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* LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a communication involving both legal and nonlegal advice is protected by attorney-client privilege where obtaining or providing legal advice was one of the significant purposes behind the communication.

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INTEREST OF *AMICUS CURIAE*[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has worked through the Rules Enabling Act process to propose and advocate for procedural reforms that promote balance in the civil justice system, reduce the costs and burdens associated with litigation, and make the resolution of civil disputes more consistent and efficient. LCJ, and its members, have deep knowledge of and interest in the substance and correct interpretation and application of the Federal Rules of Civil Procedure and Federal Rules of Evidence.

LCJ has submitted written comments related to the Civil Rules Advisory Committee's work to develop potential amendments to the Rules—including on privilege-related issues—and has acted as *amicus curiae* in cases involving the interpretation and application of the Rules to promote fairness, clarity, and certainty for all civil cases. For example, LCJ submitted in 2007 extensive public comments to the Advisory Committee on Evidence Rules of the Judicial Conference of the United States on

1. Under Supreme Court Rule 37, *amicus curiae* certifies that no counsel for a party authored this brief in whole, or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent consented to the filing of this *amicus curiae* brief.

the then-proposed Federal Rule of Evidence 502,[2] and in 2020 submitted suggested amendments to the Federal Rules of Civil Procedure governing privilege logging.[3] LCJ's members are also deeply familiar with the key changes in technology over the last 20 years that have drastically increased the volume and altered the nature of communications in business organizations, including how in-house and outside counsel interact with business clients to provide legal advice.

LCJ's members both propound and respond to discovery requests and third-party subpoenas. They assert the attorney-client privilege when warranted and challenge its assertion when not. Accordingly, LCJ's interest lies not in expanding the attorney-client privilege, but in ensuring that when courts evaluate the privilege status of dual-purpose communications, they apply a test that is predictable, consistent, and practical and that works fairly for both requesting and producing parties in the context of the information age.

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2. *See* Lawyers for Civil Justice, Comments to the Advisory Committee on Evidence Rules of the Judicial Conference of the U.S. on Proposed Revisions to Rule 502, Public Comment 06–EV–050 (Jan. 5, 2007), https://www.uscourts.gov/sites/default/files/fr_import/06-EV-050.pdf.

3. *See* Lawyers for Civil Justice, Suggestion for Rulemaking to the Advisory Committee on Civil Rules, *Privilege and Burden: the need to amend Rules 26(b)(5)(A) and 45(e)(2) to replace "document-by-document" privilege logs with more effective and proportional alternatives* (Aug. 4, 2020), https://www.uscourts.gov/sites/default/files/20-cv-r_suggestion_from_lawyers_for_civil_justice_-_rules_26_and_45_privilege_logs_0.pdf.

Because LCJ is an organization comprised of both corporations and their outside lawyers, LCJ has another interest in ensuring that the rules applicable to privilege (1) are practicable given the way modern corporations communicate with their counsel; and (2) facilitate the attorney-client relationship by ensuring that legal advice and requests for legal advice are protected, such that open and frank discussion between lawyers and clients is not chilled.

INTRODUCTION

"[T]he purpose of the Federal Rules of Civil Procedure [is] to provide uniform guidelines for all federal procedural matters." *Sayre v. Musicland Grp., Inc.*, 850 F.2d. 350, 354 (8th Cir. 1988).[4] Those Rules, along with the Federal Rules of Evidence, establish for all federal civil litigation the substantive scope of and choice of law governing the attorney-client privilege (Federal Rule of Evidence 501), the circumstances under which privilege is waived (Federal Rule of Evidence 502), a party's right to withhold its privileged information from disclosure (Federal Rule of Civil Procedure 26(b)(1)), and the procedures by which a party must provide its adversary sufficient information about such claims to meaningfully challenge them (Federal Rule of Civil Procedure 26(b)(5)(A)). Now, a split in authority on the circumstances under which the attorney-client privilege protects dual-purpose

4. The Court's ruling here will have significant ramifications for all criminal and civil matters where dual-purpose communications involving privileged advice are subject to challenge. LCJ's viewpoints are focused mainly on the impacts in civil litigation to help the Court evaluate the dispute and articulate the appropriate standard for assessing privilege claims across all matters.

communications undermines the uniformity governing privilege claims that the Federal Rules seek to promote, unilaterally alters the scope of discovery as defined in Federal Rule of Civil Procedure 26(b)(1), and thwarts the purpose and intent of the Rules by creating inconsistencies in the standards for asserting and sustaining privilege claims among federal jurisdictions.

