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 ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

The question presented—the extent to which the attorney-client privilege applies to a communication involving both legal and non-legal advice—is enormously important to in-house as well as outside counsel in countless circumstances. This amicus brief focuses on the reasons why the Court should adopt a reasonable, workable rule that enables both in-house

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

and outside counsel to perform their multifarious legal duties in today's corporate climate.

ALF long has had an interest in protecting the attorney-client privilege, which is critical to free enterprise, civil justice, the public interest, and the practice of law. For example, in 2005 ALF organized a conference, "The Erosion of the Attorney-Client Privilege," which featured as speakers then-Circuit Judge Samuel Alito, former Solicitor General Theodore Olson, and Professor Geoffrey Hazard. Mr. Olson's insightful remarks about safeguarding the attorney-client privilege are reproduced on pages 6 through 14 of ALF's 2017 Annual Report.[2]

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion below creates an unworkable standard concerning when the attorney-client privilege applies to dual-purpose or multipurpose communications.

Unlike the Ninth Circuit's opinion, the D.C. Circuit's opinion, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), authored by then-Circuit Judge Kavanaugh, establishes a practical test that provides clear, predicable guidance on how to identify the outer bounds of the attorney-client privilege in connection with dual-purpose or multipurpose communications. The *Kellogg* test properly balances the competing interests between allowing the free flow

[2] Available at https://atlanticlegal.org/wp-content/uploads/2018/07/20180607-med-res-2017-ALF-Annual-Report.pdf.

of information between legal counsel and client, while not cloaking every attorney-client communication with the privilege. To achieve this balance, the D.C. Circuit articulated the following test: "Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id*. at 760.

By contrast, the Ninth Circuit's opinion in this case leaves unanswered whether the attorney-client privilege applies to communications in myriad contexts where dual or multipurpose communications take place between lawyers and their clients. The court of appeals rejected adapting the broader "because-of" test (which considers, in the work-product context, whether a document was created for protection because of anticipated litigation), and concluded instead that a "primary purpose" attorney-client privilege test should apply to all dual-purpose communications. Pet. App. 10a. The court failed, however, to provide clear guidance on the meaning of primary purpose, *e.g.*, how its test, which requires that a communication's primary purpose was to obtain legal advice, is functionally or practically different from the "because-of" test that the court rejected. The court, declining (with little explanation) to apply *Kellogg*'s reasoning, left open the question of whether legal advice needs to be the *sole* primary purpose of a communication, or just *one* of the primary or significant purposes, to receive attorney-client privilege protection.

ALF urges this Court to hold that in *all* attorney-client communications, regardless of context, and

consistent with *Kellogg*, the attorney-client privilege should apply if legal advice is "*a* primary purpose"—that is, a "significant" purpose for the communication. Such a significant purpose test eliminates concerns about executives and employees including in-house or outside counsel in all communications simply to obtain a privilege imprimatur. At the same time, the significant purpose test provides clear guidance to the business community that, whenever a communication is sent to a lawyer because real legal advice is sought, that communication will be privileged.

ARGUMENT

A. The significant purpose test, as articulated by the D.C. Circuit in *Kellogg*, is consistent with *Upjohn* and fulfills the fundamental objectives of the attorney-client privilege

The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn*, 449 U.S. at 389.

To serve the objectives of the privilege, "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Id.* at 393. "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.*

Despite purporting to utilize the "primary" or "predominant" purpose test for dual or multipurpose communications, circuit courts, prior to the D.C. Circuit's decision in *Kellogg*, failed to articulate exactly how a court should determine what is the "primary purpose" or "predominant purpose" of a communication between an attorney and client. The court of appeals held in *Kellogg* that 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." 756 F.3d at 760. Accordingly, the D.C. Circuit adopted the following formulation of the "primary purpose" test: "Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.*

The D.C. Circuit's articulation of the "primary purpose" test—also known as the "significant purpose" test—fulfills the objectives of the attorney-client privilege and is "consistent with—if not compelled by—the Supreme Court's logic in *Upjohn*." *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015). In *Upjohn*, this Court recognized that mid-level and even lower-level employees may have relevant information needed by corporate counsel to properly advise a corporate client, and therefore rejected the lower court's "control group test," which restricted availability of the attorney-client privilege to officers who played a "substantial

role" in deciding and directing a corporation's legal response. 449 U.S. at 391-93. In so doing, this Court noted the test's unpredictability and held that it frustrated the "very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.*, at 392-93.

