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 FOR SILICON VALLEY TAX DIRECTORS GROUP AS AMICUS CURIAE SUPPORTING PETITIONER

JONATHAN C. BOND
Counsel of Record
SANFORD W. STARK
SAUL MEZEI
LUCAS C. TOWNSEND
VLADIMIR J. SEMENDYAI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
JBond@gibsondunn.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether an attorney-client communication that seeks or provides legal advice loses its privileged character if a court later concludes that the communication's primary purpose was to seek or provide non-legal business advice.

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INTEREST OF AMICUS CURIAE*

The Silicon Valley Tax Directors Group (SVTDG) consists of tax-focused representatives from more than 100 leading technology and other companies that together employ more than 4 million workers worldwide, with market capitalizations collectively exceeding $9 trillion. Since its inception in 1981, SVTDG's purpose has been to promote sound, long-term tax policies that support innovation and the global competitiveness of the U.S. technology industry.

* Pursuant to this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution to this brief's preparation. All parties have consented to the filing of this brief.

SVTDG's members would be harmed by the Ninth Circuit's nebulous and unpredictable standard for determining—often years after the fact—whether a communication with legal counsel that is made for more than one purpose is protected from disclosure by the attorney-client privilege. Sound, fully informed legal advice is essential for companies to ensure their compliance with applicable legal obligations—including the tax laws. Securing such advice depends on robust consultation with legal counsel, without fear that attorney-client communications will later be disclosed.

The Ninth Circuit's flawed "primary-purpose test" threatens to chill full and frank communications with counsel by subjecting those communications to an indeterminate, post hoc assessment of whether "legal" or non-legal, "business" concerns were the principal driver. Pet. App. 2a. That threat looms large in the tax context. Tax issues—including legal questions regarding the proper interpretation and application of tax statutes, Treasury Department regulations, case law, Internal Revenue Service (IRS) guidance, and other authorities to actual or contemplated transactions or other activities—are often inextricably intertwined with business concerns. Companies frequently rely on their external and internal tax advisers—who often are attorneys—to help them understand the tax consequences of particular courses of action. Those tax consequences directly affect a business's bottom line. The intractability of disentangling overlapping tax and business purposes of a single communication, and of further speculating how a court in future litigation might weigh those multiple purposes' comparative importance, will hinder candid communications and make the daily task of helping the companies that SVTDG represents to develop sound tax strategies much more difficult for the lawyers and other tax professionals who advise them.

SUMMARY OF ARGUMENT

I. The Ninth Circuit's misguided standard for determining whether attorney-client communications made both to provide (or seek) legal advice and for other purposes (so-called "dual-purpose" communications) is deeply flawed. Contrary to the court of appeals' and the government's suggestions, the problems created by the Ninth Circuit's "primary-purpose test" (Pet. App. 2a) and the harmful effects that test will foment are vividly illustrated in the tax context.

As in many other areas, in the tax context legal advice is often interwoven with consultation on related business issues. Tax advice typically *is* legal advice. Tax counsel regularly advise on the meaning and application of statutes, regulations, case law, and other authorities regarding the likely tax treatment of a completed or proposed transaction or activity. Nonlawyer tax practitioners frequently also provide "tax advice" that is subject to the same privilege principles: Congress has provided by statute that "the same common law protections" that apply to attorney-client communications also apply (with certain exceptions) to communications "[w]ith respect to tax advice" between clients and "federally authorized tax practitioner[s]." 26 U.S.C. § 7525(a)(1). Those tax practitioners include certified public accountants and other non-lawyer professionals who are authorized to practice before the IRS and who advise clients on tax-related and other aspects of their businesses.

At the same time, tax advice often also encompasses business advice. Business decisions drive tax outcomes, and the tax consequences of a particular transaction often bear directly on a business's bottom line. Lawyers and non-lawyer tax practitioners alike are often called upon to advise businesses on issues that concern tax and

non-tax issues. In many contexts, advice regarding tax issues and other aspects of a business's activities are interdependent, or even inseparable.

The overlap between legal advice concerning the interpretation and application of tax laws, on the one hand, and consultation on interrelated, non-tax issues, on the other, will likely lead in the tax context to all of the ill effects of the Ninth Circuit's test that petitioner has identified more broadly. That approach improperly excludes from the privilege many communications made to obtain or provide legal advice, which will in turn chill candid communications between clients and practitioners. And the immense difficulty of predicting with confidence how a future court might apply the Ninth Circuit's test in litigation years later, and how that court would independently divine a communication's one primary purpose, deprives clients and tax practitioners of certainty in the present about whether particular communications are privileged. That lack of certainty in turn will further deter full and frank communications among clients and counsel.

II. The Ninth Circuit and the government have hinted without elaboration that a different, less protective test for dual-purpose-communication privilege should apply in the tax context than in other areas. That approach has nothing to commend it. This Court and others have rightly been wary of tax-exceptionalism arguments in recent years. And far from cutting back on the privilege's scope in the tax context, Congress has expanded the privilege's application beyond communications with attorneys to cover a broader range of professionals who provide advice regarding application of the tax laws to particular circumstances. None of the proffered rationales for a special tax-disfavoring rule has merit.

