No. 21-1397

IN THE

Supreme Court of the United States

IN RE GRAND JURY

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS IN SUPPORT OF NEITHER PARTY

W. WILLIAM HODES
THE WILLIAM HODES LAW FIRM
3658 Conservation Trail
Village of Pine Hills
The Villages, FL 32163
(352) 630-5788
wwh@hodeslaw.com

ARDEN J. OLSON
Counsel of Record
WILLIAM F. GARY
SHARON A. RUDNICK
J. AARON LANDAU
HARRANG LONG GARY RUDNICK P.C.
497 Oakway Rd., Ste. 380
Eugene, OR 97401
(541) 485-0220
arden.j.olson@harrang.com

Counsel for Amicus Curiae

November 21, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS AS *AMICUS CURIAE*

The Association of Professional Responsibility Lawyers ("APRL") respectfully submits this brief as amicus curiae. APRL has insufficient information to suggest how the attorney-client privilege should apply to the sealed records at issue in this case. It therefore does not appear in support of either party. Instead, it appears to emphasize the critical importance of the privilege and to urge the Court to adopt a rule that provides certainty and clarity as to the scope of the privilege at the moment that communications between lawyers and their clients occur.[1]

INTEREST OF *AMICUS CURIAE*

APRL has more than 400 members in more than 40 U.S. jurisdictions and other countries. Its membership includes lawyers who regularly represent other lawyers (and other lawyers' clients) in all aspects of legal ethics and professional responsibility matters, including issues involving risk management, legal malpractice, and other aspects of the laws governing the practice of law. The organization's members also include academics and judges. It is the largest organization of private practitioners devoted exclusively to this area of the law.

APRL and its members are deeply committed to professional responsibility and to the laws governing the practice of law. APRL marshals the talent, energy,

---

[1] Notice pursuant to Sup. Ct. R. 37.3(a) was given to both parties, both parties consented to APRL filing this amicus brief, no party or counsel for a party helped to draft this brief, and no party or counsel to a party made a monetary contribution to fund the filing of this brief. Sup. Ct. R. 37.6.

and perspectives of its members to bring about positive change in the areas of legal ethics and professional responsibility law. It also issues public statements and files amicus curiae briefs, both in state and federal court. *See., e.g., Schoenefeld v. New York,* No. 16-780 (U.S. 2016); *National Assoc. for the Advancement of Multijurisdictional Practice v. Lynch,* No. 16-404 (U.S. 2016).

The issue in this case is this: what is the appropriate federal common law standard for application of the attorney-client privilege to communications with mixed legal and non-legal purposes? That question directly touches APRL's mission. APRL members are called upon regularly to advise lawyers and clients about the scope of the attorney-client privilege, not only in federal matters but in matters in each of the other jurisdictions in which APRL members practice. APRL has an interest in ensuring that there are uniform and clear rules across the nation regarding whether a communication is privileged – rules that substantially affect a broad spectrum of attorneys in many practice disciplines.

SUMMARY OF THE ARGUMENT

The purposes of the attorney-client privilege are client-focused. One such purpose is to promote adherence to law by ensuring that clients can be fully advised as to their legal rights and responsibilities through frank communications with legal counsel without fear that those communications will later be disclosed to third parties, perhaps particularly including the government. The purposes of the privilege are undermined by uncertainty as to when the privilege will be applied in the federal courts or under the laws of the states and other U.S. jurisdictions. By clarifying federal common law in this case, this Court not only

can promote certainty in federal cases but also can have a positive influence on the rules of other jurisdictions. This influence is demonstrated by the states' reactions to this Court's 1981 decision in *Upjohn Co. v. United States*. A clear majority of states have adopted the rule this Court fashioned in that case. So too, adoption of a clear federal standard for application of the attorney-client privilege in the context of dual-purpose communications may encourage states to follow suit.

