No. 20-7304

In The
Supreme Court of the United States

ROBERT PHILLIP IVERS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE LAW PROFESSORS IN SUPPORT OF PETITIONER ROBERT PHILLIP IVERS

I. RICHARD GERSHON
UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW
481 Chucky Mullins Drive
University, MS 38677
(662) 915-6918
igershon@olemiss.edu

WILLIAM M. JANSSEN
*Counsel of Record**
CHARLESTON SCHOOL OF LAW
81 Mary Street
Charleston, SC 29403
(843) 377-2442
wjanssen@charlestonlaw.edu

April 1, 2021

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST

The amici curiae, listed in Appendix A, are each professors at U.S. law schools who study, teach, research, and/or write about the attorney-client privilege. Their interest here is to advocate for an interpretation and application of the privilege that best safeguards the privilege's important goal of facilitating an optimal level of client representation in the federal courts.[1]

SUMMARY OF ARGUMENT

This Petition invites review of troublesome (and now precedential) reasoning in an attorney-client privilege ruling. The context was a consultative telephone conversation scheduled by two attorneys with their client. Only the attorneys and the client were present on the phone. The 30-minute discussion was devoted to a single, substantive topic—the viability of filing a new lawsuit in light of a court's dismissal of a related, earlier lawsuit. The attorneys conveyed their disappointing advice to the client which prompted a venting from

[1] No counsel for a party authored this brief in whole or in part. Monetary contributions intended to fund the preparation or submission of this brief were made only by the amici curiae themselves; no contributions were made by any party or their counsel. All parties have given their specific consents to the filing of this law professors' amicus curiae brief. The amici curiae gave notice to all parties of their intent to file this brief, though that notice was given less than 10 days prior to the filing; however, all parties have consented to this filing on shortened notice.

the client that (a jury later found) included threatening statements about the first lawsuit's presiding judge. The discussion closed with the attorneys asking their client if he had other questions (he did not), and the call was ended.

In ruling that the client's threat was not privileged, the courts below adopted an unusual analysis. They did not hold that, to what would otherwise have been an attorney-client privileged discussion, some *exception* to the privilege applied. Rather, they reasoned that no exception was needed because this particular portion of the client's consultative telephone call enjoyed no privilege. In effect, the courts determined that during a concededly confidential discussion between client and counsel, the attorney-client privilege in the federal courts is correctly assessed in a segmented manner—thought-by-thought, sentence-by-sentence, perhaps even word-by-word. That reasoning poses a grave danger to the privilege and its underlying goal of client-to-counsel candor.

Oral conversations do not follow a neat, linear progression. Thoughts wander. Focus ebbs and returns. Comments meander. This is the very nature of verbal communication. These tendencies are accentuated in a setting where a client is conversing, in confidence, with an attorney on a topic of great personal interest. In that setting, emotions may flare as the client, untrained in the law, reacts viscerally to new information. Of course, this is certainly not to say that a client might, in that setting, utter a statement that could

qualify for an exception to the attorney-client privilege.[2] But it is quite remarkable to say that the context is no longer a consultative one triggering the privilege.

Viewing, in this sort of dissected manner, a single-topic, consultative oral discussion convened for the purpose of imparting legal advice to a client would hollow out the privilege immeasurably. Clients must be able to reliably predict that a particular discussion with counsel will be shielded in confidence. The analysis employed by the courts below would discourage, rather than incentivize, candid client sharing, and thus imperils the privilege's objective of optimal lawyering preparation and considered client decision-making. This Petition for a Writ of Certiorari should be granted to review whether a segmented, thought-by-thought approach to applying the attorney-client privilege during an oral consultation with counsel is federal law.

[2] In this prosecution, that question was never presented squarely in the courts below. *See, e.g.*, *United States v. Ivers*, 967 F.3d 709, 717 n.4 (8th Cir. 2020) (App. 14a n.8) ("Because the government did not argue to the district court that the crime-fraud exception to the attorney-client privilege applies, and concedes that it does not apply on appeal, we need not address that issue."); *United States v. Ivers*, 2018 WL 11025541, at *2 n.2 (D. Minn. June 26, 2018), *aff'd*, 967 F.3d 709 (8th Cir. 2020) (App. 30a n.2) ("The Government is not asserting the crime-fraud exception . . . .").

