Nos. 14-17560 & 14-17561

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TOWN OF COLORADO CITY, CITY OF HILDALE, TWIN CITY POWER, AND TWIN CITY WATER AUTHORITY,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES' REPLY TO APPELLANTS' RESPONSE TO THIS COURT'S ORDER TO SHOW CAUSE WHY THIS CASE SHOULD NOT BE DISMISSED

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This Court should dismiss the appeals of the district court's discovery orders. An order to compel testimony is not ordinarily appealable, and does not fall within the narrow collateral order exception. Nor is this case appropriate for the extraordinary remedy of mandamus.

BACKGROUND

On June 21, 2012, the United States filed a complaint against the Town of Colorado City, Arizona, the City of Hildale, Utah, and their municipal utility providers, Twin City Water Authority, Inc., and Twin City Power, alleging a long-standing pattern or practice of discrimination on the basis of religion. R. 1. The United States alleged that the cities and utilities violated the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, by discriminating against people who were not members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS Church) in provision of police and housing-related services. R. 1 at 1-2. The United States also alleged that the cities, through their joint police force, violated 42 U.S.C. 14141 by engaging in a pattern or practice of statutory and constitutional violations, including Establishment Clause violations. R. 1 at 1-3.

The United States alleged that violations have been going on for some 20 years. R. 1 at 3. The United States alleged that the municipalities refused to provide city water, electric service, and building permits to people who were not members of the FLDS Church or who had been excommunicated by church

leaders. R. 1 at 2, 12. The United States also alleged that city officials used their law enforcement authority to carry out the church's policies and directives, harming people who were not members of the church. R. 1 at 3.

The United States alleged that municipal law enforcement improperly carried out FLDS Church directives by, for example, rounding up and killing all town residents' dogs after church leader Warren Jeffs decided to ban dogs. R. 1 at 7-8. The Colorado City Marshal's Office, the joint police force serving Colorado City and Hildale, helped the church surveille church dissidents. R. 1 at 2, 6-7. The marshals also failed to protect people who were not church members and those who had fallen out of favor with the church, including a farmer whose crops were destroyed by FLDS Church members and an underage girl who ran away from a forced marriage. R. 1 at 5. Officers unlawfully prevented individuals who were not church members from occupying houses they had a right to occupy. R. 1 at 10.

Early in the case, the defendants sought a protective order to prevent the United States from inquiring into the FLDS Church's "practices" and "'handling' of members." R. 98 at 2. Defendants claimed such questions were harassing or embarrassing. R. 98 at 4. The district court denied the motion. R. 98 at 4. Subsequently, in September 2013, the United States sought to compel testimony from current and former municipal employees. R. 185. Defendants opposed the

motion, citing First Amendment concerns of those the United States sought to depose. R. 196 at 1, 9-11; R. 197 at 1-2, 5-8.

While the district court granted the United States' motion to compel, it held that "[d]eponents' personal adherence to particular beliefs without the nexus to a defendant's city operations will be out of bounds." R. 205 at 6-7. The United States filed a second motion to compel in February 2014, explaining that defendants continued to advise deponents to withhold information the court had ruled appropriate for discovery. R. 294 at 1-2. In opposition, defendants again cited First Amendment concerns of the deponents. R. 313 at 8; R. 320 at 1, 5-6. The district court again granted the motion, holding that defendants' counsel had improperly advised the deponents to withhold information about church organization and security. R. 322 at 8. The court found that the United States' questions were sufficiently tailored to focus on defendants' conduct in relation with the church. R. 322 at 10.

Some deponents continued to assert First Amendment privileges, and in September 2014 the United States filed its third and fourth motions to compel. R. 473; R. 474. In particular, it sought testimony from two deponents, Colorado City Marshal Curtis Cooke and former town council member Vergel Steed. *Ibid*. Neither individual is a party to this case.

Cooke claimed that giving information about his membership in the church, his communications with fugitive church leader Jeffs and church entities would violate his First Amendment rights. R. 473-1 at 4-31; R. 473-2 at 6, 8, 10-11, 13-29. Steed similarly claimed that giving information about the FLDS Church's leaders, security, and administration violated his First Amendment rights. R. 474-1 at 3-11.

