No. 10-1147

IN THE

Supreme Court of the United States

WHITE & CASE LLP,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber files briefs as *amicus curiae* in cases that raise issues of vital concern to the Nation's business community.

DRI—the Voice of the Defense Bar ("DRI") is an international organization comprised of more than 23,000 civil defense attorneys. DRI strives to improve the civil justice system by addressing issues of importance to the civil defense bar. For more than a half-century, DRI has worked to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. DRI promotes these objectives by participating as *amicus curiae* in cases that have direct and significant impacts on DRI's members and their clients.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, their members, or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief.

Two factors prompt *amici*'s participation in this case. First, the *per se* rule adopted in the Ninth Circuit's decision places defendants in the "untenable position" of choosing between the risk of adverse consequences in civil litigation and the risk of self-incrimination in a parallel criminal investigation. App. 5a. Plaintiffs can exploit this dilemma as leverage to extract speedy and sizable settlements unwarranted by the merits of their cases. Second, the express three-way circuit split, which spans six circuits, creates inconsistent laws nationwide and inevitably leads to predatory forum shopping. The implications of the Ninth Circuit's ruling—and the circuit split it exacerbates—stretch far beyond antitrust litigation.

INTRODUCTION

This dispute arises out of concurrent civil litigation and grand jury proceedings against domestic and foreign manufacturers of thin-film transistor, liquid crystal display panels (TFT-LCDs) for alleged price-fixing. Rather than stay the civil action pending resolution of the criminal investigation, the district court below ordered the civil defendants (some of whom have not been indicted in the ongoing criminal investigation) to produce discovery to the civil plaintiffs. Based in part on the government's argument that proceeding with civil discovery could place defendants in the "untenable position" of having to choose between fully defending the civil action and maintaining their Fifth Amendment right against self-incrimination, the district court entered an order specifically prohibiting the government from obtaining the civil discovery for use as evidence in the grand jury investigation. App. 5a-6a. It was in reliance upon this discovery order and the accompanying civil

protective order that defendants produced significant information from outside the United States.

Two years later, the government reversed course and issued the grand jury subpoenas at issue here. Those subpoenas sought all discovery from the related civil action, including deposition testimony and foreign-origin documents brought into the United States by the civil defendants. Pet. 12. After the district court quashed the subpoenas, the Ninth Circuit reversed. The Ninth Circuit based its decision on a *per se* rule in which a grand jury subpoena always trumps a civil protective order, regardless of any countervailing considerations. This result automatically "expand[s] the DOJ's subpoena power beyond its current geographical limits," and provides the government with criminal discovery it would not have obtained but for the defendants' good-faith reliance on the discovery and protective orders in the concurrent civil litigation. App. 6a.

Like the Ninth Circuit, the Fourth and Eleventh Circuits have utilized a *per se* rule favoring grand jury subpoenas over protective orders in all circumstances. In contrast, the Second Circuit adopted the opposite approach, extending the safeguards of a civil protective order to grand jury subpoenas absent extraordinary circumstances. The First and Third Circuits have chosen a middle ground: a rebuttable presumption that grand jury subpoenas will be enforced over civil protective orders. Thus, six federal circuits have developed three completely different outcomes for defendants that face simultaneous civil and criminal proceedings and that must choose between defending their rights in one forum to their detriment in the other. This circuit split is plainly ripe for the Court's review.

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED TO CORRECT THE DECISION BELOW AND RESOLVE A THREE-WAY CIRCUIT SPLIT.

This Court has endorsed the use of "protective orders to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases." *Degen v. United States*, 517 U.S. 820, 826 (1996). The Ninth Circuit, however, has failed to heed this Court's guidance. Applying a *per se* rule in which a grand jury subpoena always trumps a civil protective order, the Ninth Circuit dramatically expanded the DOJ's subpoena power, App. 6a, and jeopardized the district court's ability to conduct full and fair civil proceedings. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.").

The Ninth Circuit's decision leads to two immediate and harmful consequences. First, it incentivizes plaintiffs to seek overly broad and foreign-based discovery from civil defendants in order to leverage the specter of possible criminal prosecution and thus force quick and unwarranted settlements. Second, the decision below exacerbates a troubling three-way circuit split that will encourage predatory forum shopping.

A. Plaintiffs Can Exploit The Ninth Circuit's *Per Se* Rule To Leverage Speedy And Sizable Settlements In Non-Meritorious Cases.

As this Court has recognized, requiring a corporation to defend itself through the testimony of an employee that might "subject[] himself to a 'real and

appreciable risk' of self-incrimination" presents a "troublesome question." *United States v. Kordel*, 397 U.S. 1, 8-9 (1970). "[I]n such a case," the Court posited, "the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action." *Id*. at 9. Defendants in this case sought to stay discovery, but the district court denied that request in favor of limited discovery and the protective order that was nullified subsequently by the Ninth Circuit. App. 5a. This outcome is characteristic of the predicament faced by other litigants in concurrent civil and criminal proceedings where discovery stays are denied. *See, e.g.*, *In re Grand Jury Subpoena*, 836 F.2d 1468, 1469 (4th Cir. 1998) (district court denied stay and issued protective order to safeguard deponents' Fifth Amendment rights).

