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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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MOHAWK INDUSTRIES, INC. *v.* CARPENTER

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

No. 08–678. Argued October 5, 2009—Decided December 8, 2009

When respondent Norman Carpenter informed the human resources department of his employer, petitioner Mohawk Industries, Inc., that the company employed undocumented immigrants, he was unaware that Mohawk stood accused in a pending class action—the *Williams* case—of conspiring to drive down its legal employees' wages by knowingly hiring undocumented workers. Mohawk directed Carpenter to meet with the company's retained counsel in *Williams*, who allegedly pressured Carpenter to recant his statements. When he refused, Carpenter maintains in this unlawful termination suit, Mohawk fired him under false pretenses. In granting Carpenter's motion to compel Mohawk to produce information concerning his meeting with retained counsel and the company's termination decision, the District Court agreed with Mohawk that the requested information was protected by the attorney-client privilege, but concluded that Mohawk had implicitly waived the privilege through its disclosures in the *Williams* case. The court declined to certify its order for interlocutory appeal, and the Eleventh Circuit dismissed Mohawk's appeal for lack of jurisdiction, holding, *inter alia,* that the District Court's ruling did not qualify as an immediately appealable collateral order under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, because a discovery order implicating the attorney-client privilege can be adequately reviewed on appeal from final judgment.

Held: Disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine. Pp. 4–13.

(a) Courts of Appeals "have jurisdiction of appeals from all final decisions of the district courts." 28 U. S. C. §1291. "Final decisions" encompass not only judgments that "terminate an action," but also a

"small class" of prejudgment orders that are "collateral to" an action's merits and "too important" to be denied immediate review, *Cohen, supra,* at 545–546. "That small category includes only decisions that are . . . effectively unreviewable on appeal from the final judgment in the underlying action." *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 42. The decisive consideration in determining whether a right is effectively unreviewable is whether delaying review until the entry of final judgment "would imperil a substantial public interest" or "some particular value of a high order." *Will* v. *Hallock*, 546 U. S. 345, 352–353. In making this determination, the Court does not engage in an "individualized jurisdictional inquiry," *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 473, but focuses on "the entire category to which a claim belongs," *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 868. If the class of claims, taken as a whole, can be adequately vindicated by other means, "the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted," does not provide a basis for §1291 jurisdiction. *Ibid*. Pp. 4–6.

(b) Effective appellate review of disclosure orders adverse to the attorney-client privilege can be had by means other than collateral order appeal, including postjudgment review. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence. Moreover, litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of immediate review apart from collateral order appeal. First, a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal involving "a controlling question of law" the prompt resolution of which "may materially advance the ultimate termination of the litigation." §1292(b). Second, in extraordinary circumstances where a disclosure order works a manifest injustice, a party may petition the court of appeals for a writ of mandamus. *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 380. Another option is for a party to defy a disclosure order and incur court-imposed sanctions that, *e.g.*, "direc[t] that the matters embraced in the order or other designated facts be taken as established," "prohibi[t] the disobedient party from supporting or opposing designated claims or defenses," or "strik[e] pleadings in whole or in part." Fed. Rule Civ. Proc. 37(b)(2). Alternatively, when the circumstances warrant, a district court may issue a contempt order against a noncomplying party, who can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment. See, *e.g.*, *Church of Scientology of Cal.* v. *United States*, 506 U. S. 9, 18, n. 11. These es-

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tablished appellate review mechanisms not only provide assurances to clients and counsel about the security of their confidential communications; they also go a long way toward addressing Mohawk's concern that, absent collateral order appeals of adverse attorney-client privilege rulings, some litigants may experience severe hardship. The limited benefits of applying "the blunt, categorical instrument of §1291 collateral order appeal" to privilege-related disclosure orders simply cannot justify the likely institutional costs, *Digital Equipment, supra,* at 883, including unduly delaying the resolution of district court litigation and needlessly burdening the courts of appeals, cf. *Cunningham* v. *Hamilton County*, 527 U. S. 198, 209. Pp. 6–12.

(c) The admonition that the class of collaterally appealable orders must remain "narrow and selective in its membership," *Will, supra,* at 350, has acquired special force in recent years with the enactment of legislation designating rulemaking, "not expansion by court decision," as the preferred means for determining whether and when prejudgment orders should be immediately appealable, *Swint, supra*, at 48. Any further avenue for immediate appeal of adverse attorney-client privilege rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides. Pp. 12–13.

541 F. 3d 1048, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined, and in which THOMAS, J., joined, as to Part II–C. THOMAS, J., filed an opinion concurring in part and concurring in the judgment.