No.

IN THE

Supreme Court of the United States

ROBERT PHILLIP IVERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a confidential attorney-client phone call made for the primary purpose of obtaining legal advice is protected in its entirety by the attorney-client privilege, or whether any statement (i.e. individual sentences) not made for the purpose of obtaining legal advice can be excised from that phone call.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

1. *United States* v. *Ivers*, No. 0:18-cr-0090, U.S. District Court for the District of Minnesota. Order entered June 26, 2018.

2. *United States* v. *Ivers*, No. 0:18-cr-0090, U.S. District Court for the District of Minnesota. Order entered August 1, 2018.

3. *United States* v. *Ivers*, No. 19-1563, U.S. Court of Appeals for the Eighth Circuit. Judgment entered July 23, 2020.

4. *United States* v. *Ivers*, No. 19-1563, U.S. Court of Appeals for the Eighth Circuit. Order denying rehearing and rehearing *en banc* entered Sept. 21, 2020.

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Robert P. Ivers respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion (App. A) is reported at 967 F.3d 709. The district court's order denying petitioner's motion to exclude attorney-client privileged information (App. B) is not reported. The district court's order denying petitioner's motion to clarify (App. C) is not reported. The Eighth Circuit's order denying rehearing (App. D) is unreported.

JURISDICTION

The Eighth Circuit entered judgment on July 23, 2020, and denied a timely petition for rehearing *en banc* on September 21, 2020 (App. D). This Court has jurisdiction under 28 U.S.C. 1254(1).

PROVISIONS OF LAW INVOLVED

This case involves application of the attorney-client privilege, which is governed by the common law "as interpreted by the United States courts in the light of reason and experience…." *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011) (quoting Fed. R. Evid. 501). Rule 501 (App. H) is appended.

STATEMENT OF THE CASE

This case concerns an important question about the scope of the attorney-client privilege that is now subject to conflict among federal circuit courts of appeals: whether the attorney-client privilege attaches to an entire legal consultation (i.e., a phone call) if the primary purpose of that consultation is to facilitate the rendition of legal services, or whether instead the privilege attaches to only individual statements within that legal consultation that are made for the purpose of facilitating legal advice.

Petitioner was convicted of threatening a federal judge based on statements made during a confidential attorney-client phone call. The primary purpose of that call was to obtain legal advice. The courts below found that petitioner did not waive the privilege and no exception to the privilege applies. Yet the district court refused to rule that the substance of the call was protected by the privilege. Instead, it concluded that *any* statement from the call not made for the express purpose of facilitating the rendition of legal services was categorically nonprivileged and therefore admissible.

Over petitioner's repeated objections, the court required petitioner's attorneys to disclose in open court the substance of what petitioner communicated to them in confidence so the court could parse out from the call specific statements *not* made for the express purpose of obtaining legal advice. The court parsed six statements from the 30-minute call, which formed the basis of petitioner's conviction. The Eighth Circuit affirmed the district court's ruling on the attorney-client privilege and affirmed petitioner's conviction.

The attorney-client privilege is well-established in federal common-law. Under the majority view in the United States, a confidential attorney-client "communication" is privileged if its "primary purpose" was to obtain legal advice. 1 Paul R. Rice, Attorney-Client Privilege in the United States § 7:6 (2018–19 ed.); *e.g.*, *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) ("We consider whether the predominant purpose of the communication is to render or solicit legal advice" to discern whether the privilege attaches); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (applying primary purpose test); *United States* v. *Jones*, 696 F.2d 1069, 1072–73 (4th Cir. 1982) (same); *Robinson* v. *Texas Auto. Dealers Ass'n*, 214 F.R.D. 432, 446 (E.D. Tex. 2003), *vacated in part*, 2003 WL 21911333 (5th Cir. 2003) (predominant purpose test); *Loctite Corp.* v. *Fel-Pro, Inc.*, 667 F.2d 577, 582, (7th Cir. 1981) ("[O]nly where the document is primarily concerned with legal assistance does it come within the privilege"); *In re Queen's Univ. at Kingston*, 820 F.3d 1287, 1295 (Fed. Cir. 2016) (primary purpose test).

