cir. 2020) (dismissing discovery appeal as moot following settlement of underlying action); Handy v. Price, 996 F.2d 1064, 1068 (10th Cir. 1993) (finding discovery issue moot after dismissal of a claim on the merits).

157. *See Mohawk Indus.*, 558 U.S. at 112–13.

158. Despite the courts' general agreement that discovery issues usually do not warrant immediate appeals, the lack of appealability does have drawbacks, including mooted issues never getting reviewed and a decrease in the parties' senses of fairness and procedural justice when erroneous rulings are never corrected (even if they would not have changed the outcome). *See* Robertson, *supra* note 45, at 740–41.

eventual Supreme Court decisions. Otherwise, the district courts will confront open questions about which standard to apply and how, with no means of authoritatively resolving them. And the case-specific factual questions will go largely unreviewed, further preventing the development of the doctrine and subjecting individual litigants to arbitrary and inconsistent decisions. To provide that guidance, the appellate courts need to hear cases raising those undecided questions.[159]

The limited opportunity to appeal discovery orders after final judgment will not provide that guidance. Most discovery orders are never appealed, even as part of an appeal from a final judgment.[160] If courts of appeals only address the open questions described above when a discovery order merges into a final judgment, then there will be few appellate cases about those questions (and even fewer that reach the Supreme Court). The doctrine will only develop slowly and haphazardly. And the First Amendment rights of individual parties will be harmed in the meantime, because the unsettled doctrine will result in erroneous compelled-disclosure orders that they will be unable to appeal. In short, if parties cannot obtain immediate appeals from discovery orders compelling disclosures that threaten First Amendment rights, then many such orders will go unappealed. Many of the open questions about compelled disclosures in discovery will remain unanswered. Litigants' First Amendment rights will be violated and their First Amendment conduct chilled.

III. THE COLLATERAL ORDER DOCTRINE PERMITS IMMEDIATE APPEALS OF DISCOVERY ORDERS COMPELLING DISCLOSURES THAT THREATEN FIRST AMENDMENT RIGHTS.

Luckily, the final-judgment rule is not an absolute bar to an immediate

159. *See* Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 559 (2016) (explaining that the lack of appealability for discovery orders means that, for many discovery issues, district court precedent is the only guidance available).

160. Burns v. Thiokol Chem. Corp., 483 F.2d 300, 304–05 (5th Cir. 1973) ("Because discovery matters are committed almost exclusively to the sound discretion of the trial Judge, appellate rulings delineating the bounds of discovery under the Rules are rare."); Brandon L. Garrett & Gregory Mitchell, *The Proficiency of Experts*, 166 U. PA. L. REV. 901, 945 (2018) ("The rarity with which discovery rulings are the subject of appeal or published opinions makes the survey of discovery practices an imperfect enterprise."); Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 701 (2014) ("Many trial court procedural decisions are structurally insulated from appellate review."); Adam N. Steinman, *The End of an Era? Federal Civil Procedure after the 2015 Amendments*, 66 EMORY L.J. 1, 46 (2016) ("When a district court decides a discovery motion . . . principles of appellate jurisdiction usually insulate that ruling from immediate appellate review.").

appeal. The idea of finality "should 'be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.'"[161] One such construction is the collateral order doctrine, which treats certain orders as appealable final orders, even if they do not end the litigation on the merits. Even though discovery orders are not normally appealable final orders, courts should apply the collateral order doctrine to permit immediate appeals from discovery orders compelling disclosures that threaten First Amendment rights.

A. The collateral order doctrine permits immediate appeals from some interlocutory orders.

The collateral order doctrine is a judge-made doctrine that permits some interlocutory orders—including some discovery orders—to be deemed final and immediately appealable.[162] When the Supreme Court first described it in *Cohen v. Beneficial Industrial Loan Corp.*, the Court called it a "practical rather than . . . technical construction" of the final-judgment rule.[163] Like the final-judgment rule, to which it acts as an exception, the collateral order doctrine strikes a balance between the individual interest in resolving questions correctly and the systemic interest in the efficiency of the court system.

The collateral order doctrine treats as final-for-appeal a "small class [of orders] 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."[164] Later Supreme Court cases have "distilled" this original description into a test with three elements.[165] To fit within the "small class" of immediately appealable collateral orders, an order must: "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."[166] Perhaps necessarily, this test is

161. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376 (1981) (quoting Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976)).

162. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949); *Mohawk Indus.*, 558 U.S. at 106.

163. *Cohen*, 337 U.S. at 546–47.

164. *Id.* at 546.

165. Will v. Hallock, 546 U.S. 345, 349 (2006).

166. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); *see also Mohawk Indus.*, 558 U.S. at 106 (quoting Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995)); Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1708 n.3 (2017).

somewhat vague and the elements are somewhat overlapping.[167] But it has proven to be a useful framework that courts use to assess appealability under the collateral order doctrine.

First, an order must "conclusively determine the disputed question."[168] That means that the order being appealed must be the trial judge's final word on the question, not just a tentative or provisional ruling subject to change later. Thus, an order is not conclusive if the trial judge explicitly reserves the question or affirmatively indicates that they are open to reconsidering their ruling.[169] Technically, judges can reconsider any order short of a final judgment,[170] so this element must be considered practically, based on actual indications of whether the judge has issued their last word on the issue. Some types of orders (class certification and decertification, denials of stays, interim fee awards, etc.) have been held to be inherently or at least usually tentative, while others (denials of qualified and absolute immunity) are inherently considered final.[171]

Second, an order must "resolve an important issue completely separate from the merits of the action."[172] That means the issue the order resolves must be collateral to the central issues in the case, not just a "[step] towards final judgment."[173] Thus, in *Cohen*, the order held to be collateral decided the question of whether the federal court should apply a state law requiring the plaintiff to post security before bringing suit, an issue entirely separable from the actual merits of the plaintiff's claims.[174] Other cases have held, for example, that orders requiring anonymous plaintiffs or attorneys to reveal their names are separate from the merits of the case.[175] The focus is on whether resolving the question makes a difference to the merits, other than its immediate procedural effect on the progress of the litigation.

Courts have struggled with whether this second element requires an

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167. *See* Palmer v. City of Chi., 806 F.2d 1316, 1318 (7th Cir. 1986) (observing that the three-element test "manages to be at once redundant, incomplete, and unclear").

168. *Coopers & Lybrand*, 437 U.S. at 468 (emphasis added).

169. 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911.1 (2d ed. 1991) .

170. *Id.*

171. *Id.*

172. *Coopers & Lybrand*, 437 U.S. at 468 (emphasis added).

173. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

174. *Id.* at 543–47.