When civil discovery is allowed to proceed, as here, a protective order provides no shelter from a grand jury subpoena under the Ninth Circuit's *per se* rule. The Ninth Circuit's rule forces deponents to assert their Fifth Amendment privilege and withhold testimony in order to avoid self-incrimination in the concurrent criminal proceeding. This "untenable" choice potentially deprives the corporate defendant of valuable evidence necessary to defend the civil suit. App. 5a. Similarly, defendants in follow-on suits cannot rely on a protective order to shield documents produced during civil discovery from a grand jury subpoena, even when those documents originated beyond the territorial subpoena power of U.S. prosecutors. Accordingly, the only way for a civil defendant to prevent the government from using foreign-based documents in a concurrent criminal proceeding would be to refuse to produce those documents in civil discovery.

Noncompliance with civil discovery carries heavy penalties. A defendant's refusal to comply with relevant discovery requests can result in monetary sanctions, adverse inferences, and even default on the civil claims. Fed. R. Civ. P. 37(b)(2); *Mitchell v. United States*, 526 U.S. 314, 328 (1999) ("invocation of the [Fifth Amendment] privilege . . . [runs] the risk of suffering an adverse inference or even a default"); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980) (cataloging discovery sanctions); *see also, e.g.*, *Lockheed Martin Corp. v. L-3 Commc'ns Integrated Sys., L.P.*, No. 05-CV-902, 2010 WL 1891779 (N.D. Ga. Mar. 31, 2010) (vacating $37.3 million jury award due to discovery noncompliance). Because the Fifth Amendment does not protect against the adverse consequences of silence in civil litigation, *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976), defendants face a legal dilemma: either defend oneself fully in the civil action at the risk of providing the government criminal discovery to which it has no right to access, or risk severe adverse consequences in the civil litigation in order to avoid disclosing incriminating information that lies beyond the grand jury's reach.

The mere existence of this dilemma dramatically increases the *ex ante* costs of civil litigation as defendants must take appropriate and costly measures to reduce potential criminal exposure. For example, defendants may elect to review foreign-based documents abroad rather than risk bringing those documents into the United States. Defendants also might file additional, aggressive motions to limit broad discovery requests on the basis of relevancy, oppression, or undue burden. Fed. R. Civ. P. 26(b)(1), (c). These measures, which are necessary to mitigate the risk that civil discovery will be misused

in criminal proceedings, come with significant financial costs borne overwhelmingly by defendants.

Even more significantly, enterprising plaintiffs can exploit these *ex ante* costs, as well as defendants' concern about disclosing potentially incriminating evidence to which the government is not otherwise entitled, in order to leverage settlements in non-meritorious civil cases. Defendants may be willing to settle such cases rather than risk the threat of having documents and deposition testimony subpoenaed in a concurrent criminal investigation and to avoid the high legal costs required to limit the scope of civil discovery. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) (weighing the "practical consequence[]" "that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies"). In contrast, in jurisdictions where defendants can rely on civil protective orders to shield discovery from grand jury subpoenas (like the Second Circuit), costly *ex ante* remedial measures would be unnecessary and the civil playing field would be leveled.[2]

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[2] The risk of unwarranted settlement has a long pedigree in private antitrust litigation. *See* Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 97th Cong. 7 (1982), p. 67 (statement of Hon. William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice) (expressing the need to "reduce certain abuses of antitrust litigation that now occur, cases that are brought without any very substantial prospect of success and really can only be characterized as shakedown attempts, whereby people are induced to settle to save the litigation and discovery costs and so on that lie between them and the future"); Antitrust Equal Enforcement

Federal courts have no interest in promoting the "type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff . . . [only] because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742-43 (1975). Rather, "when the costs of discovery and litigation are used to force settlement even absent fault or injury . . . the Court, by failing to adopt a reasonable interpretation to counter th[is] excess[], risks compromising its own institutional responsibility to ensure a workable and just litigation system." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1628-29 (2010) (Kennedy, J., dissenting).

Finally, the government's lack of "bad faith" in proceedings below, App. 3a, is irrelevant. Collusion between prosecutors and plaintiffs is unnecessary in situations, like this one, where the interests of plaintiffs and prosecutors align; plaintiffs have the incentive to seek overly broad civil discovery precisely *because* prosecutors could use that discovery—to which they are not otherwise entitled—to secure a criminal indictment or conviction. The specter of criminal prosecution inevitably inures to plaintiffs' benefit, and plaintiffs do not need the government's

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Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary, 96th Cong. 85 (1979), p. 66 (statement of Donald G. Kempf, Jr.) ("The fact of the matter is that today antitrust settlements are being entered into which bear no necessary relationship to whether or not the defendants engaged in any improper conduct or whether or not the plaintiffs suffered any damage.").

complicity or involvement in such tactics. As a result, disputes like this one can be expected to recur. *See* Mike Scarcella, *DOJ Defending Grand Jury Subpoenas in Trade Secrets Theft Investigation*, The Blog of LegalTimes, Mar. 22, 2011 (covering recent proceedings in the Fourth Circuit over an accusation "that prosecutors were unfairly piggybacking on [discovery in a] civil action, using subpoenas to try to grab documents outside of the grand jury's power"), *available at* http://legaltimes.typepad.com/blt/2011/03/doj-defending-grand-jury-subpoenas-in-trade-secrets-theft-investigation.html.