In opposition to the motions, defendants reiterated First Amendment concerns of the deponents and claimed the questioning substantially burdened the deponents' religious exercise in violation of the Religious Freedom Restoration Act, 42 U.S.C. 2000bb (RFRA). R. 486 at 2-3; R. 490 at 1-2, 7. The district court granted the United States' motion. R. 523. It rejected Cooke's claim of a burden on religious exercise, and suggested it was "a self-imposed, testimony avoidance technique, as opposed to a tenet of his church." R. 523 at 3. The court nevertheless assumed that Cooke could make the necessary initial showing of a burden on religious exercise under RFRA (R. 523 at 3), and held Steed had done so (R. 524 at 3-4).

The court then found that the United States had shown, as an appropriate justification under RFRA, a compelling interest in obtaining answers to its questions. "Eradication of discrimination, [and] the enforcement of civil rights laws, are compelling governmental interests" and "important public goals." R. 523

at 3-4. The court held that the United States had shown a "compelling government interest in obtaining the answers to questions it seeks," R. 523 at 3; R. 524 at 4-5. The court stated that Cooke's testimony was essential to the government's case, as "[w]hat Cooke as a police officer knows about the interactions between" the FLDS Church and the municipal entities "is unique." R. 523 at 4. As a city official, the court stated, what Steed knew of how the church and the defendants "interact in the performance of city functions," was "highly relevant." R. 524 at 4. Accordingly, the court held that, consistent with the requirements of RFRA, the questions were "the least restrictive means of obtaining the desired information." R. 523 at 4.[1]

Colorado City, Hildale, and the municipal utilities appealed the orders as to Cooke (in case No. 14-17560) and Steed (in case No. 14-17561). Neither Cooke nor Steed filed an appeal. Defendants did not seek to certify an appeal under 28 U.S.C. 1292(b).

On January 16, 2015, this Court ordered defendants to show cause as to why the cases should not be dismissed for lack of jurisdiction, as discovery orders are generally not immediately appealable. Defendants filed a response in case No. 14-

[1] Defendants assert that the district court applied an erroneous, "two step First Amendment analysis" and complain that the court did not cite certain RFRA cases they relied upon. Resp. 5. As described above, however, the court properly considered all three parts of the RFRA test, which it characterized as "strict scrutiny." R. 523 at 2. It did not hold RFRA and First Amendment analyses were "one and the same." Resp. 5.

17560 on February 6, 2015, and a notice adopting those arguments in case No. 14-17561. The United States submits this combined reply.

DISCUSSION

A. Because There Is No Final Or Appealable Interlocutory Order, This Court Lacks Jurisdiction

A discovery order is not a final order and is not immediately appealable. 28 U.S.C. 1291; *United States* v. *Ryan*, 402 U.S. 530, 531-532 (1971); *Nascimento* v. *Dummer*, 508 F.3d 905, 909-910 (9th Cir. 2007).

The proper remedy for deponents Steed and Cooke, the real individuals whose rights are at issue here, is well established; they may refuse to comply with the subpoena, be held in contempt, and then seek to vindicate their own rights by appealing the contempt order. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377 (1981); *Cobbledick* v. *United States*, 309 U.S. 323, 327-328 (1940); *Perry* v. *Schwarzeneger*, 602 F.3d 976, 979 (9th Cir. 2010) (*Perry II*). As *Ryan* explained, if a discovery order is "unduly burdensome or otherwise unlawful," the witness "may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought." *Ryan*, 402 U.S. at 532. This Court has said that the rights of witnesses like Steed and Cooke "are protected sufficiently by their ability to disobey and test" a court's discovery order "on [their] appeal from a subsequent citation for contempt." *Belfer* v. *Pence*, 435 F.2d 121, 122-123 (9th Cir. 1970) (per curiam); see also *In re Subpoena Served on Cal.*

Pub. Utils. Comm'n, 813 F.2d 1473, 1476 (9th Cir. 1987) (*Utility Comm'n*); *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Litig*., 857 F.2d 1238, 1239 (9th Cir. 1988) (per curiam). This requirement of issuance of an appealable contempt order applies even if important constitutional rights are at stake. *Perry II*, 602 F.3d at 979. It is only after deponents or witnesses refuse to provide contested testimony and are found in contempt for doing so that "the witness[es]' situation becomes so severed from the main proceeding as to permit an appeal." *Cobbledick*, 309 U.S. at 328. This "serves to illustrate the strictness in applying the final judgment rule." *Utility Comm'n*, 813 F.2d at 1476 n.1.