The test for dual or multipurpose communications must be predictable, and reflect the true nature of how corporations operate, in order to fulfill the goals of the attorney-client privilege. The D.C. Circuit's articulation of the "significant purpose" test accomplishes these requirements. The *Kellogg* test takes into account the fact that the "very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line." *In re Gen. Motors*, LLC, 80 F. Supp. 3d at 530 (adopting the D.C. Circuit's analysis of the "significant purpose" as consistent with the Second Circuit's analysis in *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007)). Therefore, "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" and "often not useful or even feasible." *Kellogg*, 756 F.3d at 759.

The Ninth Circuit's opinion here is a glaring example of how the "primary purpose" test, without further clarity, undermines any certainty regarding the attorney-client privilege in dual-purpose or

multipurpose communications. While the Ninth Circuit specifically held that "the 'primary purpose' test applies to dual-purpose communications," it nonetheless saw no need to adopt the D.C. Circuit's reasoning because "the district court did not clearly err in finding that *the* predominate purpose of the disputed communications was not to obtain legal advice." Pet. App. 12a.

Indeed, federal courts of appeals have consistently rejected, as contrary to *Upjohn*, tests for attorney-client privilege that are "intolerably uncertain." *Ross v. City of Memphis*, 423 F.3d 596, 604 (6th Cir. 2005). In *Ross*, for example, the Sixth Circuit examined whether a municipal official's assertion of the advice-of-counsel defense required the defendant to relinquish its attorney-client privilege. In that case, the City asserted attorney-client privilege as to the content of conversations between its former police director and various employees. *Id.* at 597. The former police director, however, who was sued in his individual capacity, raised the advice of counsel as the basis for his qualified immunity defense. *Id.* Accordingly, the court was required to determine whether the police director's invocation of the advice of counsel impliedly waived the City's attorney-client privilege. *Id.* at 597-98.

The Sixth Circuit reasoned that the district court's balance of the competing interests of the former police director and the City was improper, as it rendered the City's ability to invoke attorney-client privilege contingent on litigation choices made by one of its

former employees, and thus was intolerably uncertain. *Id.* at 603-04 (citing *Upjohn*, 449 U.S. at 393).

For all of these reasons, the D.C. Circuit's articulation of the "significant purpose" test for dual or multipurpose communications provides the certainty needed to serve the objectives of the attorney-client privilege, as set forth in *Upjohn*.

B. The significant purpose test furthers the objectives of the attorney-client privilege in common corporate settings

Without a doubt, non-legal considerations and interests frequently are embedded in attorney-client communications. But as the Ninth Circuit correctly observed, an attorney is increasingly seen as a business counselor or advocate in the legal landscape. *See* Pet. App. 1a. Today, most communications between a business and a lawyer have two or more purposes. The test for whether such communications are privileged should not change depending on the subject being discussed. Rather, whether the communication is privileged simply should turn on whether a significant reason for the communication was to solicit or receive legal advice.

One role of in-house and, sometimes, outside counsel is to police a corporation. Like law enforcement, counsel is tasked with enforcing and ensuring compliance with the law and also with helping to prevent future misconduct. Within that role, counsel's actions and communications vis-à-vis the corporation would sometimes fall within the

constructs of a defined legal purpose. But at other times, it is not so clear.

In the employment law context, lawyers (both outside and in-house counsel) get involved to review operative agreements and policies, and to assist with defining appropriate punitive measures that a company could administer within the confines of employment rules as well as business justifications. A lawyer's role, therefore, is not only that of a document interpreter, but also that of a thought leader who will help effectuate improvements within the organization. That very lawyer, for instance, may help implement policies, such as mandatory sensitivity training for all employees, that will not only mitigate the public relations crisis but also protect the organization for the future legal risks.

Lawyers across organizations in the United States undertake such tasks every day, particularly in the employment arena. Allegations of a hostile work environment, for example, will not only lead to a series of private investigations but also to the adoption of improved internal policies to help prevent similar future allegations. In *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998), this Court even held that an employer has an affirmative defense to a hostile-work-environment claim where the employer has "provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense." The umbrella of an "affirmative defense" would undoubtedly cloak the lawyer's advice into a clearly defined legal purpose. But what about other contexts

involving like-kind policies designed to address other like-kind issues? Would a lawyer's advice regarding implementing mandatory sensitivity training, for example, be a protected communication? Under the D.C. Circuit's test, it may be protected as a "significant purpose." Under the Ninth Circuit rule, it may not be.