In the absence of guidance from this Court, three federal circuits have construed an attorney-client privileged "communication"—or that to which the privilege applies—as an overall exchange of information (*e.g.*, a consultation, conversation, or meeting). *In re County of Erie*, 473 F.3d 413, 420–21 (2d Cir. 2007) ("The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered."); *Alomari* v. *Ohio Dept. of Pub. Safety*, 626 Fed. Appx. 558, 570 (6th Cir. 2015) (unpublished) (quoting same); *id.* at 570–72 ("[T]he privilege … covers all communications from the June 2010 *meeting* because its purpose was to acquire legal advice.") (emphasis added); *Rush* v. *Columbus Mun. Sch. Dist.*, 234 F.3d 706 (5th Cir. 2000) (unpublished table decision) ("[T]he attorney-client privilege protects all communications during a *meeting* between a school board and its attorney for the purpose of obtaining legal advice."); *see also* Rice, *supra*, § 2:3 ("The purpose of the privilege in the United States has always been to encourage people to seek legal advice freely and to communicate candidly with the attorney during those *consultations*.") (emphasis added); *id.* § 7:6 ("Only if the *consultation* was predominantly legal in nature will the protection of the privilege apply.") (emphasis added); *id.* § 7:4 ("The only question is whether the advice given is related to the legal assistance that is the primary purpose of the *consultation*.") (emphasis added); THE NEW WIGMORE:

EVIDENTIARY PRIVILEGES § 6.13.2 (Edward J. Imwinkelried ed., 3rd ed. 2021) ("During an attorney-client *consultation*, the client might [even] mention [a] planned future crime without seeking the attorney's assistance in executing the plan. If so, the privilege would still attach.") (emphasis added).

But the court of appeals below significantly diverges from these circuits and presumes a much narrower definition of "communication." According to the Eighth Circuit, the attorney-client privilege presumptively does not extend to an overall exchange of information (i.e., a consultation, conversation, or meeting), unless each statement therein is made for the express purpose of obtaining legal advice. *See* App. 13a–14a (finding that petitioner was "incorrect [to] assum[e] that the entire conference call with [his attorneys] was privileged … [because] courts … often segregate privileged and non-privileged communications in particular conversations or documents."). The court of appeals affirmed the district court's privilege ruling, which "conclude[d] [that] it may examine the individual statements made by Defendant in his conversation with [his attorneys] to determine whether they are protected by the attorney-client privilege."). App. 33a.

The Eighth Circuit's ruling should not stand. It contributes to a conflict among federal courts of appeals and is an issue of great importance about how broadly a privileged "communication" should be construed, subjecting clients and attorneys alike to a privilege standard that varies drastically depending on controlling jurisdiction. "An uncertain privilege, or

one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981). Moreover, the decision below contradicts well-established federal common law on the attorney-client privilege, contravening the very purpose of the privilege, which is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389; Rice, *supra*, § 2:3; Restatement (Third) of the Law Governing Lawyers § 68 (2000). This case presents a legitimate vehicle to resolve this conflict because the record is concise, no waiver was found, and the United States concedes no exception applies. The legal issue is factually and legally isolated for decision on narrow grounds. If the decision is left to stand, attorney-client communication will be chilled and the practice of law will be stifled in the Eighth Circuit. Further review is warranted.

A. Factual Background

This case arises out of two civil lawsuits initiated by petitioner. After the first lawsuit was dismissed, petitioner filed *pro se* a second lawsuit in federal court against the same defendant and on the same set of facts as the first lawsuit. Shortly after the second lawsuit was filed, the presiding judge referred petitioner's case to the Federal Bar Association's Pro Se Project, which in turn referred the case to two attorneys. The two attorneys called petitioner on February 27, 2018 to discuss his lawsuit. The call

lasted about 30 minutes. The attorneys concluded that petitioner's second lawsuit was barred by res judicata, which necessitated a discussion about petitioner's first lawsuit. During the call, the attorneys explained to petitioner the significance of the first lawsuit and its dismissal, and petitioner explained what he thought happened in the first lawsuit and made statements about the judge who presided over the first lawsuit. Petitioner was subsequently indicted and convicted based on the substance of the confidential attorney-client phone call.

1. The First Lawsuit

Petitioner sued CMFG Life Insurance Company for breach of contract in February 2015 in Minnesota State court. The case was removed to federal court in March 2015 and assigned to Judge Wilhelmina Wright. *See Ivers* v. *CMFG Life Ins. Co.*, 15-CV-1577 (WMW/BRT), 2017 WL 8315859 (D. Minn. June 29, 2017). Petitioner—who is not an attorney—proceeded *pro se* for most of the case. Petitioner made an untimely request for a jury trial, which was denied via a text-only order. On June 29, 2017, the district court ordered the case dismissed following a two-day bench trial. A month later, petitioner requested a hearing date to move for a new trial and the court established a deadline for petitioner to file his motion. Petitioner missed the deadline and the court cancelled the hearing.