The current lack of a clear federal standard, as evidenced by the split among the circuits, only serves to sow confusion in the rules enforced by other jurisdictions. To the maximum extent possible in a federalist system, the privilege should apply uniformly, not differently, from jurisdiction to jurisdiction. APRL submits that the privilege should apply to *any* communication where at least one purpose of the communication is that the client is in the process of seeking or the lawyer is rendering legal advice or seeking to gather information to assist in rendering legal advice to the client, and that tests requiring that that there be a "significant" or "primary" purpose should be rejected or abrogated.

ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE SHOULD BE PRESERVED AND STRENGTHENED AS AN ELEMENT OF OUR SYSTEM OF PROMOTING RESPECT FOR LAW.

As this Court stated in *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981):

> The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer–client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys."

(Some citations omitted). This Court went on to clarify that the privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable

him to give sound and informed advice." 449 U.S. at 390. The Court emphasized that 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.* at 393 (emphasis added).

The important role the privilege serves is equally important in the context of dual-purpose communications. For the privilege to fulfill its critical purposes, lawyers and clients alike must be able readily to understand when the privilege applies and when it does not.

II. FOR THE PRIVILEGE TO BE EFFECTIVE, LAWYERS AND CLIENTS MUST UNDERSTAND—AT THE TIME THEY ARE COMMUNICATING—WHICH STATEMENTS WILL BE PRIVILEGED AND WHICH WILL NOT BE PRIVILEGED.

In addressing the attorney-client privilege, it is common to focus on a particular communication and to analyze privilege in a vacuum; this fails to appreciate the full scope and subtlety of the attorney-client relationship. Attorneys have a duty to consult with clients not only about purely legal questions but also about the means by which to accomplish the client's objectives in the representation. *See* ABA Model Rule of Professional Conduct 1.2(a). To provide effective legal representation, an attorney must understand the client's interests and objectives and legal advice must be shaped to fit all of the circumstances affecting the client.

For this reason, all "information related to the representation" of a client is confidential, even if it is not also privileged. ABA Model Rule of Professional Conduct 1.6. A significant part of "exercis[ing] professional judgment and rendering candid advice," moreover,

is that "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." ABA Model Rule of Professional Conduct 2.1.

For the attorney-client privilege to accomplish its objectives, the client and the lawyer need and deserve to know both which of the communications with a lawyer are confidential and which of those communications with a lawyer are privileged *at the time those communications occur*. For that to happen, the law must first be clear. An important piece of legal advice that a lawyer typically (and frequently) gives to a client is *whether* the communications being engaged in at the moment are or are not protected by the attorney-client privilege. Thus, lawyers have a crucial need to know the contours of the privilege in the first instance. Unless the privilege is understood in real time as the lawyer communicates with the client, the client will be uncertain whether the privilege does or does not apply. And as this Court noted in *Upjohn,* an uncertain privilege is no privilege at all. It is only an opportunity for future arguments and for chilling the trust between lawyers and clients.[2]

---

[2] In our increasingly complex world, uncertainty in the privilege not only undermines its value, but can also multiply the costs of litigation. *See, e.g., In re Vioxx Products Liability Litigation,* 501 F. Supp. 2d 789 (E.D. La. 2007) (special master required to determine attorney-client privilege claims for 30,000 out of 2,000,000 documents).

III. UNCERTAINTY EXISTS UNDER THE PRIVILEGE BECAUSE OF VARYING TESTS ACROSS JURISDICTIONS.

The parties to this matter have amply explained the variations in the tests that the D.C. Circuit, Seventh Circuit, and Ninth Circuit apply to dual-purpose communications, and the need for a uniform federal standard. When a client and lawyer communicate, however, they typically will not know whether a dispute to which the communication might be relevant will arise in federal court, in state court, in administrative proceedings, or in some specialized context. Accordingly, both lawyer and client should be given the maximum possible opportunity to judge whether a particular communication will or will not be privileged, regardless of which kind of forum might hear the matter.