In today's corporate environment, businesses often rely on their counsel to serve a variety of legal and nonlegal roles. Both in-house and outside attorneys have business acumen and in-depth knowledge of their clients' business. They often wear multiple hats and advise clients on a broad array of both legal and nonlegal matters and issues, including employee relations, executive compensation, external relations, advertising, technical and scientific matters, intellectual property, securities, lending, transactions, and internal investigations. For that reason, communications with in-house and outside attorneys commonly intertwine both legal and nonlegal considerations, making it difficult to separate the legal and nonlegal purposes of the communication. The right to protect the portions of such dual-purpose communications that relate to legal advice from disclosure to adversaries through the attorney-client privilege is imperative for the business community if the very purpose of the privilege is to be realized.

How individuals communicate in a business context is dramatically different now than even 20 years ago. Modern communication is not limited to topic-specific memoranda or discrete letters and emails, but includes strings of messages on email, chat, or text message platforms, collaboration platforms, and other settings

(such as comments embedded in an electronic document) where legal advice is requested and received interwoven with other content that is not legal in nature. The continually emerging communication technologies create more difficulty in isolating and determining a singular or principal purpose for a communication, particularly as there can be many purposes interwoven into a thread, string, or other combinations of information that may be considered a communication.

This Court has the chance to establish a superior test for privilege protection of dual-purpose communications that supports the purposes of the Rules by rejecting the "single primary purpose" test and adopting instead the "significant legal purpose" test. Adopting the significant legal purpose test will: (1) establish uniformity as to privilege standards; (2) promote free and frank exchange of information between attorneys and their clients; and (3) reinforce the fundamental proposition that a protected attorney-client communication does not lose its privilege protection simply because it appears next to or intermixed with other information. To do otherwise would chill open communications between client and counsel, thwarting the purpose of the attorney-client privilege and imposing additional burdens on the parties and the courts in discovery.

SUMMARY OF THE ARGUMENT

The Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure instruct courts to interpret the Rules to promote efficiency and fairness,[5] yet the

5. The Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the

single primary purpose test adopted by the Ninth Circuit does the opposite. The single primary purpose test is effectively impossible to apply in practice, as the courts and the parties are required to make a subjective post-hoc determination of the primary purpose among the multiple purposes of a communication—a determination that will often be based on speculation. By requiring impractical and unpredictable guesswork, the single primary purpose test is unworkable in the context of modern business communications and thus fails to serve the intent of the Federal Rules of offering a uniform, predictable, and fair procedural framework.

The single primary purpose test will also unjustifiably increase the cost and delay associated with document review and privilege logging, ensuring that the resolution of disputes is anything but "speedy" and "inexpensive." In addition, the single primary purpose test imperils the trust of clients as to the expectation that they can freely and in confidence seek and obtain legal advice from counsel. Businesses seek their counsel's advice for overlapping legal and nonlegal purposes every day, and requests for legal advice can be packaged together or intertwined with nonlegal subjects. By excluding such communications from the attorney-client privilege simply because a court determines that, although there was an undeniable legal purpose involved, the communication was motivated more strongly by nonlegal concerns, the

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parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. The Federal Rules of Criminal Procedure "are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." Fed. R. Crim. P. 2.

single primary purpose test undermines the attorney-client privilege. To be blunt, the test casts a cloud of uncertainty over the availability of privilege to shield what are otherwise protected communications.

The single primary purpose test also imposes artificial and unworkable constraints on corporate and other client-lawyer communications. Lawyers and their clients will be forced to discuss only legal matters in a conversation and then end it to assure that the privilege that should guard and protect their attorney-client relationship is recognized by a court. That limitation ignores how conversations really occur, and an expectation that conversations related to legal advice will not also include some business purpose is unrealistic.

The significant legal purpose test adopted by the D.C. Circuit in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014), is a more easily applied, practical, and predictable standard that furthers the directive of the Rules and is likely to lead to fewer time-consuming and expensive privilege disputes and *in camera* reviews. It also better protects the fundamental interest in open and frank communications that underlies the attorney-client privilege. And it better reflects the reality of communications between clients and attorneys in the modern era as it does not mandate the difficult—if not impossible—assessment of the relative weights of legal and nonlegal purposes underlying a communication years after it was made.