2. The Second Lawsuit

In November 2017, petitioner filed *pro se* a second lawsuit against CMFG in federal court. *See Ivers* v. *CMFG Life Ins. Co.*, No. 17-cv-5068, (D. Minn. filed Nov. 9, 2017). The facts were identical to the first CMFG lawsuit, but petitioner now claimed a violation of the Americans with Disabilities Act. The presiding magistrate judge referred the case to the Federal Bar Association's Pro Se Project, which referred the case to two attorneys, Anne Rondoni Tavernier and Lora Friedemann.

Rondoni Tavernier and Friedemann initiated a phone call with petitioner on February 27, 2018, the purpose of which was for the two attorneys to provide petitioner with legal advice regarding his pending lawsuit. App. 46a–47a. For roughly the first 20 minutes of the 30-minute phone call, the attorneys explained that petitioner's second lawsuit was barred by res judicata because of the disposition of his first lawsuit. After the attorneys brought up the first lawsuit to petitioner, petitioner responded by explaining his thoughts on what occurred in the first lawsuit. Rondoni Tavernier characterized petitioner's response as "kind of an organic shift, I guess, in the conversation … as we kind of merged on to [the] topic" of the first lawsuit. App. 62a. The attorneys let petitioner speak "to make sure that … he could have a chance to explain, you know, what he thought had occurred, you know, despite what we had decided from a legal standpoint, to kind of just have that conversation and allow him to speak." App. 62a.

According to Friedemann's handwritten notes from the phone call, petitioner said the following during the discussion of the first lawsuit:

- "This fucking judge stole my life from me."
- "I had overwhelming evidence."
- Judge "stacked the deck" to make sure I lost the case.
- Didn't read the fine print and missed the 30 days to seek a new trial.
- —And "she is lucky." I was "going to throw some chairs."
- "You don't know the 50 different ways I planned to kill her."

App. 57–59a. The subject of most of these statements was Judge Wright and her rulings in the first lawsuit. *Id.* After petitioner finished speaking, the attorneys wrapped up the legal discussion and concluded the call. App. 52a. The next day, and unbeknownst to petitioner, Friedemann reported to the Pro Se Project coordinator that petitioner made a "death threat against Judge Wright," App. 59a, and later told the United States Marshal's Service that petitioner said "You don't know the 50 different ways I plan to kill her," App. 63a. Friedmann and Rondoni Tavernier were subsequently interviewed by the Government several times about the substance of the call without petitioner's consent.

B. Procedural History

1. On April 18, 2018, petitioner was charged with threatening to murder a federal judge and

threatening to injure the person of another in violation of 18 U.S.C. § 115(a)(1)(B) and 18 U.S.C. § 875(c), respectively. On June 18, 2018, an evidentiary hearing was held on petitioner's motion to exclude attorney-client privileged information. App. 25a. Petitioner moved to exclude the entire February 27 call and requested *in camera* examination of Friedemann to establish the call was privileged. The court, over petitioner's objection, required examination of Friedemann in open court.

Petitioner examined Friedemann, who testified that she volunteered to provide legal assistance to petitioner in his second lawsuit, App. 45a–46a, that the purpose of the February 27 call was to provide petitioner legal advice about his second lawsuit, App. 48a, that only herself, Rondoni Tavernier, and petitioner were on the call, App. 47a–48a, and that petitioner never authorized disclosure of any substance of the call, App. 49a. The court acknowledged that petitioner had not waived the privilege, App. 50a; 52a, and the Government conceded that the crime-fraud exception to the privilege was inapplicable, App. 14a n.6; 30a n.2. Petitioner asked the court to determine whether the phone call was privileged, but the court refused.

Instead, the court "conclude[d] it may examine the individual statements made by Defendant in his conversation with [his attorneys] to determine whether they are protected by the attorney-client privilege." App. 33a. On petitioner's motion to clarify its privilege ruling, the court clarified that "it could parse out [from the call] *any* statement not made for

the purpose of obtaining legal advice and that any such statement would not be protected under the privilege. Thus, the Court is not restricted to merely excluding threats." App. 39–40a (emphasis in original); *see also* App. 32a ("[S]tatements not made in pursuit of legal advice can be separated from those statements that are, and the statements not made for the purpose of seeking legal advice will not be protected by the attorney-client privilege."). Although the record was clear that the privilege had not been waived and no exception applied, the court permitted the Government to examine Friedemann over petitioner's repeated objections. App. 49a–50a.