175. *In re* Sealed Case, 931 F.3d 92, 95–96 (D.C. Cir. 2019); Doe v. Stegall, 653 F.2d 180, 183 (5th Cir. Unit A Aug. 1981); S. Methodist Univ. Ass'n of Women L. Students v. Wynne & Jaffe, 599 F.2d 707, 711–12 (5th Cir. 1979); Plaintiff B v. Francis, 631 F.3d 1310, 1314–15 (11th Cir. 2011); *In re* Chiquita Brands Int'l, Inc., 965 F.3d 1238, 1245 (11th Cir. 2020).

issue to be *important* to be appealable.[176] The original formulation in *Cohen* referred to decisions that were "too important to be denied review."[177] And Justice Scalia once advised that the "importance of the right asserted has always been a significant part of our collateral order doctrine."[178] Recent Supreme Court cases have focused on "the value of the interests that would be lost through rigorous application of a final judgment requirement."[179] Thus, for example, different orders with similar effects—requiring a defendant to continue with litigation—are deemed important or not depending on the value underlying the defendant's claimed "right to avoid trial." Double-jeopardy claims are deemed important because of the underlying constitutional right they protect. Governmental immunity claims are deemed important because of the underlying separation-of-powers and governmental-efficiency interests served by protecting government officials from suit. Accordingly, denials of those claims are immediately appealable under the collateral order doctrine. But claims of res judicata or that a statutory judgment bar—both of which would also permit a defendant to avoid trial—are deemed less important because they do not protect such weighty values, and thus denials of those claims do not warrant immediate appeals under collateral order doctrine.[180]

Third, an order must "be effectively unreviewable on appeal from a final judgment."[181] As explained above, an appeal from final judgment normally opens the record and permits the appellate court to review all the rulings that led up to the judgment. But the fact that interlocutory orders merge into, and can eventually be reviewed on an appeal from, a final judgment does not mean that eventual review is always effective. Review after the final judgment is not effective if it is too late to correct the harm caused by the order.

In some contexts, courts have found that pretrial orders that threaten First Amendment rights are effectively unreviewable on appeal if the right will have already been lost or impinged upon by the time of an eventual appeal from a final judgment. Two classic examples illustrate this reasoning. First, orders that strip litigants of their anonymity or

176. Sometimes the question of importance is treated as part of the "effective unreviewability" analysis for the third element, or as a separate fourth element. Will v. Hallock, 546 U.S. 345, 352–53 (2006).

177. *Cohen*, 337 U.S. at 546.

178. Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 502 (1989) (Scalia, J., concurring).

179. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107 (2009) (quoting Digit. Equip. Corp. v. Desktop Direct, 511 U.S. 863, 878–79 (1994)); *Will*, 546 U.S. at 351–52.

180. *Mohawk Indus.*, 558 U.S. at 103; *Will*, 546 U.S. at 347.

181. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (emphasis added).

pseudonymity are often considered effectively unreviewable because they "let the cat out of the bag" or because "you cannot unring a bell" (pick your metaphor).[182] Once a litigant's identity is revealed, there is nothing that an appellate ruling can do to un-reveal it, and any First Amendment protections for anonymous conduct and association are lost, so review from the final judgment would be ineffective. Second, orders that deny media access to court proceedings are also often considered effectively unreviewable because they infringe on the media's First Amendment rights and the public's right to know, which would be lost by delaying access and coverage until after an appeal from a final judgment.[183]

As something of an outgrowth of the requirement that an order be "effectively unreviewable on appeal from a final judgment,"[184] courts have held that a litigant may not immediately appeal from an order—even if it will have immediate irreversible effects—if they could disobey the order, be held in contempt, and then appeal from that final order of contempt.[185] Thus, in *Mohawk Industries*, the Supreme Court held that a discovery order compelling disclosure of information that was arguably covered by the attorney-client privilege was not immediately appealable under the collateral order doctrine because it was not "effectively unreviewable on appeal from a final judgment."[186] The Court explained that—even though privileged information could not be un-disclosed if it turned out that the order was erroneous—the order could be effectively reviewed on appeal from a final judgment because the party facing the compelled disclosure could disobey the order, be held in contempt, and then could appeal from that final order of contempt.[187]

182. *See, e.g.*, Doe v. Stegall, 653 F.2d 180, 181 (5th Cir. Unit A Aug. 1981); Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1065–67 (9th Cir. 2000); *In re* Papandreou, 139 F.3d 247, 251 (D.C. Cir. 1998); *In re* Grand Jury Subpoena Dated June 5, 1985, 825 F.2d 231, 234 (9th Cir. 1987) ("[W]e cannot 'unring that bell.'"). *See also* Maness v. Meyers, 419 U.S. 449, 463 (1975) ("Here, on the contrary, petitioner's client had not yet delivered the subpoenaed material, and he consistently and vigorously asserted his privilege. Here the 'cat' was not yet 'out of the bag' and reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back.").

183. *See, e.g.*, *In re* Hearst Newspapers, LLC, 641 F.3d 168, 171–72 (5th Cir. 2011); *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 928–29 (6th Cir. 2019); *In re* N.Y. Times Co., 828 F.2d 110, 113 (2d Cir. 1987); United States v. Wecht, 537 F.3d 222, 228 (3d Cir. 2008). *See also* Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 120–24 (2d Cir. 2006); Marceaux v. Lafayette City-Par. Consol. Gov't, 731 F.3d 488, 492–95 (5th Cir. 2013) (holding an interlocutory protective order requiring police officers to take down their website and to limit communication about the website to the media is immediately appealable because it implicates freedom of speech under the First Amendment).

184. *Coopers & Lybrand*, 437 U.S. at 468.

185. *Mohawk Indus.*, 558 U.S. at 111–12.

186. *Id.* at 105, 114.

187. *Id.* at 111–12.

Requiring parties to be held in contempt for disobeying orders before they may appeal can serve an important purpose. It preserves the efficiency of the litigation process. It discourages parties from making frivolous claims of privilege in order to obtain immediate appeals and delay or drive up the expense of litigating cases—the "implicit assumption" being that "unless a party resisting discovery is willing to risk being held in contempt, the significance of his claim is insufficient to justify interrupting the ongoing proceedings."[188] Given how common claims of attorney-client privilege are, the holding in *Mohawk Industries* likely did prevent significant expenses and delays. But courting contempt is not always a viable path to appeal. As discussed below, while some contempt sanctions (like dismissal, default judgment, and criminal contempt) are immediately appealable, many others (including monetary sanctions, most discovery sanctions, and civil contempt) are not.[189]

Some of the concerns informing the third factor of the collateral order doctrine are addressed by a related doctrine that sometimes permits immediate appeals from discovery orders that are aimed at nonparties, the *Perlman* doctrine.[190] The *Perlman* doctrine provides that "a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance."[191] The *Perlman* doctrine is distinct from the collateral order doctrine; the *Perlman* case involved a grand jury proceeding, not civil discovery, and it predates *Cohen*. But its motivating principle—that certain disclosures that a litigant is powerless to prevent are, once made, not effectively reviewable from a final judgment—echoes the "effectively unreviewable from a final judgment" requirement of the collateral order doctrine.[192]

Thus, for example, in *Arista Records, LLC v. Doe 3*, the Second Circuit allowed an anonymous defendant to immediately appeal from the denial of his motion to quash a subpoena directed at a third party.[193] In that case, the plaintiff record company sued unknown internet users for downloading and distributing copyrighted music.[194] The company sued

188. Pennsylvania v. Ritchie, 480 U.S. 39, 50 n.8 (1987).

189. *See infra* notes 271–78 and accompanying text.