A total of 27 states have detailed codifications (by rule or statute) of the attorney-client (or "client-lawyer") privilege,[3] and the other 23 states either have very brief codifications that do not define the scope of the privilege or otherwise follow a common-law approach to the privilege.[4] A number of the state codifications

---

[3] Ala. R. Evid. 502; Alaska R. Evid. 503; Ariz. Rev. Stat. § 12-2234; Ark. R. Evid. 502; Del. R. Evid. 502; Fla. Stat. 90.502; Haw. R. Evid. 503; Ida. R. Evid. 502; Ka. St. 60-426; Ky. R. Evid. 503; La. Code Evid. 506; Me. R. Evid. 502; Mass. R. Evid. 502; Miss. R. Evid. 502; Neb. R. St. 27-503; Nev. R. St. 49.035-.095; N.H. R. Evid. 502; N.J. Code 2A:84A-20; N.J. R. Evid. 504; N.M. R. Evid. 11-503; N.D. R. Evid. 502; Okla. Stat. 12-2502; S.D. Codified Laws §19-13-2 *et seq*.; Tex. R. Civ. Evid. 503; Utah R. Evid. 504; 12 V.S.A. § 1613; Vt. R. Evid. 502; Wisc. Stat. 905.03.

[4] *E.g.,* Cal. Evid. Code § 954 (refers to but does not define the privilege); Mich. R. Evid. 501 (the privilege "is governed by the common law").

were based on proposed Rule 503 of the Federal Rules of Evidence, which was prescribed by this Court and submitted to Congress but never enacted, although some state versions reflect modifications to that proposed rule.

In a world where many individuals and corporations do business across multiple jurisdictions, courts should seek as much uniformity in the rules governing privilege as it is possible to achieve. A workable standard established by this Court in this case will go a long way toward achieving that goal.

IV. THIS COURT IS UNIQUELY POSITIONED TO REDUCE THAT UNCERTAINTY, EVEN IN THE STATES, BY ARTICULATING A CLEAR, WORKABLE, AND PERSUASIVE TEST.

In *Upjohn Company v. United States, supra*, this Court made a major pronouncement on how to apply the attorney-client privilege in the corporate context, holding that the privilege was not only available to protect communications with a company's "control group," but also communications with such other corporate employees as might be necessary to advise both the company and the lawyers in connection with the particular legal problem at hand. 449 U.S. at 397. That decision not only clarified that aspect of the privilege for federal courts, but also served as persuasive precedent for the states, and a majority of states have, in one form or another, followed *Upjohn's* lead.

At least 27 states[5] have followed *Upjohn* in clearly rejecting the "control group" approach and looking

[5] Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, Ohio,

instead to the substance of a corporate communication to determine whether it is privileged. For examples, codifications of the privilege in Alabama, Oregon, and Vermont were changed to conform to *Upjohn* (*see* Advisory Committee's Notes to Ala. R. Evid. 502 (1996); *OHSU. v. Haas*, 942 P.2d 261, 270 (Or. 1997); *Baisley v. Missisquoi Cemetery Ass'n*, 708 A.2d 924, 931 (Vt. 1998)), and when the Arizona Supreme Court construed Arizona's rule relatively narrowly, the Arizona Legislature responded by amending the rule to reflect more clearly the broad subject-matter test of *Upjohn* (*see* 1994 Ariz. Legis. Serv. ch. 334 (H.B. 2161)). In Nevada, although its codification of the privilege still reflects the prior "control group" test, the Nevada Supreme Court nevertheless has adopted the *Upjohn* test in *Wardleigh v. Second Judicial Dist. Court In & For Cnty. of Washoe*, 891 P.2d 1180, 1185 (Nev. 1995).

California also follows *Upjohn's* approach, but its rule predated *Upjohn*. Of the remaining 22 states, the courts in eleven of them have either discussed *Upjohn* without resolving the "control group" issue or have expressly relied on *Upjohn* in construing their own rules of attorney-client privilege for other purposes, usually in discussing the privilege's broader aims. Only nine states have affirmatively retained the prior "control group" test, although all but Illinois (*see Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257-58 (Ill. 1982)) have done so through codifications rather than by any disagreement by the state court with this Court's reasoning. Only Nebraska and Wyoming have neither discussed *Upjohn* nor taken a position on the "control group" issue.

Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin.

All of that makes clear that the attorney-client privilege occupies a rare space in the legal landscape – a subject on which the Supreme Court of the United States has had a huge impact in nearly every state even as to state law, notwithstanding federal constitutional concerns. The states almost universally look to federal common law for guidance in construing the privilege and they *especially* look to decisions of this Court in doing so. Even though a majority of the states have codified the privilege by statute or rule, they still largely consider the substance of the privilege and its underlying principles to be, at least to some degree, a matter of shared common law. In short, on the subject of the attorney-client privilege, when this Court speaks, the states listen.

V. THE PRIVILEGE SHOULD APPLY TO ANY COMMUNICATION THAT EITHER SEEKS LEGAL ADVICE FROM A LAWYER OR IS PART OF THE PROCESS OF GIVING LEGAL ADVICE TO A CLIENT.

The parties have focused on the three tests articulated by the D.C. Circuit, the Seventh Circuit, and the Ninth Circuit to be applied to dual-purpose communications.

The Seventh Circuit's test focused on the fact that there is no accountant's or tax preparer's privilege and it formulated a rule for that narrow circumstance only: "a dual-purpose document – a document prepared for use in preparing tax returns *and* for use in litigation – is not privileged . . . ." *United States v. Frederick,* 182 F.3d 496, 501 (7th Cir. 1999) (italics in original). However, dual-purpose communications may occur in other contexts. The communication may involve both legal and business advice, for example.

The D.C. Circuit, relying on *Upjohn*, adopted a broader test: "[s]o long as obtaining or providing legal advice was *one of the significant purposes* of the [communication], the attorney privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754, 759 (D.C. Cir. 2014) (italics added).

The Ninth Circuit in this case fashioned a balancing test, holding that only where "*the primary purpose* of the communication is to give or receive legal advice, as opposed to business or tax advice," will the attorney-client privilege apply. *In re Grand Jury,* 23 F.4th 1088, 1091-92 (9th Cir. 2021) (italics added).

APRL submits that none of these tests is entirely satisfactory.

The Seventh Circuit's test would take out of the attorney-client privilege *all* dual-purpose communications, contrary to the goals promoted by the privilege and significantly undermining the value of the privilege both to clients and to society. Because the *Frederick* opinion focused almost entirely on the context of tax preparers, it ignored the impact of that rule on advice given in other contexts.

The Ninth Circuit expressly acknowledged that a "primary purpose" test assumes that "a dual-purpose communication can only have a single 'primary' purpose." 23 F.4th at 1091. It left open whether *a* primary purpose might be sufficient to protect some dual-purpose communications, suggesting that different rules might apply in different contexts. *Id.* at 1094-95. APRL submits that the Ninth Circuit's approach is flawed for at least three reasons: (a) there may not

have been a "primary" purpose (perhaps each purpose served by the communication was equally important), (b) the "primary purpose" test makes it impossible for a lawyer or client to know *at the time of a dual-purpose communication* whether a court later will hold that seeking or giving legal advice was the "primary" purpose, and (c) the court's suggestion that the attorney-client privilege will be differently applied in different contexts runs directly contrary to the need for client clarity on what is protected by the privilege.

Another problem with the Ninth Circuit's test is that weighing the primacy of the purpose requires an intrusion into the communication itself, potentially forcing the lawyer (if that is the person from whom the information is sought) to breach confidentiality and the privilege "a little bit" by disclosing the information to the court or other reviewing party.[6] *Cf.* State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Op. 2015-192 (in attempting to justify withdrawal from a case, a lawyer "may not disclose confidential communications or other confidential information – either in open court or even in camera"). The prospect that privileged communications may be disclosed to a court can itself chill attorney-client communications if clients understand that what they tell lawyers may ultimately be shared with judges sitting on their matters. Consistent with this Court's direction, clients are rightly told to be fully transparent so the lawyers who represent them can be

[6] Having to solve this problem by using such reviewers as special masters, unless unavoidable in a complex case, can be a crazy waste of resources and therefore an undue burden on society as a whole. *See* note 2 *supra.*

effective. Even limited disclosures can undermine that advice.

