No. 20-7304

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

REPLY BRIEF FOR PETITIONER

BRETT D. KELLEY
KELLEY, WOLTER & SCOTT, P.A.
Centre Village Offices
Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
Tel: (612) 371-9090
Fax: (612) 371-0574
bkelley@kelleywolter.com

**CJA Counsel for Petitioner*
**Counsel of Record*

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

INTRODUCTION

This petition invites this Court to resolve a fundamental question of federal common law: whether confidential oral consultations between attorney and client, made for the indisputable purpose of obtaining legal advice, are privileged in their entirety unless the privilege is waived or an exception applies; or whether such consultations should be "assessed in a segmented manner—thought-by-thought, sentence-by-sentence, perhaps even word-by-word"—to determine whether the privilege applies. Brief of Amicus Curiae Law Professors in Support of Petitioner (Amicus Br.) 2. The lower courts endorsed the latter approach. It is *sui generis*. This breathtaking departure from the common law "poses a grave danger to the privilege and its underlying goal of client-to-counsel candor." *Id*. The petition and amicus curiae brief crystalize the question presented and the urgent need for this Court's intervention.[1] *See* Pet. 25-29; Amicus Br. 16.

The attorney-client privilege is predicated upon predictability that particular discussions between attorney and client will be protected. *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981). The Eighth Circuit's unworkable rule "imperils" this predictability, Amicus Br. 7-16; Pet. 25-29, rendering

---

[1] The amici represent some of the foremost scholars on the attorney-client privilege, legal ethics, and professional responsibility. *See* Amicus App. 1. Professors Janssen and Gershon, for example, are co-authors of the seminal treatise on the privilege, PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES.

the privilege "little better than no privilege at all." *See Upjohn*, 449 U.S. at 393. If the Eighth Circuit's decision stands, it "w[ill] hollow out the privilege immeasurably." Amicus Br. 3.

The petition presents a question of great national importance that strikes at the heart of the legal profession. The Eighth Circuit's departure from well-established common law—highlighted by decisions from the Second, Fifth, and Sixth Circuits—warrants review. Clients and attorneys need to know whether, and to what extent, the law protects their confidential consultations. The narrow set of indisputable material facts and the academic question presented provide an excellent vehicle to resolve this critical issue.

ARGUMENT

I. There Is An Urgent Need For The Court To Clarify An Issue Of Federal Law That Is Of Great National Importance

A. The Government's Opposition Highlights Why The Court's Review Is Urgently Needed To Clarify Federal Attorney-Client Privilege Jurisprudence

The Government's opposition bespeaks a need for the Court's intervention to clarify its decision in *Fisher* v. *United States*, 425 U.S. 391 (1976). In *Fisher*, this Court stated the privilege "protects only those disclosures *necessary* to obtain informed legal advice which might not have been made absent the privilege." *Id*. at 403 (emphasis added); *see also* PAUL

R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 5.21 (2018-19 ed.) (collecting cases and discussing confusion among lower courts about *Fisher's* "necessity" pronouncement). The Eighth Circuit's segmented approach to the privilege relies on *Fisher* for the proposition that a client's individual statements, expressions, and perhaps words within an oral consultation enjoy no privilege unless they are *absolutely necessary* to obtain legal advice. *See* App. 11a (quoting *Fisher*, 425 U.S. at 403-404); Opp. 9. (citing *Fisher* for the same proposition). Thus, the Government contends that, in an otherwise privileged consultation, anything said not absolutely necessary to the legal advice is nonprivileged and parsed out. For the many reasons already identified by petitioner and amici curiae, this approach would be disastrous to the privilege. Pet. 25-29; Amicus Br. 7-16. This cannot be what the Court intended in *Fisher*.

Confusion about what is "necessary to obtain informed legal advice" is not limited to the Eighth Circuit's decision. *See* RICE, *supra* § 5.21 (collecting cases and explaining post-*Fisher* confusion across the circuits).

Some courts have "suggested that a client's confidential communication to his attorney must be '*necessary* to obtain informed legal advice' before it is protected by the attorney-client privilege." RICE, *supra*, § 5.21 (collecting cases). "Those courts, however, have made this pronouncement without any accompanying justification or explanation—only citations to prior cases containing the same unsupported pronouncement." *Id.* "Many courts have

adopted the better reasoned position that the client's communication will be protected if the client *reasonably believed the communication was relevant to or necessary for the legal advice sought*." *Id.* (emphasis added) (collecting cases).