ARGUMENT

I. ANY PROPER INTERPRETATION OF THE ATTORNEY-CLIENT PRIVILEGE MUST DELIVER PREDICTABILITY, OR IT WILL FAIL IN ITS OBJECTIVE OF ENCOURAGING CLIENT CANDOR.

The attorney-client privilege has a long and venerable history. It originated centuries ago as a protection held by legal advisors (not clients), designed to safeguard their professional honor, but later evolved into a protection held by the clients (not their advisors), so as to secure a client's liberty in acting. *See* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §§ 1.1-1.13 (2020). By the time the privilege found its way into American case law, its objective and rationale were settled:

> The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888). *See generally Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) ("We readily acknowledge the importance of the attorney-client privilege, which 'is one of the oldest recognized privileges for confidential communications.' ")

(quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)).

By freeing both advisee and advisor from those consequences and apprehensions by the shield of confidentiality, the privilege is well positioned "to encourage full and frank communication" between client and counsel, enabling thereby counsel's ability to impart an optimal level of "sound legal advice or advocacy," which, in turn, "promote[s] broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). The triggering attribute that ushers in this sequence of privilege-conferred benefits is client willingness. The privilege endeavors to incentivize that willingness by its protection, but that incentivizing occurs only if the protection is perceived subjectively to be in place by those from whom the trust must be given. Thus, at ground, the privilege works not because of the protection it affords, but because the protection it affords is predictable.

The importance of predictability to the law of privileges is difficult to overstate. It is an attribute this Court has never discounted. Predictability was a core link in the Court's reasoning in *Upjohn Co. v. United States*, which faulted one approach to the privilege in the corporate employee context because it would be "difficult to apply in practice." *Upjohn Co.*, 449 U.S. at 393. After noting that "no abstractly formulated and unvarying 'test' will necessarily enable courts to decide questions such as this with mathematical precision," the Court nonetheless reinforced the decisive value of

predictability when devising a formulation for the privilege:

> But if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. 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.

Id. See also In re County of Erie, 473 F.3d 413, 417-18 (2d Cir. 2007) ("To 'encourage full and frank communications between attorneys and clients,' lawyers and clients need to know which of their communications are protected.") (quoting *Upjohn*, 449 U.S. at 389).

Fifteen years later, this Court highlighted predictability when it rejected the notion that a psychotherapist/patient privilege ought to be made to depend on a subsequent balancing by the trial court of patient privacy against evidentiary need. Quoting from *Upjohn*, the Court wrote that "if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.'" *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996) (quoting *Upjohn*, 449 U.S. at 393).

Because of the essential role predictability plays in the functioning of the attorney-client privilege, any approach to interpreting and applying the privilege must first be measured against that prerequisite: Will

the proposed approach allow the client to fairly discern the boundary between what is shielded in confidence and what is not?

II. THE SEGMENTED EVALUATION APPROACH TO THE PRIVILEGE ENDORSED BY THE COURTS BELOW IS NEITHER REALISTIC NOR FUNCTIONAL; IT IMPERILS PREDICTABILITY.

Before the Court of Appeals, the Government framed its litigating position unambiguously: "This Court should uphold the jury's verdict. Ivers's threat was not protected by the attorney-client privilege because it was not made for the purpose of obtaining legal advice." *See* Brief of Appellee at 24-25, in *United States v. Ivers*, No. 19-1563, 2019 WL 3947835 (8th Cir. 2019) ("Government's Eighth Circuit Brief"). Thus, the Government argued, the trial court "properly segregated Ivers's vitriolic rant"—because, during it, he "did not ask any questions and [his] attorneys remained silent—from the privileged portion of the consultation in which the attorneys provided legal advice." *Id.* at 26.