Friedemann testified, among other things, that petitioner said "he had imagined 50 ways to kill" Judge Wright. App. 50a. She explained that Petitioner made this statement and others in "reacti[on] to our advice with respect to the attempted claim—basically the attempt to bring—the same claim" that was dismissed in the first lawsuit. App. 51a. The court concluded petitioner's "alleged angry and threatening statements … made to [his attorneys in confidence] were not 'made for the purpose of facilitating the rendition of legal services'" and thus "are not protected by the attorney-client privilege." App. 35a (citation omitted).

At trial, over petitioner's objections, Rondoni Tavernier testified about the February 27 call. She testified that after she explained that petitioner's second lawsuit was barred by res judicata due to dismissal of the first lawsuit, there "was kind of an organic shift … in the conversation.… as we kind of

merged on" the topic of the first lawsuit. App. 62a. She testified that petitioner "focused on Judge Wright … [and] the way that the lawsuit in front of her had proceeded. App. 63a. Rondoni Tavernier also testified that it was "logical" for petitioner to discuss the first lawsuit in response to her advice. App. 63a.

Petitioner was convicted of both charges.

2. The court of appeals affirmed petitioner's conviction and the district court's attorney-client-privilege rulings, concluding that regardless of whether the primary purpose of the February 27 call was to obtain legal advice, petitioner was "incorrect [to] assum[e] that the entire conference call with [his attorneys] was privileged … [because] courts routinely decide which specific communications between a client and his attorneys are privileged, and they often segregate privileged and non-privileged communications in particular conversations or documents." App. 13a–14a. The court assumed that a 30-minute "conference call" (*i.e.*, consultation, conversation, or discussion) cannot be construed as a "communication" to which the privilege applies. App. 14a. Rather, it treated the phone call as the sum of "privileged and non-privileged communications." App. 14a. The court construed the privilege as narrowly as the district court did, holding "that the [individual] *statements* at issue were not for the purpose of obtaining legal advice about [petitioner's] pending lawsuit against an insurance company and [thus] are not protected by the attorney-client privilege." App. 13a (emphasis added).

The court denied petitioner's timely petition for rehearing *en banc*. App. D

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Narrow Construction Of The Attorney-Client Privilege Conflicts With Other Circuits and Governing Common Law

A. The Elements Of The Privilege Are Well-Established By Federal Common Law

The majority of federal circuits cite with approval the following definition of the attorney-client privilege articulated in *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950):

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

See, e.g., In re Lindsey, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (quoting *United Shoe*); *Siler* v. *EPA*, 908 F.3d 1291, 1297 (Fed. Cir. 2018); *United States* v. *Wilson*, 798 F.2d 509, 512 (1st Cir. 1986); *Rhone-Poulenc Rorer Inc.* v. *Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994); *In re Grand Jury Subp.*, 341 F.3d 331, 335 (4th Cir. 2003); *United States* v. *Kelly*, 569 F.2d 928, 938 (5th Cir. 1978); *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596, 601–02 (8th Cir. 1977); *United States* v. *Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990). More succinctly put, the "privilege protects confidential communications between a client and his attorney made for the purpose of facilitating the rendering of legal services to the client." *United States* v. *Spencer*, 700 F.3d 317, 320 (8th Cir. 2012); *accord Brennan Ctr. for Justice* v. *U.S. Dept. of Justice*, 697 F.3d 184, 207 (2d Cir. 2012); *United States* v. *Nelson*, 732 F.3d 504, 518 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2682 (2014).

The party invoking the attorney-client privilege must establish that the privilege applies to a claimed communication. *See Wilson*, 798 F.2d at 512; *United States* v. *Intl. Broth. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997); *In re Grand Jury*, 705 F.3d 133, 160 (3d Cir. 2012); *Zeus Enterprises, Inc.* v. *Alphin Aircraft, Inc.*, 190 F.3d 238, 244 (4th Cir. 1999); *EEOC.* v. *BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017); *United States* v. *Dakota*, 197 F.3d 821, 825 (6th Cir. 1999); *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000); *Bouschor* v. *United States*, 316 F.2d 451, 456 (8th Cir. 1963); *United States* v. *Landof*, 591 F.2d 36, 38 (9th Cir. 1978); *Barclaysamerican Corp.* v. *Kane*,

746 F.2d 653, 656 (10th Cir. 1984); *United States* v. *Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991); *In re Lindsey*, 158 F.3d at 1270; *In re Google Inc.*, 462 Fed. Appx. 975, 977 (Fed. Cir. 2012).