190. Perlman v. United States, 247 U.S. 7, 13 (1918); *see also* Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11 (1992).

191. *Church of Scientology of Cal*., 506 U.S. at 18 n.11 (citing *Perlman*, 247 U.S. at 13).

192. *See In re* Sealed Case (Med. Recs.), 381 F.3d 1205, 1210 (D.C. Cir. 2004) (noting that discovery order compelling disclosure of confidential information was appealable under either collateral order doctrine or *Perlman* doctrine).

193. Arista Recs., LLC v. Doe 3, 604 F.3d 110, 116 (2d Cir. 2010).

194. *Id.* at 113.

the defendants anonymously, identifying them only by their IP addresses, and then served a subpoena on their nonparty internet provider to compel disclosure of their identities.[195] The district court denied a defendant's motion to quash the subpoena based on his First Amendment right to anonymity, and the Second Circuit held that it could hear an immediate appeal because the subpoena was "directed against a third party who is unlikely to risk being held in contempt to vindicate someone else's rights."[196]

Many courts of appeals, however, have extrapolated from the reasoning in *Mohawk Industries*—where the Supreme Court held that a party could not use the collateral order doctrine to immediately appeal an order compelling disclosure of information that was arguably covered by the attorney-client privilege—to limit the reach of the *Perlman* doctrine.[197] They have held that the *Perlman* doctrine should apply only to grand-jury proceedings or to appeals by non-parties themselves, because parties in civil litigation can, like the party in *Mohawk*, either appeal from the final judgment or disobey the order, obtain a contempt ruling, and appeal from that.[198] Whether or not that is sufficient to protect the attorney-client privilege (and there are reasons to argue that it is not),[199] it is not sufficient to protect First Amendment associational rights, as discussed further below.

Lastly, the collateral order doctrine must be applied categorically. This is not an element of the collateral order doctrine *per se*, but it is a requirement that warrants some explanation. The collateral order doctrine must be applied *categorically*—to whole classes of orders—not individually, based on the specifics of the case.[200] The Supreme Court has admonished judges not to "engage in ad hoc balancing to decide issues of appealability," based on "particular injustice[s]" in a specific case.[201] Instead, the Court has declared, judges must decide whether an order is

195. *Id.*

196. *Id.* at 116 (cleaned up).

197. *See* Bryan Lammon, Perlman *Appeals after* Mohawk, 84 U. CIN. L. REV. 1, 12 (2016).

198. *See id.* at 9–10 (explaining how the courts of appeals have erroneously limited *Perlman* after *Mohawk* and thus failed to adequately protect privileged information from disclosure).

199. *Id.* at 7–9.

200. In some sense, this categorical approach is inherent in applying any appealability doctrine. *See* Heppner, *supra* note 141, at 422. But the Court has made it explicit for the collateral order doctrine. *See id.* at 433–36.

201. Johnson v. Jones, 515 U.S. 304, 315 (1995); Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994).

appealable "at a higher level of generality."[202] They must consider "the entire category to which a claim [of appealability] belongs,"[203] and "decide appealability for categories of orders rather than individual orders."[204] Thus, the collateral order doctrine only permits an immediate appeal of an order if it permits an immediate appeal of the entire class of orders to which it belongs.

In practice, this means that judges cannot just look at the specific circumstances of each case and decide whether the three elements of the collateral order doctrine are met. Judges must first define or divine some larger *category* of rorders that includes the specific order at issue, and must then determine whether *all* the orders, or at least the *typical* orders, in that category meet the collateral-order-doctrine requirements.

B. Courts are split on whether the collateral order doctrine applies to compelled disclosures in discovery that threaten First Amendment rights.

Since *NAACP v. Alabama*, some circuit courts have had occasion to consider whether the collateral order doctrine permits immediate appeals from discovery orders compelling disclosures that threaten First Amendment rights. But they have not reached a consensus. Courts have sometimes held that such discovery orders fail this test because discovery orders are generally not immediately appealable, and parties may obtain immediate appeals by defying the order and being held in contempt. But courts have also held that they pass the test because they can irreparably harm an important constitutional right.[205]

Some courts have held that interlocutory discovery orders are not immediately appealable under the collateral order doctrine, even if they compel disclosures that threaten First Amendment associational rights.

In *Grinnell Corp. v. Hackett*, the First Circuit held that an order requiring the Chamber of Commerce to disclose the identities of its members was not immediately appealable under the collateral order doctrine.[206] The case was a labor dispute about whether Rhode Island

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202. *Digit. Equip.*, 511 U.S. at 876–77; *see also* Van Cauwenberghe v. Biard, 486 U.S. 517, 529 (1988) ("In fashioning a rule of appealability under § 1291, however, we look to categories of cases, not to particular injustices.").

203. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 101 (2009) (quoting *Digit. Equip.*, 511 U.S. at 868).

204. *Johnson*, 515 U.S. at 315.

205. And still others have acknowledged the confusion, but avoided deciding the issue. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1154 (9th Cir. 2010).

206. 519 F.2d 595, 596 (1st Cir. 1975).

could provide unemployment benefits to striking workers.[207] The Chamber of Commerce intervened on the side of the businesses opposing the provision of unemployment benefits.[208] The district court ordered the Chamber to respond to an interrogatory about the identities of its member firms, despite the Chamber's invocation of *NAACP v. Alabama* and its assertion that the disclosure would subject its member firms "to violence, property destruction, and other forms of harassment and economic reprisal."[209]

The First Circuit held that the compelled disclosure order did not meet any of the collateral order elements. It was not truly collateral to the merits of the case because, to determine the propriety of the discovery, "reference must be made to the issues of the underlying case to determine the relevance of the information whose disclosure has been ordered."[210] It did not resolve an important or unsettled question, since the basis of the order was the district court's determination that the disclosure was highly relevant (not the First Amendment question).[211] And it was not effectively unreviewable from a final judgment, since the Chamber could flout the order and appeal after being held in criminal contempt or having its claim dismissed.[212] The court also denied the Chamber's petition for a writ of mandamus, reasoning that there was no "clear usurpation of judicial power" to warrant it, and dismissed the appeal without reaching the merits.[213]

In *In re Motor Fuel Temperature Sales Practices Litigation*, the Tenth Circuit held similarly that a discovery order compelling a non-party trade association to disclose membership and other sensitive lobbying information was not immediately appealable under the collateral order doctrine.[214] The multidistrict litigation case combined twelve putative class actions in which customers sued motor fuel retailers (gas station companies) alleging that they sold motor fuel by the gallon, without accounting for the fact that motor fuel expands, and therefore costs more, at higher temperatures.[215] They alleged that the motor fuel retailers conspired by buying motor fuel under a wholesale pricing system that