ARGUMENT

The Ninth Circuit's primary-purpose test for determining whether dual-purpose attorney-client communications are privileged is unworkable. Despite acknowledging that test's shortcomings in other areas, both the court of appeals and the government have suggested that the primary-purpose test poses fewer problems in the tax context. Pet. App. 11a & n.5; Br. in Opp. 14-16. And each has hinted—and the government may contend at the merits stage—that a tax-specific standard for applying the attorney-client privilege to dual-purpose communications is appropriate, with contours and limitations to be named later. Both suggestions are unsound. The flaws in the Ninth Circuit's primary-purpose test and the practical difficulties it poses are poignantly illustrated in the context of tax advice. And nothing about legal advice in the tax context warrants a watered-down privilege rule applicable to tax only.

I. THE PROBLEMS INHERENT IN THE NINTH CIRCUIT'S PRIMARY-PURPOSE TEST ARE WELL ILLUSTRATED IN THE TAX CONTEXT

As petitioner explains (Br. 24-28), the Ninth Circuit's "primary-purpose test" for determining whether dual-purpose communications are privileged (Pet. App. 6a) invites an array of conceptual and practical problems that the D.C. Circuit's sound approach to the issue avoids. Those problems can be seen in stark relief in the tax context, in which the privilege issues in this case arise, where communications motivated by both "legal and business concerns" (*id.* at 2a) are ubiquitous, and disentangling and ranking multiple motives is all but impossible. The harms that flow from the primary-purpose test's flaws would be acutely felt by tax professionals and the clients they serve if the Ninth Circuit's standard were to become the law.

A. Federal Rule of Evidence 501 directs federal courts to follow the "common law—as interpreted by United States courts in the light of reason and experience"—in assessing claims of privilege. Fed. R. Evid. 501. The light shed by "reason and experience" (*ibid.*) counsels decisively against the Ninth Circuit's rule.

At issue in this case is "[t]he attorney-client privilege," which is "the 'oldest of the privileges for confidential communications known to the common law.'" *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014) (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)), cert. denied, 574 U.S. 1122 (2015); see *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 108 (2009). The privilege was recognized in England by the 16th century, and its roots run to Roman law. See Bruce Kayle, *The Tax Adviser's Privilege in Transactional Matters: A Synopsis and a Suggestion*, 54 Tax Law. 509, 510 (2001); William H. Volz et al., *An Attorney-Client Privilege for Embattled Tax Practitioners: A Legislative Response to Uncertain Legal Counsel*, 38 Hofstra L. Rev. 213, 216-217 (2009) (Volz); 1 *McCormick on Evidence* § 87(a) (Robert P. Mosteller et al. eds., 8th ed. 2022 update). As this Court has recognized, the privilege promotes values of paramount importance: "By assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." *Mohawk Indus.*, 558 U.S. at 108. Encouraging candid disclosure and advice, "in turn, serves 'broader public interests in the observance of law and administration of justice.'" *Ibid.* (quoting *Upjohn*, 449 U.S. at 389).

The attorney-client privilege's basic contours are by now well settled. At its core, "the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *Kellogg Brown & Root*, 756 F.3d at 757. The question here is how that privilege applies to communications made for multiple purposes—where legal advice is sought or obtained that serves both legal objectives as well as non-legal, business-focused aims.

The simplest answer to that question, posited by then-Judge Kavanaugh for the D.C. Circuit in *Kellogg Brown & Root*, is also the correct one. "Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication." 756 F.3d at 760. Although courts have floated various formulations of the inquiry, "it is clearer, more precise, and more predictable 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?" *Ibid.* There are often multiple motives for one missive, and disentangling them is unnecessary once a court finds that seeking or giving legal advice was among them. That simple inquiry settles the question in cases like this, where seeking legal advice was *a* significant purpose.

The Ninth Circuit here did not adopt the D.C. Circuit's sensible approach. See Pet. App. 11a. But it also declined to adopt what it described as the Seventh Circuit's bright-line rule that "a dual-purpose document * * * is not privileged," full stop. *Id.* at 5a n.2 (quoting *United States* v. *Frederick*, 182 F.3d 496,

501 (7th Cir. 1999), cert. denied, 528 U.S. 1154 (2000)). And for good reason: A rule that strips the privilege from any communications made to seek or supply legal advice that also serve an additional, non-legal purpose would profoundly chill attorney-client communications and severely undermine the purposes of the privilege. Even the government here does not appear to defend that unsound approach and has sought to portray the Seventh Circuit's rule as more limited. Br. in Opp. 13-14 (suggesting that the Seventh Circuit's statements in *Frederick* "were specific to 'accountants' worksheets' prepared by an attorney" (citation omitted)).