The municipalities here cannot appeal an order affecting only non-party deponents or witnesses. *David* v. *Hooker, Ltd*., 560 F.2d 412, 416 (9th Cir. 1977). The proper remedy for the municipalities from a discovery disagreement is a direct appeal of the final judgment.[2] Particularly in this case, where the municipalities are not asserting their own constitutional rights but those of non-parties, this Court can review the judgment and remedy any harm to the defendants after final judgment. *Utilities Comm'n*, 813 F.2d at 1480 (dismissing attempted appeal of an order quashing subpoena). The municipalities are not claiming there is a burden

[2] Defendants simply skipped over another possibility for accelerated review, a request that the district court certify an interlocutory appeal under 28 U.S.C. 1292(b).

on *their* religious exercise, nor could they. They simply claim that evidence they feel is improper may be admitted. If the court of appeals holds that improper and prejudicial evidence is admitted, that can easily be remedied – as is any evidentiary error – by a new trial.

B. The Collateral Order Doctrine Does Not Apply Here

Contrary to defendants' argument, this case is not eligible for a "narrow exception" to the final order doctrine, the collateral order doctrine. *Firestone Tire & Rubber Co.*, 449 U.S. at 374-375. To qualify for such an interlocutory appeal, a party must show that the order (1) conclusively determines the disputed question, (2) presents a question of law separate from the merits of the litigation, and (3) that the order is "effectively unreviewable" on appeal. *Perry* v. *Schwarzenegger*, 591 F.3d 1147, 1155 (9th Cir. 2010) (*Perry I*).

The district court's discovery order arguably meets the first requirement, as is a conclusive determination of the disputed question of whether RFRA protects deponents from answering questions about their church. See *Perry I*, 591 F.3d at 1155-1156. It does not meet the second requirement, that the discovery questions present an issue of law separate from the merits. The propriety of the questions is inextricably intertwined with the merits of the case. In determining whether the questions were barred by RFRA, the district court was required to consider the nature of the allegations, the United States' interest in enforcing antidiscrimination

laws, and the likelihood that the deponents' evidence would help prove the United States' claims. In addition, there is potentially "some overlap with merits-related issues" because both deponents' objections to specific questions and the United States' claims involve religious or church-related issues. *Perry I*, 591 F.3d at 1155-1156. The court will make similar determinations as it weighs the United States' claims and the evidence on record when it reaches the merits in this case.

But as in *Perry I*, this Court need not decide the degree of overlap because the defendants cannot meet the third requirement for application of the collateral order doctrine. *Perry I*, 591 F.3d at 1155.[3] It is this consideration, an order's reviewability on appeal, that usually differentiates eligible from non-eligible cases, *Firestone Tire & Rubber Co.*, 449 U.S. at 374-375; *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009), and that is true here. A case satisfies the third requirement only if the ruling is effectively unreviewable on appeal. *Perry*, 591 F.3d at 1136. Because finality is so important, the standard is high. The appellant must show that an "opportunity for meaningful review will *perish* unless immediate appeal is permitted," *Firestone Tire & Rubber Co.*, 449 U.S. at 377-778

[3] Contrary to defendants' assertion (Resp. 10-11), this Court did not conclusively decide whether there was meaningful overlap of the issues in *Perry I*. The Court said there could be "some overlap" "[i]n theory," and "assumed without deciding" that the district court decision was correct on the First Amendment issues relevant to the case, so that it could avoid "delv[ing] into those questions on appeal." *Perry*, 591 F.3d at 1155.

(emphasis added), and that "denial of immediate review would render *impossible* any review whatsoever," *Ryan*, 402 U.S. at 533 (emphasis added); see also *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Litig.*, 857 F.2d at 1240. Even if a claim is "only imperfectly reparable by appellate reversal," interlocutory appeal is inappropriate. *Mohawk Indus., Inc.*, 558 U.S. at 107 (internal quotation marks and citation omitted).