Both the trial judge and the Court of Appeals accepted and applied the Government's segmented approach to the privilege. *See United States v. Ivers (Ivers I)*, 2018 WL 11025541, at *3 (D. Minn. June 26, 2018) (App. at 32a) ("The Court is more persuaded by the numerous other cases—mostly civil cases, in fact—that support the Government's argument that statements 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."); *United States v. Ivers (Ivers II)*, 967 F.3d 709, 717 (8th Cir. 2020) (App. at 12a) ("The first part of the call in which Ivers was actually receiving legal advice is easily severable from the second part of the call, in which Ivers ranted about and threatened Judge Wright.").

This approach is unsound and portends to do great mischief to the attorney-client privilege.

Preliminarily, all seem to agree that the statement at issue was made *during* a phone call convened by counsel for the sole and privileged purpose of consulting with their client. The Government seems to concede this. *See* Government's Eighth Circuit Brief at 14-15 (noting referral to pro bono counsel, and that "the attorneys conducted a phone consultation to provide Ivers with their conclusions and to inform him of their decision against taking his case"); *id.* at 31-32 ("That portion of the call was protected by the attorney-client privilege. . . ."). The trial court concurred. *See Ivers I*, 2018 WL 11025541, at *4 (App. at 35a) (recounting counsel's testimony about the phone call, "the purpose of which was for Defendant to obtain legal advice in a pending civil lawsuit"). The Court of Appeals agreed. *See Ivers II*, 967 F.3d at 716-17 (App. at 12a) ("the communications made in the first part of the call were indisputably for the purpose of obtaining legal services, as they concerned the merits of Ivers's lawsuit and the attorneys' opinions as to Ivers's prospects for success").

The only open question, then as here, is whether Petitioner's "venting" portion of this private client-counsel consultation lost its claim to the attorney-client privilege because the particular statements at issue were not questions posed by the client actively inviting specific advice from his legal advisors.

In its ruling adopting the Government's segmented approach to the privilege, the district court cited case law for the familiar proposition that those portions of documents that contain privileged content may be withheld, but the remaining portions may not. *See Ivers I*, 2018 WL 11025541, at *3 (App. at 33a) (parenthetically summarizing one Maryland district court opinion as: "examining documents paragraph by paragraph and ordering the disclosure of those portions that related more to business strategy than legal strategy"). From this uncontroversial body of precedent, the trial court deduced a license to apply a sweeping segmented approach to the privilege in all settings: "Thus, the Court concludes that it may examine the individual statements made by Defendant in his conversation with Attorney A to determine whether they are protected by the attorney-client privilege." *Id.*[3]

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[3] The courts below also relied on the Ninth Circuit's decision in *United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002), which held that a client's threats to commit future violent crimes were not privileged. The *Alexander* opinion is not helpful guidance here for at least two reasons. First, that opinion notes that the defendant had uttered threats in the presence of counsel, but offers no details about those communicative events. If the defendant had randomly phoned counsel to threaten him, the consultative context—essential to the privilege's application and "indisputably"

The document privilege analogy is not fitting. If a document analogy is to be imported at all into this context, the more apt question would ask whether a particular dependent clause snuggled within an otherwise privileged sentence in that document can lose its entitlement to the privilege.

That is, after all, what the record demonstrates happened here. During a private, consultative phone call between counsel and client, convened for a singular, privileged purpose, "indisputably" privileged advice was given.[4] The call concluded with counsel asking their client whether he had any "further" questions of them.[5] Bookended in between, Petitioner vented—to the very advice he was then hearing from his counsel.[6]

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present here—would be absent. Second, unlike Petitioner here, the defendant was an attorney, able to discern what sort of factual sharing was relevant to legal advice and what was not.

[4] *See* Transcript of Evidentiary Hearing on Defendant's Motion to Exclude Attorney-Client Privileged Communication, in *United States v. Ivers*, No. 0:18-cr-90 (D. Minn. June 18, 2018) ("Hearing Tr.") (App. at 48a) ("Q: And your goal with this consultation was to provide him legal advice on that civil lawsuit in front of Judge Schultz? A: Yes. To give—we explained that we were going—our purpose, we were volunteers. And that our purpose was to answer questions he had and to give him our assessment of the case.").