Moreover, the significant legal purpose test does not expand the scope of privilege, nor does it unjustifiably shield from discovery relevant, nonlegal business-related

information because the burden of showing a significant legal interest for a given communication remains a substantial one and non-privileged factual information remains discoverable.

ARGUMENT

A. The Single Primary Purpose Test Should Be Rejected Because It Undermines The Purposes Of The Federal Rules And The Attorney-Client Privilege.

The single primary purpose test applied by the Ninth Circuit conflicts with the purposes of the Federal Rules in establishing a uniform, practical framework to permit parties to protect their privileged information. The test is impractical and undermines the attorney-client privilege. It is often impossible in applying the single primary purpose test to conclude reliably whether a legal or nonlegal purpose was the primary purpose of the communication. A court must—in hindsight and usually with little or no contextual information—identify the multiple purposes of a communication, determine the relative importance of each purpose for each participant, and then select a primary purpose.

The inherent subjectivity in making such a post-hoc determination guarantees inconsistency and uncertainty in parties' privilege assertions, challenges to those assertions, and the courts' resulting privilege determinations, undermining the Rules' goal of providing consistent and fair procedures. The single primary purpose test also thwarts the Rules' stated intent of speedy and inexpensive resolution of civil disputes by spawning

costly privilege disputes that burden both litigants and courts. The unpredictability as to what attorney-client communications will be protected in applying this test also hinders full and frank communications between clients and their attorneys, undermining the fundamental purpose of the attorney-client privilege and of the Federal Rules that protect it.

1. The Single Primary Purpose Test Is Not Practicable.

As this Court has recognized, "for the attorney-client privilege to be effective, it must be predictable." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011). The Federal Rules have similarly recognized the importance of uniformity and predictability in rules governing privileges. *See* Fed. R. Evid. 502 Advisory Committee Notes ("The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection."). To that end, the Court has consistently rejected the use of balancing tests in determining when privileges apply because such tests inherently make privilege determinations substantially less predictable. *See, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399, 409–11 (1998) (rejecting a test under which attorney-client communications could lose privilege protection after the client's death if of sufficiently substantial importance to a criminal investigation); *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) (rejecting a test balancing the evidentiary need for disclosure against a patient's privacy interests when applying the psychotherapist-patient privilege); *Upjohn*

Co. v. United States, 449 U.S. 383, 393 (1981) (rejecting a test that "restricts the availability of the [attorney-client] privilege to those officers who play a 'substantial role' in deciding and directing a corporation's legal response").

The Ninth Circuit's single primary purpose test is impracticable, and so will not achieve the uniformity and predictability parties need. As observed in *Kellogg*, "trying to find *the* one primary purpose" of a dual-purpose communication "can be an inherently impossible task." 756 F.3d at 759.

The inherent difficulties presented by the single primary purpose test arise in connection with the complexities of regulation and laws that impact individuals and corporations alike. For example, corporate attorneys often have responsibilities related to, and make decisions about, nonlegal issues facing the enterprises for which they work. *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007); *see also* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 7:3 (2021–2022 ed. 2021) (commenting on the ease with which email permits counsel to participate in regular business matters). It is common for communications with corporate counsel to reflect counsel's legal and nonlegal insights intermingled together, or to reflect business information that aids counsel in providing legal advice. It is also common in today's business age for requests for legal advice and the resulting advice to be found within the context of communications channels or documents where multiple purposes of the overall communication abound.[6] The

6. As noted by Petitioner and *amici*, such intermingling can occur in many corporate situations. *See* Pet'r's Br. 15–16 (pointing

impossibility of not only disentangling and inventorying the many motivations underlying a communication but also assigning one of them primacy will make producing parties uncertain as to what privilege claims they can legitimately assert, will cause requesting parties to doubt what privilege claims they can legitimately challenge, and will leave courts less confident in how to resolve privilege disputes.

2. The Single Primary Purpose Test Will Lead To Needless Costs And Delay.

The single primary purpose test also exacerbates the already costly and prolonged process of litigating privilege disputes, especially where parties produce millions of documents and assert privilege over tens of thousands of documents. Courts will struggle to apply the single primary purpose test, a difficulty that the *Kellogg* court illustrated as determining, for example, "whether the purpose was A *or* B when the purpose was A *and* B." *See Kellogg*, 756 F.3d at 759 (emphasis added).