"An unyielding standard of *actual necessity* presumes an unrealistic level of sophistication and expertise on the part of clients which, in our complex legal environment, is inconsistent with the rationale of the privilege. Such an absolute standard would discourage the very openness and candor the privilege should encourage." RICE, *supra*, § 5.21. Yet this unyielding standard is now precedential in the Eighth Circuit. It is doubtful this Court intended in *Fischer* to impose such an incredibly high standard upon those untrained in the law, like petitioner, or that its decision would be relied on to support a segmented, sentence-by-sentence approach to the privilege that imperils the very predictability upon which the privilege rests.

The Eighth Circuit's decision departs from well-established federal common law on the privilege, *see* Pet. 13-25, and conflicts with its sister circuits over the fundamental principles discussed in *Fisher*. Clarity is urgently needed to preserve the predictability of the privilege. The narrow, indisputable facts of this case provide an excellent vehicle to do so.

B. A Bona Fide Circuit Split Exists

In arguing no circuit conflict exists, the Government contends the decisions of the Second,

Fifth, and Sixth Circuits are inapposite because "none of those cases involved threatening statements." Opp. 13. This mischaracterizes the Eighth Circuit's decision and the question presented by the petition.

The lower courts did not merely create an ad hoc "threat exception" to the privilege. *See* Pet. 18-21; Amicus Br. 11-13, n.10. Rather—and contrary to the Government's perfunctory contention—the courts below created a sweeping rule: *any* statement not made for the express purpose of obtaining legal advice (or deemed, in retrospect, not absolutely necessary for that advice), is nonprivileged and may be parsed out from an otherwise privileged consultation. App. 12a-14a (Eighth Circuit); App. 39a-40a (district court); *see* Amicus Br. 2. This *sui generis* rule applies to all statements during attorney-client consultations, not just threats. App. 39a-40a ("Thus, the Court is not restricted to merely excluding threats.").

This case is about the very nature of the attorney-client privilege. The decisions of the Second, Fifth, and Sixth Circuits demonstrate the Eighth Circuit radically departed from well-established common law on the privilege. Pet. 4-6, 21-25 (discussing this split). Those decisions directly conflict with the Eighth Circuit's segmented approach to the privilege, and show its approach is erroneous. Pet. 21-25; *see* Amicus Br. 7-16 ("The segmented evaluation approach to the privilege endorsed by the courts below is neither realistic nor functional; it imperils predictability."). Contrary to the Government's opposition, the privilege analyses of Second, Fifth, and Sixth Circuit

decisions are apposite to, and in direct conflict with, the Eighth Circuit's approach.

Furthermore, the Government claims the Second Circuit's decision in *In re County of Erie* supports the Eighth Circuit's segmented approach to assessing single-topic, attorney-client consultations. This is untrue. The Government misleadingly contends the Second Circuit "recognized that 'redaction is available' in certain 'instances where both privileged and nonprivileged material exist.' Opp. 13 (quoting *Erie*, 473 F.3d 413, 421 n.8 (2d Cir. 2007)). However, the Government's selective omission of the quoted material misconstrues the Second Circuit's point entirely. The Second Circuit stated that "redaction is available for documents which contain legal advice that is incidental to the *nonlegal advice that is the predominant purpose of the communication*." *Erie*, 473 F. 3d at 421 n.8 (emphasis added to omitted portion). In other words, segregating privileged and nonprivileged statements from a consultation should occur *only* when the primary purpose of the consultation was *not* to render legal services (*i.e.*, redacting privileged statements from a nonlegal document). *See* Amicus Br. 9-10 (explaining that the courts below (and now the Government) wrongly analogized the uncontroversial practice of redacting privileged content from nonprivileged documents with the Eighth Circuit's *sui generis* practice of excising statements from single-topic, attorney-client consultations).

A consultation "between an attorney and client (*i.e.*, a phone call) is shielded by the privilege if its

primary purpose was to obtain legal services"; "[t]he proponent of the privilege need not prove that the purpose of each statement therein was to obtain legal services" unless the primary purpose of the consultation is *not* to obtain legal advice. Pet. 24 (citing RICE, *supra*, §§ 7:4; 7:6). The lower courts flipped on its head the "uncontroversial body of precedent" on document redaction, "deduc[ing] a license to a apply a sweeping segmented approach to the privileged in all settings," Amicus Br. 9 (citing App. 33a), even where the primary purpose of an oral consultation is "indisputably" for obtaining legal services. Pet. 19 (quoting App. 12a); Amicus Br. 8 (citing App. 12a, 35a; Government's Eighth Circuit Br. at 14-15, 31-32). Thus, the Eighth Circuit's decision directly conflicts with what was articulated by the Second Circuit in *Erie*.