The D.C. Circuit's test is therefore superior to the approaches adopted by the Seventh and Ninth Circuits. It reflects a careful application of *Upjohn* to dual-purpose communications. APRL submits, however, that the D.C. Circuit's use of the word "significant" to modify "purpose" injects uncertainty into the test where none is warranted. The decision pointed to an American Law Institute Reporter's Note in RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 72 at 554 as the basis for using the word "significant," quoting from a reporter's general summary of that on which "American decisions agree." *Kellogg,* 756 F.3d at 760. What neither the American Law Institute note[7] nor the *Kellogg* opinion addressed, however, is calibrating the level of "significance" necessary to trigger its rule.

This Court has never attempted to define "significant." Webster defines it, in relevant part, as "having or likely to have influence or effect: deserving to be considered : important weighty notable." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2116 (2002). But whether something is likely to have influence, deserves to be considered, is important, is weighty, or is notable are all subjective judgments susceptible to differing results depending on the person making the judgment. Neither the lawyer nor the client may actually know which pieces of information are

[7] The American Law Institute endorses as policy only its "black letter" rules and the comments to those rules. Reporter's Notes in Restatements are not debated by or voted on by the ALI membership so are merely the summaries or opinions of the reporter. They are neither authoritative nor, of course, precedential.

significant until the lawyer is able to get the client to divulge and then to evaluate all the information that the client provides along the way.

In *Upjohn*, this Court rejected the "control group" test applicable to "those officers who play a 'substantial role' in deciding and directing a corporation's legal response" to a situation, stating that the decisions attempting to apply that test "illustrate its unpredictability." 449 U.S. at 393. APRL submits that applying the term "significant" is no less unpredictable than using the term "substantial," and therefore respectfully requests this Court to find that where *any* purpose of a dual-purpose communication is the seeking or giving of legal advice, or gathering the information necessary to give legal advice, that communication should be protected by the attorney-client privilege.

The brief of the United States opposing *certiorari* in this case indicated that the district court, "[w]here it found a portion of a tax-preparation communication contained tax-related legal advice, . . . instructed petitioner to redact it before disclosing the rest of the document." Brief for the United States in Opposition, at 3. By doing so, the district court may have effectively protected all communications with respect to which any purpose was the giving or receiving of legal advice, consistent with the test that APRL advocates here. Redaction is a commonly employed method for segregating privileged communications from adjacent non-privileged communications. This Court should not hesitate to include the possibility of redaction as part of adopting the simplified and more certain rule that APRL has proposed.

CONCLUSION

APRL submits that, among the tests articulated by the circuits, the "significant purpose" test of the D.C. Circuit is the most viable, but the better rule would be that if at least one purpose of *any* communication made by a client is that the client is in the process of seeking legal advice, and if at least one purpose of a communication is the rendering of legal advice to the client or seeking to gather information to assist in rendering legal advice to the client, the attorney-client privilege should attach to it, and that tests requiring that that there be a "significant" or "primary" purpose of a particular communication should be rejected or abrogated.

Respectfully submitted,

W. WILLIAM HODES
THE WILLIAM HODES LAW FIRM
3658 Conservation Trail
Village of Pine Hills
The Villages, FL 32163
(352) 630-5788
wwh@hodeslaw.com

ARDEN J. OLSON
Counsel of Record
WILLIAM F. GARY
SHARON A. RUDNICK
J. AARON LANDAU
HARRANG LONG GARY RUDNICK P.C.
497 Oakway Rd., Ste. 380
Eugene, OR 97401
(541) 485-0220
arden.j.olson@harrang.com

Counsel for Amicus Curiae

November 21, 2022