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out that a lawyer's advice about corporate law may discuss different legal alternatives as well as the business risks of those alternatives) (citing *Note Funding Corp. v. Bobian Inv. Corp.*, No. 93-CIV-7427, 1995 WL 662402, at *2–3 (S.D.N.Y. Nov. 9, 1995)); N.Y. Intell. Prop. Law Ass'n's Br. 11, Nov. 17, 2022 (explaining that patent clients seeking legal advice rely on the nonlegal scientific expertise of intellectual property counsel to inform legal advice); Chamber of Com.'s Br. 15–16, June 1, 2022 (providing the hypothetical example of a corporate executive turning to in-house counsel for assistance dealing with a crisis with inseparable legal and business implications); Wash. Legal Found.'s Br. 8–9, June 1, 2022 (discussing how in-house counsel may be central to corporate compliance programs and internal investigations, activities that may be motivated by both legal and nonlegal concerns).

For example, in *City of Roseville Employees' Retirement System v. Apple Inc.*, No. 19-cv-02033, 2022 WL 3083000 (N.D. Cal. Aug. 3, 2022), a magistrate judge thoroughly examined various documents withheld on privilege grounds and supplemental attorney declarations supporting the withholding. After expressing uncertainty whether certain documents served a primarily legal purpose, the magistrate judge permitted the privilege claimant to file yet more supplemental declarations supporting, with detailed facts, its assertions that the documents served a specific and primarily legal purpose.[7] *City of Roseville Emp. Ret. Sys.*, 2022 WL 3083000, at *14, *18–19, *24–25. As a practical matter, gathering declarations or similar evidence for often thousands of disputed privilege assertions is extremely time consuming, burdensome, and expensive—and frequently unworkable, especially for parties with limited means.

Furthermore, the single primary purpose test creates costly problems well before the matter is even brought to the court for resolution. Modern complex litigation often requires parties to collect, review, and produce tens of thousands to millions of documents, and reviewers ordinarily only have immediately available the four corners

7. Further illustrating the difficulties litigants face in understanding the permissible scope of privilege claims under the Ninth Circuit's ruling, Apple sought a writ of mandamus and cited the Ninth Circuit's language in *In re Grand Jury* leaving open the possibility of adopting the significant legal purpose test from *Kellogg*. Pet. for Writ of Mandamus, at 9, *Apple Inc. v. U.S. Dist. Ct.*, No. 22-70220 (9th Cir. Sep. 30, 2022). The Ninth Circuit denied the writ but noted that the district court may wish to reconsider its order after the Court rules in this case. *Apple Inc. v. U.S. Dist. Ct.*, No. 22-70220 (9th Cir. Oct. 19, 2022).

of a document and any associated attachments or "family" members. They are usually required to make quick judgments about a dual-purpose communication without a substantial understanding of the communication's underlying context and history. Determining the single primary purpose of each communication could require making inquiries to the sender and possibly the recipients of the communication—if doing so is even possible, given that significant time has often passed between the communication and the review, and none of the participants involved in the original communication may still be available for questioning.

The necessity for such inquiries would likely slow the document review process to a crawl, needlessly elongating and making more expensive an already burdensome exercise. Even under the unrealistic assumption that such an inquiry could be made about the thousands of dual-purpose communications a producing party may need to review, it is unrealistic to expect that counsel or the person communicating with counsel will reliably recall which of the purposes was primary, or even to have ever had the knowledge to determine what "the" single primary purpose was. That dual-purpose communications often involve senior company leadership further exacerbates the difficulties in determining the single primary purpose of a communication post-hoc, given such individuals' responsibility for making business decisions that comply with the law.

In addition, reviewing attorneys often must not only make a good-faith determination about which documents to withhold but also describe applicable privileges for all withheld content on a privilege log. *See* Fed. R. Civ. P. 26(b)

(5)(A)(ii) (requiring parties to "describe the nature" of withheld communications "without revealing information itself privileged or protected, [that] will enable other parties to assess the claim"). The process is burdensome, time-consuming, and expensive for the producing parties, and yet the log is often of limited utility to the requesting parties. *See Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95, 99 (D.D.C. 2012) ("[T]he modern privilege log [is] as expensive to produce as it is useless."). When a document-by-document log is required, having to justify withholding dual-purpose communications with an explanation of the single primary purpose supporting each claim would greatly multiply the burden and time required for the logging process. The attorneys preparing the privilege log could face the daunting task of identifying, for every document and based on facts rather than conclusory assertions, not only the legal purpose of the communication but each nonlegal purpose and an explanation of why the legal one is the more significant. That exercise is perilous and only encourages more challenges to privilege claims.

