No. 21-1397

In the Supreme Court of the United States

IN RE GRAND JURY

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court permissibly denied petitioner's general claim of attorney-client privilege over communications, related to the preparation of a tax return, that did not have obtaining legal advice as their primary purpose, while instructing that all legal advice contained in the communications be redacted.

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OPINIONS BELOW

The amended opinion of the court of appeals regarding dual-purpose communications (Pet. App. 1a-12a) is reported at 23 F.4th 1088. The original opinion of the court of appeals is reported at 13 F.4th 710. A memorandum opinion of the court of appeals (Pet. App. 13a-19a) regarding other privilege issues is sealed and unreported. The order of the district court granting in part and denying in part the government's motion to compel production (Pet. App. 23a-138a) is sealed and unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2021. A petition for rehearing was denied on January 27, 2022 (Pet. App. 1a-12a). The petition for a writ of certiorari was filed on April 1, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As part of a criminal investigation, a federal grand jury subpoenaed petitioner for the production of certain documents. See Pet. App. 2a. Petitioner refused to produce some documents responsive to the grand jury's subpoena, asserting attorney-client privilege and work-product protection. See *ibid.* The district court granted in part the government's motion to compel production and ordered the disclosure of some documents and portions of additional documents. *Id.* at 23a-138a. After petitioner failed to comply with the court's order, the court held petitioner in civil contempt. *Id.* at 20a-22a. The court of appeals affirmed. See *id.* at 1a-12a.

1. Petitioner is a law firm that prepares tax forms for its clients and provides tax advice. See Pet. App. 2a. A federal grand jury conducting a criminal investigation of one of petitioner's clients subpoenaed petitioner for the production of certain documents. See *ibid.* Petitioner withheld some documents, invoking the attorney-client privilege and the work-product privilege. *Ibid.*

The government moved in the United States District Court for the Central District of California to compel production of the withheld documents. Pet. App. 2a. After *in camera* review of the disputed documents, the district court granted the government's motion in part. *Id.* at 23a-138a. The court explained that "although communications that are only about tax return preparation are not covered by the attorney-client privilege, communications seeking legal advice about what to claim on tax returns or other tax-related legal advice may be privileged" when "the primary purpose of the communication was to obtain or provide such legal advice." *Id.* at 44a; see *id.* at 43a. The court took the view

that any communications that "concern legal advice related to what must be claimed on a tax return, what strategies to pursue, the potential risks of taking certain positions, or other types of tax-related legal advice, * * * are subject to the attorney-client privilege." *Id.* at 53a. And it placed a thumb on the scales in favor of deeming potentially unsettled accounting questions as legal rather than accounting advice. *Id.* at 52a-53a.

The district court accordingly permitted petitioner to withhold in full all documents that involved non-tax legal advice. Pet. App. 48a-49a. The court also permitted petitioner to withhold in full a set of documents related to the preparation of the client's tax return because the "primary purpose" of those documents was obtaining legal advice and "not solely tax return preparation." *Id.* at 52a; see *id.* at 49a-52a. But the court ordered disclosure of the portions of communications "where the primary or predominate purpose was about the procedural aspects of the preparation of [the client's] tax return" or where a certified public accountant "provided advice as an accountant." *Id.* at 54a. Where it found a portion of a tax-preparation communication contained tax-related legal advice, the court instructed petitioner to redact it before disclosing the rest of the document. *Ibid.* The court also ordered the production of certain documents on the ground that the crime-fraud exception applied. *Id.* at 57a-78a.

Notwithstanding the district court's order requiring disclosure of certain documents and portions of others, petitioner continued to withhold all of the relevant documents in their entirety. Pet. App. 3a. The government moved to hold petitioner in civil contempt. See *id.* at 3a, 20a. The district court granted the motion. *Id.* at 20a-22a.

2. Petitioner appealed the contempt order, and the court of appeals affirmed. Pet. App. 1a-12a.

The court of appeals emphasized that the attorney-client privilege protects confidential communications between attorneys and clients "which are made for the purpose of giving legal advice." Pet. App. 3a (citation omitted). The court observed, however, that communications can have more than one purpose, noting in particular that "'in the tax law context'" a communication can address both "tax compliance considerations" (a non-legal purpose) and "advice on what to do if the IRS challenged the deduction" (potentially a legal purpose). *Id.* at 4a (citation omitted). And, consistent with the great weight of legal authority, it agreed with the district court that, in determining whether a communication that involves both legal and non-legal analyses is wholly protected by attorney-client privilege, courts should look to its "primary purpose." *Id.* at 10a; see *id.* at 6a-10a.