207. *Id.* at 595.
208. *Id.* at 596.
209. *Id.*
210. *Id.* at 597.
211. *Id.* at 598.
212. *Id.*
213. *Id.* at 599.
214. 641 F.3d 470, 484 (10th Cir. 2011).
215. *Id.* at 476.

accounted for temperature variations, and then selling it, after it expanded, under a retail pricing system that did not account for temperature variations.[216] The customers sought discovery and disclosures from the defendants' trade associations, who were not parties to the suit, and they and the defendants opposed the discovery, arguing that it would infringe on their First Amendment associational rights.[217] The district court ordered the discovery to proceed, and they appealed, invoking the collateral order doctrine (among other theories).[218]

The Tenth Circuit held that the collateral order doctrine did not apply because, as a category, discovery orders adverse to a claimed First Amendment privilege are "effectively reviewable after final judgment and by other means."[219] The court relied on *Mohawk Industries* to conclude that there were other means of obtaining an appeal and disbelieved the trade groups' argument that lack of appealability would deter them from any First Amendment conduct.[220] The court, nonetheless, heard the appeal via a writ of mandamus and upheld the disclosure order, finding no evidence of chill.[221]

In *Ohio A. Philip Randolph Institute v. Larose*, the Sixth Circuit held that a discovery order requiring third-party political party committees to produce documents was not immediately appealable under the collateral order doctrine.[222] In this case, the plaintiffs were challenging Ohio's congressional redistricting plan as an unconstitutional gerrymander, and they sent subpoenas to the Republican National Committee, the National Republican Congressional Committee, and its redistricting coordinator demanding documents related to proving a partisan intent behind the plan.[223] The three-judge district court reviewed the documents *in camera* and then ordered the targets of the subpoenas to comply, despite their argument that divulging internal communications violated their First Amendment associational rights.[224] And they sought an appeal under the collateral order doctrine or, alternatively, a writ of mandamus.[225]

The Sixth Circuit held that the collateral order doctrine did not permit

216. *Id.*
217. *Id.* at 477.
218. *Id.* at 478–79.
219. *Id.* at 482–83.
220. *Id.* at 483–84.
221. *Id.* at 487–92.
222. 761 F. App'x 506, 508 (6th Cir. 2019).
223. *Id.* at 507–08.
224. *Id.* at 509.
225. *Id.* at 510.

an immediate appeal, relying largely on *Mohawk Industries* and *In re Motor Fuels* for the principle that the doctrine does not permit immediate appeals of orders compelling disclosures despite claims of privilege.[226] And the court emphasized that the appellants had other routes to seek an appeal, namely seeking an interlocutory appeal under § 1292(b), appealing after being held in contempt, or seeking a writ of mandamus[227] (though the court also ruled that writ was not available here).[228] Last year, in *White v. City of Cleveland*, the Sixth Circuit relied on this holding to hold categorically that discovery orders adverse to a claimed First Amendment privilege were not immediately appealable under the collateral order doctrine.[229]

However, some courts have found that discovery orders compelling disclosures that threaten First Amendment associational rights are immediately appealable because they do meet the collateral order doctrine's requirements.

For example, in *Whole Woman's Health v. Smith*, when a group of abortion providers challenged state regulations governing the disposal of fetal remains, the district court issued a discovery order compelling the production of documents from the Texas Conference of Catholic Bishops, a third party that had offered burial services for the fetal remains.[230] The Fifth Circuit held that the order was immediately appealable, especially given the importance of the First Amendment issues and the "repeated judicial admonitions that courts stay out of the business of weighing the sincerity of religious beliefs and practices."[231] The Fifth Circuit also relied on its own precedents holding that the collateral order doctrine permits appeals from interlocutory orders "bearing on First Amendment rights."[232] Notably, however, the precedents cited had nothing to do with discovery, the chilling effects of compelled disclosures, or even religious rights like those at issue in the case. They implicated the First Amendment in other ways, because they involved challenges to prior restraints on speech,[233] denials of motions to dismiss under anti-SLAPP statutes,[234] and denials of

226. *Id.* at 511.

227. *Id.*

228. *Id.* at 512–15.

229. No. 20-3687, 2021 WL 2763305, at *1 (6th Cir. Jan. 14, 2021) (citing *Ohio A. Philip Randolph Inst.*, 761 F. App'x at 511).

230. 896 F.3d 362, 364 (5th Cir. 2018).

231. *Id.* at 368.

232. *Id.*

233. Marceaux v. Lafayette City-Par. Consol. Gov't, 731 F.3d 488, 490 (5th Cir. 2013); United States v. Brown, 218 F.3d 415, 420 (5th Cir. 2000).

234. Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164, 180–81 (5th Cir. 2009).

press access to judicial proceedings.[235] Nonetheless, the court held that the order was appealable, and then it went on to find that the compelled disclosure would violate the Conference's First Amendment rights and reversed the discovery order.[236]

In *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*, a law-student group and four anonymous female lawyers sued two law firms in federal court for sex discrimination under Title VII.[237] In discovery, the defendant law firms sought compelled disclosures of the names of the anonymous female lawyers and the Association's members.[238] Fearing "embarrassment, annoyance and economic loss" and "that, if they are associated with the Association, they will be singled out for discrimination by Defendants and other law firms," the plaintiffs opposed the disclosures, argued that they violated the Constitution and Title VII, and moved for protective orders limiting the disclosures to the defendants' counsel.[239] The district court judge eventually ruled that the plaintiffs had to disclose to the defendants the female lawyer's names and the Association's membership lists, and the plaintiffs sought to appeal.[240]

The Fifth Circuit held that the collateral order doctrine applied and permitted an immediate appeal.[241] It found that the discovery order was "finished and conclusive" since there was no indication the trial judge would alter it.[242] It found that the issue of whether to reveal the plaintiffs' identities was "plainly" separable from the substance of their claims, since it would not require examining the merits of the claims or defenses.[243] And it found that "to postpone review until final judgment would risk irremediable injury" to the plaintiffs' First Amendment rights, since their identities "once revealed, could not again be concealed."[244] Plus, it further recognized that the appeal raised a serious and unsettled question of law about whether Title VII plaintiffs can bring suit anonymously.[245] After holding that the order was appealable, the court found that the anonymous female attorneys had no constitutional right to proceed anonymously, and that the compelled disclosure of the Association's members was

235. *In re* Hearst Newspapers, LLC, 641 F.3d 168, 171–72 (5th Cir. 2011).
236. *Whole Woman's Health*, 896 F.3d at 364.
237. 599 F.2d 707, 708–09 (5th Cir. 1979).
238. *Id.* at 709.
239. *Id.* at 709–11.
240. *Id.* at 711.
241. *Id.* at 712.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*

permissible with a protective order limiting the use of the information.[246]