In determining whether an attorney-client communication was made for the purpose of obtaining legal advice, the majority of circuits apply the "primary purpose test."[1] *In re County of Erie*, 473 F.3d at 420 (CA2) (predominant purpose test);[2] *In re Kellogg,* 756 F.3d at 760 (D.C. Cir.) (applying primary purpose test); *Jones*, 696 F.2d at 1072–73 (applying primary purpose test); *Robinson*, 214 F.R.D. at 446 (E.D. Tex. 2003), *vacated in part*, 2003 WL 21911333 (5th Cir. 2003) (predominant purpose test); *Alomari*, 626 Fed. Appx. at 570 (CA6) (adopting predominant purpose test); *Loctite*, 667 F.2d at 582 (CA5) ("[O]nly where the document is primarily concerned with legal assistance does it come within the privilege"); *In re Queen's*, 820 F.3d at 1295 (Fed. Cir.) (primary purpose test); *see also* Rice, *supra*, § 7:6 (discussing primary purpose test and collecting cases).

Courts applying this test "consider whether the predominant [or primary] purpose of the

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[1] The primary purpose test has also been referred to as the predominant, dominant, and principal purpose or motivation test. The analysis is the same.

[2] The Second Circuit has also applied a more stringent "sole purpose test," which would similarly shield petitioner's February 27 phone call since its sole purpose was to obtain legal advice. *See Schaeffler* v. *United States*, 806 F.3d 34, 40 (2d Cir. 2015) ("[T]he purpose of the communications must be solely for the obtaining or providing of legal advice.").

communication is to render or solicit legal advice." *E.g., In re County of Erie*, 473 F.3d at 420; *see generally* Rice*, supra*, § 7:6; Restatement (Third) of the Law Governing Lawyers § 72 ("A client must consult the lawyer for the purpose of obtaining legal assistance and not predominantly for another purpose."). "The only question is whether the advice given is related to legal assistance that is the primary purpose of the consultation." Rice*, supra*, § 7.4.

> "The rule that has evolved in the courts is that if the non-legal aspects of the consultation are integral to the legal assistance given and the legal assistance is the *primary purpose* of the consultation, both the client's communications and the lawyer's advice and assistance that reveals the substance of those communications will be afforded the privilege."

Rice, *supra*, § 7.4 (collecting cases). As stated by then-Judge Kavanaugh, "[s]ensibly and properly applied, the [primary purpose] test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication." *In re Kellogg,* 756 F.3d at 760.

When the proponent of the privilege satisfies this burden, the communication is absolutely protected unless the party opposing the privilege proves (1) there has been waiver, or (2) an exception to the privilege applies. THE NEW WIGMORE § 6.3; Rice, *supra*, § 2:2.

The privilege "is not subject to ad hoc exceptions." Restatement (Third) of the Law Governing Lawyers § 68. Thus, Courts "may not override the privilege … based on a litigant's need for the evidence." THE NEW WIGMORE § 6.3. And courts have routinely rejected attempts to narrow the scope of the privilege or create new exceptions. *See*, *e.g.*, *Upjohn*, 449 U.S. at 383–384 (rejecting "control group test" and holding the privilege applies to lower-level corporate employees); *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409–411 (1998) (rejecting posthumous balancing test exception in criminal cases and holding the privilege survives the client's death); *Jicarilla Apache Nation*, 564 U.S. at 165 (holding the fiduciary exception to the privilege inapplicable to general trust relationship between United States and Indian tribes); *In re Itron, Inc.*, 883 F.3d 553, 561–62 (5th Cir. 2018) (rejecting relevance exception to privilege); *Admiral Ins. Co.* v. *U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1493 (9th Cir. 1989) (rejecting "substantial need" and "unavailability" exceptions to the privilege).

B. The District Court's Construction Of The Attorney-client Privilege Is Unprecedented, Departing Significantly From The Common Law Of The United States And Judicial Reason And Experience

Petitioner satisfied his burden that the February 27 phone call was privileged. It was a confidential communication between petitioner and his two attorneys. The only purpose of the call was for

petitioner to obtain legal assistance with his pending lawsuit. App. 35a. The district court explicitly concluded that petitioner did not waive the privilege. App. 50a; 52a. The Government conceded that no exception to the privilege applied. App. 14a n.6; App. 30a n.2. At this juncture, the district court should have excluded the substance of phone call.

Instead, the court concluded "it could parse out [from the call] *any* statement not made for the purpose of obtaining legal advice and that any such statement would not be protected under the privilege." App. 39a (emphasis in original). The court admitted six statements from the 30-minute phone call, which formed the basis for petitioner's conviction.