The court of appeals acknowledged, but found it unnecessary to address, petitioner's argument that the primary purpose test should be satisfied whenever providing legal advice was "*a* primary purpose" of the communication (*i.e.*, "'one of the significant purposes of the communication'"), noting that, while it "see[s] the merits of the reasoning in [*In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759-760 (D.C. Cir. 2014), cert. denied, 574 U.S. 1122 (2015)]," which employed that approach, "the facts here [do not] require [it] to reach the *Kellogg* question." Pet. App. 10a-11a (citation omitted); see *id.* at 10a-12a. The court of appeals stated that the *Kellogg* court's approach to the primary purpose test "would only change the outcome of a privilege analysis in truly close cases," for instance where legal and non-legal

purposes are similarly significant. *Id.* at 11a-12a. But it explained that in this case, the district court "did not clearly err in finding that *the* predominate purpose of the disputed communications was not to obtain legal advice." *Id.* at 12a. The court also noted that "it is not clear" that, even if the *Kellogg* approach to the primary purpose test should apply as a general matter, that it would be "appropriate in [the tax] context." *Id.* at 11a n.5. The court therefore "le[ft] open" whether "the *Kellogg* formulation of the primary-purpose test" should apply in some or all future cases presenting primary-purpose issues. *Id.* at 10a, 12a (capitalization omitted).[*]

ARGUMENT

Petitioner renews its contention (Pet. 9-30) that the district court erred in finding that certain documents were subject to disclosure in whole or in part because they were not entirely privileged. The courts below correctly rejected the assertion of attorney-client privilege, and the court of appeals' decision does not implicate any conflict among the courts of appeals. The petition for a writ of certiorari should be denied.

1. The district court permissibly determined that the documents and portions of documents now at issue were not subject to attorney-client privilege.

a. Under the Federal Rules of Evidence, "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege." Fed. R. Evid. 501. A well-established privilege protects communications between attorneys and their clients. See *Upjohn Co.* v. *United States*, 449 U.S. 383,

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[*] In a separate memorandum opinion, the court of appeals rejected petitioner's remaining arguments. See Pet. App. 2a n.1, 13a-19a.

389 (1981). That privilege, however, protects only those communications between an attorney and client that are "necessary to obtain informed legal advice." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Accordingly, the privilege applies only to the extent that a communication was made "for the purpose of obtaining legal assistance and not predominantly for another purpose." Restatement (Third) of the Law Governing Lawyers § 72 cmt. c (2000).

Where a communication has more than one purpose, courts generally employ a "primary-purpose" test to determine whether the communication is protected by attorney-client privilege. See, *e.g.*, *Taylor Lohmeyer Law Firm P.L.L.C.* v. *United States*, 957 F.3d 505, 510 (5th Cir. 2020), cert. denied, 142 S. Ct. 87 (2021); *Alomari* v. *Ohio Dep't of Pub. Safety*, 626 Fed. Appx. 558, 570 (6th Cir. 2015), cert. denied, 577 U.S. 1144 (2016); *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007); *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805 (Fed. Cir. 2000); see also 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 7:6, at 1341-1342 (2021-2022 ed. 2021) (describing the "general agreement that the protection of the privilege applies only if the primary or predominant purpose of the attorney-client consultations is to seek legal advice or assistance") (emphasis omitted); 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2017, at 432 (3d ed. 2010) ("for the purpose of securing *primarily* either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding") (emphasis added; citation omitted). Under that rubric, a dual-purpose communication is protected if the primary or predominate purpose of the communication (generally, as determined based on the totality of the relevant circum-

stances) is to provide legal advice. See, *e.g.*, *Erie*, 473 F.3d at 420-421.

Although federal law recognizes an attorney-client privilege, it does not recognize an accountant-client privilege, and "[a] taxpayer should not be able to invoke a privilege simply because he hires an attorney to prepare his tax returns." *In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987) (*Schroeder*); see, *e.g.*, *United States* v. *Frederick*, 182 F.3d 496, 500 (7th Cir. 1999) (explaining that "[t]o rule otherwise would be to impede tax investigations, reward lawyers for doing nonlawyers' work, and create a privileged position for lawyers in competition with other tax preparers"), cert. denied, 528 U.S. 1154 (2000). Accordingly, it is well established that the preparation of tax returns and other tax filings does not constitute legal advice within the scope of the attorney-client privilege, even when done by an attorney. See *Schroeder*, 842 F.2d at 1224-1225 (collecting cases). That is so despite the fact that "the preparation of a tax return requires some knowledge of the law, and the manner in which a tax return is prepared can be viewed as an implicit interpretation of that law." *Id.* at 1225.