Recently, in *In re Chiquita Brands International*, the Eleventh Circuit held that a district court order modifying an earlier protective order to permit disclosures of private information was immediately appealable under the collateral order doctrine.[247] The case was brought pseudonymously by the survivors of terrorist acts, alleging that the banana-producing company had provided financial support to the terrorist organizations responsible.[248] During discovery, the parties hammered out, and the district court entered, a protective order prohibiting Chiquita from revealing certain "private facts" that would make the plaintiffs' identities known publicly.[249] Eventually, Chiquita moved to remove those protections because they were increasing the costs of litigation, and the district court entered an order removing the protection and requiring the plaintiffs to reveal their identities.[250] The plaintiffs sought an appeal under the collateral order doctrine.[251]

The Eleventh Circuit quickly decided that the order stripping the plaintiffs of their pseudonymity was an appealable collateral order, relying on its own precedents holding that orders denying anonymity for a party meet the doctrine's requirements.[252] As for the order stripping the protections from the plaintiffs' "private facts," the court held that each element of the collateral order doctrine was met because: The order "conclusively determine[d] an important issue[]" of public interest, namely how to balance private individuals' rights to seek redress without fear of harm against the transparency and openness of court proceedings.[253] The order was "distinct" from the merits question of whether the plaintiffs should recover from Chiquita.[254] And it was effectively unreviewable after appeal because it could reveal facts that, once revealed, could not be concealed again.[255]

246. *Id.* at 713–14.

247. 965 F.3d 1238, 1245–46 (11th Cir. 2020).

248. *Id.* at 1243.

249. *Id.* at 1243–44.

250. *Id.* at 1244.

251. *Id.* In the meantime, the district court proceeded with the case and entered partial summary judgment against most of the plaintiffs, and that decision was appealed separately. *Id.* The Eleventh Circuit found that the collateral appeal was not moot, despite the separate appeal from the partial summary judgment. *Id.* at 1245–46.

252. *Id.* at 1245 (citing Plaintiff B v. Francis, 631 F.3d 1310, 1314 (11th Cir. 2011)).

253. *Id.* at 1246 (citing Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est., 596 F.3d 1036, 1038 (9th Cir. 2010)).

254. *Id.*

255. *Id.* (citing S. Methodist Univ. Ass'n of Women L. Students v. Wynne & Jaffe, 599 F.2d 707, 712 (5th Cir. 1979)).

Lastly, some courts have declined to decide whether the collateral order doctrine applies to disclosure orders that threaten First Amendment rights, as the Ninth Circuit did in *Perry v. Schwarzenegger* when it stated that "[a]fter *Mohawk*, it is uncertain whether the collateral order doctrine applies to discovery orders denying claims of First Amendment privilege . . . . Ultimately, we do not resolve the question here. Given the uncertainty, we have decided instead to rely on mandamus to review the district court's rulings."[256]

C. Courts should use the collateral order doctrine to hear immediate appeals from compelled disclosures in discovery that threaten First Amendment rights.

In order to resolve the open legal questions and to protect litigants' First Amendment rights, courts should use the collateral order doctrine to permit immediate appeals from discovery orders that compel disclosures threatening First Amendment rights.

1. Discovery orders compelling disclosures that threaten First Amendment rights qualify as appealable final orders under the collateral order doctrine.

The first element of the collateral order doctrine is easily met. Discovery orders compelling disclosures that threaten First Amendment rights "conclusively determine the disputed question."[257] Discovery orders compelling discovery of sensitive information despite a First Amendment objection have necessarily determined that the disclosure (along with any protective order or other protective measures the court orders) does not violate the First Amendment. That determination is conclusive.

To be sure, all trial court orders are subject to reconsideration by the court. But, unless the court specifically indicates that the discovery order is subject to reconsideration and provides a mechanism to protect the sensitive information from being disclosed in the meantime, an order requiring disclosure is conclusive. By contrast, orders that, on their own terms, are tentative or protect the information from actually being disclosed (such as an order compelling a party to provide information to the judge for *in camera* review or in sealed form to be unsealed upon a

256. 591 F.3d 1147, 1154 (9th Cir. 2010).

257. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

later showing) are not conclusive. They also are not effectively unreviewable on appeal from a final judgment, as discussed below. But that is true only because those orders do not actually compel any disclosures. If an order does actually compel a disclosure, then it is conclusive. Categorically speaking, orders compelling disclosures of sensitive information despite a claim of First Amendment associational privilege do conclusively determine the disputed question.

The second element of the collateral order doctrine is met because discovery orders that compel, or decline to compel, disclosures that threaten First Amendment associational rights "resolve an important issue completely separate from the merits of the action."[258] Whether or not the court compels the disclosure, it has decided an important issue—whether the sensitive information is protected by the First Amendment—that is completely separate from the merits of the action.

The issue of whether a compelled disclosure violates the First Amendment is normally separate from the merits of the underlying litigation. In *NAACP v. Alabama*, for example, the issue of whether to compel the NAACP to disclose its members' names was distinct from the merits questions in the case (whether the NAACP was required to and had complied with the State's corporate registration requirements).[259] To be sure, discovery orders compelling disclosures are often somewhat entangled with the merits of the case because deciding whether to permit discovery requires of the court to assess the value of the sought-after discovery to the claims and defenses in the case. And that has led some courts to find that such orders are not "completely separate" from the merits.[260] But recent Supreme Court cases have framed the issue decided at a more abstract level, focusing particularly on "the value of the interests that would be lost" by not permitting an appeal.[261] When the interests that would be lost are First Amendment rights, and the issue to be decided is of constitutional importance, the interests are important and the issue is usually separate from the underlying merits of the case. As courts have noted, "few tenets of the U.S. justice system rank above the conflicting principles presented when a party seeks to shield information in a judicial proceeding from public view,"[262] and that importance is even greater when

258. *See id.*

259. NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 451 (1958).

260. *See, e.g.*, Grinnell Corp. v. Hackett, 519 F.2d 595, 597 (1st Cir. 1975).

261. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107 (2009); Will v. Hallock, 546 U.S. 345, 351–52 (2006).

262. *In re* Chiquita Brands Int'l, Inc., 965 F.3d 1238, 1246 (11th Cir. 2020) (quoting Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est., 596 F.3d 1036, 1038 (9th Cir. 2010) (cleaned up)).

there are First Amendment interests on both sides.

The third element of the collateral order doctrine is met because discovery orders compelling disclosures that threaten First Amendment associational rights are "effectively unreviewable on appeal from a final judgment."[263] The chance to appeal an order once it merges into a final judgment does not provide enough protection against erroneous discovery orders compelling disclosures that violate the First Amendment. Many cases do not end in appealable judgments and, if they do, the issue will often not survive to be appealable. If the issue does survive to be appealable, it will often be too late to provide an effective remedy. And, disobeying the order and obtaining a contempt sanction is not an effective way to obtain a final appealable order when a compelled disclosure threatens First Amendment rights.