Instead, the Ninth Circuit adopted a "*primary*-purpose test," Pet. App. 6a (emphasis added), which turns on which of multiple motives for a communication *principally* prompted the speaker to speak. *Id.* at 6a-10a. That which-purpose-predominated framework is deeply fraught. As then-Judge Kavanaugh aptly observed, "[a]fter all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task." *Kellogg Brown & Root*, 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." *Ibid.* (emphases added).

As petitioner explains (Br. 24-28), the problems with the primary-purpose test are manifold. The test is unworkable in application because it calls for isolating and then weighing multiple purposes behind a single communication, even though those purposes are often closely intertwined. The indeterminacy and intractability of that inquiry makes it prohibitively difficult for attorneys and clients in the present to pre-

dict how a court might classify a particular communication in litigation years in the future. Clients and their tax counsel thus will lack certainty as to whether many communications will ultimately be deemed privileged. That uncertainty, in turn, threatens to chill full and frank attorney-client consultation—the opposite of what the privilege exists to encourage.

B. Those fundamental problems with the Ninth Circuit's primary-purpose test would proliferate in cases involving tax-related legal advice if this Court were to adopt that approach. Contrary to the court of appeals' and the government's suggestions, Pet. App. 11a & n.5; Br. in Opp. 15-16, the tax-advice setting puts the indeterminacy and unpredictability of the Ninth Circuit's approach in sharp relief.

1. As lower courts, including the Ninth Circuit, have recognized, "[t]ax advice rendered by an attorney *is* legal advice within the ambit of the privilege." *United States* v. *Sanmina Corp.*, 968 F.3d 1107, 1118 n.4 (9th Cir. 2020) (emphasis added) (quoting *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984)); see, *e.g.*, *Colton* v. *United States*, 306 F.2d 633, 637 (2d Cir. 1962) ("There can, of course, be no question that the giving of tax advice * * * [is] basically [a] matte[r] sufficiently within the professional competence of an attorney to make [it] prima facie subject to the attorney-client privilege." (citing *United States* v. *Kovel*, 296 F.2d 918 (2d Cir. 1961) (Friendly, J.))), cert. denied, 371 U.S. 951 (1963). A lawyer's communications with a client regarding the proper application of tax statutes, regulations, case law, IRS guidance, and other authorities to actual or contemplated transactions or other activities is quintessential "legal advice." *In re County of Erie*, 473 F.3d 413, 419 (2d Cir.

2007) ("Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct.").

That is true not only of a lawyer's analysis of the effect of particular transactions or other activities on the client's ultimate tax liability, but also of whether particular activities must be reported to the government and, if so, how they should be characterized under the law. Just as a securities lawyer's advice to a corporate client regarding what filings and disclosures may be necessary in light of a new factual development is privileged, so too is a lawyer's advice regarding what a taxpayer-client needs to report and how to do so properly. Tax-related legal advice provided by a lawyer lies in the heartland of communications protected by the privilege.

The same is true of "tax advice" provided by many non-lawyer tax professionals, to whom Congress has extended "the same common law protections of confidentiality " that apply to attorneys (with limited exceptions). 26 U.S.C. § 7525(a)(1). Section 7525, enacted in 1998, provides that, "[w]ith respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney." *Ibid.*; see *id.* § 7525(a)(3) (defining a "'federally authorized tax practitioner'" as "any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under [31 U.S.C. § 330]," and defining "'tax advice'" as "advice given by an individual with respect to a matter

which is within the scope of the individual's authority to practice" under such authorization).

Section 7525's extension of the privilege is subject to notable limits. The privilege that provision confers on client communications with federally authorized tax practitioners may be asserted only in a "noncriminal tax matter before the [IRS]" or a "noncriminal tax proceeding" in federal court. 26 U.S.C. § 7525(a)(2). And it does not apply to certain "written communication[s]" concerning "tax shelter[s]." *Id.* § 7525(b). But apart from those specified limitations, Section 7525 puts covered non-lawyer tax professionals providing "tax advice" on the same privilege footing as lawyers providing legal advice by expressly incorporating traditional, "common law" privilege principles. *Id.* § 7525(a)(1).

2. At the same time, as in many other areas where clients seek privileged advice, both the substance of tax-related legal advice and the client's reasons for seeking it often overlap with other, non-legal considerations relating to a client's business. Because tax liabilities and benefits are linked to a client's business and typically bear directly on the client's bottom line, advice regarding those liabilities and benefits is also business advice. And just as "corporate lawyers (whether internal or external) are called on by their clients to advise them of the legal risks and consequences of various courses of action and the ways in which various corporate goals may be achieved within the legal framework," William W. Horton, *A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad for* Upjohn, 61 Bus. Law. 95, 104 (2005), lawyers and non-lawyer tax practitioners likewise often advise on tax issues that bear on a client's business strategy and decisions.