II. The Government Provides No Sound Basis To Deny Certiorari

The Government's opposition contains immaterial facts, misstatements, mischaracterizations, and irrelevant arguments. First, contrary to the Government's assertion, the question presented does not involve a "fact-bound" inquiry. *See* Opp. 2, 11. The material facts are clear as amici summarize: "During a private, consultative phone call between counsel and client, convened for a singular, privileged purpose, 'indisputably' privileged advice was given." Amicus Br. 10 (citing App. 48a); Pet. 10 (citing App. 45-48a). "The call concluded with counsel asking their client whether he had any 'further' questions of them." Amicus Br. 10 (citing App. 52a). "Bookended in

between, Petitioner vented—to the very advice he was then hearing from his counsel." *Id*. (citing App. 51a); *see* Pet. 8-9 (describing these same material facts); Pet. 10 (citing App. 14a n.6, 30a n.2, 45a-46a, 47-48a, 49a, App. 50a, 52a); Pet. 17-18 (citing App. 14a n.6; 30a n.2, 35a, 50a, 52a). The indictment is based solely on petitioner's statements parsed from the middle of his attorney-client phone consultation.

Second, the Government devotes nearly a third of its thirteen-page opposition to statements made by petitioner months before and after the 30-minute legal consultation. *See*, *e.g.*, Opp. 2-4, 6. These facts are irrelevant and immaterial to the question presented on the scope of the attorney-client privilege. These facts might have been relevant had the petition invited review of the sufficiency of the evidence or jury instructions on true threats. But those questions are not raised by the petition. The petition presents an academic legal question about the scope of the privilege. The Government's inclusion of these immaterial facts is meant to inflame emotions and distract from the important question raised in the petition and reinforced by amici curiae. The Court should disregard these irrelevant, immaterial facts. *See* Supreme Court Rule 24.6 ("A brief shall be . . . free of irrelevant, immaterial, or scandalous matter. *The Court may disregard or strike a brief that does not comply with this paragraph*." (emphasis added)); Supreme Court Rule 15.3 ("Whether prepared under Rule 33.1 or Rule 33.2, the brief in opposition shall comply with the requirements of Rule 24 governing a respondent's brief.").

Third, the Government misstates what it claims is a determinative fact. The Government erroneously asserts petitioner's "rant" during the legal consultation was "truncated" at the end of the phone call "without any response from the attorneys[.]" Opp. (I); *see* Opp. 5, 7, 8, 9, 10 (repeating this misstatement). This is patently false. Petitioner's attorneys concluded the phone call by inquiring whether his legal questions had been sufficiently answered. App. 52a-53a ("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 was before. And then the threats happened. And then we did conclude the call by asking if he had any further questions. Q: So legal questions? A: Yes."). Thus, there was legal discussion on both sides of petitioner's venting.

Aside from being untrue, the Government's misstatement is irrelevant to the question presented. Whether there was additional legal discussion after petitioner's venting misses the point. Assuming arguendo that the statements from the privileged phone call were made at the very end without any further legal discussion by the attorneys, the Court must first answer the question presented by the petition: can individual statements from a single-topic oral consultation (*i.e.*, a phone call), be severed from a confidential attorney-client consultation indisputably convened for the purpose of obtaining legal advice? This academic question is properly framed in the petition and acknowledged by amici curiae.

Fourth, the Government's opposition mischaracterizes the lower court rulings as having created a "threat exception" to the privilege.[2] Opp. 12. The Eighth Circuit's ruling is far more expansive than merely creating a "threat exception," as the petition and amici curiae explain. *See* Pet. 18-21; Amicus Br. 11-13 and n.10. The district court ruled, "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. The Eighth Circuit affirmed this rule. While the lower courts both opined that threats are categorically nonprivileged, App. 11a-12a, 34a, the segmented, sentence-by-sentence approach to the privilege adopted below and challenged by petitioner is not restricted merely to threats.