The first problem with relying on appeals from eventual final judgments to obtain meaningful reviews is that not every case results in an appealable final judgment. In many cases parties settle before judgment. In fact, the prospect of the disclosure itself may prevent the case from reaching an appealable final judgment. A defendant faced with a discovery order compelling a disclosure that they believe violates their First Amendment rights may choose to settle rather than comply. And a plaintiff may choose to drop the case. Indeed, the prospect of facing such discovery may deter prospective plaintiffs from bringing cases in the first place.

Or, if there is a final judgment, the party subject to the disclosure order may not be able appeal if they prevailed on the merits. Usually, prevailing parties lack standing to appeal from judgments in their favor.[264] "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom."[265] Although the Supreme Court has recognized an exception to this general rule for "an adverse ruling collateral to the judgment on the merits" which can be appealed "at the behest of the party who has prevailed on the merits, so long as that party retains a [sufficient] stake in the appeal,"[266] that

263. *See Coopers & Lybrand*, 437 U.S. at 468; *see also Mohawk Indus.*, 558 U.S. at 105; Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1708 n.3 (2017).

264. *See, e.g.*, ACLU v. U.S. Dep't of Just., 894 F.3d 490, 494 (2d Cir. 2018) ("A party may not appeal from a judgment or decree in its favor, for the purpose of obtaining a review of findings it deems erroneous which are not necessary to support the decree.") (quoting Elec. Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939) (cleaned up); Allstate Ins. Co. v. A.A. McNamara & Sons, Inc., 1 F.3d 133, 137 (2d Cir. 1993) ("In order to have standing to appeal, a party must be aggrieved by the judicial action from which it appeals.") (cleaned up).

265. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980).

266. *Id.* at 334.

exception will often be unavailable or provide only a fruitless appeal, given the second problem with relying on appeals from final judgments

The second problem with relying on appeals from final judgments is that the review will often come too late to provide meaningful relief. An appeal from a final judgment will be ineffective. As explained above, once a party complies with a disclosure has already occurred, the cat cannot be put back in the bag.[267] If a party has already made the disclosure, then the issue will be moot by the time the case reaches a final appeal. For an appeal to provide any real relief—which is to say, any real protection—the appeal must come before the disclosure is compelled.

There is another reason that an appeal from a final judgment comes too late to prevent or remedy the harm from an erroneous disclosure order: the harm does not only arise after the party complies. The chilling effect of potential compelled disclosures in discovery happens well before litigation even starts. As the compelled-disclosure cases from *NAACP v. Alabama* to *Americans for Prosperity* recognize, the *possibility of future* compelled disclosures can be sufficient to deter people from joining, donating to, associating with, or expressing views within advocacy groups. That is to say, even the threat of the disclosure (without the backstop protections of an immediate appeal) can have a chilling effect.

What about the other way for litigants to obtain an appealable final judgment, disobeying the order, being held in contempt, and appealing from the final contempt order?[268] Relying on appeals from contempt orders will not sufficiently protect First Amendment rights threatened by compelled disclosures in discovery. In *Mohawk Industries* the Court held that the collateral order doctrine does not permit immediate appeals from orders compelling disclosures despite claims of attorney-client privilege,[269] but that holding should not apply to orders compelling disclosures despite claims of First Amendment associational privilege. Compared to appeals from orders arguably violating attorney-client privilege, appeals from orders arguably violating First Amendment rights: protect a more important right, are less of a burden on the court system, and cannot be avoided by requiring parties to be held in contempt before appealing.

First, as important as attorney-client privilege is, First Amendment rights are, as explained above, even more important—and they will often

267. *See In re* Papandreou, 139 F.3d 247, 251 (D.C. Cir. 1998); *In re* Grand Jury Subpoena Dated June 5, 1985, 825 F.2d 231, 234 (9th Cir. 1987).

268. *See, e.g.*, Mohawk Indus., 558 U.S. at 111 (2009).

269. *Id.* at 114.

be implicated on both sides of a contested compelled-disclosure order.[270] *Second*, permitting appeals of disclosure orders denying claims of First Amendment associational privilege would impose much less of a burden on the courts than permitting appeals of disclosure orders denying claims of attorney-client privilege. To be sure, the holding in *Americans for Prosperity* will likely make claims of associational privilege more common. But there will still likely be far fewer such claims than there are claims of attorney-client privilege, which arise in almost every case. And the number of such challenges will decrease as the open questions about compelled disclosures are resolved (so long as those challenges can be appealed). The burden on litigants and the courts would not likely reach the levels that concerned the Court in *Mohawk Industries*. Thus, in comparison to the category of discovery orders found unappealable in *Mohawk Industries*, the balance between potential loss of rights versus efficiency comes out differently.

Third, the ability to appeal after a judge enters a final contempt order will not mitigate the chilling effect on the exercise of First Amendment rights given the other harsh sanctions courts impose besides appealable contempt orders. Judges have multiple ways to sanction failure to comply with discovery orders, many of which are not immediately appealable. Judges may hold people in civil or criminal contempt. And, while nonparties may appeal from civil or criminal contempt orders, parties to the litigation may only appeal orders holding them in *criminal* contempt.[271] Judges may impose the other discovery sanctions authorized by Rule 37(b).[272] And only some of those sanctions—like entry of a dismissal or default judgment—are final and appealable; others—like directing that matters be deemed established, claims be struck, proceedings be stayed, or costs be paid—are not. And, to make matters worse, the Supreme Court has directed trial judges to impose these coercive civil sanctions first, before resorting to appealable criminal sanctions.[273]

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270. *See supra* notes 262–63 and accompanying text. *See also* Perry v. Schwarzenegger, 591 F.3d 1147, 1155 (9th Cir. 2010).

271. *See* 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3917 (2d ed. 1992); Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11 (1992) ("A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order."); United States v. Nixon, 418 U.S. 683, 691 (1974) (explaining exception for orders aimed at third parties who are unlikely risk contempt to obtain an appeal).

272. FED. R. CIV. P. 37(b).

273. *See* Shillitani v. United States, 384 U.S. 364, 371 n.9 (1966) (instructing district courts to

Such nonappealable civil sanctions can still have a chilling effect on First Amendment rights, which the prospect of an eventual appeal from a final judgment cannot cure. For instance, parties held in civil contempt can be ordered to pay fines or even imprisoned, even though they may not be able to immediately appeal those orders.[274] This harsh rule is traditionally justified by saying that those orders are not final because the parties "carry the keys of their prison in their own pockets"—they can always obey the orders and then later appeal from a final judgment.[275] But that option is cold comfort for parties for whom obeying will itself be an irremediable harm. The prospect of this disclose-or-be-sanctioned regime can have a chilling effect on First Amendment participation in the first place.

