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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

The Ninth Circuit's decision creates a three-way split as to when dual-purpose communications are privileged. The government's opposition rests principally on the Ninth Circuit's assertion that there was no conflict with the D.C. Circuit. But the Ninth Circuit was able to make that assertion only by misconstruing the D.C. Circuit's approach.

There is a clear and obvious difference between the test the D.C. Circuit *actually* applies and the test that the Ninth Circuit announced and applied in this case. The D.C. Circuit asks whether obtaining or providing legal advice is "one of the significant purposes" of the communication. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014). That test recognizes that attorney-client communications may have multiple purposes and is designed to avoid intractable inquiries into the relative importance of the legal and non-legal aspects of a communication. *Id.* at 759-760.

The Ninth Circuit, by contrast, holds that a communication "can only have a single 'primary' purpose," Pet. App. 4a, and requires courts to determine whether a communication's legal purpose is at least as significant as its non-legal purpose, Pet. App. 12a. It thus requires precisely the kinds of intractable inquiries that the D.C. Circuit's test is designed to avoid. Tellingly, district courts in the Ninth Circuit have consistently interpreted the decision precisely as the petition does.

That divergence in approach was outcome determinative. The Ninth Circuit never evaluated, much less held, that the communications at issue here lacked a significant legal purpose, and it could not plausibly have reached such a result on this record. The court

instead rejected the privilege claim based solely on its conclusion that non-legal purposes predominated over legal purposes.

There is a reason that amici representing tens of thousands of lawyers and businesses have asked this Court to review the petition: The Ninth Circuit has adopted a rule that conflicts with the governing rule in other Circuits, is difficult if not impossible to apply in practice, and imposes a serious and unwarranted limitation on the scope of the attorney-client privilege.

As amici stress, lawyers and trial court judges must navigate privilege questions every day. Dual-purpose communications present challenging and important privilege issues—and those issues recur frequently in matters involving attorney tax advice of the kind at issue here. Yet vehicles for appellate review of privilege issues are rare. This petition presents an ideal vehicle to provide needed guidance and resolve the circuit conflict over dual-purpose communications.

ARGUMENT

A. The Circuits Are Split As To When Dual-Purpose Communications Are Privileged.

1. a. The Ninth Circuit adopted a test for dual-purpose communications that directly conflicts with the D.C. Circuit's approach. The government's main response is to repeatedly invoke the Ninth Circuit's statement that it was not deciding whether to adopt the D.C. Circuit's approach. See Opp. 4, 5, 10, 11, 13. But denying the existence of a conflict does not make it so.

Whatever issue the Ninth Circuit purportedly reserved, its *reasoning* is incompatible with the D.C. Circuit's and that divergence was outcome-determinative

here. In the D.C. Circuit, a communication is privileged when "obtaining or providing legal advice was one of the significant purposes of the communications at issue." *Fed. Trade Comm'n* v. *Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1268 (D.C. Cir. 2018). It does not matter whether there was also a non-legal purpose, even if that non-legal purpose was also significant or even *more* significant than the legal purpose. See *ibid.* (recognizing that "the communications at issue here also served a business purpose" but explaining that "what matters is whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communications").

The Ninth Circuit's decision endorses a different approach. Rather than ask whether the legal purpose was significant, the Ninth Circuit adopted a standard that forces trial courts to put the communication's legal and non-legal purposes on opposite sides of the scale to determine a single "primary" purpose. See Pet. App. 12a (holding that communications were not privileged because "*the* predominate purpose" was non-legal).

Several district courts in the Ninth Circuit have applied the decision below in precisely this fashion, explaining that, under the Ninth Circuit's new test, "a dual-purpose communication can only have a single 'primary' purpose." *City of Roseville Employees' Retirement System* v. *Apple Inc.*, 2022 WL 3083000, at *3 (N.D. Cal. Aug. 3, 2022) (describing the decision below as holding that "where the purpose of a communication is to give or receive both legal advice and business advice, the communication is protected by attorney-client privilege only where the 'primary purpose' of the communication is 'to give or receive legal advice, as opposed to business * * * advice'" (quoting Pet. App.