Moreover, even when an attorney has given legal advice regarding the preparation of a tax return, the filing of the return itself "waive[s] the privilege not only to the transmitted data but also as to the details underlying that information." *United States* v. *Cote*, 456 F.2d 142, 144-145 (8th Cir. 1972); see *United States* v. *Davis*, 636 F.2d 1028, 1043 n.18 (5th Cir.), cert. denied, 454 U.S. 862 (1981); *United States* v. *Lawless*, 709 F.2d 485, 487-488 (7th Cir. 1983); *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 280 (10th Cir. 1983). As this Court has recognized, construing the privilege narrowly is

particularly important for Internal Revenue Service (IRS) investigations because of the "congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984).

b. Petitioner does not generally dispute those well-settled principles, and the district court and the court of appeals permissibly applied them to resolve petitioner's claims of attorney-client privilege.

The district court explained that any "communications seeking legal advice about what to claim on tax returns or other tax-related legal advice" were privileged if their primary purpose was to obtain or provide such legal advice. Pet. App. 44a. It took a broad view of tax-related legal advice, construing such advice to include any communications that "concern legal advice related to what must be claimed on a tax return, what strategies to pursue, the potential risks of taking certain positions, or other types of tax-related legal advice." *Id.* at 53a. And it did not deny application of the privilege solely on the ground that communication "occurred during the preparation of [the client's] tax return." *Ibid.*

At the same time, the district court rejected the wholesale assertion of attorney-client privilege only over communications in which "the primary or predominate purpose was about the procedural aspects of the preparation of [the client's] tax return or where [the firm's accountant] provided advice as an accountant." Pet. App. 54a; see also *id.* at 53a (stating that "communications made * * * solely for the purpose of preparing a tax return" are not privileged). The court emphasized, however, that even if the majority of a communication concerned tax preparation, "portions of those documents concern[ing] communications about tax-related

legal advice" were nevertheless privileged. *Id.* at 54a. Accordingly, the district court redacted all attorney-client communications involving legal advice, even when they appeared in documents having primarily a non-legal purpose. *Id.* at 54a & n.7, 99a-108a, 113a-116a. In doing so, it sought to exclude *all* legal advice from disclosure.

In reviewing those findings, the court of appeals found that the district court "did not clearly err" in determining that certain communications with "the predominate purpose" of something other than "obtain[ing] legal advice" were subject to disclosure. Pet. App. 12a (emphasis omitted); see *id.* at 10a-12a.

c. Petitioner errs in suggesting (Pet. 14-15) that the courts below could not properly resolve this case without applying the approach to primary-purpose analysis undertaken by the D.C. Circuit in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759-760 (2014), cert. denied, 574 U.S. 1122 (2015).

In *Kellogg*, a company sought review after a district court declined to apply the attorney-client privilege to any of the communications that were part of a company's lawyer-led internal investigation, on the ground that because the investigation would have occurred regardless, seeking legal advice was not the "but for" cause of the communications. 756 F.3d at 756, 759. The D.C. Circuit rejected that "sole purpose" approach, determining—in accord with the general consensus among courts of appeals—that the "primary purpose" inquiry should govern. *Id.* at 759. The court also stated that it "can be an inherently impossible task" to "try[] to find the one primary purpose for a communication motivated by two sometimes overlapping purposes," and viewed it as "clearer, more precise, and more

predicable to articulate the test as follows: Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.* at 759-760 (emphases omitted). And finding "no serious dispute that one of the significant purposes of the [company's] internal investigation [in that case] was to obtain or provide legal advice," the court found that the district court clearly erred in denying the assertion of privilege. *Id.* at 760.

In contrast to *Kellogg*, where the district court applied a sole-purpose approach to compel the wholesale production of all communications related to an internal investigation, 756 F.3d at 756, 760, the district court in this case employed a primary-purpose approach, in combination with an expansive definition of legal advice (Pet. App. 53a), under which it broadly redacted legal communication contained in documents, including documents whose primary purpose was not the provision of legal advice. Specifically, the court emphasized that even if the majority of a communication concerned only tax preparation, "portions of those documents concern[ing] communications about tax-related legal advice" were nevertheless privileged and redacted those portions. *Id.* at 54a; see *id.* at 54a & n.7. Accordingly, its application of the primary purpose approach did not require the disclosure of *any* legal advice that could be redacted.