[5] *See* Hearing Tr. (App. at 52a) ("Q: I think you said before that at the end of the phone call when you were wrapping up, you told him about your general legal opinion about the case. Was that before or after? A: The general legal opinion about the case was before. And then the threats happened. And then we did conclude the call by asking if he had any further questions.").

[6] *See* Hearing Tr. (App. at 51a) ("Mr. Ivers was reacting to our advice with respect to the attempted claim—basically the

This venting was specific; his anger was directed at what he was learning about the preclusive effect on his intended new lawsuit by the ruling of the former judge in his earlier lawsuit.[7] More specifically, his anger focused on what he considered the injustice and irregularity of the first lawsuit now being used by the law to defeat his pursuit of a remedy in a later proceeding.[8] His counsel did not interrupt him as he vented, choosing not to for a very particular reason:

> At that point I had made the determination that I would kind of let him speak, you know, wanting to make sure that he had felt like his—like he had been heard, 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. So I mostly let him speak unhindered. I didn't interject. And as he spoke, it escalated very quickly and it kind of became essentially just a rant, an angry rant based

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attempt to bring a—the same claim in a different legal box, which we told him would not work.")

[7] *See* Hearing Tr. (App. at 53a-54a) ("Q: And that's what he was upset about, right? He was upset about the Judge's reasoning in the first case? A: Yes. His anger was directed primarily at Judge Wright. Q: About her decision in the other case? A: Yes.").

[8] *See* Hearing Tr. (App. at 58a) ("Q: [D]id you understand what he was talking about in reference to the didn't read the fine print and missed the 30 days to seek a new trial? What was that about? A: That was what I was referring to, where he had missed the deadline for him to seek a new trial. And he was talking about what he would've done in the courtroom that day had there been a hearing in front of [the judge].").

> on—or discussing what had happened in the case in front of Judge Wright.[9]

Client venting (even angry, raging disappointment) at legal advice is hardly uncommon. In fact, managing, mitigating, and productively channeling a client's emotions *is* legal advice. *See* ABA MODEL RULES OF PRO. CONDUCT r. 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."); *id.* cmt. 1 ("Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits."); *id.* cmt. 2 ("Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."). *See generally United States v. Eirven*, 987 F.2d 634, 636 (9th Cir. 1993) (noting that defendants are "supposed to feel free to explore all possible options" with their attorneys, and "[i]f one of the options is improper, it's the job of the attorney, who knows much more about the often Byzantine rules of our criminal justice system than the defendant, to dissuade the defendant from taking it.").

No doubt, threats by a client may well be different. Consequently, the law affords counsel ample maneuvering space to share confidential client information in

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[9] *See* Hearing Tr. (App. at 62a).

a limited manner to prevent injury, harm, or death. *See* ABA MODEL RULES OF PRO. CONDUCT r. 1.6(b). Permitting such disclosures to stave off a future criminal act is one step. Receiving testimony from counsel against their clients in a later prosecution is a far different step. The Supreme Judicial Court of Massachusetts cautioned reserve in that latter setting because:

> Lawyers will be reluctant to come forward if they know that the information that they disclose may lead to adverse consequences to their clients. A practice of the use of such disclosures might prompt a lawyer to warn a client in advance that the disclosure of certain information may not be held confidential, thereby chilling free discourse between lawyer and client and reducing the prospect that the lawyer will learn of a serious threat to the well-being of others.

Purcell v. Dist. Att'y for Suffolk Dist., 676 N.E.2d 436, 440 (Mass. 1997).[10]

But the courts below did not rule that an exception to the attorney-client privilege permitted the evidentiary use of threats. Instead, the courts below held that threats were unprivileged because Petitioner's entire vent was unprivileged because it was not uttered in

[10] Likewise, for many similar reasons, it is prudent to consider crafting exceptions to the attorney-client privilege gingerly. It is easy to imagine, for example, a parent in a pediatric medical malpractice case, a spouse in a contentious divorce case, or a dismissed employee in an age discrimination case venting in an immoderate way that counsels against any new, bright-line "threat" exception to the privilege.

active search for legal advice. Ergo, the more fitting dependent-clause analogy.