"Since the introduction of the federal income tax in 1913, taxpayers have frequently sought the advice of attorneys to counsel them on tax matters * * * in limitless contexts" where tax and business considerations overlap. Jerald David August, *Attorney-Client Privilege and Work-Product Doctrine in Federal Tax Matters*, 10 Bus. Entities 4, 4 (July/Aug. 2008). Those contexts "rang[e] from determining the most advantageous way to organize a new business from an income tax standpoint" and "planning for the acquisition or sale of a company," to "structuring distributions to owners of an enterprise." *Ibid.* Practitioners advising on such matters often fill a "dual role," *ibid.*, providing advice on tax and business aspects simultaneously. That is true of many tax lawyers, and it may be especially evident for many non-lawyer tax practitioners covered by Section 7525, such as certified public accountants, whose expertise and responsibilities frequently encompass advising on both tax and non-tax business issues.

3. The inevitable overlap of tax and business issues means that many situations will arise in which the Ninth Circuit's primary-purpose test will create problems for professionals providing tax-related legal advice. As the Ninth Circuit itself has recognized, "communications [that] might have more than one purpose" are "especially" prevalent "'in the tax law context, where an attorney's advice may integrally involve both legal and non-legal analyses.'" Pet. App. 4a (quoting *Sanmina*, 968 F.3d at 1118). Occasions where courts must determine whether a dual-purpose communication is privileged are thus ubiquitous in the tax context.

Under the D.C. Circuit's sensible approach, determining whether the attorney-client privilege applies to

such dual-purpose communications is straightforward. So long as "obtaining or providing legal advice was *one* of the significant purposes of the attorney-client communication," the privilege applies. *Kellogg Brown & Root*, 756 F.3d at 760 (emphasis added). That inquiry is comparatively easy for courts to apply. A court should have relatively little difficulty ascertaining whether at least one significant purpose of the communication was to obtain or provide legal advice that concerns tax matters. Once the court identifies that purpose, the inquiry ends, and the existence of one or more additional, overlapping, non-tax-advice purposes is irrelevant. The outcome of that analysis also should be predictable for participants in that communication at the time it is made. The client and the tax practitioner each should know whether seeking or providing tax-related legal advice is at least one significant purpose of the communication, even if other purposes also exist.

Under the Ninth Circuit's *primary*-purpose test, by contrast, the inquiry concerning dual-purpose communications involving both tax and non-tax issues will frequently be prohibitively difficult. For example:

- Suppose that, following the enactment of a new investment-tax-credit regime, a company's CEO asks the company's in-house tax practitioner who knows the business well—whether a tax attorney, or a certified public accountant or other tax professional to whom Section 7525 extends the privilege—to conduct a cost-benefit analysis that identifies potential ways in which the company can maximize its available tax credits while minimizing any disruptive effects on the current business. Performing that analysis requires the tax practitioner to inter-

pret and apply the pertinent statutes, regulations, case law, and IRS guidance relating to the new tax-credit regime—quintessential legal advice covered by the traditional common-law privilege that applies to lawyers and (through Section 7525) federally authorized tax practitioners alike. But the tax practitioner must also integrate that tax-related legal advice with non-legal, business considerations.

- Suppose that, following the enactment of a new law increasing certain corporate taxes, the CEO asks the same tax practitioner to identify a menu of potential mitigating measures that the company might take in response to the new law and to assess the likely effects of each of those measures on the business and whether any is worth pursuing given the associated costs and risks. Once again, the tax practitioner must interpret and apply the internal-revenue laws, regulations, case law, and IRS guidance to determine what mitigating measures exist and how each would affect the company's tax liability—the heartland of privileged communications. But the practitioner must synthesize that tax-related legal analysis with an evaluation of other potential business consequences.

- Suppose that a client asks a tax practitioner for advice regarding controlled transactions subject to potential IRS income adjustments and additional tax under 26 U.S.C. § 482 and its implementing regulations. See 26 C.F.R. § 1.482-1 *et seq.* Section 482 and the regula-

tions address the tax treatment of certain transfers of assets or the provision of services by one entity to another entity that is under common control, such as between affiliates within a single multinational enterprise. See, *e.g.*, *Commissioner* v. *First Sec. Bank of Utah, N.A.*, 405 U.S. 394, 400 (1972). The governing standard generally requires that the "transfer price" in the controlled transaction must "reflect a counterfactual arm's-length transaction 'with an uncontrolled taxpayer.'" *Eaton Corp. & Subsidiaries* v. *Commissioner*, 47 F.4th 434, 437 (6th Cir. 2022) (citation omitted). The tax practitioner advising on such transactions must construe and apply the pertinent legal authorities to advise the client on the effects of different aspects of the contemplated transactions—classic privileged material. But such advice often also requires and may depend on a detailed analysis of the transactions from a business perspective—which may entail extensive client communications and advice concerning how each subsidiary will operate, where personnel and facilities of each would or should be located, and how the transactions fit into or affect the broader enterprise.