This case does not fall within any class recognized under the collateral order doctrine. These are limited to claims that present such irremediable situations as potential double jeopardy, *Abney* v. *United States*, 431 U.S. 651, 659 (1977), and violation of right to bail, *Stack* v. *Boyle*, 342 U.S. 1, 6 (1951). Other claims, such as refusal to disqualify counsel, *Firestone Tire & Rubber Co.*, 449 U.S. at 377, or improper disclosure of privileged attorney-client material, *Mohawk Indus., Inc.*, 558 U.S. at 109, do not qualify for an immediate appeal.

The discovery rulings at issue here could, from defendants' perspective, lead to the admission of prejudicial evidence. This harm is remediable on appeal of a final order. If Steed and Cooke are compelled to provide the disputed information, and if their testimony is used at trial and harms defendants, then defendants can argue on direct appeal that the evidence was improper and request a retrial. What *Mohawk Indus., Inc.*, 558 U.S. at 109, said about attorney-client privilege controls here: "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."

Defendants here have an even weaker claim than did the *Mohawk* petitioner, who claimed loss of its own attorney-client privilege. Defendants do not claim *their* rights are violated, but only that Cooke and Steed, who are *not* parties, may face harm. In claiming that there is irremediable harm in this case and in lauding the "privilege of a high order – the free exercise of religion" (Resp. 12), defendants are forgetting that they, as municipalities, do not have religious rights. Local government must "be neutral when it comes to competition between sects." *Larson* v. *Valente*, 456 U.S. 228, 246 (1982) (internal citation and quotation marks omitted). They are not facing a "peril to" their own "fundamental rights" or the possibility that their own "spiritual association" would be irreparably "broken." Resp. 13. In addressing the evidentiary issue here they can claim harm only from *use* of the contested material at trial, not from its collection in discovery. As they explain it, the disputed testimony "could confuse the jury about the issues of the case and prejudice them against Appellants." Resp. 11. Were this to occur, an appeal from the final judgment could resolve this issue and provide sufficient relief.

Defendants have not shown why they should be permitted to bypass the usual avenue for review of a discovery order. Contrary to their assertions (Resp. 7-8), the municipalities are not like the ballot measure proponents who appealed in *Perry I*, 591 F.3d at 1153. There, the appellants faced the possibility of having their political campaign strategies revealed to their opponents.[4] The municipal defendants in this case do not face harm to First Amendments rights. Instead, they challenge a discovery order they claim may lead to improper admission of evidence. Resp. 11. The deponents, who do assert First Amendment concerns, are not before this Court, and they have an avenue for appeal through contempt proceedings. See *Perry II*, 602 F.3d at 979.

This case is not like *DC Comics* v. *Pacific Pictures Corp.*, 706 F.3d 1009, 1013-1016 (9th Cir. 2013) (see Resp. 8-9), where appellants, who claimed that state law gave them effective immunity from suit, appealed the denial of their motion to dismiss. They argued that if they were subject to suit and had to wait for a direct appeal, they would lose the benefit of the state law grant of effective immunity. This Court agreed – not surprisingly, because immunity from suit is "effectively lost" if the rights holder must endure trial, *DC Comics*, 706 F.3d at 1015.

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[4] This Court ultimately did *not* permit appeal under the collateral order doctrine. *Perry I*, 591 F.3d at 1156.

Defendants point out that *DC Comics* involved First Amendment concerns, and argue that the deponents in this case have First Amendment concerns. Resp. 9. But they ignore an important difference when it comes to appealability. In *DC Comics*, it was the disputed right of immunity, not the fact that the state statute providing immunity was intended to protect First Amendment rights, that justified interlocutory appeal. *DC Comics*, 706 F.3d at 1015. And even if *DC Comics* had given a right of interlocutory appeal whenever parties' First-Amendment rights are involved, the municipalities here do not face a threat to their own First-Amendment rights.

The municipalities here are alleging harm to deponents. But there is a proper procedure for potential vindication, and the municipalities' appeal is not it. If Steed and Cooke wish to assert those rights before this Court, they may seek review of any contempt order the district court may issue.