Petitioner argues at length (Pet. 19-25) that *Kellogg*'s articulation of its primary-purpose approach is superior to one that catalogues every significant purpose and treats as determinative the one that is most significant. But the court of appeals explicitly took no position on that issue. Indeed, the court specifically made clear that it saw "merit[]" in the reasoning from

Kellogg that petitioner endorses, but emphasized that this case presented no need to address its potential general or tax-specific application because it would not "change the outcome of the privilege analysis" in this case. Pet. App. 11a-12a. It thus expressly "le[ft] open" those questions for a future case, to which it might be relevant. *Id.* at 10a (capitalization omitted). Petitioner therefore is incorrect in asserting (Pet. 21) that "[i]n the Ninth Circuit, a dual-purpose communication is subject to disclosure any time a court decides a non-legal motivation for the communication outweighs the legal motivation" or that the Ninth Circuit has "direct[ed] district court judges to balance competing legal and non-legal motivations *ex post*."

To the extent that petitioner suggests that the court below was required to resolve those issues here, and failed to do so only because it misunderstood the scope of situations to which *Kellogg*'s discussion might apply, that fact-bound suggestion is incorrect. To the contrary, the court of appeals correctly described *Kellogg* as articulating an analysis of requiring legal advice to be "a primary purpose, meaning one of the significant purposes of the communication." Pet. App. 10a (quoting *Kellogg*, 756 F.3d at 760). The citation in the decision below of an example of a situation in which the *Kellogg* test would be most salient—"like where the legal purpose is just as significant as a non-legal purpose"—does not indicate a general misreading of the opinion in *Kellogg*. *Id.* at 12a. And the court of appeals' determination that the district court had not "clearly err[ed] in finding that the predominate purpose of the disputed communications was not to obtain legal advice," *ibid.* (emphasis omitted), does not reflect confusion over *Kellogg*'s reasoning; instead, it reflects the court of appeals'

agreement with the district court's findings that the *only* primary or predominate purpose of the disputed communications—following the district court's extensive redactions—was non-legal.

d. Petitioner relatedly challenges (Pet. 15-17) the district court's factual findings, affirmed by the court of appeals, that particular documents were not subject to attorney-client privilege. This Court ordinarily "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). And "under what [the Court] ha[s] called the 'two-court rule,' the policy has been applied with particular rigor when [the] district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

Regardless, petitioner can identify no error, let alone any clear error, in the lower courts' factual findings regarding those documents. Two of the documents consist of e-mails between the client and a non-attorney accountant. The first (IST_0000001953) concerned the information needed for the preparation of FBAR ("Report of Foreign Bank and Financial Accounts") forms to be submitted to the IRS. The second (DECRYPTED_0000000136)—consisting of portions of an e-mail that the district court otherwise substantially redacted to omit legal advice about tax matters, see Pet. App. 53a, 104a—concerned whether the client wished to file amended state returns given the cost of preparing the tax returns compared to the likelihood of receiving a tax refund. Both constitute the provision of tax services as an accountant (which petitioner acknowledges

is not protected, Pet. 6 n.2), not the provision of legal advice. Similarly, the court of appeals specifically found that the remaining document that petitioner identifies (DECRYPTED_0000000139-140)—consisting of e-mails regarding preparation of IRS filings seeking to abate failure-to-file penalties—related to "tax services," namely, the preparation of a portion of the tax filing explaining the reasons for not filing or paying on time. Pet. App. 19a.

2. Petitioner likewise errs in suggesting that the outcome of this case would have been different in other circuits.

Petitioner primarily contends that the decision below conflicts with that of the D.C. Circuit in *Kellogg* because "[t]he Ninth Circuit here adopted a rule that is fundamentally different from the D.C. Circuit's approach." Pet. 13; see Pet. 10-17. But the court of appeals expressly stated that it was "leav[ing] open" whether the *Kellogg* approach would apply in future cases, Pet. App. 10a (capitalization omitted), and specifically determined that the D.C. Circuit's articulation of the primary-purpose approach would not change the outcome on these facts, *id.* at 11a-12a. Even if the court of appeals misinterpreted what the district court did in this case—which it did not, see pp. 9-13, *supra*—such a factbound error offers no basis for this Court's review where the Ninth Circuit made clear that future panels remain free to adopt petitioner's legal position, see Pet. App. 10a-12a, and where (as petitioner acknowledges, Pet. 12), no other circuit has weighed in on the question.