- Suppose that a client considering a joint venture consults outside tax counsel with extensive experience handling such complex partnership transactions regarding the best method for allocating income, deductions, gains, or losses with respect to contributed property for tax purposes and how to best leverage that tax advice to negotiate the best business terms

> with the joint venture counterparty. Here, likewise, the tax practitioner must engage in garden-variety application of legal authorities to particular circumstances—advice covered by the privilege. But that advice would be interwoven with business and strategic considerations.

Dual-purpose communications would arise in each of those instances. The request from the client is made in significant part to obtain legal advice: the practitioner's assessment of how the tax laws and other authorities apply to particular circumstances. And the response from the tax practitioner—whether an attorney or other professional covered by Section 7525—includes such legal advice. But the client's request also simultaneously seeks, and the tax practitioner's communications would include, advice concerning non-legal, business considerations that are intertwined with the tax-related legal issues.

Under the D.C. Circuit's significant-purpose approach, those overlapping purposes pose no problem. The client and tax practitioner in each scenario will know that seeking and providing tax-related legal advice was at least one significant purpose of their communications. They thus can have certainty that their communications will be protected from disclosure, unless the privilege cannot be asserted for other, independent reasons. See, *e.g.*, 26 U.S.C. § 7525(a)(2) (privilege for tax advice provided by non-lawyer tax practitioner cannot be asserted in criminal matters).

The Ninth Circuit's approach, in contrast, deprives client and counsel alike of necessary certainty. That approach requires a court, likely long after the

fact, to attempt to isolate the tax-related legal purposes from non-legal, business purposes—and then to weigh them to determine which single purpose predominated. As the scenarios discussed above illustrate, the artificial exercise of disentangling and then somehow comparing those multiple purposes may be practically impossible. Worse still, neither the client nor the tax practitioner can reliably know at the time of a particular communication how a reviewing court applying the Ninth Circuit's approach would view that communication years later. The resulting uncertainty puts clients and tax practitioners to an untenable choice of either forgoing full and frank consultation or running a risk that the communication will be subject to compelled disclosure.

The Ninth Circuit's primary-purpose test thus would frustrate the core objectives of the attorney-client privilege in the tax context. This Court has underscored that the attorney-client privilege's "purpose" is "'to encourage clients to make full disclosure to their attorneys,'" based on the "recogni[tion] 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." *Upjohn*, 449 U.S. at 389 (citation omitted). "[F]ully informed" legal advice (*ibid.*) requires correspondingly robust privilege protection. And "for the attorney-client privilege to be effective, it must be predictable." *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011). "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." *Upjohn*, 449 U.S. at 393. "[I]f the purpose of the attorney-client privilege is to be served, the attorney

and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Ibid.*

The Ninth Circuit's "primary-purpose test" (Pet. App. 2a) flunks these criteria. That approach would render non-privileged many communications seeking or providing tax-related legal advice merely because they are also motivated by additional, non-legal purposes. That regime would make it more challenging for clients to seek and tax counsel to provide tax-related legal advice with assurance that their communications will remain confidential. And like the untethered "'substantial role'" test that this Court rejected in *Upjohn*, "[t]he very terms of the test adopted by the court below suggest the unpredictability of its application," 449 U.S. at 393, in the tax context as elsewhere. The uncertainty inherent in the post hoc judicial evaluation called for by the Ninth Circuit—which seeks to find a message's one and only primary purpose—will further chill candid tax-related legal advice.

II. THE COURT SHOULD REJECT CALLS TO DILUTE PRIVILEGE PROTECTIONS IN THE TAX CONTEXT

Near the end of its opinion, the Ninth Circuit cryptically indicated that a standard more protective of attorney-client communications might be warranted in other, non-tax settings. Pet. App. 11a & n.5. At the petition stage, the government also obliquely gestured (Br. in Opp. 7-8, 14-16) toward a less-protective privilege standard in the context of tax-related advice alone. To the extent that either the court of appeals or the United States has suggested a diluted privilege rule unique to the tax context, the Court should reject that suggestion.

A. The Ninth Circuit's and the government's noncommittal bid for a uniquely narrow attorney-client privilege—and conversely a uniquely broad governmental ability to compel disclosure—in the tax context is out of step with the drumbeat of judicial decisions away from so-called "tax exceptionalism." Stephanie Hoffer et al., *The Death of Tax Court Exceptionalism*, 99 Minn. L. Rev. 221, 222 (2014). It may once have been received wisdom that "tax law is so different from the rest of the regulatory state" that it was subject to different governing principles—for example, that "general administrative law doctrines and principles do not apply" to Treasury's development of rules and guidance to implement the Internal Revenue Code. *Ibid.*; but see *ibid.* (critiquing this "'tax myopia'" approach); Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 Va. Tax. Rev. 517, 531 (1994) (criticizing the "myth that tax law is fundamentally different from other areas of the law"). But more recently, this Court and others have recognized that courts should not invent special tax-specific rules or interpretive principles that put taxpayers on uniquely different footing in litigating against the government.