B. The Existing Circuit Split Incentivizes Forum Shopping.

In the Fourth, Ninth, and Eleventh Circuits (the *per se* Circuits), civil defendants risk sanctions, adverse inferences, or default in order to protect fully their constitutional right against self-incrimination. Pet. 16-18. In contrast, defendants in the Second Circuit can rely on the security afforded by a civil protective order to produce documents and robustly defend a civil lawsuit on the merits without fearing the government's exploitation of civil disclosures to secure a criminal indictment. Pet. 18-20. Without a doubt, plaintiffs who bring follow-on civil lawsuits in the Fourth, Ninth, and Eleventh Circuits have a distinct strategic advantage that is unavailable to plaintiffs in the Second Circuit.

The temptation to forum shop is irresistible under these conditions. That temptation increases in cases involving large corporations, which, because of their far-reaching enterprises, usually are subject to personal jurisdiction in multiple circuits. It would be naïve to think that plaintiffs would not exploit such a

significant advantage that they can leverage for settlement purposes when given the option of bringing a follow-on lawsuit in the Ninth Circuit versus the Second Circuit. Prosecutors, too, face the same temptation to forum shop, given their discretion in selecting an appropriate jurisdiction from which to issue a subpoena. Even the possibility that prosecutors would be employing such gamesmanship undermines public confidence in the uniform and fair application of criminal laws.

Presently, half of the nation's circuit courts have ruled on the interplay between civil protective orders and grand jury subpoenas. The result is three different, intractable positions on this issue among the three most active circuits for federal antitrust litigation. Pet. 16-23 (detailing circuit split); Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases*, 24 Antitrust 58, 59 (2010) (62% of antitrust class action suits are filed in the Ninth, Third, and Second Circuits). In another recent case, the government successfully sought certiorari on the ground that a single inconsistent circuit decision, "if left unreviewed, w[ould] encourage corporate entities to engage in forum shopping to capitalize on the ruling." Reply Brief for the United States at 9-10, *FCC v. AT&T Inc.*, 131 S. Ct. 1177 (2011) (No. 09-1279), 2010 WL 3019690. The circuit split in this case is indisputably broader than it was in *FCC v. AT&T* and just as stark. In order to prevent forum shopping and ensure the uniform application of laws nationwide, the Court should grant certiorari and resolve these inconsistent judgments.

II. THIS CASE HAS BROAD IMPLICATIONS FOR NUMEROUS AREAS OF LAW.

As Petitioner correctly notes, civil suits often follow immediately on the heels of the government's announcement of a criminal investigation. Pet. 5; App. 8a. Nearly 60% of federal antitrust class action cases filed from 2007 to 2009 arose from a prior government enforcement action. Hawthorne, *supra*, at 58 (reviewing 121 lead cases compiled from 1,811 class action complaints). A survey of the 40 largest successful private antitrust lawsuits similarly revealed that only 15 of those cases did *not* follow government enforcement actions. Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Cases: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 897-98 (2008). In antitrust cases like this one, piggyback plaintiffs seek to reap the spoils of a government investigation by filing civil lawsuits for treble damages and attorneys' fees under the Clayton Act. 15 U.S.C. § 15.

This "follow-on phenomenon" recurs in a broad range of cases affecting many business sectors. In addition to the antitrust context, similar suits have been filed in products liability, securities, white collar, civil rights, and consumer fraud litigation. Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 2 (2000); *see also* Pet. 24-25. The practice has become so ubiquitous that one commentator concluded, "[c]oattail class actions are a common feature of mass litigation" today. Erichson, *supra*, at 5. In this case alone, nearly 140 putative class action complaints were filed throughout the country following news that the DOJ was investigating

potential antitrust violations within the TFT-LCD industry. Pet. 4; App. 2a.

Consequently, the practical impact of the Ninth Circuit's *per se* rule and the existing circuit split will be felt in multiple areas of law and will affect numerous industries in the United States and abroad. These broad ramifications have prompted close attention to the outcome of this case, as well as *amici*'s participation here. Mike Scarcella, *DOJ Presses Law Firms in LCD Probe*, Nat'l L. J., May 10, 2010, at 6. The importance of resolving this circuit split and correcting the Ninth Circuit's decision below warrants the Court's attention.

CONCLUSION

For the reasons set forth above, the Chamber and DRI respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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