Under the district court's construction of the privilege, petitioner could have satisfied his burden only by proving that each of the six admitted statements, judged alone, was made for the purpose of obtaining legal services.

This construction of the attorney-client privilege is unprecedented in the United States. The court below relied principally on *United States* v. *Alexander*, 287 F.3d 811 (9th Cir. 2002), a case in which the Ninth Circuit held that threats to commit future violent crimes are categorically nonprivileged even where legal advice is not sought in furtherance of the crime. *Id.* at 817. In *Alexander*, the crime-fraud exception was held inapplicable to several attorney-client privileged discussions, but the court nonetheless carved out "threat" statements from the otherwise privileged discussions. *Id.* at 815. The Ninth Circuit

thus created an ad hoc exception to the privilege for threat crimes.

Here, the district court went far beyond the Ninth Circuit in narrowing the scope of the privilege. When pressed by petitioner for clarification on its pre-trial privilege ruling, the district court concluded "it could parse out *any* statement not made for the purpose of obtaining legal advice and that any such statement would not be protected under the privilege. Thus, the Court is not restricted to merely excluding threats." App. 39a–40a. (emphasis in original).

C. The Eighth Circuit Affirmed This Unprecedented Narrowing Of The Privilege And Placed Itself In Direct Conflict With Sister Circuits

1. The Eighth Circuit affirmed the district court's privilege ruling that "any" statement not made expressly for the purpose of obtaining legal advice could be parsed out from a confidential attorney-client phone call made for the primary purpose of obtaining legal advice. Thus, it concluded the district court properly admitted six statements from the 30-minute phone call between petitioner and his attorneys. App. 14a.

The Eighth Circuit acknowledged that the primary purpose of the phone call was "indisputably" for obtaining legal advice about petitioner's pending lawsuit; it opined that at least the first 20 minutes of the 30-minute phone call were "indisputably for the purpose of obtaining legal services, as it concerned the

merits of Ivers's lawsuit and the attorneys' opinions as to Ivers's prospects for success[.]" App. 12a.

But the court refused to apply the primary purpose test to the entire phone call. The court found that regardless of whether the primary purpose of the call was to obtain legal advice, it would be "incorrect [to] assum[e] that the entire conference call with [petitioner and his attorneys] was privileged." App. 13a–14a (citing *Alexander*, 287 F.3d at 815).[3] Instead, the court construed petitioner's phone call with his attorneys as the sum of several "privileged and non-privileged communications." The court assumed that an overall communicative exchange (i.e. a phone call) made for the primary purpose of obtaining legal advice should not itself be construed as a privileged "communication." App. 12a–14a. The Eighth Circuit, just like the district court, construed a "communication"—to which the privilege applies—as an individual "statement" within an overall communicative exchange. Hence why the court evaluated the purpose of petitioner's statements individually, detached from the context and primary purpose of the call. App. 13a.

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[3] The Eighth Circuit agreed with the Ninth Circuit in *Alexander*. App. 11a–12a. Notwithstanding the propriety of the Ninth Circuit's decision, *see, e.g.,* THE NEW WIGMORE § 6.13.2 ("During an attorney-client consultation, the client might [even] mention his or her planned future crime without seeking the attorney's assistance in executing the plan. If so, the privilege would still attach."), the Eighth Circuit narrowed the scope of the privilege far beyond the Ninth Circuit's limited holding about a "threats" exception.

As the rule stands in the Eighth Circuit, any statement not made for the express purpose of obtaining legal advice is categorically nonprivileged and may be parsed out from a confidential attorney-client phone call that is made for the primary purpose of obtaining legal advice. This is unprecedented.

2. This directly conflicts with the Second Circuit, which made clear that a "communication"—to which the privilege applies—is construed as an overall communicative exchange, and not as subparts of an overall exchange discussed above. *See In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) ("The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; *it should be assessed dynamically and in light of the advice being sought or rendered*.") (emphasis added). The Eight Circuit's ruling also contravenes two unpublished opinions from the Fifth and Sixth Circuits, which likewise construed the privilege as applying to an overall communicative exchange and not to just individual statements or utterances therein. *Rush* v. *Columbus Mun. Sch. Dist.*, 234 F.3d 706 (5th Cir. 2000) (unpublished table opinion) ("the attorney-client privilege protects all communications during a *meeting* between a school board and its attorney for the purpose of obtaining legal advice, even those communications not addressed directly to the attorney.") (emphasis added); *Alomari* v. *Ohio Dept. of Pub. Safety*, 626 Fed. Appx. 558, 570 (6th Cir. 2015) (unpublished) (quoting same); *id.* at 570–72 ("[T]he privilege … covers all communications from the June 2010 *meeting* because

its purpose was to acquire legal advice.") (emphasis added).