3. The Single Primary Purpose Test Is Inconsistent With The Goals Of The Attorney-Client Privilege.

The single primary purpose test frustrates the goals underlying the attorney-client privilege and undermines the attorney-client relationship in four ways.

First, the single primary purpose test threatens to improperly strip legitimate legal advice of privilege protection simply because it is combined with nonlegal content in the same communication. Even if it were possible to reliably determine that the nonlegal purpose

of a communication was "primary," the communication still deserves protection if obtaining legal advice was a significant reason behind it—no matter how content related to legal advice may be bundled or transmitted with other information. As one court has observed, "[w]here a lawyer possesses multifarious talents, his clients should not be deprived of the attorney-client privilege, where applicable, simply because their correspondence is also concerned with highly technical matters." *Chore-Time Equip., Inc. v. Big Dutchman, Inc.*, 255 F. Supp. 1020, 1023 (W.D. Mich. 1966). "Accordingly, an attorney-client privilege that fails to account for the multiple and often-overlapping purposes . . . would 'threaten[ ] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.'" *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015) (second alteration in original) (quoting *Upjohn*, 449 U.S. at 393).

Requiring the disclosure of legal advice simply because it is combined with nonlegal concerns within the same communication conflicts with the Federal Rules and would effectively broaden the scope of discovery in litigation, which is limited to nonprivileged matters. The single primary purpose test therefore represents a unilateral amendment to the Rules, bypassing the role of this Court, Congress, and the Rules Enabling Act and effectively circumventing the Judicial Conference of the United States. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . ."). Such an approach also lacks a rational basis and is fundamentally unjust. It has long been accepted that the legal portions of dual-purpose

communications "deserve protection under the privilege because that protection will further its goal." Rice, *supra*, § 7:9. Under the single primary purpose test, however, legal advice that would be privileged standing alone loses that protection simply because it is intermingled with business considerations.

Moreover, a trial judge or magistrate's subjective, post-hoc evaluation of the primary purpose of a given communication based on limited information will be inherently unreliable (and unpredictable), and a party may seek appellate review of privilege decisions only in very limited circumstances. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103, 114 (2009) (holding adverse rulings about privilege do not fall within the collateral order doctrine). As a result, companies will have little choice but to limit the free flow of information in their communications with corporate counsel, even where legal advice is sought, in stark contrast to the fundamental purpose of the attorney-client privilege: "to encourage full and frank communication between attorneys and their clients." *Upjohn*, 449 U.S. at 389.

Second, the unpredictability of the single primary purpose test discourages the open exchange of information between lawyer and client. Clients may forego consulting counsel out of fear that in future litigation a court may decide that while seeking legal advice may have been a purpose of the communication, it was not the primary purpose of the communication—thus exposing the communication to an adversary. In addition, clients may withhold from their counsel business information relevant to the legal advice sought, to limit communication with counsel purely to legal matters, which would hinder the

attorney's ability to provide sound legal advice to the client. The result is to chill open communication between clients and attorneys and to inhibit attorneys' ability to "formulate sound advice" and "ensure their client's compliance with the law." *Id.* at 392.

If the single primary purpose test applies, reasonable lawyers communicating with their clients would need to assess whether the privilege protection is at risk because there are business elements to the communication that could be later considered principal. That assessment is impractical given the pace of business decision-making and the need for legal advice to follow complex law. Yet the single primary purpose test would require lawyers to try to divine mid-communication what purpose could be seen later as primary, and to then advise the client to change how it is communicating (or even to stop communicating entirely) due to the risk that the communication could later be exposed as unprivileged.

Third, the chilling effect of the significant primary purpose test creates ethical dilemmas for counsel. Besides hampering the relationship of open communication between the lawyer and client, professional ethical obligations would likely place many new burdens on the lawyer by requiring the lawyer to instruct the client on the scope of communications allowed under the single primary purpose test and the potential loss of privilege protection should the client continue to communicate about matters in a way that a court may later find did not have as its primary purpose the provision of legal advice. *See* Model Rules of Pro. Conduct r. 1.4(b) (Am. Bar Ass'n 2019) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions

regarding the representation."). The resulting verbal watchdog role, combined with a nervous client's resulting reticence to fully share information with the lawyer, could obstruct the lawyer's ability to fulfill his or her ethical duties to provide competent representation and to consult with the client to achieve the client's objectives. *See id.* rr. 1.1 (duty of competence), 1.4(a)(2) (duty to "reasonably consult with the client").