C. Mandamus Is Not Justified In This Case

Defendants also suggest their case is appropriate for an even rarer process: a writ of mandamus, 28 U.S.C. 1651(a); Fed. R. App. P. 21(a). But mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380 (2004) (citation and internal quotation marks omitted). The petitioner must show a "clear and indisputable"

right to the writ. *United States* v. *Fei Ye*, 436 F.3d 1117, 1121-1122 (9th Cir. 2006). Mandamus, quite simply, may not circumvent an appeal.

There are five guidelines a court will consider on mandamus: (1) whether there is "no other means, such as a direct appeal, to obtain the desired relief;" (2) whether any harm to the petitioner can be corrected on appeal; (3) whether there is a clear error of law; (4) whether there is an "oft repeated error" or "persistent disregard of the federal rules;" and (5) whether there are "new and important problems or issues of first impression." *Hernandez* v. *Tanninen*, 604 F.3d 1095, 1098-1099 (9th Cir. 2010) (internal citation and quotation marks omitted).

These guidelines show that mandamus is not appropriate here. First, as explained above, defendants have adequate means for relief through a direct appeal after final judgment. This case is not like those where this Court has found that the first factor is satisfied, such as *Reynaga* v. *Cammisa*, 971 F.2d 414, 416 (9th Cir. 1992), where a magistrate exceeded his authority by staying plaintiff's action indefinitely, or *Miller* v. *Gammie*, 335 F.3d 889, 894-895 (9th Cir. 2003), where this Court considered a district court's order deferring a decision on immunity. Where error can be otherwise corrected, mandamus is inappropriate, even though the appeal is not immediately available. In *DeGeorge* v. *United States District Court for Central District of California*, 219 F.3d 930, 934-935 (9th Cir. 2000), for example, this Court held that because the court of appeals could review and reverse

the lower court's denial of his motion to dismiss an indictment as time-barred, the petitioner had not met the first mandamus factor. It concluded, ultimately, that the petitioner must await the outcome of his trial. *Ibid*.

Applying the second guideline, which this Court has explained "is closely related to the first," yields the same result. *National Org. For the Reform of Marijuana Laws* v. *Mullen*, 828 F.2d 536, 541-542 (9th Cir. 1987). There is no special "damage" or "prejudice" defendants will suffer if Steed and Cooke give their evidence, because that evidence – even if it makes its way into the trial and is improper – may be omitted from a new trial. The types of harm this Court has held may justify mandamus are irreversible harms, such as where *a party* must give up trade secrets, *Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324, 330 (9th Cir. 1961), or campaign strategies, *Perry I*, 591 F.3d at 1157. Here, of course, the municipalities are not being asked to divulge their own information. Instead, they are trying to invoke the First Amendment rights of third parties who are not before this Court.

Defendants also fail to meet the third guideline, as there is no clear error of law in the court's application of RFRA. For their RFRA claim to succeed, deponents must show that the federal government's action in seeking their testimony "works a substantial burden on [their] ability to freely practice [their] religion." *United States* v. *Lafley*, 656 F.3d 936, 939 (9th Cir. 2011) (internal

citations omitted); 42 U.S.C. 2000bb-1(a) & (c). Again, deponents are not before this Court, and the municipalities do not have any RFRA rights of their own.

In addition, the district court assumed Cooke could show a substantial burden, and moved on to the second step of the RFRA analysis for both Steed and Cooke.[5] In the second step of the RFRA analysis – considering whether a substantial burden on religion is justified – the United States must show that the deponents' testimony is "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(b). The United States has a compelling interest in enforcing antidiscrimination laws. *New York State Club Ass'n* v. *New York City*, 487 U.S. 1, 14 & n.5 (1988); see also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984).

The testimony the United States seeks is important to its enforcement of antidiscrimination law. The United States alleged that the municipal law enforcement here "operated as an arm" of the FLDS Church and carried out the orders of church leader Warren Jeffs and others. R. 1 at 3. Cooke, as a police officer, was a witness to interactions between police and church leaders.

[5] The district court found that Cooke likely could not make such a showing. Questions such as whether there were security cameras at church buildings or whether he used an untraceable phone connection with church leaders likely are not spiritual in nature. R. 473-1 at 27, 29-30. At the very least, the court's decision is not clear error.