4a)); see also *L.D.* v. *United Behavioral Health*, 2022 WL 3139520, at *12 (N.D. Cal. Aug. 5, 2022) (under decision below, "a dual-purpose communication can only have a single 'primary' purpose").

The Ninth Circuit formulation directly conflicts with the D.C. Circuit's rule. In the D.C. Circuit it is "not correct for a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes." *Kellogg*, 756 F.3d at 760. The decision below, by contrast, ruled that "a dual-purpose communication can only have a single 'primary' purpose" and held that the communications were not privileged because "*the* predominate purpose" was non-legal. Pet. App. 4a, 12a. Strikingly, despite that the entire dispute here is whether the Ninth Circuit sought to find *the* primary purpose or *a* primary purpose, the government twice omits the Ninth Circuit's emphasis when describing its holding about "*the* predominate purpose." Pet. App. 12a; compare Opp. 9, 11.

b. The government never addresses head on the fact that the district court and Ninth Circuit did not inquire whether the communications at issue had a significant legal purpose—*i.e.*, that they never asked the only question that is relevant in the D.C. Circuit. Instead, the opposition tries to obscure the clear import of the decision below.

The government first says that the Ninth Circuit affirmed the district court because it agreed that "the *only* primary or predominate purpose of the disputed communications—following the district court's extensive redactions—was non-legal." Opp. 12. To the extent the government's use of "*only* primary or predominate purpose" means "most significant purpose"—*i.e.*,

that the Ninth Circuit engaged in the comparative inquiry that the D.C. Circuit prohibits—that proves there is a split.

If, instead, the government uses "*only* primary or predominate purpose" to mean "only significant purpose," it is misreading the opinion. Neither the district court nor the Ninth Circuit ever asked, much less determined, whether the communications had a significant legal purpose—as the opposition's lack of citation highlights, see Opp. 12. It is accordingly wrong to suggest that a court applying the D.C. Circuit test would have reached the same result here on the ground that the communications lacked a significant legal purpose.

The opposition further contends that the district court "redacted all attorney-client communications involving legal advice" in an effort "to exclude *all* legal advice from disclosure." Opp. 9; see also *id.* at 10, 12. That is wrong. If redactions had excised *all* legal advice, this case would not even concern dual-purpose communications, which is clearly not how the courts below viewed the communications at issue. It was because portions of those documents had inseparable legal and non-legal purposes—*i.e.*, portions where pure legal advice could not be redacted—that the Ninth Circuit needed to address the standard for reviewing a dual-purpose communication. The government's effort to obscure the split by distorting the opinion only emphasizes the clear conflict.

c. The government wrongly characterizes the petition as seeking clear error review of individual privilege findings. Opp. 12-13. The petition identified (at 15-17) examples of communications that would have been privileged under the D.C. Circuit's approach to highlight the outcome-determinative difference between the Ninth Circuit's approach and that of the

D.C. Circuit. In responding to that argument, the opposition emphasizes a non-legal purpose of each document without ever addressing the significance of the *legal* purpose. See Opp. 12-13. In other words, the opposition undertakes precisely the mode of analysis that the Ninth Circuit conducted, and that the D.C. Circuit would reject.

For example, the government points out that one document "concerned the information needed for the preparation of FBAR ('Report of Foreign Bank and Financial Accounts') forms." Opp. 12 (discussing IST_0000001953). But that communication was not just about obtaining information for inclusion on FBARs. Indeed, Petitioner had already produced, before the district court's order, the portion of the communication where the Client provided the financial details to be reported on the form. See 6-ER-986-989; FER-032. The withheld communication also had a significant legal purpose because it included the Client's questions about the scope of the FBAR and attorneys' responses and interpretation of the law in this unsettled area. See 6-ER-987; see also Pet. 16-17 (identifying multiple additional examples of communications about legal strategy).[1]