Petitioner also suggests that review is warranted on the theory that the Seventh Circuit has held that "dual-purpose documents can *never* be privileged." Pet. 17 (citing *Frederick*, 182 F.3d at 501); see Pet. 17-18. But

the Seventh Circuit's observations—which emphasize the unique considerations at issue in the tax context, particularly given the need to avoid creating an accountant-client privilege or extending special protections to attorneys who are performing non-legal work—were specific to "accountants' worksheets" prepared by an attorney. *Frederick*, 182 F.3d at 501; see also *Valero Energy Corp.* v. *United States*, 569 F.3d 626, 631 (7th Cir. 2009) (addressing "worksheets containing financial data and estimates of tax liability" and documents discussing "deductions and the calculations of gains and losses"); *Smith-Brown* v. *Ulta Beauty, Inc.*, No. 18-C-610, 2019 WL 2644243, at *2-3 (N.D. Ill. June 27, 2019) (finding no "binding precedent" regarding attorney-client privilege claims over dual-purpose communications, and applying *Kellogg*'s articulation of the primary-purpose test). In any event, even assuming that petitioner were correctly describing the Seventh Circuit's approach, it would not lead to a different outcome here.

3. Petitioner nevertheless urges this Court to grant the petition on the ground that it presents a "rare" opportunity for appellate review of a privilege issue because a non-party law firm was held in civil contempt. Pet. 29 n.11; see Pet. 28-30. But nothing is uncommon about an entity that receives a grand-jury subpoena standing in civil contempt when faced with a disclosure order—particularly because, as is the case here, see Pet. App. 21a-22a, the penalties might not accrue until after the appeal is resolved. See, *e.g.*, *id.* at 2a-3a (explaining that another entity, a company owned by the target of the criminal investigation, also stood in contempt rather than producing the documents). In any event, privilege questions can arise in a wide array of

contexts where review by the courts of appeals and by this Court are available. See *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 110-111 (2009); *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992); see also, *e.g.*, *Kellogg*, 756 F.3d at 756 (mandamus review of the denial a privilege claim by a party in the underlying litigation). If a conflict warranting this Court's review develops at a later date, this Court will be able to address the question presented at that juncture.

Indeed, this case would be a poor vehicle for further review of the question presented because it arises in the tax context. *Kellogg* based its articulation of the primary-purpose approach on its view that, where a communication has a significant legal purpose, it may be difficult and unnecessary to identify other significant purposes and to compare which of those purposes is more significant and so predominant. 756 F.3d at 759-760. Communications related to a company's internal investigation, like those at issue in *Kellogg*, can create this difficulty because such an investigation involves the provision of "quintessential[] legal advice." *Id.* at 759. But communications related to the preparation of tax returns raise distinct questions. For example, courts in this context must be careful not to inadvertently create an accountant-client privilege, or to extend special treatment to lawyers performing non-legal tasks. See pp. 7-8, *supra*; see also, *e.g.*, Pet. App. 11a n.5; *Frederick*, 182 F.3d at 501 (citing *Arthur Young & Co.*, 465 U.S. at 817-819). Similarly, communications related to tax returns are less amenable to claims of privilege because tax returns are disclosed to a third party, and that disclosure "effectively waive[s] the privilege not only to the transmitted data but also as to the details underlying that information." *Cote*, 456 F.2d at 144-145; *Davis*,

636 F.2d at 1043 & n.18; *Lawless*, 709 F.2d at 487-488; *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000); *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d at 280. Moreover, a tax return preparation purpose may be "readily separable" from a litigation purpose, even when done by a lawyer. *In re Grand Jury Subpoena*, 357 F.3d 900, 909 (9th Cir. 2004).

Given those context-specific considerations, *Kellogg*'s articulation might be viewed as more germane in a typical dual-purpose case where segregating multiple purposes is (as was the case in *Kellogg* itself) an "inherently impossible task," *Kellogg*, 756 F.3d at 759, which may less often be the case in the tax context. Intervention by this Court before the Ninth Circuit or any other court of appeals—including the D.C. Circuit itself—determines whether to apply its articulation in the tax context is thus premature at best and in no way warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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