Orders compelling disclosures that threaten First Amendment rights are particularly susceptible to this catch-22 because the individual or organization subject to the discovery order is often not the same individual or organization whose First Amendment conduct may be chilled. In *NAACP v. Alabama*, the litigant, the NAACP, faced a discovery order compelling it to disclose sensitive information about nonlitigants, its members.[276] The NAACP was willing to invite the contempt order necessary to obtain an appeal to protect its members' rights.[277] But not all litigants or political organizations will be so courageous in defense of their nonlitigant supporters.[278] And the problem is even worse when the roles are reversed and a nonparty faces the threat of sanctions for not complying with a discovery order that would compel it to disclose sensitive information about a party. While nonparties *can* immediately appeal from orders holding them in civil contempt, they often have less incentive to disobey and be held in contempt in the first place.[279] Imagine a case where a political organization is a party, and their opponent subpoenas a non-party internet provider for records revealing the members with accounts on the organization's website. The internet provider has no motivation to

"first consider the feasibility of coercing testimony through the imposition of civil contempt," and to "resort to criminal sanctions only after [determining], for good reason, that the civil remedy would be inappropriate").

274. Fox v. Cap. Co., 299 U.S. 105, 107–08 (1936).

275. Penfield Co. of Cal. v. Sec. & Exch. Comm'n, 330 U.S. 585, 590 (1947).

276. NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 451 (1958).

277. *Id.*

278. *See, e.g.*, United States v. Nixon, 418 U.S. 638, 691 (1974) (explaining exception for orders aimed at third parties who are unlikely to risk contempt to obtain an appeal). Nor can the third parties be expected to intervene or otherwise act to protect their anonymity, when doing so would risk disclosing their identities.

279. *Id.*

suffer sanctions to protect the members' identities. And, while the organization might seek an immediate appeal under the *Perlman* doctrine, many courts have held that doctrine only permits appeals by non-parties to protect their own rights.[280]

Thus, once again, the prospect of eventual disclosure can chill the members' or donors' exercise of their First Amendment rights *ex ante*. From the perspective of a potential member or donor who wishes to remain anonymous, that chill is not relieved by the mere possibility that a disclosure order might only be directed at an individual (party or nonparty, depending on the nature of the lawsuit) who has the opportunity, and the incentive, to court a contempt order that is immediately appealable.

2. Discovery orders compelling disclosures that threaten First Amendment rights constitute an appropriately limited collateral-order-doctrine category.

As explained above,[281] appealability under the collateral order doctrine cannot be determined on a case-by-case basis. Courts must identify categories of orders that warrant immediate appealability. It is tempting to try to apply the collateral order doctrine to familiar, easily identifiable, categories—like "discovery orders," or "discovery orders overruling a claim of privilege"—but those categories are too broad to treat as appealable collateral orders.[282]

The courts are in agreement that discovery orders writ large should not be categorically immediately appealable.[283] That broad category clearly does not meet the collateral order doctrine's requirements. Discovery orders are often, particularly in civil cases, not separable from the merits of a case because many discovery issues require inquiring into the merits of the claims to assess the need for the discovery.[284] If they *are* separable, then they are less likely to conclusively resolve important issues because they turn on discretionary procedural questions. Plus discovery orders are often effectively reviewable (if necessary) from a final appeal. As explained above, the same cannot be said of the subset of discovery orders

280. *See* Lammon, *supra* note 197, at 12.

281. *See supra* notes 200–204 and accompanying text.

282. But more specific descriptions—like "discovery orders requiring churches to turn over internal communications regarding their participation in legislation drafting," as described in *Whole Woman's Health v. Smith*, 896 F.3d 362 (5th Cir. 2018)—risk undermining the categorical nature of the inquiry, reducing them to a category of one, describing only the case at issue.

283. *See* discussion *supra* Section II.B.1.

284. Robertson, *supra* note 45, at 763–66.

compelling disclosures that threaten First Amendment rights.[285]

Nor would it make sense to permit immediate appeals from a more broadly defined category of all orders that affect or threaten First Amendment rights. For one thing, that category is not much narrower than the category of discovery orders writ large. Many discovery orders require one party to disclose something and/or limit what the other party may do with the disclosed information, and they could therefore be said to affect First Amendment conduct. But even taking a less expansive view of what kind of order affects First Amendment rights, it makes little sense to lump together all such orders into a category for appeals. Different First Amendment rights are threatened in different ways by different disclosures. For example, the Fifth Circuit likely erred in *Whole Woman's Health* by relying on its precedents permitting immediate appeals from interlocutory orders "bearing on First Amendment rights."[286] Gathering together cases about different First Amendment rights—each arising in different contexts (including outside of discovery), and each found appealable for different reasons—does not a coherent category make.

What about the category of discovery orders compelling disclosures despite *any* claim of privilege? This category would also include too many orders that do not meet the collateral order doctrine's requirements, particularly separability and ineffective reviewability from a final order.[287] Notably, it would include orders compelling a disclosure despite a claim of attorney-client privilege, which the Supreme Court held were not immediately appealable in *Mohawk Industries*.[288]

Another potential, but ultimately overly broad, category to consider, could be discovery orders compelling *or declining to compel* disclosures in the face of a First Amendment associational privilege claim. At first glance, this seems like an attractive idea. It would ensure that all rulings on the associational privilege were appealable. And it seems more fair to allow either side to appeal if it loses. But discovery orders *declining* to compel disclosures do not fulfill the collateral order doctrine's requirements. They do, like discovery orders compelling disclosures, necessarily determine the disputed question: whether the proposed disclosure would violate First Amendment rights has been decided, this time in the affirmative. That determination may or may not be conclusive, depending on whether the judge has indicated that the ruling is final or

285. *See supra* notes 261–67 and accompanying text.

286. *See Whole Woman's Health*, 896 F.3d at 368.

287. Robertson, *supra* note 45, at 764–66; *see* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009).

288. *Mohawk Indus.*, 558 U.S. at 103.

open to reconsideration. But either way, orders declining to compel discovery are not effectively unreviewable on appeal from a final judgment, unlike orders compelling discovery. Because the disclosure has not actually happened, there is no "letting the cat out of the bag" problem. If the order was erroneous, nothing confidential has been revealed, and the appellate court can correct the error on appeal from the final judgment and remand for further proceedings after the information is turned over.[289]

This is not to say every order that falls into these broader categories should be unappealable. Some orders may be immediately appealable for other reasons, including falling into other categories of orders that do meet the collateral order doctrine's requirements. But for purposes of defining this category, it makes sense to exclude them.

3. Alternative routes to appeal are unavailable or inadequate.

Aside from the collateral order doctrine, there are other ways to obtain immediate appellate review of non-final orders. The two most likely existing alternatives are seeking a writ of appellate mandamus or moving for a certificate of appealability as an interlocutory order under 28 U.S.C. § 1292(b). And, hypothetically, a new statute or procedural rule could be enacted to permit such appeals. But neither the existing routes nor a new rule would work as well as the collateral order doctrine for appealing discovery orders compelling disclosures that threaten First Amendment rights.