For example, this Court has made clear that Treasury and the IRS are subject to the same core constraints in interpreting tax laws and promulgating tax regulations as other federal agencies administering other statutes. The Court in *Mayo Foundation for Medical Education & Research* v. *United States*, 562 U.S. 44 (2011), found no "justification for applying a less deferential standard of review to Treasury Department regulations than [it] appl[ies] to the rules of any other agency" and declined "to carve out an ap-

proach to administrative review good for tax law only." *Id.* at 55. This Court and lower courts have also rejected efforts by the IRS to insulate its regulatory actions from the same modes of judicial review that courts apply to other agencies. See *CIC Servs., LLC* v. *IRS*, 141 S. Ct. 1582, 1588-1594 (2021) (rejecting government's contention that the Anti-Injunction Act, 26 U.S.C. § 7421(a), foreclosed judicial review of procedural challenge to an IRS notice); see also *Mann Constr., Inc.* v. *United States*, 27 F.4th 1138, 1142-1148 (6th Cir. 2022) (holding an IRS notice invalid for failure to comply with notice-and-comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*); *Cohen* v. *United States*, 650 F.3d 717, 722-736 (D.C. Cir. 2011) (en banc) (holding that the APA's judicial-review provisions applied to permit review of another IRS notice).

More recently, this Court rejected the government's suggestion that the general presumption that nonjurisdictional limitations periods are subject to equitable tolling applies differently, and should be easier for the government to overcome, in the tax setting. *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493, 1501 (2022). Invoking this Court's decision in *United States* v. *Brockamp*, 519 U.S. 347 (1997)—in which the Court had held that a particular tax deadline was immune to equitable tolling—the government contended in *Boechler* that "the *Brockamp* Court's observation that tax law generally is not amenable to 'case-specific exceptions reflecting individualized equities' applie[d] with particular force" to another tax deadline that was at issue in *Boechler*. Gov't Br. at 43-44, *Boechler*, *supra* (No. 20-1472) (quoting *Brockamp*, 519 U.S. at 352). This Court rejected that argument, concluding that

ordinary interpretive principles regarding equitable tolling applied equally to the tax-law deadline at issue. See *Boechler*, 142 S. Ct. at 1501 ("[I]t bears emphasis that *Brockamp* does not control simply because it also dealt with a statute relating to tax collection.").

Congress, of course, is free within constitutional limits to prescribe distinct rules for the tax context, including those relating to the privileges applicable in federal court. Congress enacted the Federal Rules of Evidence, including Rule 501, Pub. L. No. 93-595, 88 Stat. 1926, 1933-1934 (1975), and Congress retains the prerogative to amend them. But Congress has not chosen to adopt a more government-friendly test for attorney-client privilege in the tax context. Instead, Rule 501 directs federal courts to follow the "common law—as interpreted by United States courts in the light of reason and experience"—in discerning the scope of privileges. Fed. R. Evid. 501. Nothing in that simple standard relegates tax-related legal advice to second-class status for privilege purposes.

If anything, Congress has taken the opposite tack by making privilege protections more broadly applicable in the tax context. Section 7525 extends "the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney" to communications "[w]ith respect to tax advice * * * between a taxpayer and any federally authorized tax practitioner," 26 U.S.C. § 7525(a)(1), who need *not* be a lawyer, *id.* § 7525(a)(3)(A). Section 7525 does not speak directly to the question presented because Congress expressly incorporated existing attorney-client privilege law. Cf. *Jam* v. *Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) ("[W]hen a statute refers to a general subject, the statute adopts the law on that subject as it

exists whenever a question under the statute arises."). But Congress's decision to expand the applicability of traditional privilege principles to a broader range of federally authorized tax practitioners providing "tax advice," 26 U.S.C. § 7525(a)(1), is hard to reconcile with any suggestion that Federal Rule of Evidence 501 silently restricts the scope of the attorney-client privilege in the tax context to protect fewer communications.

B. None of the rationales that the Ninth Circuit and the government have identified for applying a less-protective privilege in the tax context has merit.

1. Both the court of appeals and the government at the petition stage expressed concern that applying ordinary attorney-client privilege standards to tax matters risks "inadvertently creat[ing] an *accountant*-client privilege." Br. in Opp. 15 (emphasis added); see Pet. App. 11a n.5. Both relied on lower-court decisions that in turn had cited this Court's decisions in *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984), and *Couch* v. *United States*, 409 U.S. 322 (1973), as foreclosing an accountant-client privilege. Pet. App. 11a n.5 (citing *Frederick*, 182 F.3d at 500); Br. in Opp. 15 (same); see *Frederick*, 182 F.3d at 500 (citing *Arthur Young* and *Couch*). But to the extent the Court's statements in *Arthur Young* and *Couch* that "no confidential accountant-client privilege exists under federal law" might be thought to exclude tax advice provided by accountants from the shield of privilege, *Arthur Young*, 465 U.S. at 817 (quoting *Couch*, 409 U.S. at 335), those decisions were abrogated by Congress's enactment of Section 7525. That provision, as discussed, expressly extends the common-law privilege to "tax advice" provided by federally authorized tax practitioners even if those practitioners are not licensed attorneys. 26 U.S.C. § 7525(a)(1).