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[1] The government's carefully worded description (at 12) of the communications as "e-mails between the client and a non-attorney accountant" glosses over the fact that, as the district court recognized, the accountant's role at the law firm included gathering information to facilitate legal advice and that when the accountant acted in this manner, it did not change the application of the privilege. See Pet. 15-16; see also Pet. App. 50a-51a (explaining that accountant "performed many roles at [Petitioner]," including "collecting, organizing and synthesizing information that [attorney] would use in order to provide legal advice to [the Client]," and that such "involvement * * * does not change the

Even assuming the most significant purpose of this email exchange was to gather information for preparing FBARs, a still significant purpose was to solicit and provide legal advice. It is because of that significant legal purpose that the D.C. Circuit would consider this document privileged—regardless of whether a non-legal purpose was *more* significant. In ignoring that significant legal purpose, the opposition reveals that, for all its attempts to muddy the waters, the Ninth Circuit's approach is irreconcilable with the D.C. Circuit's rule.

To be clear, Petitioner is not trying to identify "error * * * in the lower courts' factual findings regarding [any] documents." Opp. 12. Nor is Petitioner asking this Court to review the Ninth Circuit's application of its balancing approach to dual-purpose documents. Petitioner seeks review because the courts below applied the *wrong legal test* by seeking to uncover a single "primary purpose" of the communications rather than asking whether a significant legal purpose existed.

d. In the end, all the opposition can really say about the split is not to worry because the Ninth Circuit said it was not creating one. But, as noted, district courts in the Ninth Circuit are already interpreting its opinion to require precisely what Petitioner claims that opinion requires: a determination of the single most-important purpose behind a communication. See *City of Roseville*, 2022 WL 3083000, at *3 (interpreting

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application of the attorney-client privilege"); *United States* v. *Judson*, 322 F.2d 460, 462 (9th Cir. 1963) (documents prepared by accountant "at the attorney's request, in the course of an attorney-client relationship, for the purpose of advising and defending his client" were privileged).

decision below as holding "that a dual-purpose communication can only have a single 'primary' purpose"); *id.* at 11 n.6 (explaining that district court decision that found a communication contained both business and legal advice but "did not address which was primary" "may not be consistent" with the Ninth Circuit's approach); *L.D.*, 2022 WL 3139520, at *12. Amicus briefs on behalf of organizations representing the business community and over 70,000 California lawyers make clear that the circuit conflict is already creating confusion. See Chamber of Commerce (Chamber) Amicus Br. 4-6, 12-20; California Lawyers Association (CLA) Amicus Br. 1, 4, 7.

Lawyers and their clients need to communicate based on their understanding of what the law is now. See *Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 110 (2009) (explaining that "[t]he breadth of the privilege" shapes "the conduct of clients and counsel"). The government's assurances that a future Ninth Circuit panel might seize on the decision's statement (Pet. App. 10a) that it was "[l]eav[ing] [o]pen" whether to adopt the D.C. Circuit's test provide little comfort to lawyers practicing in the Ninth Circuit and the clients they serve. The decision's effects are particularly pernicious for businesses that operate in multiple states and that may see the "same underlying communication" subject to "different privilege protections in different federal jurisdictions." Chamber Amicus Br. 13-14 (explaining "that the accompanying uncertainty could chill the provision of legal advice").

Notwithstanding its claimed agnosticism about the D.C. Circuit's approach, the Ninth Circuit's decision in fact requires courts and lawyers to divine a single "primary" purpose of a communication by weighing the le-

gal and non-legal purposes, and deem the communication privileged only if the legal purpose was at least as significant as any other purpose. That rule directly contravenes the D.C. Circuit's test.

2. As the petition explained (at 17-18), the Seventh Circuit's even more extreme approach—treating dual-purpose communications as always unprivileged, at least in the tax context—adds to the uncertainty among the circuits and provides an additional reason for this Court's review.