Finally, the single primary purpose test also creates unnecessary obstacles and undue burdens for in-house counsel and their corporate clients. Courts have recognized the deep integration of in-house counsel into all aspects of the modern corporation. *See, e.g.*, *In re Dental Supplies Antitrust Litig.*, No. 16-cv-00696, 2017 WL 1154995, at *3 (E.D.N.Y. Mar. 27, 2017) ("In-house counsel wear a variety of corporate hats: lawyer, business advisor, corporate officer and dealmaker, to name just a few."); *In re Vioxx*, 501 F. Supp. 2d at 798 (recognizing that in-house counsel are consulted on a variety of legal and nonlegal matters because "lawyers are some of the most intelligent and informed people within corporations"). Business considerations commonly have legal implications and vice-versa, and a communication from in-house counsel conveying legal advice will often contain contextual business information necessary for the client to understand the legal advice. *See In re Vioxx*, 501 F. Supp. 2d at 798 ("Often business advice needs to be mixed with legal advice so that the legal advice is fully understood and followed by the client.").

Legal advice rendered by in-house counsel to a corporation cannot realistically be siloed from the corporation's business interests, as "virtually all internal

legal communications are, to some extent, relevant to the business ends of the company." Rice, *supra*, § 7:2. This business reality tracks the technological evolution of communications platforms through which in-house lawyers are asked to provide, and do provide, legal advice to help companies meet legal obligations that is intermingled with nonlegal matters.

At its core, the single primary purpose test places form over substance. Under the test, legal advice that would be privileged standing alone loses that protection simply because it includes discussion of related business considerations such that the legal purpose could be considered (by non-participants to the conversation, and often years later) not to be primary.

B. The Significant Legal Purpose Test Should Be Adopted As It Is Consistent With The Purposes of the Federal Rules And The Attorney-Client Privilege.

The dual-purpose communication test that better promotes the goals of the Federal Rules and protects the attorney-client privilege is the significant legal purpose test set forth by the D.C. Circuit. This test requires litigants and courts to ask whether obtaining or providing legal advice was "one of the significant purposes of the communication." *Kellogg*, 756 F.3d at 760. If a legal purpose was a significant factor motivating the communication, then the communication is privileged. *Id.*

Unlike the single primary purpose test, the significant legal interest test can be applied more consistently, fairly, and predictably in practice; is in harmony with the reality

of communications in today's corporate environment; and promotes the open discourse the attorney-client privilege was designed to protect. By adopting this test and making clear that it applies to each discrete communication wherever it may be located, the Court will provide needed clarification and certainty across all federal courts.

1. The Significant Legal Purpose Test Is Consistent With The Goals Of The Federal Rules And Is Both Practical And Predictable.

The significant legal purpose test in practice leads to greater predictability and certainty than the single primary purpose test and leads to fewer costly disputes, thereby promoting the Federal Rules' purposes of uniformity and the speedy and inexpensive resolution of actions. The test requires resolving only a single question: whether obtaining or providing legal advice was a significant purpose of the communication, no matter what other purposes may have existed.[8] Once a significant legal purpose has been identified, courts need not grapple

8. That a communication had at least one significant legal purpose can be established through the communication on its face, declarations of the claimant and its attorneys, or the totality of the circumstances. *See, e.g.*, *United States ex rel. Wollman v. Mass. Gen. Hosp., Inc.*, 475 F. Supp. 3d 45, 64–65 (D. Mass. 2020) (examining the totality of the circumstances in determining that an internal investigation report was prepared with a significant purpose of providing legal advice); *Jones v. Carson*, No. 15-cv-00310, 2018 WL 11410070, at *22–23 (D.D.C. Mar. 30, 2018) (presenting document-by-document findings after *in camera* review); *In re Gen. Motors*, 80 F. Supp. 3d at 530–31 (examining the totality of the circumstances and outside counsel's declaration in holding that witness interview notes were privileged).

with the relative significance of any nonlegal purpose. *See Kellogg*, 756 F. 3d at 759–60.