Indeed, the D.C. Circuit's significant purpose test would help promote effective legal corporate controls and policing. It would allow lawyers to provide sound and sensible advice to clients without the chilling effect of the Ninth Circuit's interpretation of the primary purpose rule. If counsel for an organization must risk waiving privilege in order to help implement controls and improved policies, counsel may rather not bother. A lawyer must think prospectively, not retrospectively; to be proactive, not reactive. That lawyer's advice may keep the organization out of litigation in the future, and it may also have the consequence of improving the work environment generally. Either way, a significant purpose test will better help avoid the implications of the inferior rule adopted by the Ninth Circuit.

Finally, the D.C. Circuit's test does not in any way disturb the crime-fraud exception to the attorney-client privilege. As always, the privilege simply will not apply when a client consults an attorney for advice in carrying on a contemplated or ongoing crime or fraud, regardless of whether that was the significant or an ancillary purpose of the communication. "In such a case, the communication is not designed to promote 'the observance of law and administration of justice'." *See United States v. Zolin*, 491 U.S. 554, 562

(1989). (Likely, when a client communicates with an attorney for purposes of carrying out a fraud or other crime, that purpose is not an ancillary one. Nevertheless, the exception will hold.)

Accordingly, *in camera* review may be used to determine whether allegedly privileged attorney-client communications [including ones made for a significant legal purpose] fall within the crime-fraud exception. *Id*. at 574.

C. The significant purpose test also works in the tax advice context

As argued by Petitioner, "there is a vast and complicated array of regulatory legislation confronting the modern . . . [taxpayer]." Pet. at 24 (internal quotations and citation omitted). "Communications made for such a 'dual purpose' are not uncommon in the tax law context, where an attorney's advice may integrally involve both legal and non-legal analyses." *United States v. Sanmina Corp.*, 968 F.3d 1107, 1118 (9th Cir. 2020).

Taxpayers need legal advice not only in the context of amending tax returns, responding to IRS inquiries, and understanding foreign tax exemptions, but also, for example, as to tax implications for stock issuance or divestitures. The latter context itself presents the fundamental challenge that this Court addressed in *Upjohn*; namely: "The narrow scope given the attorney–client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with

a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." 449 U.S. at 392. Indeed, the Tax Court regularly applies the guidance from *Upjohn* in evaluating the application of the privilege in the tax context. *See, e.g.*, *Johnston v. Comm'r of Internal Revenue*, 119 T.C. 27, 34 (2002), *supplemented sub nom*. *Johnston v. Comm'r*, 122 T.C. 124 (2004), *aff'd*, 461 F.3d 1162 (9th Cir. 2006).

As discussed above, the attorney-client privilege must be predictable to be effective. In addition, the test for application of the privilege should not create an intolerable risk of loss of the privilege. As this Court held in *Zolin*, "'examination of the evidence, even by the judge alone, in chambers' might in some cases 'jeopardize the security which the privilege is meant to protect.'" 491 U.S. at 570 (quoting *United States v. Reynolds,* 345 U.S. 1 (1953)). "Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect." *Id*. This is precisely the same risk presented by the "*single* primary purpose" test, including in the tax context.

In addition, to rule that courts should employ a different, more stringent privilege analysis in the tax context gives the government and other similar parties in interest an unfair advantage in the court system that (i) creates an implied presumption against the application of the privilege even where the attorney "actually delivered legal advice," *United*

States v. Bauer, 132 F.3d 504, 508 (9th Cir. 1997),[3] and (ii) creates an inherent conflict or otherwise turns the privilege's relationship with the Fifth Amendment on its head, *see Fisher v. United States*, 425 U.S. 391, (1976).[4]

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[3] This outcome flies squarely in the face of the Ninth Circuit's recent holding that "[i]n general . . . [i]f a person hires a lawyer for advice, there is a *rebuttable presumption that the lawyer is hired as such to give legal advice,* whether the subject of the advice is criminal or civil, business, tort, domestic relations, or anything else." *Sanmina*, 968 F.3d at 1116 (internal quotation marks omitted) (emphasis added). The fact another purpose is embedded in a communication does not change the ultimate fact that the lawyer actually delivered legal advice.

[4] The attorney-client privilege is broader than the Fifth Amendment's protection against self-incrimination. *See Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

CONCLUSION

The Court should adopt the D.C. Circuit's significant purpose test.

Respectfully submitted,

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