One wonders if the courts below would have ruled differently had Petitioner added a closing sentence to his venting, something like "So, in light of all I've just told you about what I think was the flawed first trial, should I still be precluded?" or "So, why should I be precluded if the first trial was as unfair as I found it to be?" That closing inquiry is all that is missing here. The venting, as Petitioner's counsel recounted it, was mired in a client's disbelief that what he found to be an injustice in his first lawsuit was now to be compounded by an injustice in his second try, all because of that first ruling. Petitioner's incredulity evidently was quite animated, but there is no denying it was part and parcel of, squarely related to, and inseparable from the privileged purpose of his consultative discussion with counsel.

Petitioner is not trained in the law. Few lawyers would agree that the elements and nuances of civil preclusion theory come quickly to mind.[11] It is certainly easy to imagine a nonlawyer querying counsel whether unfairness in a first proceeding could warrant an exemption from its preclusive effects in a second trial. The point is not that Petitioner's understanding of

[11] That just this past Term the Court had occasion to rule on a still unsettled preclusion nuance tends to confirm the point. *See Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589 (2020) (considering whether "defense preclusion" exists "as a standalone category of res judicata, unmoored from the two guideposts of issue preclusion and claim preclusion").

preclusion theory is correct, or that the preclusion escape-hatch he seemed to be arguing for exists, or that an actual threat to commit a future criminal act should be privileged. But an approach to the privilege that disqualifies Petitioner's venting simply because it was not punctuated with a thought-concluding question mark is dangerous

Lawyers, like those for Petitioner here, are well served by encouraging their clients to speak freely in as candid and forthcoming a manner as they'd like. That is, after all, the whole point of the attorney-client privilege. *See generally Eirven*, 987 F.2d at 636 (rejecting an interpretation of the federal sentencing guidelines that would "punish defendants for things they say to their lawyers when discussing legal strategy," reasoning: "A defendant who knows that saying something impermissible to his lawyer can mean extra years in prison—and who knows how little he knows about what exactly is permissible—may well become afraid to say anything," thus defeating the opportunity for taking "full advantage of his Sixth Amendment right to effective legal assistance").

Granting the privilege this wide a berth benefits the lawyering task in many ways. It allows for a fulsome understanding of all the facts and feelings, which could prove valuable—a fact shared in a venting session might present the winning angle for the lawyer's future advocacy. It engenders in the client a sense of confidence in the lawyer's empathy for the client's cause. It stimulates a trust and camaraderie with the lawyer that can prove indispensable over

the course of the representation. It affords the lawyer a preview into the client's likely persona and demeanor when called to testify. This is the fabric of the privilege and the very setting that the privilege is designed to create.

A segmented, thought-by-thought approach to the attorney-client privilege would leave much of these critical client-counsel moments vulnerable to disclosure. Many of those statements surmised above may well fail under a test that asks, utterance by utterance, whether this or that particular remark was posed as a question in active pursuit of legal advice.

The segmented approach applied by the courts below is unrealistic in its understanding of the client-counsel consultative act and unworkable in actual practice. It will fail to afford clients the ability to reasonably, fairly predict when the privilege shields their communication and when it does not. Single-topic oral consultations, convened for an "indisputably" privileged purpose, cannot be dissected thought-by-thought without disserving the objective of the attorney-client privilege. This Petition should be granted to ward off that mischief.

CONCLUSION

For these reasons and others set out by Petitioner's counsel, we endorse the request to grant a Writ of Certiorari to the United States Court of Appeals for

the Eighth Circuit to review the attorney-client privilege analysis applied in the decisions below.

Respectfully submitted,

I. RICHARD GERSHON
UNIVERSITY OF MISSISSIPPI
SCHOOL OF LAW
481 Chucky Mullins Drive
University, MS 38677
(662) 915-6918
igershon@olemiss.edu

WILLIAM M. JANSSEN
*Counsel of Record**
CHARLESTON SCHOOL
OF LAW
81 Mary Street
Charleston, SC 29403
(843) 377-2442
wjanssen@charlestonlaw.edu

April 1, 2021