The test thus necessarily involves a simpler determination than the single primary purpose test, which requires resolving that same initial question of whether a significant legal purpose exists, but then *also* identifying every possible legal and nonlegal purpose underlying the communication and weighing them against each other to determine which is predominant—often an impossible task. *See Pitkin v. Corizon Health, Inc.*, No. 16-cv-02235, 2017 WL 6496565, at *3–4 (D. Or. Dec. 18, 2017) (rejecting the single primary purpose test as unworkable "in circumstances where a communication serves many overlapping purposes, and none of them can reasonably be considered 'primary' over any other").

By avoiding the need to engage in an after-the-fact weighing of legal and nonlegal purposes, the significant legal purpose test is "clearer, more precise, and more predictable," *Kellogg*, 756 F.3d at 760, and "helps to reduce uncertainty regarding the attorney-client privilege," *Fed. Trade Comm'n v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1268 (D.C. Cir. 2018). This greater predictability and simplicity of application can be expected to lead to both a lesser incidence of privilege disputes (because the parties or more likely to agree on whether a legal purpose exists at all than whether it is the sole primary purpose of a dual-purpose communication) and reduced burden and delay when disputes do arise (because the one-step inquiry is relatively simpler and can often be resolved without resorting to extrinsic evidence such as attorney declarations).

District courts across the nation have adopted the significant legal purpose test because of its administrability and predictability. *See, e.g.*, *Boehringer*, 892 F.3d at 1267 (applying *Kellogg's* test to communications with in-house counsel about settlement of patent dispute); *Ramb v. Paramatma*, No. 19-cv-00021, 2021 WL 5038756, at *3–4 (N.D. Ga. Sept. 22, 2021) (applying the significant legal purpose test in the context of communications with outside counsel regarding real estate transactions); *Aetna Inc. v. Mednax, Inc.*, No. 18-cv-02217, 2019 WL 6467349, at *1 (E.D. Pa. Dec. 2, 2019) ("If getting or receiving legal advice 'was one of the significant purposes of the [communication]' the privilege should apply, even if there were additional purposes . . ."). [9] Indeed, even the Ninth Circuit recognized the value of the significant legal purpose test. *See In re Grand Jury*, 23 F.4th 1088, 1094 (9th Cir. 2021) ("We see the merits of the reasoning in *Kellogg*.").

2. The Significant Legal Purpose Test Is Consistent With The Purpose Of The Attorney-Client Privilege.

Over forty years ago, this Court articulated the purpose and foundations of the attorney-client privilege as follows:

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9. The government has presumably benefited from the significant legal purpose test in litigation regarding whether dual-purpose communications can be withheld on the basis of privilege in responses to Freedom of Information Act ("FOIA") requests, as such cases are frequency brought in the District of Columbia where *Kellogg* applies. *See, e.g.*, *Avila v. U.S. Dep't of State*, No. 17-cv-2865, 2022 WL 2104483, at *13 (D.D.C. June 10, 2022) (citing *Kellogg*'s test and permitting the government to withhold from a response to a FOIA request communications containing a mix of legal and policy advice).

> [T]o 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.

Upjohn, 449 U.S. at 389. By ensuring that requests for legal advice will not lose their privilege protection simply because they are intertwined with discussion of nonlegal concerns, the significant legal purpose test promotes open communication and ensures that the client can obtain the maximum benefit from the attorney-client relationship by permitting the client to safely share with counsel all information potentially relevant to securing legal advice. *See 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.").

Adopting the significant legal purpose test also furthers the Court's role in interpreting the common law "in the light of reason and experience," Fed. R. Evid. 501, as reason and experience recommend a test for dual-purpose communications that courts can apply with the least possible difficulty, while recognizing that no uniform rule "will necessarily enable courts to decide questions such as this with mathematical precision." *Upjohn*, 449 U.S. at 393. The significant legal purpose test meets that criterion while also fulfilling the mandate of the Federal Rules to construe and administer the Rules "to

secure the just, speedy, and inexpensive determination" of actions. Fed. R. Civ. P. 1. The test provides a clear, consistent standard that enables the claimant of the privilege to efficiently comply with Rule 26(b)(5)'s logging requirements and allows the parties and the courts to efficiently resolve disputed claims.