These courts have clarified that the attorney-client privilege applies to an overall exchange of information, rejecting the notion that the privilege applies to individual statements or sub-parts of a primarily legal exchange. For example, in *County of Erie*, a class brought suit against the county and several of its officials for alleged Fourth Amendment violations. 473 F.3d at 415. The plaintiffs moved to compel the disclosure of emails contained in a privilege log. *Id.* at 416. After an *in-camera* inspection, the district court ordered production of an "entire e-mail 'conversation'" between a government lawyer and a public official about the legality of an existing policy, which included discussion about alternative policies. *Id.* at 416 n.2. The district court reasoned that the discussion about policy was non-legal and thus did not constitute legal advice. *Id.* at 422. The Second Circuit agreed that parts of the conversation were non-legal, but reversed, concluding that "[s]o long as the predominant purpose of the communication is legal advice, [non-legal] considerations and caveats are not other than legal advice or severable from it." *Id.* at 420. The court explained that "[t]he predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another;" instead, "it should be assessed dynamically and in light of the advice being sought or rendered." *Id.* at 420–21. Thus, the court found the e-mails at issue, "when viewed in the context in which [they

were] solicited and rendered" were not "unprotected by the privilege." *Id.* at 423.[4]

In *Alomari*, a former employee of the Ohio Department of Public Safety (ODPS) was terminated and sued ODPS and its directors for various employment-related claims. 626 Fed. Appx at 560. In relevant part, the plaintiff sought to compel disclosure of the substance of a meeting that occurred prior to plaintiff's termination in which defendants sought legal advice from in-house counsel about plaintiff's previous employment. *Id.* at 569. The plaintiff argued that even if the primary purpose of the meeting was to obtain legal advice, the privilege "did not immunize *all* communications that occurred at the meeting." *Id.* at 572 (emphasis in original). The court rejected this argument, concluding that "the privilege … covers all communications from the June 2010 meeting because its purpose was to acquire legal advice." *Id.* This construction makes sense in light of reason and experience.

Similarly, in *Rush*, a teacher brought an employment discrimination claim against a school district and its board members. 234 F.3d at *1. The plaintiff moved to compel disclosure of conversations made between the board members and the school district's attorney during an executive session, arguing that some communications within the meeting were not directed to the attorney and thus

[4] The court directed the lower court to enter an order protecting the emails, and remanded on the question of waiver. *In re County of Erie*, 473 F.3d at 423.

were not privileged. *Id.* at *2. The Fifth Circuit, citing *Upjohn*, explained that the "attorney-client privilege is designed to encourage a corporation and its attorneys to facilitate fully informed legal advice and that the only way to ensure such communication is to construe the privilege broadly." *Id.* The court determined that "[s]imilar policy dictates encouraging full communication between a school board and its counsel" and held that "the attorney-client privilege protects all communications during a meeting between a school board and its attorney for the purpose of obtaining legal advice." *Id.* Thus, the court held that the attorney-client privilege protected the substance of the entire executive session. *Id.*

Thus, according to decisions of the Second, Fifth, and Sixth Circuits, the whole of a confidential communicative exchange between an attorney and client (i.e., a phone call) is shielded by the privilege if its primary purpose was to obtain legal services. The proponent of the privilege need not prove that the purpose of each statement therein was to obtain legal services independent of the purpose of the overall exchange. *See* Rice, *supra*, §§ 7:4; 7:6. Indeed, "the scope of the privilege is not limited to information directly relevant to the subject of the consultation. In the real world, privileged relationships need some 'space' to flourish." THE NEW WIGMORE § 6.11.

But the Eighth Circuit's rule patently rejects these constructions of the privilege in favor of a fundamentally different approach far narrower in scope. Per the Eighth Circuit's rule, a client must prove the privilege attaches to each statement made

during an attorney-client consultation if the client wishes the keep the substance of that entire consultation confidential. This defies reason and experience, and is unworkable in practice.

II. This Case Raises A Question Of Great Importance That If Not Settled By This Court Will Eviscerate The Privilege, Result In Inconsistent Application Among Jurisdictions, And Undermine Public Trust In The Legal Profession

"The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn*, 449 U.S. at 389 (citing 8 J. Wigmore, Evidence § 2290 (J. McNaughton rev. 1961)). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* "Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *United States* v. *Zolin*, 491 U.S. 554, 570–71 (1989) (quoting *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953)).