Whatever weight any concerns of creating an accountant-client privilege by accident might carry outside the context of "tax advice" under Section 7525, they accordingly cannot justify withholding the privilege for tax-related advice that Congress codified in the Internal Revenue Code. Although courts should not invent interpretive principles applicable only to the tax context, see pp. 19-21, *supra*, Congress is free enact different rules for the tax setting. And here Congress has made the judgment that traditional privilege principles should apply in the tax context to an even broader array of professionals—non-lawyers authorized to practice before the IRS—than it does in other areas. The Court should not skew the scope of the privilege narrowly based on concerns of upsetting background rules when Congress has stepped in to provide expressly that the privilege applies more broadly in the tax context.

2. The Ninth Circuit and the government relatedly posited that the attorney-client privilege is less clearly implicated in the tax context because disclosing information on a tax return waives the privilege with respect to underlying details. Br. in Opp. 15-16; see Pet. App. 11a n.5. But the fact that a disclosed tax return, and potentially other supporting documents that were created for the purpose of being disclosed, are or become non-privileged has no bearing on the privileged status of earlier tax-related legal advice. Attorneys often provide legal advice that affects the content of future filings with courts or government agencies, but those future filings do not strip the privilege from the prior legal advice concerning what the future filings must or should include. The filing of a complaint in court to commence civil litigation or of a Form 10-K with the Securities and Exchange Commission does not abrogate the privilege for all prior

attorney-client communications that affected the content of such filings.

The same is true in the tax context. A tax practitioner's advice about how to structure a transaction in light of potential tax consequences does not become non-privileged merely because the client proceeds with the transaction and reports the transaction or its tax effects on a tax return. Nor does a client waive the privilege regarding advice about how to interpret and apply the laws that govern what must be reported on a tax return with respect to specific activities by following (or rejecting) that advice and filing a tax return that includes (or omits) certain data.

The Ninth Circuit initially may have been confused about the difference between privileged tax-related legal advice and the preparation of a tax return. Its original opinion stated that "normal *tax advice*—even coming from lawyers—is generally not privileged." 13 F.4th 710, 717 n.5 (9th Cir. 2021) (emphasis altered), amended on denial of rehearing, 23 F.4th 1088 (9th Cir. 2022) (Pet. App. 1a-12a); but cf. 13 F.4th at 714 n.2 (noting that a prior Ninth Circuit decision had "h[eld] that attorney-client privilege might apply to legal advice about what to claim on a tax return, even if it does not apply to the numbers themselves"). But in denying a petition for rehearing, the panel amended its opinion by replacing "tax advice" with "*tax return preparation assistance*." Pet. App. 1a (emphasis added); see *id.* at 11a n.5. Although that amendment cured the court of appeals' original misstatement of the law, neither the court nor the government at the petition stage appears to have appreciated the importance of the distinction between those two concepts.

A unique, less-protective privilege standard for all dual-purpose communications in the tax context might have been warranted *if* "tax advice" in general were "not privileged." 13 F.4th at 717 n.5 (emphasis omitted). But as discussed above, and as the Ninth Circuit's correction reflects, that is not true: tax advice from a lawyer or federally authorized tax practitioner generally *is* privileged. See pp. 9-11, 24, *supra*. And although tax returns and certain supporting materials themselves are non-privileged, it does not follow that legal advice regarding the tax treatment of the underlying subject matter, or even concerning the application of reporting requirements to the relevant transactions or other activities, is unprotected by the privilege and Section 7525 as well. Because almost any tax-related legal advice could ultimately be tied in some way to a tax return, to conclude otherwise would be to render non-privileged practically all tax-related advice, in contravention of decades of case law and Section 7525. The non-privileged status of filed returns and supporting documentation under ordinary privilege principles certainly does not justify adopting a different, less-protective privilege regime for all tax-related matters.

The government's and the Ninth Circuit's mistakenly crabbed view of what constitutes privileged tax-related legal advice also may have contributed to their equally mistaken conjecture that the primary-purpose test will pose fewer practical problems in the tax context than in other settings. Br. in Opp. 15-16; Pet. App. 11a. At the petition stage, the government contrasted "the tax context"—in which it asserted that a communication's dual legal and non-legal purposes "may be readily separable"—with that of "a company's internal investigation," which the government conceded "involves the provision of 'quintessential legal advice'" and in which "segregating multiple

purposes is * * * an 'inherently impossible task.'" Br. in Opp. 15-16 (quoting *Kellogg Brown & Root*, 756 F.3d at 759; brackets and other internal quotation marks omitted); see Pet. App. 11a (stating that *Kellogg Brown & Root* "dealt with the very specific context of corporate internal investigations, and its reasoning does not apply with equal force in the tax context"). The government's apparent premise that the tax context does not "involv[e] the provision of 'quintessential legal advice'" (Br. in Opp. 15 (brackets and citation omitted)) is incorrect for the reasons explained above. The government's additional, tentative conjecture that legal and non-legal purposes "*may*" be easier to disentangle in the tax context than in other areas (*id.* at 16 (emphasis added)) is similarly unsound. At a minimum, the government to date has identified nothing to support that speculation.