3. The Significant Legal Purpose Test Does Not Expand The Privilege Or Shield Discoverable Materials From Discovery.

The attorney-client privilege withholds otherwise discoverable information from the factfinder, and thus the privilege "applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976). The significant legal purpose test satisfies that requirement. As the concurrence in *Boehringer* observed, "the court's opinion [adopting the significant legal purpose test] should not be mistaken for an expansion of the attorney-client privilege." 892 F.3d at 1269 (Pillard, J., concurring). The claimant exclusively carries the burden of establishing the privilege for dual-purpose communications and that burden is substantial and applies to each withheld communication:

> Where a privilege claimant has closely intertwined purposes—a legal purpose as well as a business purpose—it must still establish to a "reasonable certainty," that "obtaining or providing legal advice was one of the significant purposes" animating each communication withheld.

Boehringer, 892 F.3d at 1269 (citations omitted). The concurrence further observes that the magistrate judge had reviewed the documents *in camera*, considered the claimant's affidavit supporting the privilege claims, and found that the claimant met its burden. *Id.* at 1270–71.

This substantial burden of proof mitigates the risk of overreach. Under any test, the party asserting the privilege must make a "clear showing" that the lawyer involved in a communication was acting "in a professional legal capacity" rather than exercising "responsibilities outside the lawyer's sphere." *In re Sealed Case,* 737 F.2d 94, 99 (D.C. Cir. 1984); s*ee also SEC v. Microtune, Inc.*, 258 F.R.D. 310, 315 (N.D. Tex. 2009) ("The proponent must provide sufficient facts by way of detailed affidavits or other evidence to enable the court to determine whether the privilege exists."). The significant legal purpose test leaves existing guardrails protecting the discovery interest from overbroad privilege claims intact; for example, simply copying an attorney on a communication or including an attorney in a distribution list will not make the communication privileged. *See Jordan v. U.S. Dep't of Lab.*, 308 F. Supp. 3d 24, 43–44 & n.9 (D.D.C. 2018) (applying *Kellogg* and finding a communication was not privileged where the sender copied an attorney to keep him apprised of business communications in case there was a future legal dispute).

No matter what the test, the relevant facts underlying a request for legal advice are not protected from disclosure by the attorney-client privilege. *See, e.g., Upjohn*, 449 U.S. at 395 ("The privilege only protects disclosure of communications; it does not protect the disclosure of the underlying facts by those who communicated with

the attorney . . . ."). Only the facts communicated by the client to the attorney to obtain informed legal advice (or as incorporated by the attorney in communicating legal advice to the client) are protected as essential to the protected communication. *See id.* at 390 ("[T]he 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."). At common law, the attorney-client privilege protects the communication of facts by the client to the attorney. *See United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996) (common law extends the attorney-client privilege to communications made "for the purpose of facilitating the rendition of professional legal services."). Protecting communications with attorneys where a significant (but not the sole) purpose is to obtain legal advice applies the common law principle "in light of reason and experience," as Federal Rule of Evidence 501 requires.[10] *See* Fed. R. Evid. 501.

Given the various forms and tremendous volume of communications among different groupings of personnel in modern organizations, however, any underlying relevant facts withheld from a dual-purpose communication will generally appear in other unprotected communications

10. The Ninth Circuit's opinion in *In re Grand Jury* did not reject this reasoning, as it affirmatively cited *Rowe* for the proposition that the attorney-client privilege extends to communications made "for the purpose of facilitating the rendition of professional legal services." *See In re Grand Jury,* 23 F.4th at 1092 (citing *Rowe*, 96 F.3d at 1296). Thus, *In re Grand Jury* cannot be read to discount the principle that a purpose of factual background provided to an attorney may be to facilitate the rendition of legal advice and, therefore, should be protected.

or documents or be obtainable through other means of discovery such as interrogatories or depositions. *See* 24 Charles Alan Wright et al., *Federal Practice and Procedure* § 5484 (1st ed. Apr. 2022 update) (observing that non-privileged information can still be discovered through testimony or an interrogatory).

Finally, as the Petitioner notes, when legal and nonlegal portions of a communication are severable, redaction of the legal communications appropriately protects privileged material while allowing the production of non-privileged material. *See* Pet'r's Br. 22–23. For these reasons, the information protected by the attorney-client privilege as a dual-purpose communication under the significant legal purpose test is that which is inextricably intertwined with requests for or the provision of legal advice. The significant legal purpose test will thus not improperly expand the privilege to protect from disclosure relevant, nonlegal information that requesting parties have a right to discover.

CONCLUSION

Accordingly, *amicus curiae* respectfully requests that this Court overturn the ruling of the Ninth Circuit adopting the single primary purpose test for dual-purpose communications and adopt the D.C. Circuit's significant legal purpose test.

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Respectfully submitted,

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