The government seeks to minimize that tension by contending that the Seventh Circuit's rule applies only to accountants' worksheets. Opp. 14. But that is not how the Seventh Circuit characterized its holding in *United States* v. *Frederick*, 182 F.3d 496 (7th Cir. 1999), the case that announced the rule. See *id.* at 501 ("a dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged"). It is not how the Seventh Circuit subsequently has applied that holding. See *Valero Energy Corp.* v. *United States*, 569 F.3d 626, 631 (7th Cir. 2009) (only some of documents at issue were worksheets). And it is not how the Ninth Circuit understood the law of the Seventh Circuit when the decision below noted its disagreement with the Seventh Circuit's rule. See Pet. App. 12a.

Properly read, the Seventh Circuit's decisions are irreconcilable with those of the Ninth and D.C. Circuits. This Court's review is needed to resolve that three-way split.

B. The Ninth Circuit's Approach To The Question Presented Is Wrong.

The government argued below that then-Judge Kavanaugh's decision announcing the D.C. Circuit's approach to dual-purpose communications was wrongly decided. See Ninth Circuit Gov't Br. 29 n.11. In its brief in opposition, the government retreats from that attack and offers no defense of a single-primary-purpose approach. Instead, it stakes its entire brief on the (incorrect) claim that the Ninth Circuit did not adopt such an approach.

For good reason. As the petition and Petitioner's amici explain, trying to disentangle and weigh the different reasons why a communication was made is a hopeless exercise. Pet. 19-20; see also *Kellogg*, 756 F.3d at 759 ("It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B."). It yields unpredictable results. Pet. 20-21; Chamber Amicus Br. 14-15. And it chills far too many communications, minimizing the "public ends" that the attorney-client privilege is intended to serve. *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981); see Pet. 21-22; Chamber Amicus Br. 17-20; Washington Legal Foundation Amicus Br. 7-13. The government's silence in response to these arguments speaks volumes. This Court should grant the petition to correct the Ninth Circuit's misguided and problematic view of privilege.

C. The Petition Presents An Excellent And Rare Vehicle.

1. This Court's review is particularly warranted because, even though privilege questions arise frequently, opportunities for appellate review of privilege decisions are rare. See Pet. 28-30; *Swidler & Berlin* v.

United States, 524 U.S. 399 (1998) (last decision addressing general scope of attorney-client privilege). The government asserts that the recipients of grand-jury subpoenas frequently refuse to comply with those subpoenas to trigger appealable civil contempt orders. Opp. 14. But its *only* citation for this empirical claim is to the other subpoena recipient *in this investigation, ibid.* (citing Pet. App. 2a-3a)—a subpoena recipient whose documents did not even involve dual-purpose communications, Pet. 7 n.3.

The government asserts that "privilege questions can arise in a wide array of contexts" where appellate review is available. Opp. 14-15. But the cases it cites identify just three contexts: interlocutory appeal, mandamus, and criminal contempt. Those routes to appellate review are rarely available. See Pet. 28-29; Chamber Amicus Br. 8-10. This Court *rejected* immediate interlocutory appeal of privilege decisions in *Mohawk*, 558 U.S. 100; mandamus is reserved for "really extraordinary causes," *Cheney* v. *United States District Court*, 542 U.S. 367, 380 (2004) (internal citation omitted); and there is no guarantee a litigant could even get a criminal contempt sanction issued against it, see Pet. 29, and the government cites no evidence that litigants routinely try. A petition like this is unlikely to arise again for many years; the Court should take it now.

2. The government also asserts this case is a poor vehicle because it is a tax case, which the government claims "raise[s] distinct questions." Opp. 15-16. But the opposition offers no justification for adopting different privilege rules for tax cases. Cf. *Mayo Foundation for Medical Educ. & Research* v. *United States*, 562 U.S. 44, 55 (2011) ("[W]e are not inclined to carve out an approach to administrative review good for tax

law only."). Nor does the opposition grapple with amici's very real concerns that the Ninth Circuit's rule applies in "nearly every conceivable area of practice." CLA Amicus Br. 5.

If anything, the tax context makes the need for review more important. Tax attorneys regularly engage in dual-purpose communications, providing legal and non-legal advice about clients' taxes. See Pet. 4-5, 15-17; Opp. 7-8. Clarity is thus particularly important in the context of tax advice. That this petition arises from a tax case is a feature, not a bug.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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