The government's related attempt to cabin the difficulties of the Ninth Circuit's approach to non-tax cases, and on that basis to justify a less-protective privilege rule for tax cases than the government agrees (Br. in Opp. 16) might be appropriate for internal investigations, is equally untenable. Consider, for example, a company's internal investigation that involves a tax issue. Cf. Pet. Br. 30-31 (discussing *Upjohn*, 449 U.S. at 394). It is far from clear how the court of appeals' primary-purpose test would apply in that scenario. Would a court be required to ascertain at the outset not only the primary purpose of a particular communication, but also the primary purpose of the underlying subject matter, to determine which privilege rubric applies? That added layer of uncertainty and unpredictability is yet another reason to reject the Ninth Circuit's approach.

3. To the extent the government's parsimonious view of attorney-client privilege in the tax context reflects a fear that improper tax-related conduct will otherwise go undetected, that fear also cannot justify a tax-specific, government-friendly test for privilege.

The government has at its disposal the full arsenal that Congress by statute, Treasury by regulation, and the courts have seen fit to provide for the enforcement of the tax laws. The IRS wields expansive investigative powers—including summons authority, which extends not only to taxpayers but also to third parties, who may possess non-privileged materials reflecting factual information the IRS seeks. See 26 U.S.C. §§ 7602, 7609. And the privilege extended to client communications with non-lawyer federally authorized tax practitioners under Section 7525 applies only in certain noncriminal matters and excludes communications regarding tax shelters. *Id.* § 7525(a)(2), (b). The IRS also possesses broad collection powers (including even before completion of the administrative process when it deems collection at risk, see *id.* § 6861).

In addition, the IRS enjoys the fundamental advantage associated with the burden of proof in tax cases. Once the IRS has determined a tax deficiency, a "presumption of correctness" attaches to that determination, and the taxpayer bears the burden of overcoming that presumption by presenting evidence to refute the Commissioner's ruling. *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933) (Cardozo, J.); see, *e.g.*, *United States* v. *Janis*, 428 U.S. 433, 440-441 (1976). The IRS also has the power to assert penalties, and taxpayers may have significant incentives to disclose information to the IRS or present evidence willingly to courts (thereby waiving privilege) in order to avoid or

reduce such penalties. See, *e.g.*, 26 U.S.C. § 6662; 26 C.F.R. § 1.6664-4(a).

The IRS has not been shy in deploying those tools. Since the ratification of the Sixteenth Amendment in 1913, the Commissioner has vigorously enforced the internal revenue laws, collecting billions of dollars each year. See, *e.g.*, IRS, Department of the Treasury, *Internal Revenue Service Data Book, 2021*, at 59 (May 2022), https://www.irs.gov/pub/irs-pdf/p55b.pdf (reporting that the IRS collected $95.4 billion through its enforcement efforts in fiscal year 2021). Congress very recently augmented the IRS's enforcement resources. Inflation Reduction Act of 2022, Pub. L. No. 117-169, Tit. I, Subtit. A, Pt. 3, § 10301, 136 Stat. 1818, 1831-1833. The government has not identified any evidence that the tools at its disposal are inadequate absent vitiating the privilege applicable to tax-related legal advice.

On the other side of the scales, constricting the scope of the privilege would counterproductively undermine compliance with the Internal Revenue Code. "[C]andidness between the attorney and client is particularly important in tax practice precisely because the U.S. tax system is based on self-assessment." Volz 248. "The Code is notoriously detailed, voluminous, complex, and prone to change," and "[t]axpayers with any type of sophisticated business interests will necessarily need assistance navigating through it." *Ibid.* "Attorneys can help the client fully comply with the law and fully give their client the benefit of their expertise," but "only if they are apprised of the client's entire situation." *Ibid.* "[F]or the tax advisor to aid the client in fully complying with [the] Code," the client therefore "must feel comfortable divulging all fi-

nancial information, including transactions simply considered as remote possibilities." *Ibid.* "The candidness stimulated by confidentiality should result in more legal compliance, not less." *Ibid.* Narrowing the attorney-client privilege—and with it, the scope of the tax-advice privilege enshrined in Section 7525—would jeopardize that enhanced compliance with the tax laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JONATHAN C. BOND
Counsel of Record
SANFORD W. STARK
SAUL MEZEI
LUCAS C. TOWNSEND
VLADIMIR J. SEMENDYAI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
JBond@gibsondunn.com

Counsel for Amicus Curiae

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