A writ of appellate mandamus permits a discretionary appeal if a court of appeals determines certain extraordinary circumstances warrant an appeal.[290] Under the All Writs Act, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[291] An appellate court may grant a writ of mandamus if the petitioner shows that it has no other adequate means of obtaining relief, the right to issuance of the writ is "clear and indisputable,"

289. That the opposing party will have suffered the inconvenience of not having the information during the litigation and will bear the expense of the appeal and re-litigation is not sufficient hardships to render an order "effectively unreviewable." Those are part of the ordinary costs of litigation.

290. Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1708 (2017) (quoting Will v. United States, 389 U.S. 90, 108 (1967) (Black, J., concurring)) ("[In] extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means 'final' and thus appealable under federal statutes.").

291. 28 U.S.C. § 1651(a).

and issuing the writ is "appropriate under the circumstances."[292] Thus, this discretionary standard is designed to act as a "safety valve" for individual cases that do not meet the requirements for an appeal under other appealability doctrines, "only when there is practically no other remedy."[293] It is reserved for "extraordinary" cases, "exceptional circumstances amounting to a judicial 'usurpation of power,' or a 'clear abuse of discretion.'"[294]

Requiring parties to seek a writ of mandamus to obtain an appeal from a compelled-disclosure order will not suffice to protect First Amendment rights. First, to the extent that appellate mandamus requires a "clear abuse of discretion," it will not provide a realistic chance of obtaining appellate review when—as is decidedly the case after *Americans for Prosperity*—the undecided legal questions mean that an error may very well not be "clear." An erroneous ruling on an open question of law does not rise to the level of clear abuse of discretion or "usurpation of power" of the type necessary to warrant granting mandamus.[295] Second, mandamus is a rare exception granted for extraordinary cases when no other means of appeal is available. It is not a reason *not* to apply the collateral order doctrine. It would be circular logic to decline to apply the collateral order doctrine because mandamus would be available if the collateral order doctrine did not apply. If that were a valid reason not to apply the collateral order doctrine, then the theoretical possibility of mandamus would always undermine the availability of the collateral doctrine. Third, the specificity and flexibility of the mandamus doctrine (it applies based on the specific facts of specific cases) means that it does not operate categorically. Even if it would apply in some cases, that would not make it an alternative means of obtaining an appeal for a whole category of orders. And the rare cases where it did apply would do little to help answer the open legal questions about compelled disclosures. Indeed, if only extraordinary or egregious cases that met the mandamus requirements made it to the appellate courts, they might distort the development of the doctrine.

Another alternative route to appeal is seeking a permissive

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292. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 381 (2004) (quoting Kerr v. U.S. Dist. Ct. for N. Dist. of Cal., 426 U.S. 394, 403 (1976)).

293. Helstoski v. Meanor, 442 U.S. 500, 505 (1979) ("The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it*. It lies only when there is practically *no other remedy*.") (quoting *Ex parte* Rowland, 104 U.S. 604, 617 (1882)).

294. *Cheney*, 542 U.S. at 380 (citation omitted).

295. *Id.* The Court has made some indication that mandamus can also be available when needed "to settle important issues of first impression." *Id.* at 391. But such "advisory mandamus" would still be an insufficiently reliable path to appellate review, for the other reasons discussed herein.

interlocutory appeal under 28 U.S.C. § 1292(b).[296] Section 1292(b) permits interlocutory review at the discretion of the trial judge by allowing a party to move for a certification that an interlocutory 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."[297] Unfortunately, district courts are notoriously reluctant to certify orders for appeal using § 1292(b).[298] Given the potential for delay—and the low likelihood of eventual reversal, since few discovery disputes survive to final appeal—district judges have little incentive to permit immediate appeals of their own discovery decisions.[299]

Section 1292(b) has two particular shortcomings (compared to using the collateral order doctrine) as a mechanism for obtaining appeals of discovery orders compelling disclosures that threaten First Amendment associational rights. First, an immediate appeal from such an order will often not "materially advance the ultimate termination of the litigation." Discovery orders are often collateral to the merits of the case, as is the issue of First Amendment rights. Despite its immense value to the litigants, determining whether or not a compelled disclosure violates the First Amendment will often not materially advance the case—especially if the alternative is disclosing the information and proceeding with the case. Second, although discovery orders compelling disclosures that threaten First Amendment rights do raise "question[s] of law as to which there is a substantial ground for disagreement" (see the discussion above of questions left open by *Americans for Prosperity*), those questions will, one hopes, not always be unanswered. Even if using § 1292(b) might help flesh out the doctrine by answering some legal questions, it will no longer apply (there will no longer be "a substantial ground for disagreement") once the first case in a given circuit has decided an issue. Later cases raising questions about the applications of the law to the particular disclosure at issue will not be immediately appealable.

One final alternative, albeit a hypothetical one, warrants

296. 28 U.S.C. § 1292(b).

297. *Id.* The appellate court then reviews the certification de novo and decides whether to accept the appeal by applying its own more discretionary standard of whether "exceptional circumstances" warrant an immediate appeal. *See* Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 883 n.9 (1994); Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978) ("[E]ven if the district judge certifies the order under § 1292(b), the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.").

298. Robertson, *supra* note 45, at 762–63.

299. *Id.*

consideration: what about enabling immediate appeals of discovery orders compelling disclosures that threaten First Amendment rights by passing a statute or amending the Federal Rules of Civil Procedure to permit a new kind of appeal? It has happened before.[300] To be sure, a possible rule change in the future is not a reason *not* to recognize a category of appealable collateral orders now. But it is worth considering whether a new codified rule would better protect First Amendment rights that relying on the collateral order doctrine. Unfortunately, given the questions about compelled disclosures and First Amendment associational rights that remain unanswered after *Americans for Prosperity*, it would be premature, and perhaps impossible, to set down a bright line rule declaring which orders should be immediately appealable. Using the collateral order doctrine would work better, allowing courts to employ common law, iterative adjudication to refine the category of appealable orders at the same time as they refine the underlying First Amendment compelled-disclosure doctrine.

CONCLUSION

After *Americans for Prosperity*, civil litigants are more likely to invoke the First Amendment associational privilege to oppose discovery. District court judges will make rulings on those discovery motions, but most of those orders will go unappealed. Appeals are necessary for two reasons: to resolve the open questions about which compelled disclosures violate the First Amendment; and to protect First Amendment rights. The best way to ensure those appeals happen is to use the collateral order doctrine to permit immediate appeals from discovery orders compelling disclosures that threaten First Amendment rights.

300. For example: § 1292(b) was created in 1958. Interlocutory Appeals Act of 1958, Pub. L. No. 85-919, 72 Stat. 1770 (codified at 28 U.S.C. § 1292(b)). Federal Rule of Civil Procedure 54(b) was amended in 1946 to permit entry of appealable partial final judgments. FED. R. CIV. P. 54 advisory committee's note to 1946 amendment. And Rule 23(f) was added in 1998 to permit immediate appeals of class certification orders. FED. R. CIV. P. 23 advisory committee's note to 1998 amendment.