Furthermore, he could testify as to his own motivations in carrying out his police duties. Steed, as a town council member, could testify about interactions between town leaders and church leaders. In denying defendants' motions to bar discovery of "religious information," the district court pointed out that this material would be essential, "given that this case involves claims of religious discrimination." R. 98 at 3. Accordingly, as this Court stated in *Lafley*, 656 F.3d at 940, "[t]he record establishes that 'the compelling interest test is satisfied through application of the challenged law'" to these "particular claimant[s]" (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006); internal quotation marks omitted).

As required under RFRA, the district court took care to ensure its ruling was narrowly tailored to accomplish the United States' interest in law enforcement. The court only permitted questions touching defendants' conduct and its relations with the church, and did not permit inquiry into purely personal matters about the deponent municipal employees' faith. R. 322 at 10. The court made clear that certain questions would be "out of bounds," including questioning of "[d]eponents' personal adherence to particular beliefs" unless there was a "nexus to a defendant's city operations." R. 205 at 6-7.

Even if this question were close, and we do not believe it is, it is not clearly wrong. This Court will not issue a writ of mandamus merely because the legal

"question appears * * * to be close." *Stanley* v. *Chappell*, 764 F.3d 990, 996 (9th Cir. 2014); see also *Hernandez*, 604 F.3d at 1099; *Kerr* v. *United States Dist. Ct. for N. Dist. of Cal.*, 511 F.2d 192, 196-197 (9th Cir. 1975), aff'd, 426 U.S. 394 (1976). And defendants here cannot rely on the other mandamus guidelines if they cannot show clear error. As this Court stated in *DeGeorge*, 219 F.3d at 934, "[u]sually, the absence of factor three – clear error as a matter of law – will always defeat a petition for mandamus."

Nor can defendants plausibly claim that any alleged error of the district court here is "an oft-repeated error, or manifests a persistent disregard of the federal rules," *Fei Ye*, 436 F.3d at 1121-1122, as required under the fourth guideline. The situation is relatively rare. The only similar situation of which we are aware arose in an administrative investigation of child labor violations. *Perez* v. *Paragon Contractors, Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572, at *1-2 (D. Utah Sept. 11, 2014). In *Paragon Contractors*, the United States Department of Labor sought to enforce an administrative subpoena against one of the deponents here, Steed, and the district court sustained Steed's objections to certain questions about the church. *Id*. at *4. In that case, the district court concluded, there were other sources for the specific information needed, and Steed had "no firsthand knowledge" about the relevant agricultural work or the church's involvement in it. *Id*. at *1 n.2, *4.

The fifth guideline for mandamus consideration is whether there are "new and important problems, or issues of law of first impression." *Fei Ye*, 436 F.3d at 1121-1122. This Court concluded, for example, that mandamus was proper in *City of Las Vegas* v. *Foley*, 747 F.2d 1294, 1296 (9th Cir. 1984), which involved interpretation of this Court's recent precedent on the issue of whether legislators can be deposed to determine their motives in enacting an ordinance. "Resolution of this issue," this Court emphasized, "would substantially aid the administration of justice." *Ibid*.

The fact-specific discovery question presented in this case is hardly an "important problem[]" likely to recur with any frequency. *Fei Ye*, 436 F.3d at 1121-1122. Indeed, defendants can identify no case where mandamus was granted simply because there was an issue of first impression. In *Bauman* v. *United States District Court*, 557 F.2d 650, 656 (9th Cir. 1977), this Court declared that it had not typically granted mandamus "on the basis of only one of the five guidelines" or "where most of the guidelines pointed against such relief." See also *DeGeorge*, 219 F.3d at 940 (holding issue not arising in the prior 15 years not "particularly important").

CONCLUSION

Because the district court's discovery order is not appealable under the collateral order doctrine and is not reviewable under mandamus, this appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2015, I electronically filed the foregoing UNITED STATES' REPLY TO APPELLANTS' RESPONSE TO THIS COURT'S ORDER TO SHOW CAUSE WHY THIS CASE SHOULD NOT BE DISMISSED with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/April J. Anderson
APRIL J. ANDERSON
Attorney