To fulfill its purpose, the privilege must be predictable. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. "[T]he attorney and client must be able to predict with some

degree of certainty whether particular *discussions* will be protected." *Id.* (emphasis added). "[A]t the time of communication, the persons communicating must be able to confidently predict whether a privilege will attach. Otherwise, the person might refrain from consulting or communicating." THE NEW WIGMORE § 6.3. In none of this Court's decisions about the attorney-client privilege—from *Hunt* v. *Blackburn*, 128 U.S. 464 (1888), to *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162 (2011)—has the Court's review been needed to decide whether the privilege applies presumptively to an overall communicative exchange (*i.e.*, an entire discussion), or to something narrower.

A. The Eighth Circuit's Ruling Directly Contravenes The Purpose Of The Privilege As Stated By This Court

The Eighth Circuit's rule eviscerates the purpose of the privilege. A client cannot meaningfully engage in "full and frank communication" when seeking an attorney's advice where any imprecise statement to the attorney may be subject to disclosure, or worse, admitted against them in a criminal proceeding. The very "rationale behind the privilege is to encourage communications from the client to the attorney that very likely would otherwise not have been uttered, absent the assurance of confidentiality." Rice, *supra*, § 2:3; *accord Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Indeed, "the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place." *Swidler*, 524 U.S. at 408. But the Eight Circuit's

construction of the privilege provides the opposite rationale, and for this it stands apart from its sister circuits.

Under the Eighth Circuit's rule—where *any* statement by a client not made for the express purpose of obtaining legal advice is subject to disclosure—the attorney-client relationship will erode. This decision not only chills open and frank communication between client and attorney, but unwisely places the burden of determining what to share and not to share on a layperson. Clients will be reluctant to communicate openly and frankly with their attorneys for fear that their confidences will eventually be revealed. In order to fall within the privilege, every statement, sentence, and utterance by client to attorney must be made precisely for the purpose of obtaining legal services. The vast majority of clients are not attorneys, but they will now be forced to calculate their statements with the precision of an attorney. A 60-minute attorney-client consultation made for the primary purpose of obtaining legal services very likely includes statements that, when viewed in a vacuum, are nonprivileged under the Eighth Circuit's rule. Clients and attorneys will be left to wonder what portions of their exchanges will be protected by the privilege. This uncertainty is unique to the Eighth Circuit's jurisdiction.

Additionally, an attorney's ability to adequately provide legal advice will be significantly diminished if the attorney must inform the client that any miscalculated statement will not be afforded the privilege. Under these circumstances, the attorney-

client relationship will suffer because clients will be reluctant to communicate fully and frankly with attorneys for fear of subsequent disclosure. The predictability required for the privilege to operate will no longer exist. *See Upjohn*, 449 U.S. 393 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."). The object of the privilege—to promote full and frank communication between attorney and client—will be defeated in the Eighth Circuit, so long as its decision in this case is left to stand. *See*, Rice, *supra*, § 2:3. Public trust in the legal profession will suffer under the Eight Circuit's rule.

B. The Court's Rule Will Have A Significant Chilling Effect On Client Communication And Negatively Affect The Practice Of Law In The Eighth Circuit

The privilege cannot promote the broad public interests in the observance of law and administration of justice, as intended, if clients are fearful that confidences made during a legal consultation may be divulged. As happened to petitioner, the Government can subpoena an attorney and require judicial examination of confidential attorney-client communications so that every individual statement not made precisely for obtaining legal services could be parsed out for use in a criminal prosecution. Civil practitioners could engage in similar tactics. These practices are now possible in the Eighth Circuit. This will severely undermine trust in the legal profession.

Civil discovery will become unduly burdensome and expensive in the Eighth Circuit. Documents made primarily for a legal purpose are no longer presumptively privileged. Thus, a party may require judicial examination of virtually any document on a privilege log, and the court will be additionally burdened with the time and expense required to parse out the nonprivileged portions. The detail required of privilege logs will be daunting. How will a party justify on a privilege log that a lengthy document contains zero individual sentences considered nonprivileged under the Eighth Circuit's rule? Will every sentence in the document require a separate entry on the privilege log? Will documents that would normally be withheld in their entirety now be produced with line-by-line redactions of the privileged sentences? The costs to civil litigants and the courts will increase dramatically in the Eighth Circuit.

If not settled by this Court, the Eighth Circuit's rule will discourage full and frank communication between attorney and client, undermine public trust in the law, and significantly alter the practice of law in the Eighth Circuit. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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