Finally, the Government's confounding crime-fraud argument is irrelevant and was conceded below. *See* Opp. 10 (arguing crime-fraud exception "reinforces" the Eighth Circuit's decision). The Government conceded the crime-fraud exception is inapplicable. Pet. 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

---

[2] The attorney-client privilege "is not subject to ad hoc exceptions." Restatement (Third) of the Law Governing Lawyers § 68 (2000); *see* Pet. 17 (listing cases rejecting new exceptions or attempts to narrow the privilege). Thus, even if the Eighth Circuit had merely created an ad hoc threat exception, it would be invalid.

address that issue."); App. 30a n.2 ("The Government is not asserting the crime-fraud exception[.]").

Moreover, the Government's argument about crime-fraud is erroneous. This exception applies only when legal advice is sought in furtherance of a crime or fraud. *United States* v. *Horvath*, 731 F.2d 557, 562 (8th Cir. 1984); *see United States* v. *Zolin*, 491 U.S. 554, 568-72 (1989) (discussing procedure for administering the crime-fraud exception). The Government admits that no advice was sought in furtherance of any threat here. Opp. 10. The crime-fraud exception does not apply to criminal or fraudulent statements where no legal advice is sought in furtherance thereof.[3] Dismayed, the Government argues that statements about future crimes should never be privileged. It contends that any criminal or fraudulent statement should be categorically nonprivileged even where no legal advice is sought in furtherance, as if to say the requirement that "legal advice be sought in furtherance of a crime or fraud" be eliminated from the crime-fraud exception. Opp. 10. Not only is the Government wrong, *see* Pet. at 4-5 ("During an attorney client consultation, the client might mention [a] planned future crime without seeking the attorney's assistance in executing the

[3] Contrary to the Government's contention, *United States* v. *Alexander*, 287 F.3d 811 (9th Cir. 2002) is inapposite here. *See* Amicus Br. 9 n.3 (explaining why *Alexander* is "not helpful guidance" for the Court); Amicus Br. 12-13 (discussing the difference between the crime-fraud exception to the privilege, which is an evidentiary rule, and exceptions to the duty of confidentiality under the rules of professional conduct); Pet. 17-20 (discussing *Alexander*).

plan. If so, the privilege would still attach.") (quoting THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.13.2 (Edward J. Imwinkelried ed., 3rd. ed. 2021)); Amicus Br. 12-16 (discussing why petitioner's venting during the phone call falls squarely within the privilege), the Government's proposal would also chill attorney-client communication and reduce the prospect that attorneys will even learn of serious threats to others, Amicus Br. 13 (quoting *Purcell* v. *Dist. Att'y for Suffolk Dist.*, 676 N.E.2d 436, 440 (Mass. 1997)).

The Government simply misses the mark. It fundamentally misunderstands the black letter law on the privilege and relevant facts raised in the petition and amici curiae brief. The question presented is an academic one resting upon narrow, indisputable facts.

III. This Case Presents An Ideal Vehicle For Addressing The Question Presented and Settling An Issue of National Importance

The Eighth Circuit's rule "poses a grave danger to the privilege and its underlying goal of client-to-counsel candor." Amicus Br. 2. The key facts establish the privilege applies to the legal consultation between petitioner and his attorneys. This case "indisputably" involves (1) a confidential oral consultation (2) between attorneys and client (3) made for the sole purpose of discussing the viability of a pending lawsuit, (4) the privilege was never waived, and (5) no exception to the privilege applies. Pet. 10, 17-18; App. 14a n.6, 30a n.2, 35a 45a-50a, 52a. The *only* question here is whether under federal law the attorney-client

privilege shields from disclosure the entire substance of this legal consultation, or whether the consultation should be analyzed in a segmented manner—thought-by-thought, sentence-by-sentence, word-by-word—with legally imprecise statements parsed out.

The post-*Ivers* future is grim without the Court's intervention. The purpose of the privilege is to assure client and attorney that their confidential consultations will be shielded from disclosure. The vast majority of clients are not learned in the law, yet now they must communicate with the legal precision of an attorney. The Eighth Circuit has eviscerated the predictability required to achieve the purpose of the privilege. Attorneys will need to warn clients about the danger of digressions and imprecise statements. This will do great harm to the privilege and undermine public trust in the legal profession. This case presents a concise legal question of federal common law—one that is of immense national importance and warrants review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

BRETT D. KELLEY
KELLEY, WOLTER & SCOTT, P.A.
Centre Village Offices,
Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
Tel: (612) 371-9090
Fax: (612) 371-0574
bkelley@kelleywolter.com

CJA Counsel for Petitioner

MAY 2021